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## Sustainable Development in Law Practice: A Lens for Addressing All Legal Problems

John C. Dernbach

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# SUSTAINABLE DEVELOPMENT IN LAW PRACTICE: A LENS FOR ADDRESSING ALL LEGAL PROBLEMS

JOHN C. DERNBACH<sup>†</sup>

## ABSTRACT

Sustainable development is a normative conceptual framework for integrating economic development, social well-being, and environmental protection in decision making. While it is widely recognized that lawyers have an important role to play in advancing sustainable development, and while a growing number of lawyers describe themselves as doing sustainability work, it is less clear what they actually do. This is an impediment not only to achieving sustainability but also to law students and lawyers who want to direct or redirect their legal careers toward sustainability.

This Article, which is based on structured interviews with twenty-six lawyers who practice or have practiced law related to sustainability, provides a first assessment of what this work entails. It describes what these lawyers understand sustainability or sustainable development to mean, both as defined and as applied. These lawyers tend to see sustainability as a lens for productively addressing all legal problems and for helping clients make better decisions. The Article explains who their clients are and what they do for them, and provides insight into the dynamics of attorney–client conversations related to sustainability. It describes key personal and professional qualities of these lawyers, such as how they became interested, and what they like and do not like about doing work related to sustainability. Finally, by exploring what these lawyers see as obstacles to sustainability and where the jobs are in sustainability-related law, it sheds light on the future of sustainability in law practice.

## TABLE OF CONTENTS

INTRODUCTION.....	124
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I. METHODOLOGY .....	134
II. HOW THESE LAWYERS UNDERSTAND SUSTAINABILITY .....	136
III. WHAT SUSTAINABILITY LAWYERS DO .....	143
<i>A. Subject Matter and Clients</i> .....	144
<i>B. Types of Legal Work</i> .....	147
IV. DYNAMICS OF ATTORNEY–CLIENT CONVERSATIONS ON SUSTAINABILITY .....	151
<i>A. When Clients Raise Sustainability Issues with Attorneys</i> .....	152
<i>B. When Attorneys Raise Sustainability Issues with Clients</i> .....	155
<i>C. What Attorneys Say in Sustainability Conversations</i> .....	159
V. PERSONAL AND PROFESSIONAL QUALITIES OF LAWYERS DOING SUSTAINABILITY WORK .....	164
<i>A. How They Became Interested in Sustainability</i> .....	164
<i>B. Most Essential Personal and Professional Characteristics     for Sustainability Work</i> .....	169
<i>C. Most Rewarding Aspects of Sustainability Work</i> .....	172
<i>D. Least Enjoyable or Most Frustrating Aspects of     Sustainability Work</i> .....	176
VI. FUTURE OF SUSTAINABILITY IN LAW PRACTICE .....	180
<i>A. Roadblocks to Sustainability</i> .....	180
<i>B. Jobs in Sustainability and Law</i> .....	183
CONCLUSION .....	188
APPENDIX .....	190

## INTRODUCTION

Sustainable development is becoming increasingly important to lawyers.<sup>1</sup> A small but growing number of lawyers describe themselves as doing work related to sustainability or sustainable development. Many lawyers or law firms engaged in the private practice of law identify their practice area using sustainability language.<sup>2</sup> Sustainable development is a growing part of law practice in nearly every practice area and involves many different skills.<sup>3</sup> As the final report of American Bar Association (ABA) Task Force on Sustainable Development concluded in 2015, “[t]he transition to sustainability in both governmental and private sector deci-

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1. See TASK FORCE ON SUSTAINABLE DEV., AM. BAR ASS’N, FINAL REPORT 2 (2015), [https://www.americanbar.org/content/dam/aba/administrative/environment\\_energy\\_resources/resources/final\\_sdtf\\_aba\\_annual\\_08-2015.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/environment_energy_resources/resources/final_sdtf_aba_annual_08-2015.authcheckdam.pdf). According to the Task Force: “Sustainability is affecting, or will affect, tax law, insurance, banking, finance, real estate development, environmental and energy law, among other fields. It also involves a wide range of knowledge and skills, including litigation, commercial transactions, client counseling, advocacy before governmental agencies and other bodies, and legislative drafting.” *Id.* at 2–3. For an overview of this activity, see John C. Dembach et al., *The Growing Importance of Sustainability to Lawyers and the ABA*, ABA TRENDS, July/Aug. 2013, at 21, 24.

2. See *infra* Part I.

3. TASK FORCE ON SUSTAINABLE DEV., AM. BAR ASS’N, *supra* note 1, at 2–3.

sion making is inevitable, and will profoundly affect the legal profession.”<sup>4</sup> The transition toward sustainability in the legal profession is also both reflected in and encouraged by a wide variety of activities involving sustainability in law schools, including but not limited to courses, scholarship, facilities, and community service.<sup>5</sup>

Sustainable development is a normative, conceptual framework for integrating development (which includes not only economic development but also social development, and is based on peace and security) with environmental protection in decision making.<sup>6</sup> “It is premised on principles of basic equity—that each human being is entitled to a certain quality of life and that the minimum conditions for human quality of life should be maintained from generation to generation.”<sup>7</sup> Sustainability is intended to address two significant and related problems: widespread environmental degradation, including climate disruption; and large-scale extreme poverty.<sup>8</sup> The framework applies to a wide variety of decisions, including but not limited to those involving climate change.<sup>9</sup>

Sustainable development is reflected, but only partially, in U.S. conservation, environmental, and land use laws.<sup>10</sup> In fact, the National Environmental Policy Act of 1969 (NEPA) declared sustainable development to be national policy even before the term “sustainable development” was coined.<sup>11</sup> NEPA declares a national policy “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”<sup>12</sup> Environmental, conservation, and land use laws provide a baseline of environmental protection and employ many of the tools and much of the vocabulary of sustainable development (e.g., integrated decision making, precaution, planning, public information, and

4. *Id.* at 4.

5. John C. Dernbach, *The Essential and Growing Role of Legal Education in Achieving Sustainability*, 60 J. LEGAL EDUC. 489, 504–17 (2011).

6. John C. Dernbach & Federico Cheever, *Sustainable Development and Its Discontents*, 4 TRANSNAT’L ENVTL. L. 247, 256–61 (2015); John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1, 32 (1998). Peace and security provide a foundation for development; without peace and security, development is difficult or impossible. *Id.* at 19.

7. Dernbach & Cheever, *supra* note 6, at 252.

8. See World Comm’n on Env’t & Dev., *Our Common Future, From One Earth to One World*, ¶¶ 3, 7–9, 11, 13–14, 20, 23–24, 26–28, 34, 39–44, U.N. Doc. A/42/427, annex (Mar. 20, 1987) [hereinafter *Our Common Future*].

9. See John C. Dernbach, *Achieving Sustainable Development: The Centrality and Multiple Facets of Integrated Decisionmaking*, 10 IND. J. GLOBAL LEGAL STUD. 247 (2003).

10. JOHN C. DERNBACH ET AL., *ACTING AS IF TOMORROW MATTERS: ACCELERATING THE TRANSITION TO SUSTAINABILITY* 15 (2012).

11. See National Environmental Policy Act of 1969 § 101, 42 U.S.C. § 4321 (2012). The first use of the term appears to be in 1980, when the International Union for the Conservation of Nature and Natural Resources (IUCN) published a conservation strategy for living resources that explicitly linked conservation and development in the term sustainable development. INT’L UNION FOR CONSERVATION OF NATURE & NAT. RES., *WORLD CONSERVATION STRATEGY: LIVING RESOURCE CONSERVATION FOR SUSTAINABLE DEVELOPMENT*, at sec. 1, paras. 2, 10 (1980).

12. 42 U.S.C. § 4331(a).

public participation).<sup>13</sup> But, these laws do not directly address the large ecological footprint (energy, water, resources, and land) of the United States.<sup>14</sup> They do not directly address a great many laws historically used to foster economic development—laws that have the effect of encouraging, supporting, and even rewarding environmental degradation and unsustainable development.<sup>15</sup> Nor do these laws fully address existing threats, particularly climate change.<sup>16</sup> Finally, environmental and conservation laws do not directly or fully address the social dimensions of sustainable development, which include but are not limited to poverty, food security, public health, and human rights.<sup>17</sup>

Sustainable development has nonetheless influenced the development and implementation of law in various ways and contexts, including

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13. See, e.g., RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 4–10 (2d ed. 2006); see also RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW*, at xii–xvi (2004) (describing the development of environmental law and policy and explaining the use of these principles and ideas in its development).

14. CTR. FOR SUSTAINABLE SYS., UNIV. OF MICH., *U.S. ENVIRONMENTAL FOOTPRINT* (2016), [http://css.umich.edu/sites/default/files/U.S.\\_Environmental\\_Footprint\\_Factsheet\\_CSS08-08\\_e2017.pdf](http://css.umich.edu/sites/default/files/U.S._Environmental_Footprint_Factsheet_CSS08-08_e2017.pdf) (describing in detail U.S. consumption of resources and explaining that it would take five earths to supply the resources needed for the entire world's population if it consumed resources at the same level as the average American).

15. See, e.g., Justin Gillis, *Flooding of Coast, Caused by Global Warming, Has Already Begun*, N.Y. TIMES (Sept. 3, 2016), <https://www.nytimes.com/2016/09/04/science/flooding-of-coast-caused-by-global-warming-has-already-begun.html> (“The federal government spends billions of taxpayer dollars in ways that add to the risks [of sea level rise], by subsidizing local governments and homeowners who build in imperiled locations along the coast.”); Michael Lewyn, *How Government Regulation Forces Americans into Their Cars: A Case Study*, 16 WIDENER L.J. 839, 839 (2007) (providing a case study of land use and zoning in Jacksonville, Florida); Dernbach, *supra* note 6, at 67–68 (summarizing different types of legal obstacles). See also *infra* Sections V.D., VI.A., in which lawyers describe various legal obstacles to sustainable development.

16. See, e.g., Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 109 COLUM. L. REV. 1531, 1531 n.2 (2009) (explaining the strong case for U.S. action based only on U.S. self-interest).

17. See G.A. Res. 70/1, ¶¶ 14–15, 17, *Transforming Our World: The 2030 Agenda for Sustainable Development* (Oct. 21, 2015). Among the sustainable development goals contained in this agenda are Goal 1 (“End poverty in all its forms everywhere”), Goal 2 (“End hunger, achieve food security and improved nutrition and promote sustainable agriculture”), Goal 3 (“Ensure healthy lives and promote well-being for all at all ages”), and Goal 4 (“Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all”). *Id.* at 14.

brownfields redevelopment,<sup>18</sup> smart growth,<sup>19</sup> public access to information,<sup>20</sup> recycling,<sup>21</sup> biodiversity conservation,<sup>22</sup> and green building.<sup>23</sup> Indeed, the U.S. Environmental Protection Agency (EPA) has increasingly integrated sustainability into the implementation of the laws it administers.<sup>24</sup> These changes are not limited to traditional environmental law. For example, energy law is being transformed by a great many federal, state, and local laws that foster greenhouse gas reductions; renewable energy; energy efficiency and conservation in buildings, transportation, and industry; and distributed energy.<sup>25</sup> Many longstanding business reporting and disclosure requirements, including those administered by the Securities and Exchange Commission (SEC), are now being applied to greenhouse gas emissions, working conditions, and the environmental and social impacts of activities in a company's supply chain (because investors and the public now deem these things material to the company's profitability).<sup>26</sup> The investigation by state attorneys general and the SEC into whether Exxon misled the public and investors about climate change raises significant economic, environmental, and social questions.<sup>27</sup> To a growing degree, the private sector employs many forms of private law or governance

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18. See Joel B. Eisen, *Brownfields Development: From Individual Sites to Smart Growth*, in AGENDA FOR A SUSTAINABLE AMERICA 57, 57 (John C. Dembach ed., 2009).

19. See Patricia Salkin, *Land Use: Blending Smart Growth with Social Equity and Climate Change Mitigation*, in AGENDA FOR A SUSTAINABLE AMERICA, *supra* note 18, at 349, 349–51.

20. See Carl Bruch et al., *Public Access to Information, Participation, and Justice: Forward and Backward Steps Toward an Informed and Engaged Citizenry*, in AGENDA FOR A SUSTAINABLE AMERICA, *supra* note 18, at 459, 460.

21. See Marian Chertow, *Municipal Solid Waste: Building Stronger Connections to Jobs and the Economy*, in AGENDA FOR A SUSTAINABLE AMERICA, *supra* note 18, at 335, 344.

22. See A. Dan Tarlock & Andrew Zabel, *Biodiversity Conservation: An Unrealized Aspiration*, in AGENDA FOR A SUSTAINABLE AMERICA, *supra* note 18, at 269, 270.

23. See Stuart Kaplow, *Can Green Building Law Save the Planet?*, 3 U. BALT. J. LAND & DEV. 131, 133–34 (2014).

24. See U.S. ENVTL. PROT. AGENCY, FISCAL YEAR 2014–2018 EPA STRATEGIC PLAN 4 (2014) (identifying “Cleaning Up Communities and Advancing Sustainable Development” as one of EPA’s five goals and “Working Toward a Sustainable Future” as one of four cross-agency strategies); COMM. ON INCORPORATING SUSTAINABILITY IN THE U.S. ENVTL. PROT. AGENCY, SUSTAINABILITY AND THE U.S. EPA 1 (2011) (recommending that the EPA adopt a sustainability strategy and take other actions to incorporate sustainability into its programs).

25. See GLOBAL CLIMATE CHANGE AND U.S. LAW (Michael B. Gerrard & Jody Freeman eds., 2d ed. 2014) (providing a comprehensive description of federal and state energy laws); see also Steven Ferrey, *Solving the Multimillion Dollar Constitutional Puzzle Surrounding State “Sustainable” Energy Policy*, 49 WAKE FOREST L. REV. 121, 122 (2014) (describing five different types of state energy laws that are “the primary pillars of sustainable energy policy in the United States”—net metering, renewable portfolio standards, renewable system benefit charges, carbon/greenhouse gas regulation, and feed-in tariffs).

26. See Jeffrey A. Smith & Matthew Morreale, *Disclosure Issues*, in GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 25, at 453, 453–54; Nancy S. Cleveland et al., *Sustainability Reporting: The Lawyer’s Response*, BUS. L. TODAY, Jan. 2015, at 2–4 (explaining what corporate clients can and should report publicly about their sustainability activities).

27. Paul Barrett & Matthew Phillips, *Can ExxonMobil Be Found Liable for Misleading the Public on Climate Change?*, BLOOMBERG BUSINESSWEEK (Sept. 7, 2016, 3:00 AM), <https://www.bloomberg.com/news/articles/2016-09-07/will-exxonmobil-have-to-pay-for-misleading-the-public-on-climate-change>; Bradley Olson & Aruna Viswanatha, *SEC Probes Exxon Over Accounting for Climate Change*, WALL STREET J. (Sept. 20, 2016, 7:55 PM), <https://www.wsj.com/articles/sec-investigating-exxon-on-valuing-of-assets-accounting-practices-1474393593>.

to foster sustainability, in lieu of public law, including certification, auditing, labeling, and reporting programs, and tends to enforce them through a variety of contractual and related arrangements.<sup>28</sup>

Three assessments of U.S. sustainability activity track the real but limited progress that this country has made. The first, published in 2002, concluded that there had been little progress, but that “[i]n virtually every area of American life, a few people and organizations are exercising leadership for sustainability.”<sup>29</sup> This assessment, based on the contributions of more than three dozen experts, represents a wide range of perspectives and disciplines from universities, nongovernmental organizations, and the private sector. The second, published in 2009 and based on the work of essentially the same set of contributors, found that the United States “has made significant progress since 2002 in at least six areas: local governance, brownfields redevelopment, business and industry, higher education, kindergarten through 12th-grade education, and religious organizations.”<sup>30</sup> The third and most recent review, published in 2012, and based on the contributions of fifty-one people from a variety of fields<sup>31</sup> found that while the United States had made “some progress” over the past two decades, “the sustainability destination is now farther away than it was” two decades ago, largely because of climate change.<sup>32</sup> The report emphasized that the basic challenge is “accelerating the transition to sustainability.”<sup>33</sup> The review continued:

Yet there is nonetheless an emerging sustainability movement in the United States. It includes dedicated practitioners in a wide variety of fields who have thought deeply about what sustainability means in different contexts and why it is attractive, and whose day-to-day job is to make it happen, fix what doesn’t work, and improve results. They are engaged in a wide variety of fields, including agriculture, energy, manufacturing, technology, community planning and development, business and industry, government, education, building construction, engineering, and law.<sup>34</sup>

Within the field of law, attorneys are making their offices run more sustainably, most obviously by reducing their environmental footprint, and also by using sustainable development concepts and ideas to help clients

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28. See Errol E. Meidinger, *Environmental Certification Programs and U.S. Environmental Law: Closer Than You May Think*, 31 ENVTL. L. REP. 10162, 10162 (2001); Michael P. Vandenberg, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 134 (2013).

29. John C. Dernbach, *Synthesis*, in STUMBLING TOWARD SUSTAINABILITY 1, 2 (John C. Dernbach ed., 2002).

30. John C. Dernbach et al., *Progress Toward Sustainability: A Report Card*, in AGENDA FOR A SUSTAINABLE AMERICA, *supra* note 18, at 16.

31. DERNBACH ET AL., *supra* note 10, at iii–iv.

32. See *id.* at 9.

33. *Id.* at i.

34. *Id.* at 9–10.

solve or address specific issues.<sup>35</sup> More than three hundred law organizations participate in the ABA–EPA Law Office Climate Challenge, under which they do one or more of the following: reduce paper use, use renewable energy, or become more energy efficient.<sup>36</sup> Bar associations in California,<sup>37</sup> Pennsylvania,<sup>38</sup> and Massachusetts<sup>39</sup> adopted and encourage the use of similar guidelines. Lawyers for a Sustainable Future—a nonprofit organization with roots in Oregon that is now becoming a national network of lawyers—developed a set of tools to improve the sustainability activities within a law office.<sup>40</sup> The Law Firm Sustainability Network—a nonprofit organization made up of law firms as well as legal departments of major corporations<sup>41</sup>—launched the American Legal Industry Sustainability Standard (ALISS), a “self-assessment tool . . . designed to help law firms measure the success of their environmental sustainability programs and discover opportunities to improve their sustainability programs.”<sup>42</sup> The ABA Section on Environment, Energy, and Resources developed the Sustainability Framework for Law Organizations, which many leading firms endorsed and are implementing.<sup>43</sup> The framework provides a structure for progressively greater law firm commitment to economic, social, and environmental responsibility.<sup>44</sup>

Still, the existing literature on sustainable development does not tell us exactly what these lawyers actually do when they are assisting clients. While there are many stories in magazines, newspapers, and online about

35. Lawyers can also play other roles. These include: 1) working through bar associations and other organizations to encourage sustainable development in other sectors of the economy, and 2) working to change legal frameworks to encourage or enable sustainable development. Although these latter two roles may help clients address specific problems, they are not the primary focus of this article.

36. *ABA-EPA Law Office Climate Challenge*, ABA, [http://www.americanbar.org/groups/environment\\_energy\\_resources/public\\_service/aba\\_epa\\_law\\_office\\_climate\\_challenge.html](http://www.americanbar.org/groups/environment_energy_resources/public_service/aba_epa_law_office_climate_challenge.html) (last visited Sept. 19, 2017) (explaining and describing the program); *Partners and Leaders*, ABA (Dec. 3, 2014), [http://www.americanbar.org/groups/environment\\_energy\\_resources/public\\_service/aba\\_epa\\_law\\_office\\_climate\\_challenge/partners\\_leaders.html](http://www.americanbar.org/groups/environment_energy_resources/public_service/aba_epa_law_office_climate_challenge/partners_leaders.html) (listing more than 300 firms and other law organizations as “partners and leaders”).

37. See STATE BAR OF CAL., VOLUNTARY STATE BAR OF CALIFORNIA LAWYERS ECO-PLEDGE AND VOLUNTARY LAW OFFICE SUSTAINABILITY POLICY 1 (2008).

38. See *Pennsylvania Lawyers United for Sustainability (PLUS) Program*, PA. BAR ASS’N, <http://www.pabar.org/public/sections/envco/plusprogram.asp> (last visited Sept. 19, 2017).

39. See *Green Guidelines*, MASS. BAR ASS’N, <http://www.massbar.org/for-attorneys/lawyers-eco-challenge/green-guidelines> (last visited Sept. 19, 2017).

40. *Welcome*, LAWYERS FOR A SUSTAINABLE FUTURE, <http://www.sustainablelawyers.org> (last visited Sept. 19, 2017) (providing links to tools on sustainability policy, sustainable practices, building management, tenant improvements, events and retreats, and green lunches).

41. *Who We Are*, LAW FIRM SUSTAINABILITY NETWORK, <http://www.lfsnetwork.org/about/who-we-are/> (last visited Oct. 19, 2017).

42. *About ALISS*, LAW FIRM SUSTAINABILITY NETWORK, <http://www.lfsnetwork.org/aliss/overview> (last visited Sept. 19, 2017).

43. See *Law Firm Sustainability Framework*, ABA (Dec. 2, 2010), [http://www.americanbar.org/groups/environment\\_energy\\_resources/public\\_service/model\\_law.html](http://www.americanbar.org/groups/environment_energy_resources/public_service/model_law.html).

44. See *id.* For an excellent summary of what some of the leading law firms are doing on sustainability under this framework see William R. (Bill) Blackburn, *The Sustainability Strategy*, ENVTL. F., Mar./Apr. 2011, at 34, 34.



lawyers who do work related to sustainability,<sup>45</sup> there has thus far been no effort to systematically assess what they do. That is the basic question this Article attempts to answer. The answer matters because accelerating the transition to sustainability requires more and better sustainability choices, including legal choices, the use of law on behalf of sustainability, and visionary and supportive governance.<sup>46</sup> Accelerating the transition also requires the participation of all significant parts of society, including lawyers.<sup>47</sup> If the lawyers doing work related to sustainability are actually helping accelerate the transition, then it would be of real value to know what they do, how they do it, and why. Because these lawyers are a distinct minority of all practicing lawyers, and because there is growing understanding of the importance of sustainable development, it is highly likely that a great many other lawyers and lawyers-to-be would consider doing this kind of work if they knew how to do it or better understood what this work entails, both personally and professionally. At the same time, many lawyers who are doing sustainability work on behalf of their clients may recognize some of their own experiences and approaches in the stories of other lawyers who are working on sustainability. They may thus appreciate that more lawyers are doing this kind of work than they may have believed.

As a growing number of law schools provide sustainability training for law students,<sup>48</sup> moreover, it behooves them to know what lawyers engaged in sustainability work actually do. Greater understanding of what sustainable development in law practice means will improve the ability of students to do this work in the real world. It is also consistent with growing recognition of the need to provide students with the skills and knowledge they will need in the practice of law, including the importance of training lawyers to practice law in new and challenging contexts.<sup>49</sup> In a 2013 reso-

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45. See, e.g., Richard J. Sobelsohn, *Law Firms Adopt Sustainability to Stay Sustainable*, N.Y. L.J. (Dec. 28, 2015), <http://www.newyorklawjournal.com/id=1202745732909>; Stuart Kaplow, *Lawyers' Opinion Matters in Green Building Transactions*, GREEN BUILDING L. UPDATE (July 12, 2015), <http://www.greenbuildinglawupdate.com/2015/07/articles/leed/lawyers-opinion-matters-in-green-building-transactions>; Christine Bader, *Corporate Lawyers Can Be More Than Naysayers-in-Chief*, ATLANTIC (May 8, 2015), <https://www.theatlantic.com/business/archive/2015/05/corporate-lawyers-social-responsibility/392474>; Bob Langert, *Are Lawyers the Enemy of Sustainability Execs?*, GREEN BIZ (Apr. 6, 2015, 1:45 AM), <https://www.greenbiz.com/article/are-lawyers-enemy-sustainability-exec>; Thomas Bourne, *Why Lawyers Have a Part to Play in Sustainable Development*, GUARDIAN (Feb. 16, 2012, 9:53 AM), <https://www.theguardian.com/sustainable-business/blog/sustainable-business-development-law>.

46. DERNBACH ET AL., *supra* note 10, at 229.

47. See *id.* at 285.

48. Dernbach, *supra* note 5, at 495–96.

49. See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 202 (2007) (“The calling of legal educators is a high one: to prepare future professionals with enough understanding, skill, and judgment to support the vast and complicated system of the law needed to sustain the United States as a free society worthy of its citizen’s loyalty; that is, to uphold the vital values of freedom with equity and extend these values into situations as yet unknown but continuous with the best aspirations of our past.”).

lution, the ABA House of Delegates—the policy-making body for the organization—urged “all governments, lawyers, and ABA entities to act in ways that accelerate progress toward sustainability,” and called on “law schools, legal education providers, and others concerned with professional development to foster sustainability in their facilities and operations and to help promote a better understanding of the principles of sustainable development in relevant fields of law.”<sup>50</sup>

The answer also matters for a more basic reason: although it has been more than twenty years since the United Nations Conference on Environment and Development first endorsed sustainable development, and adopted an international strategy and set of principles to realize it,<sup>51</sup> the term is still subject to misunderstanding and skepticism.<sup>52</sup> This is true in spite of—and also perhaps because of—the adoption by the United Nations General Assembly in 2015 of Sustainable Development Goals for the world.<sup>53</sup> Understanding what practicing lawyers say and do about sustainable development in the context of specific client situations sheds light on what the term means in practice, and the extent to which it actually adds value.

This Article examines systematically what lawyers in the sustainability arena actually do. It is based on qualitative research, a form of social-science research that provides insight into how particular people understand what they do.<sup>54</sup>

Part I of this Article describes the methodology used in the research. Essentially, the research involved structured telephone interviews based on thirteen questions. The twenty-six lawyers interviewed have all spent a considerable part of their professional lives doing work related to sustainability. I chose the interviewees from a much larger pool of lawyers who do this work. The rest of this Article—Parts II through VI—describes and analyzes their answers, explanations, and stories.

Part II explains the interviewees’ understanding of sustainable development and sustainability (unless the context indicates otherwise, the two terms are used interchangeably in this Article). Most understood one or more widely applied shorthand definitions of sustainable development. Many focused on its long-term time horizon or the importance of reducing overall negative impacts. At the same time, they tended to be more interested in how those concepts and principles apply to their clients. They also

50. AM. BAR ASS’N, HOUSE OF DELEGATES, RESOLUTION 105, 13 (2013).

51. U.N. Conference on Environment and Development, Agenda 21, ¶¶ 1.1, 1.3, 1.6 (Apr. 23, 1993), <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>; U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principles 3–4, 8, U.N. Doc. A/CONF.151/26 (Vol. I), annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*].

52. Dernbach & Cheever, *supra* note 6, at 272.

53. See G.A. Res. 70/1, *supra* note 17; see also U.N. Secretary-General, *Progress towards the Sustainable Development Goals*, ¶ 3, U.N. Doc. E/2016/75 (June 3, 2016) (one-year report on progress toward these goals).

54. See *infra* Part I.

tended to emphasize the environmental aspects of sustainability more than the social aspects.

Part III provides an overview of what these lawyers do. The primary subject matter of the work performed by these lawyers varies considerably and includes environmental law, climate change and clean energy law, corporate law, land use and development law, sustainable infrastructure finance, and corporate social responsibility and human rights. Their clients are also diverse, including developers, banks, multinational corporations, start-up businesses, nongovernmental organizations, and federal, state, and local governments. These lawyers also perform a wide variety of types of legal work—not only counseling clients but also performing transactional work, litigating, advocating, and drafting.

Part IV explores the dynamics of the attorney–client conversation on sustainability. Many said that their clients come to them for sustainability-related legal work precisely because they specialize in the kind of legal work that is being sought. This Part then addresses the converse question—the circumstances under which attorneys raise sustainability issues with their clients. Some believe they have a fiduciary duty to explain risks and opportunities related to sustainability when a sustainability approach would benefit the client. Some lawyers raise sustainability-related questions and suggestions based on what the client seems to care about, and to the extent that the client is interested. Others have developed standard questions, programs, and tools related to sustainability, and share those with clients when relevant. Part IV also examines what attorneys say in those conversations. The essential starting point, of course, is whatever law may be applicable to the client’s situation; sustainable development is sometimes required or encouraged by law, but often it is not. Beyond that, many said, the next requirement is understanding what the particular client needs and wants, rather than preaching to the client about sustainability. Other attorneys described the importance of framing a conversation with clients in terms of risks and opportunities related to sustainable development, even when clients are not focused on those risks and opportunities.

Part V explores the personal and professional qualities of the attorneys who are doing this work. It begins by examining how these lawyers became interested in sustainability. A few were always interested or developed an interest prior to law school. Work in environmental law led to an interest in sustainability for some. Exposure to sustainable development concepts through specific workplace or community experiences was the catalyst for others. Still others concluded, based on these experiences, that they were not doing the work they wanted to do. They moved their careers in the direction of sustainable development because it offered a more satisfying framework to solve problems. This Part then examines the most essential personal and professional characteristics for sustainability work. While many of the most essential skills of a lawyer practicing law relating

to sustainability are the same as those of a good lawyer, these lawyers emphasized six characteristics that overlap with, and extend beyond, basic legal skills. These characteristics are expertise in, and even passion for, sustainability; ability to listen well; open-mindedness, curiosity, and creativity; good problem-solving skills; patience; and an ability to think big picture and long term.

Part V then discusses what these lawyers find most enjoyable about their work and what they find least enjoyable or most frustrating. In explaining what they most enjoy, they identified the achievement of specific and positive results, success in explaining a sustainability project or proposal to a skeptical or uninformed client, the intellectual challenge of the work, and their ability to work with likeable and talented people. In explaining what they find least enjoyable, they identified clients that did not understand or support sustainability; public opposition based on ideology, misrepresentation, or ignorance; the slow pace of progress, particularly on energy and climate change; and legal barriers to sustainability.

Part VI addresses two questions about the future of sustainability in law practice. The first is about the greatest obstacles to sustainability. These lawyers identified public opinion as a major obstacle, including failure to understand both the underlying problems and what sustainable development means. The other major obstacle they identified is legal—not only laws that obstruct progress but also the absence of an effective legal structure that guides and supports sustainable development. Part VI also explores present and future employment in law related to sustainability. Many said that legal jobs related to sustainability are everywhere, but they are not ordinarily labeled as such. Rather, these lawyers said, sustainability is or should be a critical part of all legal work. Many identified specific workplaces or subjects that are particularly amenable to sustainability-related legal work. These lawyers provided a common piece of advice for those who want to enter the field: find some particular subject matter or legal field that is of interest, master both that subject matter or field as well as its sustainability aspects, and create a sustainability job based on that. At the same time, some lawyers said there is little or no sustainability-related work.

The sustainability-related legal work described in this Article varies considerably in its scope and ambitiousness. Some of it is about more sustainable ways to comply with existing laws; some of it may simply be a new label for the kind of work they have always done; and some of it is about helping companies, businesses, and governments achieve more ambitious environmental, social, and economic goals. But for all of these lawyers, sustainable development provides a perspective and framework for making better decisions. Understanding how this perspective and framework is applied in the real-world practice of law provides insight into the role of law and lawyers in achieving a sustainable society.

## I. METHODOLOGY

This Article is based on interviews with twenty-six practicing lawyers who identify themselves as having spent a substantial part of their career doing sustainability-related work or who bring a sustainability perspective to their legal work. This specific form of research is known as qualitative research.<sup>55</sup> Unlike quantitative research, which “uses numbers as data,” qualitative research “uses words as data.”<sup>56</sup> More specifically, “qualitative researchers are interested in understanding the meaning people have constructed; that is, how people make sense of their world and the experiences they have in the world.”<sup>57</sup>

As explained in the Introduction, the purpose of this research is to understand what practicing lawyers engaged in legal work related to sustainable development actually do. Although no one appears to have surveyed the number of lawyers in the United States who do work related to sustainability, a conservative estimate is that several thousand lawyers devote at least part of their practice to such work. A basic source of information on this topic is the Martindale–Hubbell online directory of lawyers and their listed areas of practice.<sup>58</sup> In that directory, 615 U.S. lawyers identified sustainability as a practice area, and an additional 144 lawyers identified sustainable development.<sup>59</sup> The number becomes considerably larger if lawyers that identify climate change and renewable energy as part of their practice are included: an additional 749 attorneys include climate change as part of their practice area.<sup>60</sup> Another 826 attorneys—who do not identify climate change, sustainable development, or sustainability as a practice area—identify renewable energy as a practice area.<sup>61</sup> The number gets even larger when various aspects of social sustainability are included. For instance, 590 attorneys identify human rights as a practice area.<sup>62</sup> That totals 2,624 attorneys. Because the directory is focused on lawyers in private practice,<sup>63</sup> it is less likely to include government attorneys, academic

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55. See generally SHARAN B. MERRIAM & ELIZABETH J. TISDELL, *QUALITATIVE RESEARCH: A GUIDE TO DESIGN AND IMPLEMENTATION* 5–6 (4th ed. 2016) (explaining how to conduct qualitative research and write findings).

56. *Id.* at 6 (citing VICTORIA CLARKE & VIRGINIA BRAUN, *SUCCESSFUL QUALITATIVE RESEARCH: A PRACTICAL GUIDE FOR BEGINNERS* 3–4 (2013) (emphasis removed)).

57. *Id.* at 15 (emphasis removed).

58. See *Attorney and Law Firm Search*, MARTINDALE.COM, <https://www.martindale.com/find-attorneys> (last visited Sept. 19, 2017).

Membership in the ABA’s Climate Change, Sustainable Development and Ecosystems Committee provides another data point. The Committee has 837 members. E-mail from Dana Jonusaitis, Dir., American Bar Association Section of Environment, Energy, and Resources, to John C. Dernbach (Sept. 7, 2016, 13:50 EST) (on file with author). Of course, many lawyers likely do this work who are not members of this Committee.

59. E-mail from Brent Johnson, Co-Director & Reference/State Documents Librarian, Law Library, Widener Univ. Commonwealth Law Sch., to John C. Dernbach (Mar. 3, 2017, 10:37 EST) (on file with author).

60. *Id.*

61. *Id.* Smaller numbers of attorneys identify other aspects of sustainable development, such as energy efficiency (30) and mixed-use development (77) as practice areas. *Id.*

62. *Id.*

63. See *Attorney and Law Firm Search*, *supra* note 58.

attorneys, and attorneys employed by nongovernmental organizations, businesses, and corporations. Thus, the figures provided here probably understate the number of attorneys doing legal work related to sustainable development.

The lawyers interviewed for this Article represent a subset of this larger group. All of them spent a substantial part of their career doing sustainability-related work for their clients (although not all of them were working for legal clients at the time of the interview). I interviewed twenty-six lawyers who are mostly in private practice with law firms. Some in-house counsel were included because they also work for a client. And some work for local, state, or federal government. Others now work for nongovernmental organizations, consulting firms, or law schools, although all of these have substantial, previous governmental or private experience in practicing law. The great majority have more than twenty years of experience—often in different jobs or with different law firms—over the course of their career, although some have been practicing only a few years. All of those interviewed self-identify as doing legal work related to sustainability.

The results of the interviews are not presented as a representative sample of the 1.3 million licensed lawyers in the United States.<sup>64</sup> They nonetheless constitute a reasonable sample of the total population of lawyers who do work related to sustainable development. I selected twelve of the lawyers interviewed because I know or previously worked with them on sustainable development and climate change issues through the ABA or in other professional contexts. I selected ten from suggestions by colleagues or other interviewees and four based on their law firm's website descriptions.<sup>65</sup>

I conducted the research through telephone interviews based on thirteen questions that are set out in the Appendix. Telephone interviews both encouraged participation and permitted follow-up questions when appropriate. To encourage those participating to speak frankly about their views and experiences, the identities of those interviewed are confidential.<sup>66</sup> Most interviews lasted about an hour, with a few considerably longer. I conducted the interviews between June 2014 and August 2016.<sup>67</sup> Afterwards, I sent my interview notes to those interviewed and asked for any changes or corrections they thought appropriate; many returned my notes

64. AM. BAR ASS'N, *LAWYER DEMOGRAPHICS: YEAR 2016* (2016).

65. Several interviews were subsequently excluded from this list, or were terminated quickly, because the attorney is not actually doing work related to sustainability. Interviews with three lawyers who have never practiced law, or who are long retired, were also excluded. At least five unstructured interviews with other lawyers were also excluded.

66. This Article sometimes makes details vague to protect the identity of these attorneys. For the same reason, it does not use gender-based pronouns to refer to the interviewees (*e.g.*, he/she, his/hers).

67. Interviews were not recorded; I typed while people spoke.

with revisions. I used an online database program to consolidate all of the interviews into a single master report that organized the answers by question, which facilitated comparison and analysis.<sup>68</sup> Except as otherwise stated, any quantitative indications (e.g., some, many) apply only to the lawyers who were interviewed.

## II. HOW THESE LAWYERS UNDERSTAND SUSTAINABILITY

How do the lawyers who do sustainability work understand the meaning of sustainable development and sustainability? How does that understanding square with the way that other sustainability practitioners use the term?<sup>69</sup> These lawyers have a good understanding of sustainable development and sustainability. Most were conversant with several widely applied shorthand definitions of the term, but tended to be more interested in how sustainable development concepts and principles are applied in practice. Many emphasized key aspects of sustainable development—its long-term time horizon, the importance of reducing overall negative impacts and creating positive impacts, and limits on resource use. In the context of the specific work they do, they reflected a sophisticated understanding of not only the term, but also what it means for their clients. That said, they tended as a group to be more focused on the environmental dimension of sustainability than on the social dimension.

A brief history of the term sustainable development may be helpful here.<sup>70</sup> Although many use the term sustainability as a substitute for sustainable development, the original term is sustainable development,<sup>71</sup> and the original term provides several keys to understanding. Development is understood internationally in terms of both economic and social development, and requires a foundation of peace and security.<sup>72</sup> In other words, development is not economic development alone; it is more helpfully understood in terms of human development.<sup>73</sup> The objectives of development are “human freedom, opportunity, and quality of life.”<sup>74</sup> This model of improving the human condition, which dates at least back to the end of World War II, has nothing to say about the environment.<sup>75</sup> In consequence, development tends to work by furthering economic and social progress to some degree; however, it does so at the expense of the environment, as

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68. Sustainability in Law Practice Interviews with 26 Attorneys (2016) (on file with author) [hereinafter Master Report of Interviews] (unpublished report generated by author for this Article). The data base program was developed by Qualitrics.

69. See *id.* Most of the interview material in this Part is taken from answers to Question 4 (“What is your understanding of sustainability?”). See *infra* Appendix.

70. This paragraph summarizes a history that is explained and documented in much greater detail in Dernbach & Cheever, *supra* note 6, at 252–61.

71. See *supra* note 69.

72. Dernbach, *supra* note 6, at 9–14.

73. *Id.* at 14.

74. Dernbach & Cheever, *supra* note 6, at 257.

75. See Dernbach, *supra* note 6, at 14–21.

well as living and future people who depend on that environment.<sup>76</sup> Discussions that treat development and environment as inherently oppositional forces—e.g., development versus environment, or having to choose between development and environment—are based on that weakness or limitation in the development model. Human population and economic development grew rapidly after World War II.<sup>77</sup> Widespread environmental degradation as well as deep and growing poverty—both understood as caused or not addressed by development—grew to the extent that they threatened to overcome, undermine, or weaken the progress of development.<sup>78</sup>

As a result, nations of the world concluded that the development model needed to be modified. Instead of development, countries would strive for *sustainable* development. They first committed to that change at the U.N. Conference on Environment and Development (Earth Summit) in 1992<sup>79</sup> and most recently reaffirmed that commitment with the U.N. General Assembly's 2015 adoption of Sustainable Development Goals (SDG).<sup>80</sup> As the official name of the Earth Summit indicates ("Conference on Environment and Development"), sustainable development is a way of reconciling development and environment. In fact, the key action principle for sustainable development is integrated decision making.<sup>81</sup> Essentially, decisions involving the environment or development must take the environment and development into consideration and further both in more or less equivalent ways.<sup>82</sup> Sustainable development also requires a long-term perspective; intergenerational equity is a key principle to be applied in integrated decision making.<sup>83</sup> The goals of sustainable development are essentially the same as those of development—human freedom, opportunity, and quality of life—except that sustainable development focuses on those goals for both present and future generations.<sup>84</sup>

Conceptually, this has two consequences. First, because conventional development can damage not only the environment but also humans depending on that environment, conventional development can be criticized as unjust, particularly when the adverse effects are visible or obvious.<sup>85</sup>

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76. See *id.* at 14–21; see also Dernbach & Cheever, *supra* note 6, at 257–58.

77. See Our Common Future *supra* note 8, at ch. 5, ¶¶ 3–4.

78. See *id.* at ch. 1, ¶ 1.

79. See *Rio Declaration*, *supra* note 51, at annex I.

80. G.A. Res. 70/1, *supra* note 17, ¶ 1.

81. See Dernbach, *supra* note 9, at 249 (analyzing and comparing various provisions of the Rio Declaration); see also MARIE-CLAIRE, CORDONIER SEGGER & ASHFAQ KHALFAN, SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICES, AND PROSPECTS 103 (2005) (defining "sustainable development law" as a "set of legal instruments and provisions where environment, social and economic considerations are integrated to varying degrees in different circumstances").

82. Dernbach, *supra* note 9, at 260–61.

83. See Claire Molinari, *Principle 3: From a Right to Development to Intergenerational Equity*, in THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: A COMMENTARY 139 (Jorge E. Viñuales ed., 2015).

84. Dernbach & Cheever, *supra* note 6, at 257–58.

85. *Id.*



Because sustainable development does not do these things, it follows that sustainable development is a way of fostering environmental and social justice<sup>86</sup> as well as protecting human rights.<sup>87</sup> Second, the social dimension of sustainability is often considered of equal importance to the environmental dimension.<sup>88</sup> Because damage to the environment also tends to hurt humans who depend on the environment, the social dimension also reinforces the point that sustainable development is a way to foster social justice and human rights.

Many writers have used sustainable development and sustainability synonymously.<sup>89</sup> But it is important to recognize that sustainability is often used to describe a future state of affairs—a sustainable society—where basic environmental challenges, social challenges, and threats no longer exist, and where human well-being is fostered for present and future generations.<sup>90</sup> Because no individual, corporation, or country can move from unsustainable development to sustainable development overnight, the transition to a sustainable society is often described in terms of a journey rather than a destination.<sup>91</sup> A great many of the steps in this journey move from less-sustainable activities and projects to more-sustainable activities and projects.<sup>92</sup> A critical question is whether any given project or activity should be directed at reducing adverse environmental and social impacts, or instead directed at creating positive environmental and social impacts (along with its presumed positive economic impacts).<sup>93</sup> Because of growing population and economic development, and the substantial cumulative effects of numerous negative impacts, achieving sustainable development would seem to require that we move toward the latter.

Several shorthand formulas used to explain sustainable development are more widely understood than the history. The iconic and most often cited definition of sustainable development is contained in the 1987 report

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86. See John C. Dernbach, Patricia E. Salkin & Donald A. Brown, *Sustainability as a Means of Improving Environmental Justice*, 19 J. ENVTL. & SUSTAINABILITY L. 1, 12–13 (2012).

87. CLIMATE CHANGE JUST. & HUM. RTS. TASK FORCE, INT’L BAR ASS’N, *ACHIEVING JUSTICE AND HUMAN RIGHTS IN AN ERA OF CLIMATE DISRUPTION* 9 (2014) (recommending that “states consider recognizing freestanding human rights to a safe, clean, healthy and sustainable environment”) (emphasis removed).

88. See, e.g., WILLIAM R. BLACKBURN, *THE SUSTAINABILITY HANDBOOK: THE COMPLETE MANAGEMENT GUIDE TO ACHIEVING SOCIAL, ECONOMIC, AND ENVIRONMENTAL RESPONSIBILITY* (2d ed. 2015) (explaining wide variety of best corporate sustainability practices giving equal attention to environmental and social sustainability).

89. See Dernbach & Cheever, *supra* note 6, at 248 n.2.

90. See PAMELA MATSON ET AL., *PURSUING SUSTAINABILITY: A GUIDE TO THE SCIENCE AND PRACTICE* 20–21 (2016).

91. See, e.g., BD. ON SUSTAINABLE DEV., NAT’L RESEARCH COUNCIL, *OUR COMMON JOURNEY: A TRANSITION TOWARD SUSTAINABILITY* 3 (1999).

92. See DERNBACH ET AL., *supra* note 10, at 6–7.

93. Dernbach & Cheever, *supra* note 6, at 271.

of the World Commission on Environment and Development,<sup>94</sup> *Our Common Future*. (The Commission is also called the Brundtland Commission, after then-Norwegian Prime Minister Gro Harlem Brundtland, its chair.) According to the report, sustainable development is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>95</sup> Others describe sustainable development in terms of three overlapping circles or pillars—social, economic, and environmental.<sup>96</sup> The idea is that progress on sustainable development occurs when a particular action furthers all three.<sup>97</sup> In the corporate setting, the use of independent metrics to measure each of the three is described in terms of a “triple bottom line,” where the social, economic, and environmental goals are often referred to as “people, profit, and planet.”<sup>98</sup>

It is also important to recognize what sustainable development is not. Sustainable development is not a discrete subject or area of law like energy law, insurance law, or even environmental law; it is a way of viewing, analyzing, and making decisions about a wide range of human activities. In addition, sustainable development is not another term for environmentalism or environmental protection, and it is not about protecting the environment for its own sake. Rather, it is about advancing human well-being in the context of a quality environment.<sup>99</sup> Nor is sustainable development simply about “balancing” the environmental, economic, and social aspects of a proposal; the ultimate test of a decision, as the Brundtland Commission recognized, is whether it ensures the ability of future generations to meet their needs.<sup>100</sup> Conversely, sustainable development is not another term for sustained economic growth.<sup>101</sup> Economic development is part of sustainable development, but sustainable development is a framework for integrated decision making, not simply realizing profits or growth.<sup>102</sup> Finally, sustainable development is not another way of describing environmental regulation; it is based on recognition of the need for a great variety

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94. Kaj Bärlund, *Sustainable Development - Concept and Action*, UNITED NATIONS ECON. COMMISSION FOR EUR., [http://www.unecce.org/oes/nutshell/2004-2005/focus\\_sustainable\\_development.html](http://www.unecce.org/oes/nutshell/2004-2005/focus_sustainable_development.html) (last visited Sept. 19, 2017).

95. *Our Common Future*, *supra* note 8, at ch. 2, ¶ 1.

96. *See, e.g.*, DERNBACH ET AL., *supra* note 10, at 3.

97. *See id.*

98. *See* Carolina Miranda, *The Breakthrough Thinking of the Triple Bottom Line*, SUNPOWER (Dec. 17, 2016), <http://businessfeed.sunpower.com/business-feed/written-breakthrough-thinking-of-the-triple-bottom-line>; *see also* ANDREW W. SAVITZ & KARL WEBER, *THE TRIPLE BOTTOM LINE: HOW TODAY'S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUCCESS—AND HOW YOU CAN TOO* 156 (2d ed. 2013) (explaining how businesses can design and implement sustainability strategies).

99. *Rio Declaration*, *supra* note 51, Principle 1 (“Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”).

100. *See supra* Part II.

101. DERNBACH ET AL., *supra* note 10, at 6.

102. *Id.*

of legal tools, including those fostering sustainable economic development.<sup>103</sup>

Many of the lawyers interviewed for this Article explained their understanding of sustainable development in terms of the Brundtland Commission definition, three circles, three pillars, or the triple bottom line. One lawyer captured the definition this way: “The simultaneous pursuit of economic prosperity, environmental stewardship, and social responsibility.”<sup>104</sup> Another thought that the Sustainable Development Goals are a helpful touch point, partly because of their breadth: “It is having a society, including a business model, where you are advancing environmental, social, and economic goals.”<sup>105</sup> As the following discussion indicates, however, their operational understanding tended to focus more on environment, energy, and land use rather than on the social dimensions of sustainability. In that respect, they mirror the reality that environmental sustainability is now more accepted among practicing attorneys than social sustainability.<sup>106</sup>

Some were uncomfortable with the question about the meaning of sustainable development, or highlighted the limits of one-sentence definitions. They tended to see these definitions as incomplete. As one attorney explained:

I understand sustainability to have stewardship at its core—using resources today in a manner so that resources are still available for the future. But it is more complicated than that simple definition. There are a lot of nuances involved when you start peeling the onion, with issues including energy efficiency, water usage, sustainable harvesting practices for replenishable resources, and carbon footprints.<sup>107</sup>

Another highlighted the limits of the Brundtland Commission definition by saying that it “isn’t wrong.”<sup>108</sup> A different attorney explained: “To be more technical, we have to have an energy budget that comes from the sun and other finite resources and cycles on planet. If we don’t succeed in arranging civilization within those processes, we’re toast.”<sup>109</sup> A third at-

103. See John C. Dernbach, *Creating the Law of Environmentally Sustainable Economic Development*, 28 PACE ENVTL. L. REV. 614, 614–15, 630 (2011) (setting out a typology of laws that protect the environment, create jobs, and foster economic development).

104. Master Report of Interviews, *supra* note 68, at 17.

105. *Id.* at 16 (for this attorney, the social dimensions of sustainability are particularly important).

106. E-mail from William Blackburn, William Blackburn Consulting, Ltd., to John C. Dernbach (Oct. 3, 2016, 23:03 EDT) (on file with author).

107. Master Report of Interviews, *supra* note 68, at 17.

108. *Id.*

109. *Id.*

torney made a similar point from a different perspective: “Unless sustainability is translated into tangible parameters, it is hard for businesses to get their minds around it.”<sup>110</sup>

The decision making and advocacy aspect of the sustainable development frame was much more important to one attorney than a short definition:

I’m not confident that I would put as much meaning into a short definition. The big question is how much we reduce the environmental cost of what we are doing. Part of that requires more holistic thinking than the limits in my air permit. The sustainability frame is good for options, alternatives, and advocacy. It is particularly good for advocacy with government agencies and environmental groups.<sup>111</sup>

Some lawyers emphasized the long-term aspect of sustainable development. One emphasized the need to harmonize environmental protection and economic development so “we can survive for more than the next several decades.”<sup>112</sup> Another stated the importance for long-term sustainability of being “fossil fuel free.”<sup>113</sup> And another said, “If I were going to re-define sustainability, it would be creating a system that has the components and structure to maintain itself long term and the flexibility to adjust to changing circumstances.”<sup>114</sup>

Others emphasized the importance of reducing impacts and creating healthier places:

Sustainable development law focuses on shaping land use and economic development to have a lighter impact on the environment, including but not limited to climate change mitigation and adaptation. Sustainable development uses less material; avoids consuming wetlands or eroding watersheds; consumes less energy; emits less carbon dioxide; lessens storm water runoff; reduces ground and surface water pollution; and creates healthier places for living, working, and recreating.<sup>115</sup>

Several attorneys emphasized the importance of limiting resource use. Of sustainable development, one said:

It boils down to conserving and best utilizing available resources—not using more water than you need to, turning food waste into energy, using an LED (light-emitting diode) bulb instead of an incandescent

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110. *Id.*

111. *Id.* at 16–17.

112. *Id.* at 16.

113. *Id.*

114. *Id.*

115. *Id.*

bulb,<sup>[116]</sup> smart ways of doing what we do every day that don't affect what you do every day. We are not asking people to sit in the dark. A lot of people I talk to make the assumption I am a left-wing environmentalist. I am a registered Republican, and a capitalist at heart. We don't have to live in teepees or destroy the environment to enjoy what the American lifestyle has to offer. This is being smart about how you use your resources.<sup>117</sup>

Many other attorneys were more comfortable defining and applying sustainable development concepts and principles from the perspective of their own work, rather than abstract definitions. One of these lawyers explained it in terms of its application to the corporate world: "How can we help corporations live into an aspirational goal of creating and encouraging human flourishing?"<sup>118</sup> A lawyer who works with agricultural and industrial chemicals explained:

I use it very generally as a surrogate for doing things from inception to end of life in a more environmental and human health-sensitive way, including smarter selection of feedstocks and improved manufacturing processes. It can be summarized as smarter, cheaper, and greener. It is about designing technologies so that they are fundamentally more green through their whole life cycle, and the product is sustainable from a business, environmental, and health and safety perspective.<sup>119</sup>

An attorney working as in-house counsel for a large city with an express sustainability commitment explained the term in ways that are somewhat similar to the explanation given above but also quite different in detail:

The city sees it as addressing a wide variety of issues at the same time, including receiving waters and carbon footprint. A lot of this is reversing the trend toward greater and greater degradation. We have reversed flow and now we are trying to push back and make the city a greener space, a better storm-water-managed space, and reduce energy consumption or switch to other forms of energy. This is not being driven by economic development or job creation; these things are a benefit, but not a driver.<sup>120</sup>

Another attorney, who works with businesses and investors, explained that the transition to sustainability is being driven by economics:

I see that sustainability is critical to long term-success in business and investment. If you manage your environmental, social, and governance issues and impacts well, you will be more successful in business and

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116. See U.S. Dep't of Energy, *Lighting Choices to Save You Money*, ENERGY.GOV, <https://energy.gov/energysaver/lighting-choices-save-you-money> (last visited Sept. 19, 2017) (LEDs use 20% to 25% of the energy of regular incandescent light bulbs and last up to twenty-five times longer).

117. Master Report of Interviews, *supra* note 68, at 17.

118. *Id.* at 16.

119. *Id.* at 17.

120. *Id.* at 18.

investment. There is a lot of data showing that sustainable companies outperform sustainability laggards in their industry significantly, and that investment strategies that incorporate environmental, social, and governance metrics tend to do better. Sustainability investment beats unsustainable investment. There are megatrends in terms of social license and laws pushing sustainability (at least in the European Union), as well as transparency and disclosure, and competitive pressure for companies to be sustainable. Sustainability is starting to win, but it is not because of law. It is more about economics.<sup>121</sup>

An attorney who works with many businesses that seek to do sustainability work explained these developments in terms of the economic attractiveness of the triple bottom line. This attorney used Walmart's Sustainability 360 program, a comprehensive program for integrating sustainability into all aspects of its business,<sup>122</sup> as an example:

A lot of companies these days understand an opportunity to be aspirational, and they are finding business models to do that. This provides opportunity to scale sustainability, because the programs they implement are providing profitability. Walmart did not start its Sustainability 360 program to make money. There was leadership at the top that was interested, and then they found all kinds of waste in their supply chain. So, they developed a questionnaire for suppliers that makes it clear to suppliers that you better use less plastic, ship less air in your packages, and have lower greenhouse gas emissions. Once you do that for Walmart, you will do that for other companies.<sup>123</sup>

Finally, several attorneys explained that their view of sustainable development is evolving with experience. Several years ago, one attorney came to the conclusion that simply reducing adverse impacts was not an adequate way to approach sustainable development. "My clients and I concluded that anything other than a regenerative approach is inappropriate. Simply sustaining is not enough."<sup>124</sup> At "Building to Save the Earth," a green building event at Ball State University, this attorney remembered someone asking if "building to save the earth was like logging to save the owls."<sup>125</sup> This attorney often wonders "if sustainable development has the same challenge."<sup>126</sup>

### III. WHAT SUSTAINABILITY LAWYERS DO

The question of what sustainability lawyers actually do in their work with clients addresses two distinct aspects of their work: One is subject

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121. *Id.* at 49.

122. *Sustainability*, WALMART, [http://www.corporatereport.com/walmart/2014/grr/environment\\_sustainability\\_360.html](http://www.corporatereport.com/walmart/2014/grr/environment_sustainability_360.html) (last visited Sept. 19, 2017).

123. Master Report of Interviews, *supra* note 68, at 48.

124. *Id.* at 17.

125. *Id.*

126. *Id.*

matter and clients, which are most helpfully discussed together. The other is the type of legal work they do.<sup>127</sup>

### A. Subject Matter and Clients

The primary subject matter of the work performed by these lawyers varies considerably and includes environmental law, climate change and clean energy law, corporate law, land use and development law, sustainable infrastructure finance, corporate social responsibility, and human rights. The lawyers interviewed also differ in their explicit identification with sustainability: some identify themselves not as sustainability lawyers but rather with the primary subject matter of their work. Their clients are also diverse. What follows illustrates the wide range of activities and clients they described in the practice of law related to sustainability.

Many are environmental lawyers who see issues through a sustainability lens. Taken together, these lawyers have a broad range of clients, including municipal governments, financial institutions, investors, utilities, industry, state and local governments, property owners, and nongovernmental organizations.<sup>128</sup> Many of their corporate clients have international operations. As one explained: “I do not have a sustainability practice. I have a sustainability prism that informs, or through which I view, my cases, and how my cases should be managed, litigated, or pursued.”<sup>129</sup> Another said: “I don’t sell myself as a sustainability lawyer. I am an environmental lawyer who believes in sustainability, and I counsel clients who are willing to go toward that path. I believe this is an option I need to make the client aware of.”<sup>130</sup>

Within environmental law, the subject matter of their work is also varied. Many do the full range of environmental law work, including air and water pollution, wetlands, endangered species, waste, among other subjects. Others are more specialized. Some focus on the environmental aspects of transactions and on brownfields redevelopment. One works in the industrial chemical and agro-chemical area, representing chemical producers, formulators, and end-users of these chemicals.<sup>131</sup> Another, working for a regulatory agency, is helping to “identify strategies that can be used to strengthen compliance other than the traditional inspection and enforcement route.” These strategies, the attorney said, include “greater transparency about facility compliance and performance.”<sup>132</sup>

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127. Most of the material in this Part is taken from answers to Question 1 (“How long have you been in this position?”), Question 2 (“What kind of work do you do, and who are clients?”), and Question 8 (“Apart from client counseling, what type of other legal work do you do on sustainability?”) in the Appendix. See *infra* Appendix.

128. Master Report of Interviews, *supra* note 68, at 9–10.

129. *Id.* at 7.

130. *Id.*

131. *Id.*

132. *Id.* at 5.

Other lawyers work primarily or exclusively on climate change, renewable energy, and energy efficiency. These lawyers work in a wide variety of private practice, governmental, business, academic, and nongovernmental settings. One with a long career in a variety of governmental and consulting positions has focused on “developing and teaching an awareness of energy policy in a carbon-constrained world.”<sup>133</sup> Continuing the theme of identification with the primary subject matter of their work, rather than sustainable development, another explained: “I’m a climate change lawyer; I don’t call myself a sustainability lawyer.”<sup>134</sup>

Other lawyers are anchored in corporate law, but again, their work involves a sustainability lens. One lawyer describes his clients as “renewable energy, energy storage, energy efficiency companies, and companies with strong sustainability platforms, products, or services.”<sup>135</sup> “Other clients are social enterprises and impact investors.”<sup>136</sup> Several do work for start-up companies that want to focus on sustainability, including green technology companies.

Some work primarily in land use and development law. The clients for that work can be buyers or sellers, as well as tenants or lenders. The types of projects on which they work indicate their orientation toward sustainability. One attorney worked for many years as in-house counsel for a publicly traded real estate investment trust that began to pursue energy efficiency, air and water quality, materials consumption, and other issues in its existing real estate holdings and in new construction.<sup>137</sup> Another in private practice has done considerable work in “New Urbanism”—an approach to planning and designing communities that emphasizes walkability, mixed uses, a diversity of people, traditional neighborhood structure, and quality of life.<sup>138</sup> Until somewhat recently, a considerable part of this attorney’s work involved “large-scale, New Urban projects that identified as pursuing sustainable development—energy and water efficiency, planting programs, and a wide range of environmentally themed projects.”<sup>139</sup> More recently, this attorney has been doing work for smaller-scale developments, including urban infill projects.<sup>140</sup> In addition to developers, this

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133. *Id.* at 8.

134. *Id.* at 5.

135. *Id.*

136. *Id.*

137. *Id.* at 16.

138. *Principles of New Urbanism*, NEW URBANISM, <http://www.newurbanism.org/newurbanism/principles.html> (last visited Sept. 19, 2017); see also DANIEL K. SLONE & DORIS S. GOLDSTEIN, A LEGAL GUIDE TO URBAN AND SUSTAINABLE DEVELOPMENT FOR PLANNERS, DEVELOPERS, AND ARCHITECTS (2008) (explaining how to apply New Urbanist principles).

139. Master Report of Interviews, *supra* note 68, at 7.

140. “Infill development is the process of developing vacant or under-used parcels within existing urban areas that are already largely developed.” *Infill Development: Completing the Community Fabric*, MUN. RES. & SERVS. CTR., <http://mrsc.org/Home/Explore-Topics/Planning/Development-Types-and-Land-Uses/Infill-Development-Completing-the-Community-Fabric.aspx> (last modified Dec. 22, 2016). Infill development is preferable to greenfield development—development in areas that



attorney's client base includes green building and resilient design organizations, eco-districts,<sup>141</sup> and companies that are trying to bring "energy efficiency, green energy, and social equity projects into the marketplace."<sup>142</sup>

Another lawyer combines traditional real estate development with solar energy and sustainable development. This lawyer's law firm has a longstanding client base comprised of "property owners, whether that is hotels, shopping centers, office buildings, apartments, or industrial buildings."<sup>143</sup> The lawyer said: "We were able to take that client base and put solar panels on their roofs and encourage them to enter the green sustainability movement and say, this is good for your business."<sup>144</sup> Another drafts best-practice-in-sustainability ordinances for the consideration of municipalities (e.g., transit-oriented development,<sup>145</sup> green building, and water conservation), and trains local officials on these issues.<sup>146</sup>

Some of the lawyers focus on sustainable infrastructure finance. One does legal work for "development and financing of projects that are mostly for sustainable infrastructure of one kind or another, including renewable energy, energy efficiency, micro grids,<sup>[147]</sup> water, and wastewater."<sup>148</sup>

Others are engaged in various aspects of social sustainability, including corporate social responsibility and human rights. One attorney explained: "We don't do a lot of environmentally oriented work. Our practice is primarily in the human rights space."<sup>149</sup> The attorney further said that the client base for this kind of work tends to involve multinational corporations operating in developing countries where they or their suppliers incur risks of violating human rights. This client base has expanded over time:

When I started, our client base was primarily, but not exclusively, oil, gas, and mining companies, who were worried about tort cases and were worried about litigation based on acts of security guards at their facilities. Our practice has grown. We have seen diversification of the

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are currently used for agriculture, forestry, or similar purposes—because it tends to save energy and resources and helps build and restore existing communities. *See id.*

141. An ecodistrict is a "neighborhood that combines livability, green infrastructure and community decision-making." PORTLAND SUSTAINABILITY INST., THE ECODISTRICTS INITIATIVE: GETTING TO NEXT GENERATION NEIGHBORHOODS (2010), [https://www.mayorsinnovation.org/images/uploads/pdf/22ecodistricts\\_10-22-10.pdf](https://www.mayorsinnovation.org/images/uploads/pdf/22ecodistricts_10-22-10.pdf).

142. Master Report of Interviews, *supra* note 68, at 7.

143. *Id.* at 10.

144. *Id.* at 8.

145. Transit-oriented development is walkable and mixed-use development around transit nodes such as rail or mass transit stations. *See* TRANSP. RESEARCH BD. OF THE NAT'L ACADS., TRANSIT-ORIENTED DEVELOPMENT IN THE UNITED STATES: EXPERIENCES, CHALLENGES, AND PROSPECTS S-1 (2004).

146. Master Report of Interviews, *supra* note 68, at 5.

147. "A microgrid is a local energy grid with control capability, which means it can disconnect from the traditional grid and operate autonomously." U.S. Dep't of Energy, *How Microgrids Work*, ENERGY.GOV (June 17, 2014), <https://www.energy.gov/articles/how-microgrids-work>.

148. Master Report of Interviews, *supra* note 68, at 7.

149. *Id.* at 9.

client base, including now big banks, apparel companies, private equity firms that are looking at potential investments, and technology companies.<sup>150</sup>

Finally, some lawyers who once practiced law related to sustainability have now moved into consulting or nonlegal positions on sustainable development. One explained, “I am helping a green building organization with some of its programs. I am doing sustainability consulting for corporations and not-for-profit clients. I also work with professionals who are traditional environmental lawyers, and also many, many lawyers who have transitioned from law to sustainability consulting.”<sup>151</sup> Another runs a business that sells “software to create, implement, and manage strategic sustainability plans.”<sup>152</sup> Still another works for a nongovernmental organization that is devoted to addressing climate change and sustainable development.<sup>153</sup>

### *B. Types of Legal Work*

These lawyers perform a wide variety of legal work. This includes counseling, transactional work, litigation, advocacy, and drafting. Perhaps the most common type of legal work in this context is client counseling. Much of it, of course, is traditional client counseling about compliance with statutes, regulations, and other legal requirements, including assistance in complying with those requirements.<sup>154</sup> These regulatory requirements include California’s cap-and-trade program for greenhouse gas emissions.<sup>155</sup> Much of this work is counseling related to litigation or potential litigation, including enforcement actions.<sup>156</sup> For some lawyers, counseling does not just occur in an office setting; at least one speaks to corporate boards of directors about SEC reporting and disclosure requirements related to sustainability.<sup>157</sup>

In addition to traditional counseling about compliance with applicable laws, lawyers that do sustainability-related work also counsel clients on how to move toward or achieve sustainability. Lawyers are required to address legal issues related to sustainability, of course.<sup>158</sup> But the ABA Model Rules of Professional Conduct also provide: “In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the

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150. *Id.*

151. *Id.* at 5.

152. *Id.* at 7.

153. *See id.* at 7.

154. *See id.* at 5–9.

155. *Id.* at 6.

156. *See id.* at 5–9.

157. *Id.* at 30.

158. MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2014). (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

client's situation."<sup>159</sup> As a result, lawyers may raise sustainability issues even when they are not grounded in specific legal rules. At the same time, a lawyer is generally required to abide by a client's decision about how to proceed in any matter.<sup>160</sup> As described in greater detail below, many lawyers specifically counsel their clients on a variety of sustainability matters—explaining the desirability of particular options based on reduced cost, greater efficiency, improved reputation, enhanced likelihood of compliance, and other factors. As will also be seen, clients may or may not follow that advice.

In addition to counseling, sustainability-related work in law practice also involves a great deal of transactional work. Brownfields redevelopment is a good example of this type of work. As one lawyer explained:

With transactional work, I assist with negotiating the contractual provisions that allocate environmental liability and risk between the parties to a deal. The clients for that work can be buyers or sellers as well as tenants or lenders. With brownfields redevelopment work, I assist in putting together teams to execute remediation strategies for a site. In that role, I serve as an environmental oncologist, excising the environmental cancer impacting a site so redevelopment can occur. The clients for that work are typically developers. In both roles, the ultimate goal is to make sure properties are positioned so they are marketable, lendable, and developable.<sup>161</sup>

Much transactional work involves sustainability projects other than brownfields redevelopment, and the legal aspects of these projects can be complex. An attorney who works for a large city described the legal effort required to design, construct, and operate a bio-gas recovery project at a sewage treatment plant.<sup>162</sup> "How do you do a complex project in a city framework, dealing with millions of rules on procurement and other issues? It is like running an obstacle course to do a project."<sup>163</sup> For financial reasons, a bank owns the facility—which was largely designed by the city and built by a city-selected contractor—and the bank has leased the facility back to the city.<sup>164</sup> This attorney said, "In order to do a project like that, you have to be a transactional attorney; you can't just be a regulatory lawyer. This is about writing, negotiating, managing, and selling contracts."<sup>165</sup>

Other transactional work for these lawyers involves solar energy, including negotiation of power purchase agreements, site agreements, construction agreements, finance agreements, and tax-related counseling.<sup>166</sup>

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159. *Id.* r. 2.1.

160. *Id.* r. 1.2(a).

161. Master Report of Interviews, *supra* note 68, at 7–8.

162. *See id.* at 8.

163. *Id.*

164. *Id.*

165. *Id.* at 8–9.

166. *See id.* at 32.

For green leasing, the transactional issues tend to be about setting up a structure whereby the owner can get certification under the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) program.<sup>167</sup> In addition, the leasing arrangements need to be structured "to make sure tenants do what needs to be done to keep LEED certification."<sup>168</sup> For other lawyers, transactional work in an environmental setting involves mergers and acquisitions; private equity deals; and "all sorts of offerings on the public market, including both issuers and underwriters, and strategic litigation counseling."<sup>169</sup> One attorney negotiates contracts between smaller start-up companies with a sustainability orientation "and larger companies who are interested in them and their line of business. An example is a set of agreements between a ride sharing company and major airlines that have an interest in that capability."<sup>170</sup>

Many of these lawyers are active in litigation. While litigation is a traditional part of legal practice, some lawyers are using it to advance sustainability.<sup>171</sup> A lawyer who does a lot of transactional work related to solar energy explained that sometimes "deals go bad."<sup>172</sup> This lawyer said in one case, the solar collectors installed as canopies over a parking lot collapsed, resulting in litigation.<sup>173</sup> Another lawyer who does enforcement defense work sees this work in a sustainability context:

The first step in achieving a resolution with government enforcement is correcting the violation. But compliance programs have sustainability components. Almost always, the system does not work because of sustainability concerns, such as inappropriate consumption of resources or discharge of pollutants. When you fix a system, you fix a process. A lot of sustainability is avoidance—pollution prevention, material substitution, upfront design issues. On a wastewater treatment plan with compliance issues, for example, we are counseling the client to re-evaluate the design to incorporate energy sustainability (energy recovery to provide heat and reduce energy usage costs), which can avoid multiple problems, such as noncompliance, permitting, and operational costs.<sup>174</sup>

Advocacy on behalf of sustainability is another important skill for these lawyers. They comment on proposed regulations and proposed gov-

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167. Geoffrey M. White et al., *Green Building Rating Systems and Leases*, in *THE LAW OF GREEN BUILDINGS* 15, 22 (J. Cullen Howe, Michael B. Gerrard & Frederick R. Rucci eds., 2010).

168. Master Report of Interviews, *supra* note 68, at 32.

169. *Id.* at 5.

170. *Id.*

171. On the other hand, one lawyer who does not do much litigation expressed skepticism about the value of litigation to foster sustainability, saying that litigation does not address the required behavioral changes. *Id.* at 32.

172. *Id.*

173. *Id.*

174. *Id.* at 33–34.

ernment agency actions; testify before congressional and legislative committees, lobby legislators, and government agencies; and present arguments before city councils, zoning hearing boards, and corporate boards.<sup>175</sup> One lawyer who left law practice for a period said: "I came back to being involved with the law because I saw that there is an enormous amount of work to do on advocacy."<sup>176</sup> This includes "helping people understand how things are connected, and how some things that seem okay are really bad in the long run."<sup>177</sup> Two lawyers identified advocacy involving brown-fields remediation as demonstrating how sustainability arguments can broaden the range of issues being considered as well as potential solutions. One explained: "In negotiations with environmental agencies about contaminated site remediation, I raised sustainability arguments about impacts of the remedy on other environmental media and on the community."<sup>178</sup> Another worked on a remediation case where the property owner, a refinery, was in bankruptcy. The bankruptcy trustee asked this lawyer to see if it was possible to turn the site into a solar farm. The overall objective, this lawyer explained, was to "actually make money for the estate."<sup>179</sup>

Drafting is another frequently employed type of work for lawyers engaged in sustainability. Drafting is a powerful tool for advancing sustainability because it involves writing the public and private laws that govern the behavior of individuals, businesses, and organizations in specific contexts.<sup>180</sup> Drafting on behalf of sustainability includes drafting proposed statutes, regulations, and municipal ordinances representing best practices in sustainability; drafting private governance agreements for land development (including homeowner associations, commercial associations, codes, covenants, and restrictions); and editing various disclosure documents.<sup>181</sup> One lawyer helped revise a smarter municipal regulation involving water use and conservation.<sup>182</sup> "In my city, we were charging less on a per-unit basis the more water that was used; we turned it upside down, charging more for greater per-unit water use."<sup>183</sup> Another lawyer who works in human rights and corporate social responsibility explained the range of her firm's drafting activities: "We do everything from policy and standard development to developing contract language and vendor guidelines."<sup>184</sup>

Drafting is more than scrivener's work and it is not merely legal; it requires an attorney to conceptualize how particular actions on behalf of sustainability will actually work in the real world, and to make sure that

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175. *See id.* at 30–32.

176. *Id.* at 31.

177. *Id.*

178. *Id.*

179. *Id.*

180. *See* Dernbach & Cheever, *supra* note 6, at 265–66.

181. *See* Master Report of Interviews, *supra* note 68, at 30–32.

182. *Id.* at 31.

183. *Id.*

184. *Id.* at 9.

the legal rules as drafted will work in practice. This in turn requires a solid understanding of the subject matter, which frequently involves matters that are not strictly legal in nature. A lawyer who works on sustainable land use and community planning explained:

A lot of document drafting is a formality, and a lot of lawyers throw that in for free. They don't realize how much damage can be done with a bad document, because it is so hard to change; once you start subdividing a property, it is possible to destroy a lot of value of property with bad documents. A lot of bad legal writing masks fuzzy thinking. A lot of my work involves looking at a master plan and visualizing it at each stage of development, and figuring out what needs to be done at each stage.<sup>185</sup>

Other types of legal work or skills were also identified. One lawyer's firm serves as a facilitator for multi-stakeholder dialogues—a form of collaborative decision making that engages all actors that have a stake in the decision.<sup>186</sup> This lawyer facilitates dialogues on a variety of issues, including voluntary principles for security and human rights.<sup>187</sup> Other lawyers need to have the ability to collaborate effectively with scientists on specific projects because their firm includes scientists as well as lawyers.<sup>188</sup> Many mentioned pro bono, community service, or public education work on sustainability.<sup>189</sup>

Finally, one lawyer emphasized that many people trained as lawyers can successfully use their skills in nonlegal settings:

I see so many lawyers who are in the consulting space. The skills that lawyers bring to the table are an ability to communicate orally and in writing better than almost every other professional sector, and to critically analyze a situation. I see that over and over again. Some lawyers also have the ability to convene all players, get them to the table to achieve a particular result, and deliver it.<sup>190</sup>

#### IV. DYNAMICS OF ATTORNEY–CLIENT CONVERSATIONS ON SUSTAINABILITY

Understanding the dynamics of conversations that lawyers have with their clients on sustainability involves at least three issues: the circumstances under which clients raise sustainability issues with their attorneys,

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185. *Id.* at 30.

186. *Id.* at 32.

187. *Id.*

188. *See id.* at 31.

189. *See, e.g., id.* at 23, 30, 45.

190. *Id.* at 30.

the circumstances under which attorneys raise sustainability issues with their clients, and what attorneys say in those conversations.<sup>191</sup>

*A. When Clients Raise Sustainability Issues with Attorneys*

A great many lawyers interviewed for this Article said that their clients come to them for sustainability-related legal work precisely because these lawyers, their firms, or both, specialize in the kind of legal work sought. Others said clients come to them with questions about business risks and opportunities, questions that they can answer using a sustainability lens. By contrast, very few said their clients rarely or never come to them for legal help on sustainability-related matters. One who does a lot of work for real estate developers said that clients “are driven by the bottom line, including lender concerns about project costs.”<sup>192</sup> This attorney added that clients “don’t want to spend on green if they are not going to realize a financial benefit.”<sup>193</sup>

Many attorneys said that their clients choose them because of their overall work on legal aspects of sustainable development. One who works on a broad range of sustainability-related issues said, “Clients come to us for this.”<sup>194</sup> Another, whose client base includes “social enterprise clients,” says it is easier to attract other similar clients “because they are seeking an integral approach to their business; sustainability is part of their DNA. How the business treats the planet and people is just as important to them as profits.”<sup>195</sup> A lawyer with a broad range of clients explained it this way:

Clients consult me with respect to environmental health and safety programs. In that context, they consider sustainability. I help and advise them on methods and approaches to be more sustainable. Development clients approach us on wanting to include sustainable design into their projects, for a variety of reasons. We help them with that. Energy-user clients approach us about concerns relating to greenhouse gas issues, and we counsel them on that.<sup>196</sup>

Similarly, attorneys who work in-house for a governmental or non-governmental client committed to sustainable development described a high level of interaction with people at all levels of the organization who are interested in advancing sustainability. Sometimes the client’s movement toward sustainability occurs with a noticeable shift. In 2011, the National Research Council (NRC) published a report called *Sustainability*

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191. The interview material in this Part is primarily drawn from answers to Question 5 (“Under what circumstances do your clients raise sustainability issues with you?”), Question 6 (“Under what circumstances do you raise sustainability issues with your clients?”), and Question 7 (“When you talk to clients about sustainability, what do you say?”) in the Appendix. See *infra* Appendix.

192. Master Report of Interviews, *supra* note 68, at 22.

193. *Id.* at 22.

194. *Id.*

195. *Id.* at 19.

196. *Id.* at 20.

and the U.S. EPA, which recommended that EPA adopt a comprehensive approach for integrating sustainability into its decision-making processes and strategic objectives.<sup>197</sup> A lawyer working for the EPA before and after the NRC issued the report said that, before the report, the EPA did not ask for much legal help on sustainability matters. However, the “report really changed that. We got asked to turn that into a path forward for EPA, and that has now been incorporated into EPA governance structure because it is in EPA’s strategic plan.”<sup>198</sup>

Many clients come to attorneys because of their expertise in specific sustainability-related issues. A lawyer with considerable national experience in financing renewable energy and energy efficiency projects and programs said: “I’m lucky enough to have a number of clients for whom these issues are very important. This is a self-selecting process.”<sup>199</sup> The clients of another lawyer—who has deep expertise in community planning and mixed-use development—“are starting from the position that mixed-use developments are inherently more sustainable.”<sup>200</sup>

Some clients in the chemical industry are especially interested in obtaining legal help to assist them in moving toward sustainability. A lawyer who works for many of these companies explained:

Sustainability is embedded in their entire construct. For some clients, sustainability is a motivator for creation of new technologies. If we are deploying a particular technology for a particular use, we are looking to diminish its effects in particular applications, both because it is the right thing to do and because it won’t otherwise pass EPA screening. Sustainability is always there. It is very rarely the case when we ask if they are concerned about tort liability, worker health and safety, or the like.<sup>201</sup>

Clients come to other lawyers because of their expertise with public disclosure. A lawyer who does this work explained: “At the end of the day, what a publicly traded company has done and what it is going to do must be disclosed in SEC-regulated documents, and through other media and reports, and to the public on websites.”<sup>202</sup> This lawyer’s role is to help publicly traded companies “sharpen their disclosure” to the SEC, as well as in other disclosure documents; to make sure the disclosure documents are accurate and consistent; and to help companies tell their story.<sup>203</sup> The lawyer continued:

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197. COMM. ON INCORPORATING SUSTAINABILITY IN THE U.S. ENVTL. PROT. AGENCY, *supra* note 24, at 49–50.

198. Master Report of Interviews, *supra* note 68, at 19.

199. *Id.* at 21.

200. *Id.* at 20.

201. *Id.* at 21.

202. *Id.* at 19.

203. *Id.*



There is also a strategic corporate direction part to this for consumer-facing clients, which means most companies. A global food company may have concerns about what is in its food, which may have a social, environmental, or other component. A company may want to change the perception of its profile to be more sustainable in order to recover market share.<sup>204</sup>

In some cases, lawyers are sought when a law or regulation makes it hard or impossible to do what the client believes is sustainable. Many said laws that foster or encourage unsustainable development are a recurring and substantial problem. One attorney who works with industrial clients explained her challenge:

Typically, the issues we are battling now involve EPA's regulation of recyclable materials and secondary hazardous materials. Because of the sham recycling history and EPA's policy on this,<sup>[205]</sup> clients that are exercising attempts to be sustainable by adopting really efficient processes—such as closed loop recycling and putting chemical intermediates back into manufacturing—are leading EPA to say these are sham recycling. If EPA is trying to hammer people who are doing green chemistry and more sustainable practices, then where are we going to go?<sup>206</sup>

A land use and development attorney told a similar story:

Many times, because of the reputation I've developed over many years of this kind of work, clients come to me wanting to do a sustainable project but there are all kinds of legal or regulatory obstacles. When my projects include components of New Urbanism—things we want to do to increase pedestrianism—they typically violate local laws, and we have to get these laws changed. We want to harvest water but we are not allowed to harvest water. We want to introduce a new non-toxic wood product, but the treated lumber industry blocks it.<sup>207</sup>

In other cases, clients come to lawyers on sustainability issues because of sustainability-related concerns about risk, opportunity, or both. Clients come to one attorney because they “perceive a sustainability risk, whatever that may be. It might be the manufacture of a hazardous chemical or something in the workplace.”<sup>208</sup> Clients also come to this attorney because sustainability provides a “business opportunity to operate more efficiently (use less energy, less water) or obtain a reputational advantage.”<sup>209</sup> “Companies are getting smarter about the upside to this, as

204. *Id.*

205. See Jeffrey M. Gaba, *Rethinking Recycling*, 38 ENVTL. L. 1053, 1072–73 (2008) (explaining the history and policy of sham recycling in the EPA).

206. Master Report of Interviews, *supra* note 68, at 21.

207. *Id.*

208. *Id.* at 19.

209. *Id.*

opposed to merely managing risk.”<sup>210</sup> In a somewhat similar vein, clients come to another lawyer under two circumstances (both of which involve opportunity): In one, the client is told that it needs to be green (sustainable), and it does not know how.<sup>211</sup> In the other, a client wants to build a project in a more sustainable manner, and needs legal help getting it done.<sup>212</sup>

### *B. When Attorneys Raise Sustainability Issues with Clients*

In raising sustainability-related issues with clients, there is a spectrum of approaches. On one end of the spectrum are lawyers who do not need to raise sustainability issues because their clients already embrace sustainable development. One lawyer said: “If sustainability is not consistent with their core philosophy, we tend not to work with them.”<sup>213</sup> On the other end of the spectrum are lawyers reluctant to raise sustainability issues at all if their clients do not raise them. These lawyers assume that if clients have not already raised them, then these clients are not interested. A lawyer who specializes in brownfields cleanup said: “When I raise these issues, they say ‘we are hiring you as our environmental oncologist, and we only want your input on the remedial aspects of the project.’”<sup>214</sup>

The center of the spectrum is much larger than either end. At the center are lawyers who believe they have a fiduciary duty to explain risks and opportunities related to sustainability, when these would benefit the client. Some lawyers raise sustainability-related questions and suggestions based on what the client cares about and the level of the client’s interest in sustainability. Some lawyers have standard questions, programs, and tools related to sustainability that they routinely share with clients.

Many lawyers frame the decision to raise sustainability issues with clients in terms of their professional responsibility. As a matter of professional responsibility, Stephen Gillers wrote that lawyers have a fiduciary duty toward the client that is based on “trust and confidence.”<sup>215</sup> This duty requires the lawyer to act with “solicitude for, candor toward, and tenacity on behalf of the client within the scope of the work the lawyer has been hired (or appointed) to do.”<sup>216</sup> While the fiduciary status of lawyers does not add to their other duties to clients (including competence and diligence), “it is instead meant to drive home the point that we expect lawyers to observe their obligations fully and without reservation.”<sup>217</sup>

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210. *Id.*

211. *Id.* at 22.

212. *Id.*

213. *Id.* at 25.

214. *Id.*

215. STEPHEN GILLERS, REGULATION OF THE LEGAL PROFESSION: THE ESSENTIALS 18 (2009).

216. *Id.* (emphasis omitted).

217. *Id.* at 76.

Thus, when sustainability-related issues provide opportunities to benefit clients or raise risks of which the client may be unaware, some of these lawyers believe they need to raise those issues. As one explained: “All of us as fiduciaries are honor-bound to maximize opportunities for our clients. You have to educate your client on anything that would enhance your client’s opportunity for success—to get what the client wants with as few commercial hurdles and legal obstacles as possible.”<sup>218</sup> A straightforward way this works, another explained, occurs when “they have not yet perceived a risk that we have seen in the history of other companies in the same sector, or they don’t have programs that their competitors do. This is also true for business opportunities.”<sup>219</sup>

Lawyers often raise sustainability questions with their clients when, and to the extent that, the lawyer believes their clients are interested. A lawyer who does considerable corporate work explained:

There are two kinds of lawyers: One believes in sustainability, sees all these risks related to it, and encourages clients to understand and mitigate or manage the risks. When a lawyer does that, management responds by asking what they should do or by blowing it off as “BS” and deciding they will deal with it when someone raises it. The other kind of lawyer says, “the client will tell me when they have a risk they want help with.”<sup>220</sup>

To be the first kind of lawyer—the one that believes in sustainability—the lawyer must have a good understanding of the client’s goals and orientation. One said, “The issue here is: Where is my client on the sustainability journey?”<sup>221</sup> Another explained how understanding the issues the client is sensitive to—reputational risk, litigation risk, or social responsibility—affects how that lawyer will approach explaining sustainability-related issues to that client.<sup>222</sup> An energy lawyer simply points out to clients that “there are other ways and places they can go that serve them at other levels. It is just part of conversation, not where I am preaching.”<sup>223</sup>

Often, these lawyers are in the position of explaining sustainability-related options that are either cost-saving or revenue-producing. According to a longtime environmental lawyer, the economic bottom line is a powerful driver for providing sustainability-related legal advice:

I raise it when there are opportunities for tax credits and other economic benefits, when it can assist them in marketing or preserving their market. You can’t really raise issues just because it is a good thing

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218. Master Report of Interviews, *supra* note 68, at 25.

219. *Id.* at 23.

220. *Id.* at 24.

221. *Id.* at 24. Another put it more bluntly: “This is for people I know; I don’t do this for everybody.” *Id.* at 23.

222. *Id.* at 25.

223. *Id.* at 24.

to do; you have to raise it because it is of economic benefit to shareholders.<sup>224</sup>

Sometimes these lawyers advocate for what they believe is a more sustainable remediation (at a contaminated site) that would also be less expensive to the client.<sup>225</sup> A clean energy finance lawyer provided a similar explanation:

Lots of times you can help them along at margins. Energy efficiency saves money. If you do electricity storage with a solar system, you improve operation of the grid and get paid for doing so. Lots of times the sustainable thing to do is also the right thing to do from a money-saving point of view.<sup>226</sup>

Sometimes, one lawyer explained, clients do not mention sustainability but “sustainability issues are embedded or implicit in their request for legal advice.”<sup>227</sup> This lawyer used these questions as examples: “What is the cheapest way to clean up this Superfund site? How do I get this enforcement case over with? What are the risks of this strategy?”<sup>228</sup> Other lawyers “counsel clients on how they incorporate sustainable measures into their projects if they don’t raise it with us.”<sup>229</sup> Another encourages clients to include sustainability as part of their project or product if it “is going to need public or regulatory support.”<sup>230</sup> A lawyer who works on hazardous waste issues raises sustainability “whenever we are looking at a waste stream. I ask: ‘Why are you generating this? Do you want to have to deal with these rules?’”<sup>231</sup>

A land use and development attorney said at other times clients come to lawyers when something the clients want has simply “gone wrong or is not happening.”<sup>232</sup> This lawyer explained:

They may not identify the issue as a sustainable development issue, but it is clear to us that it is. Why do people have so little disposable income in downtown? Part of the answer is that they are spending too much money on transportation and not enough on housing. So, we work on transit-oriented development.<sup>233</sup>

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224. *Id.* at 23.

225. *See id.* at 24.

226. *Id.*

227. *Id.* at 20.

228. *Id.*

229. *Id.* at 24.

230. *Id.* at 25.

231. *Id.*

232. *Id.* at 19.

233. *Id.*

A lawyer who does extensive work on corporate public disclosures described another context where the client does not raise sustainability issues, but where legal advice related to sustainability is needed:

Today, reporting material sustainability issues is gaining prominence. Clients ask: “What is legally required and what are the legal ramifications of reporting based on what stakeholders are asking?” The lawyer’s job is to ask: “Do you understand that there are issues under the umbrella of sustainability that present risks?” For example, there are climate change risk factors for all of a business’s investments. If the company is in the insurance business, how are they taking account of risks of increased disease, migration, and other public health effects?<sup>234</sup>

A lawyer who works with many multinational corporations does not broadly raise sustainability-related issues with clients, but rather sees the sustainability framework as akin to medicine, “looking at the patient holistically.”<sup>235</sup>

When a client comes to me with a problem that opens a portal to sustainability analysis, I will look at it through that portal. Then we don’t have twelve discussions about the same symptom—for example, worker dust-inhalation-claims at different facilities over time. That may be indicative that the company is using materials that are not sustainable or sourced sustainably, and alternatives may exist that will eliminate the entire issue.<sup>236</sup>

Sometimes this legal advice is directed at those within an organization who can use it to advocate a particular outcome to more senior management. One environmental lawyer in private practice gives sustainability-related legal advice when “I am trying to give broader strategic advice about what approach would likely produce the best long-term outcome for the company or institution.”<sup>237</sup> The lawyer explained:

A bunch of in-house environmental counsel and environmental health and safety managers also care about the environment, and you can work with internal champions. You can give them advice they can share with their business people. There is often an opportunity to appeal to the broader interests of environmental counsel or chief sustainability officers who do care about it, and who think sustainability is in the interests of the company.<sup>238</sup>

When the opportunity to raise sustainability issues with clients arises, many lawyers have “menus” of issues, tools, and options to share with

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234. *Id.* at 24.

235. *Id.* at 23.

236. *Id.*

237. *Id.* at 24.

238. *Id.*

them. Options include various tax incentives, rebates, and grant programs.<sup>239</sup> Tools often include specific methods or areas of expertise that lawyers have developed to address particular problems. One lawyer presents “social entrepreneur clients” with a “menu of sustainability choices,” including rules of corporate citizenship, writing into the company’s by-laws how the company treats people and the planet, and getting needed sustainability certifications.<sup>240</sup> A real estate development lawyer who has developed expertise in solar energy and other aspects of sustainable real estate development said that “[i]f I start the conversation, it generally needs to be an economic conversation.”<sup>241</sup> This lawyer has a standard approach:

The client may buy an industrial building with a big roof. I say you can put solar panels on the roof, and you can make money. That starts the conversation, and the client gets an eight percent return on its investment. Then the client comes back and says: “What else is in your bag of tricks?” And then I talk about LEDs. And that is how you make converts. This is how you get their attention.<sup>242</sup>

Many of these lawyers acknowledged that clients do not always accept these suggestions.<sup>243</sup>

Another indication of client responsiveness is seen in answers to a follow-up question that many of the lawyers were asked about the amount of time they spend doing sustainability-related work. While most answered that all, or nearly all, of their time is devoted to sustainability-related work, others answered that only half of their time is devoted, and two answered that below twenty-five percent of their time is devoted to sustainability-related work.<sup>244</sup>

### *C. What Attorneys Say in Sustainability Conversations*

This Part of the Article has thus far discussed the circumstances under which clients raise sustainability issues with lawyers, and the circumstances under which lawyers raise these issues with clients. Either way the conversation begins, what do lawyers say? Of course, if there are relevant public or private laws, those laws would need to be discussed. As previously explained, some aspects of sustainable development are required or supported by law, but many are not.<sup>245</sup> Beyond that, many attorneys believe that a critical starting point is understanding what the particular client needs and wants. Other attorneys described the importance of framing a

239. *Id.* at 8, 23–25, 33.

240. *Id.* at 23.

241. *Id.* at 25.

242. *Id.*

243. *Id.* at 38–40.

244. *Id.* at 50.

245. *See supra* Introduction.

conversation with clients in terms of risks and opportunities. These two points of emphasis, of course, are not mutually exclusive.

Many explained that what they say during these conversations depends upon the client. One attorney, who does a lot of work with sustainability-oriented start-up companies, underscored this point by focusing on the listening aspect of an attorney–client conversation: “I mostly just ask questions: How important is sustainability to you? Do you simply want to comply with the law or do you want to be aspirational?”<sup>246</sup> In addition to a client’s commitment to sustainability, other values or issues are often part of this conversation. One lawyer’s experience is that the conversation tends to depend on the client’s mix of “conservation values (water, energy, natural resources) and economic values (things that can be done more cost effectively or are more affordable).”<sup>247</sup> Another explained his approach in this way:

For clients who don’t care about climate change, I talk to them about reducing cost through using less energy, buying cheaper, and using less. Why wouldn’t one be interested in that? If there is ancillary benefit to environment, that doubles the bang for the buck. Much of it is about return on investment, and is pitched as efficient.<sup>248</sup>

In addition, one lawyer explained the importance of comparing a client’s performance to its peers: “Clients try to benchmark themselves, asking where they fit in terms of their peers. Sustainability may come into that discussion: Are they consistent with best practices?”<sup>249</sup>

An attorney with a long career in private practice (who now runs a sustainability company) framed the key issues in terms of understanding what the client needs and wants:

When you talk to a client about sustainability, it is in many ways like being a therapist talking to a patient, and you are trying to figure out whether the patient is willing and ready to do the work or is in denial. It would be easy if we could deal with sustainability as a compliance matter and tell the client, “you must do A, B, C, and D on sustainability.” And there is a legal framework like that for some sustainability matters (pollution, labor standards, etc.). But really there is no law or regulation for all issues, and certainly none at the sustainability best-practices level. So the conversation is instead about efficiencies, and evaluating and managing sustainability-related risks and opportunities, like generating revenue with new products and services or entering new markets.<sup>250</sup>

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246. Master Report of Interviews, *supra* note 68, at 26.

247. *Id.*

248. *Id.*

249. *Id.* at 28.

250. *Id.* at 27.

The risks and opportunities of sustainable development, of course, depend on what goods or services the client is producing, or where the client is planning to locate. An environmental attorney thus tailors a standard approach, based on assessment of risks and opportunities, to a specific discussion about risks and opportunities for a particular client:

I put sustainability issues into the context of risk within their industry if they do not address these issues, and opportunities they could realize if they addressed these issues. Perhaps for some industries, if one markets a product that has green components, such as household cleaners that are greener, they can capture greater market share.<sup>251</sup>

Another attorney, who does considerable work in the land use and zoning area, sees and communicates sustainable development issues in terms of risk:

Today we are telling people not to build in high-hazard areas so you don't get flooded. There are risks of climate change that are being picked up by conservative markets—banks, lenders, secondary mortgage markets. If a client is not assessing these risks—and our job is due diligence as lawyers—then I'm seeing an opportunity that perhaps others have not opened their eyes to.<sup>252</sup>

Others make a broader argument that a sustainability approach will benefit the client and relevant stakeholders. One environmental attorney habitually asks clients: “Can't we make this look better for everybody by doing (fill-in-the-blank)?”<sup>253</sup> Another tells clients: “I say, ‘this is a matter that will be important to some of the people you work with, and will be important to more people over the next decade, and if you want to deal with this issue, you should do it now.’”<sup>254</sup> An attorney with extensive corporate experience said:

There is no way to summarize it. The simplest thing to say is that to the extent sustainability principles represent good holistic management—whether from a governance, or process, or business perspective—then I encourage that approach. I believe they are best served by looking at an issue as part of a larger suite of related concerns and opportunities, all of which are embraced by sustainability-related principles.<sup>255</sup>

Another attorney summarized his approach in this way: “To make this work long-term, and minimize your long-term liabilities and transaction costs, you may want to consider the broader environmental and social

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251. *Id.* at 26.

252. *Id.* at 48.

253. *Id.* at 27.

254. *Id.* at 28.

255. *Id.* at 26.



context.”<sup>256</sup> For contaminated sites, that means doing “a good cleanup so it doesn’t come back to bite you later.”<sup>257</sup> For another attorney, that means “getting stakeholder feedback or input from the community in designing” a development project.<sup>258</sup> It might be better to “spend more time and money now, to save a lot more time and money later by achieving a sustainable result.”<sup>259</sup> Depending on the situation, this attorney makes a business case, a case based on reputational risk, a case based on demonstrating “you care about the community and the environment,” or a case based on what competitors are doing related to sustainability.<sup>260</sup>

Interestingly, many lawyers make these arguments without mentioning sustainability, sustainable development, or climate change. Several of the lawyers said that many clients will not listen to an explanation based on climate change.<sup>261</sup> One attorney uses “efficiency” as a substitute for sustainability: “Efficiency is as big a term as you want it to be. They can’t hear the S-word [sustainability] in the middle of the country.”<sup>262</sup> Another uses “sustainability principles and concepts” as a substitute for the term itself:

I have lots of sustainability conversations in which the word sustainability never comes up—such as about governance, supply chains—but which are based on sustainability as it is properly understood. People hire lawyers, not preachers, and no one wants to be preached at. You can make a lot of good medicine that will go down with the right amount of sugar.<sup>263</sup>

A green building and community development lawyer explained the dynamics of such conversations:

A lot of times I tell them how to save money, how it will give them an economic advantage in the marketplace. We talk about almost everything, except “that is the right thing to do and will save the world.” That doesn’t mean I don’t have clients that believe that. If I have to persuade them though, these other aspects get emphasized. In my state, many clients have engineers who tell you that a more sustainable model will cost you more. I tell them they have the wrong engineer. If you had an engineer who knew more, that engineer would tell you how to do this in a way that would cost you less and create more community benefits. The challenge here is to convince a client of both intrinsic benefits (lower cost, increase in tenants, lower operating costs, higher retention rate for tenants) and extrinsic benefits (that might benefit the

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256. *Id.* at 27.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *See id.* at 26.

262. *Id.* at 28.

263. *Id.* at 26.

community or the environment and would mean that the community is more likely to support your project).<sup>264</sup>

This lawyer added that there are often limits in how far an attorney can go in arguing for the intrinsic benefits of sustainable development:

Some clients are wary of attorneys who pitch intrinsic benefits. The clients see the attorneys as engaging in advocacy. They worry that you are advocating something and if they say no, your heart won't be in advocating for their position. I had one client who hired me because I pushed back against what he proposed, but I would move his project forward whether I won or lost our internal arguments. He didn't buy all of the things I suggested as sustainable but he bought a lot of them.<sup>265</sup>

When a client is fully engaged in an effort to achieve environmental and social sustainability, on the other hand, the conversation can be more fruitful. Another attorney is working with benefit corporations and B Corporations, two closely related types of for-profit corporations formed not only to make profits but also to produce social and environmental benefits.<sup>266</sup> This attorney explained:

Lawyers are creative people who can make positive change. At the end of the day, the question is whether we are able to have a conversation about how to have all three things at the same time: economic prosperity, environmental stewardship, and social responsibility. Companies are not able to stop being bad overnight. We are working with a B Corporation that has been willing to lay bare everything, and their goal is to stop contributing bad stuff. They know where they want to go, but have no idea how to get there yet. When you engage an entire company in that way, people get extraordinarily creative; the challenge is thrown down and a solution emerges over time.<sup>267</sup>

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264. *Id.* at 28.

265. *Id.*

266. *Id.* at 31; see also Jay Love, *Benefit Corporation vs. Certified B Corp in Plain English*, BLOOMERANG (Aug. 17, 2015), <https://bloomerang.co/blog/benefit-corporation-vs-certified-b-corp-in-plain-english>. Both are alternatives to nonprofit status for a company. *Id.* A benefit corporation exists by virtue of state law; a B Corporation is a benefit corporation that has also been certified by a third party for measurable social and environmental performance, accountability, and transparency. *Id.*; see also Matthew J. Dulac, *Sustaining the Sustainable Corporation: Benefit Corporations and the Viability of Going Public*, 104 GEO. L.J. 171, 173–79 (2015) (providing a primer on benefit corporations, including the 2013 Delaware statute authorizing benefit corporations).

267. Master Report of Interviews, *supra* note 68, at 31.

## V. PERSONAL AND PROFESSIONAL QUALITIES OF LAWYERS DOING SUSTAINABILITY WORK

Understanding the personal and professional qualities of these lawyers is important for two reasons:<sup>268</sup> First, for someone considering sustainability in law practice—whether a student entering law school or an experienced practitioner looking to change direction—it is useful to know what people in this field think and believe because that information may be helpful in making a decision. Second, for legal educators, this information may be helpful in designing curricula and programs, as well as in teaching classes.

### A. How They Became Interested in Sustainability

A few of these lawyers say they have a lifelong interest in sustainability and sustainability concepts, and some developed their interest during college or jobs prior to law school. For many, an interest in sustainability grew out of their work in environmental law. But some were led to sustainability by specific workplace or community experiences involving projects, perspectives, clients, or colleagues, which exposed them to sustainable development concepts. These experiences fed a sense of dissonance between what they were then doing and what they wanted to do, which led them to move their career more in the direction of sustainable development.

Many lawyers reported a lifelong interest in sustainable development concepts. A clean energy finance lawyer explained:

I was a charter subscriber to an energy efficient home magazine, *New Shelter*, which started in the 1970s or 1980s. It was all about how to build a passive solar-house, and collect rainwater, and have composting toilets—real practical advice. I grew up with a grandfather who taught botany and started arboretums, and my mother knew the names of all the trees and was an organic gardener. I read *The Sand County Almanac*<sup>[269]</sup> fairly early on.<sup>270</sup>

Others developed an interest during college.<sup>271</sup> One participated in the first Earth Day (a national teach-in on the environment in 1970) as a

268. This Part draws primarily on interview answers to Question 3 (“How did you get interested in sustainability?”), Question 9 (“What personal or professional characteristics are most essential to your sustainability work?”), Question 10 (“What do you find most rewarding about your sustainability work?”), and Question 11 (“What do you find least enjoyable or most frustrating?”) in the Appendix. See *infra* Appendix.

269. ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE (1949) (classic work in conservation and environmental protection).

270. Master Report of Interviews, *supra* note 68, at 13–14;

271. See *id.* at 11, 14–15. Interestingly, one attorney became interested in sustainability when he stepped out of law practice for several years to do teaching and research at a major university:

In my university position, the big areas were climate change, biodiversity, and sustainability. I also was working with forestry, and sustainability has been an important part of forestry for a long time. This is an emerging area, and you can’t get into an emerging area as

college student.<sup>272</sup> Several had science-related majors.<sup>273</sup> Another developed a particular sustainability-related interest in college that led to a job in that area after law school.<sup>274</sup> This attorney studied the duties of multinational corporations in college.<sup>275</sup> That led to work after college at a corporate social responsibility company that performed screenings of a company's performance for investors.<sup>276</sup> When this attorney was in law school, the field of corporate social responsibility did not exist.<sup>277</sup> The attorney worked as an intern during law school at a "group that was filing a lot of litigation against companies," but was "more interested in facilitating dialogue with companies," and saw that nongovernmental organizations and "companies were not particularly good at talking to each other."<sup>278</sup> After law school, this attorney found a law firm interested in this type of work.<sup>279</sup>

One lawyer became interested in toxic metals after dropping out of college and taking a job at a residential training institute for people with severe mental disabilities.<sup>280</sup> At that job, the lawyer learned that nine of the residents traced the origin of their disability to heavy metal poisoning experienced while working at coal-fired power plants.<sup>281</sup> This lawyer subsequently did considerable work on energy efficiency and renewable energy:

I worked for the state's only residential training institute for people who were severely retarded. I was picked to work with the twelve most difficult men, and most were in their mid-fifties. I got interested in why they were mentally retarded. One was trauma, two were genetic, and the other nine were heavy metal poisoning, mostly mercury and lead. Many of these men were kids when they were exposed to these heavy metals. So I went to law school to get lead and mercury out of kids' brains.<sup>282</sup>

Another's interest in sustainability grew out of training and work experience prior to law school as a chemical engineer. "We don't make waste and don't like to waste. Chemical engineering requires mass balance; my

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easily when you have to have billable hours, etc. When I returned to private practice, however, I saw that my clients were interested in sustainability.

*Id.* at 11.

272. *Id.* at 14.

273. *Id.* at 11, 14.

274. *Id.* at 15.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

brain is not organized to accept waste. When I worked as an on-scene coordinator for the Superfund cleanup program, I saw the result of operations that saw no downside to generating waste.”<sup>283</sup>

Some lawyers have spent their entire careers working with clients to advance sustainable development. The attorney discussed earlier who does corporate social responsibility work provides one example.<sup>284</sup> Another example is provided by an attorney who does considerable work with start-up companies interested in sustainability:

I started working with shade-grown organic fair-trade coffee, with a give-back model. They provide some of their proceeds to help educate kids in that part of the world. After that, I became more and more interested in those business models, and never gave up. Then the firm said, “You ought to be our firm’s guy.”<sup>285</sup>

For many, practicing law led them to sustainability. Some are environmental lawyers who became knowledgeable about sustainability as part of their overall practice, often because they thought broadly about how the companies and businesses they represent affect the environment and the communities in which they operate. For at least one lawyer, this interest intensified over time: “As you age, and you become a grandfather, you think about what kind of legacy you and others leave behind for your grandkids.”<sup>286</sup>

To no small degree, as previously explained, many key concepts of sustainable development are embedded, albeit imperfectly, in environmental laws and their implementation.<sup>287</sup> An attorney with a lot of experience working for the EPA explained:

The common thread of my work in the agency has been achieving environmental goals in ways that are in harmony with social and economic goals. I assume that they are not automatically in conflict. This began in the Clinton Administration “Reinvention” era. We didn’t call it sustainability then. When we discussed reinvention, we used terms like “cleaner, cheaper, smarter.” We found it wasn’t just cheaper; it could also advance environmental goals. Then we found that this aligned with what others were calling sustainability.<sup>288</sup>

A good number of lawyers became interested in sustainability when they saw the limits of simple compliance with environmental laws. One

283. *Id.* at 14.

284. *See id.* at 11.

285. *Id.*

286. *Id.* at 14.

287. *See supra* Introduction.

288. Master Report of Interviews, *supra* note 68, at 11; *see also* Sheila M. Cavanagh, Robert W. Hahn & Robert N. Stavins, *National Environmental Policy During the Clinton Years 9–10* (Res. for the Future, Discussion Paper No. 01–38, 2001) (discussing the history of the “Reinvention” era and summarizing the history of the Clinton Administration’s environmental policy).

dates his interest in sustainability to his experience in granting and denying permits for storm water discharges.<sup>289</sup> The conventional approach is to use pipes to move storm water to treatment plants, but this approach is expensive.<sup>290</sup> By contrast, green infrastructure—the use of permeable areas, green roofs, rain gardens, and other features that allow water to be absorbed into the ground—is less expensive and generates environmental and social benefits.<sup>291</sup>

The idea that we were physically and chemically impairing waterways with relatively benign discharges got me very interested. The issue is not what is in water; the issue is volume. How do you avoid overwhelming urban creeks? We began to look at green infrastructure to address the issues we had. We have looked at reducing volume and also at the redesign of urban waterways to help manage runoff.<sup>292</sup>

Taking a management position at a major pharmaceutical company led another attorney to sustainable development:

My job was about managing risk and looking for opportunities. It was more preventative. That is what moved me toward sustainability. Many of the larger companies have the luxury of being more progressive and forward looking, and they look out ahead of environmental regulation. They have to manage risks that are not yet regulated. There are business opportunities from managing risk better, being greener, operating more efficiently, and utilizing fewer natural resources. And so many times companies are out ahead of regulation in order to grab opportunities.<sup>293</sup>

Many lawyers became interested in sustainable development through real estate work. For one lawyer, it began with the realization that most of the real estate transactions that the lawyer worked on were in “greenfields, which are previously undeveloped areas that may have been used for agriculture or forestry.”<sup>294</sup> Around the same time, this lawyer became very interested in LEED and began exploring many of the legal ramifications of LEED for developers, landlords, tenants, and contractors.<sup>295</sup> Another lawyer, who has done considerable work in walkable communities and New Urbanism, was introduced to sustainability shortly after law school, when two real estate law firm jobs did not work out.<sup>296</sup> With a baby, this lawyer decided to work from home.<sup>297</sup> An attorney from the second firm

289. Master Report of Interviews, *supra* note 68, at 15.

290. See U.S. Env’t Prot. Agency, *What is Green Infrastructure?*, EPA, <https://www.epa.gov/green-infrastructure/what-green-infrastructure> (last visited Sept. 19, 2017).

291. *See id.*

292. Master Report of Interviews, *supra* note 68, at 15.

293. *Id.* at 11.

294. *Id.* at 13

295. *Id.*

296. *Id.* at 6.

297. *Id.*

this lawyer worked at introduced this lawyer to a prospective client planning a new community.<sup>298</sup> This lawyer has been doing that kind of work, for this and other clients, ever since.<sup>299</sup>

The recession that began in 2008 brought at least one lawyer, who had spent the bulk of his career doing “all things real estate,” to practice in the sustainability arena.<sup>300</sup> In 2009, this lawyer’s firm started a sustainability department:

The biggest reason for starting the department was the real estate crash; real estate work dried up, and I was looking for another area of practice. Also in 2008 the state legislature adopted a law creating one of the largest incentives for renewable energy. We started getting a client base with a lot of millennials and professionals who weren’t interested in living in the suburbs, and who were willing to entertain paying more to be in a green building. And there were retailers and other businesses who recognized that this would be a good business model, and would give them a marketing advantage.<sup>301</sup>

Another lawyer’s career went through several phases before starting to work on sustainable development. This lawyer started at a firm as a real estate attorney, but soon began “establishing a practice that could be called ‘environmental aspects of real estate transactions.’”<sup>302</sup> The firm then began asking this lawyer to do more land use projects:

Because of my environmental reputation, I got big, nefarious projects—landfills, coal co-generation projects, medical waste, mining projects, and exploratory oil wells. I developed a practice working on projects where people filled auditoriums opposing my projects. At one point, a woman asked me how I could sleep at night. I said, “Unless you are walking home, to a home that uses no power and you eat all of your garbage, you expect all of these facilities to be in someone’s back yard; you just didn’t want it to be yours. I sleep just fine.” My undergraduate degree was in philosophy, and I went home and did a “gut check,” and I was not where I wanted to be. But it was not for the reason she thought. My landfills were many times better than those the state had been using. The co-gens [combined heat and power, or co-generation plants<sup>303</sup>] were more efficient than the conventional plants. My oil well was safer. It wasn’t those projects that kept me awake—it was the shopping centers and subdivisions that chewed through irreplaceable habitat. Those kept me awake. In 1988, I began doing New

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298. *Id.*

299. *See id.*

300. *Id.* at 15.

301. *Id.*

302. *Id.* at 14.

303. *Cogeneration/Combined Heat and Power (CHP)*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, <https://www.c2es.org/technology/factsheet/CogenerationCHP> (last visited Sept. 19, 2017) (co-gens are combined heat and power, or co-generation plants).

Urbanist projects. I met the “green mafia”—leading voices of sustainable development—in a green development project. I decided that was what I wanted to do—focus on sustainable development and New Urbanism.<sup>304</sup>

Community work introduced sustainable development to yet another group of lawyers. One helped to start up a regional green building council. “I have never been in an organization where people are more committed, where the environment was more stimulating,” this lawyer said.<sup>305</sup> “It was infectious. I was the founding director and I am really proud of that.”<sup>306</sup> Another lawyer started learning about sustainable development through friends and local organizations. At the same time, the firm this lawyer worked at became interested in sustainability.<sup>307</sup>

#### *B. Most Essential Personal and Professional Characteristics for Sustainability Work*

Many of the most essential characteristics of a lawyer practicing law related to sustainability are the same as those of a good lawyer: good analytical, speaking, writing, research, and advocacy skills; an ability to work effectively with clients and others; and an appetite for hard work. The personal and professional characteristics identified by these lawyers as most essential to their sustainability-related work begin with these characteristics.<sup>308</sup> But these lawyers emphasized six basic characteristics central to practicing law related to sustainability: (1) expertise in, and even passion for, sustainability; (2) an ability to listen well; (3) open-mindedness, curiosity, and creativity; (4) good analytical and problem-solving skills; (5) patience; and (6) an ability to think big picture and long term. As a whole, they overlap with but extend beyond the skills of most lawyers.<sup>309</sup>

What follows are the personal and professional characteristics that these lawyers identified as most essential to their work:

##### 1. Expertise in, and even passion for, sustainability.

These twenty-six lawyers, of course, all have this characteristic. One said that expertise in sustainability includes “what it means, relevant legal frameworks, best practices, what other companies in the industry are doing

304. Master Report of Interviews, *supra* note 68, at 14.

305. *Id.* at 12.

306. *Id.*

307. *Id.* at 26.

308. *See id.* at 33–35.

309. A word of caution about this list is appropriate. These lawyers typically did not identify more than three or four characteristics; many identified only one or two; and many identified as the most important characteristic something that most or all of the others did not identify at all. Thus, it is inappropriate to conclude that these lawyers or any lawyer doing work related to sustainability possesses all of the characteristics identified here in equal measure. As one attorney explained in answering this question, “There is not one model of a typical lawyer in this space.” *Id.* at 35.



in sustainability, and what government policies are relevant.”<sup>310</sup> Another explained the importance of mastering the wide variety of issues that arise in this “quickly trending and developing area.”<sup>311</sup> At least one is LEED Accredited Professional (AP) certified, which means that this lawyer has significant expertise in green building.<sup>312</sup>

For many, mere expertise is not enough. One explained that “you have to have a genuine interest in it” to understand the environmental, economic, and social facets of any given issue and “all of the different parties that will be impacted.”<sup>313</sup> Another said passion for the concept is necessary to “articulate issues in an industry-friendly fashion.”<sup>314</sup> Another emphasized: “Enthusiasm helps. You have to convince people.”<sup>315</sup>

## 2. Ability to listen well.

One lawyer said, “the key thing is hearing what people really want so you can find a solution for everyone.”<sup>316</sup> Another spends “a lot of time listening to clients, trying to figure out various approaches to address a particular problem.”<sup>317</sup> Still another stressed the importance of understanding whether the “client is asking a sustainability question or if sustainability is relevant even if it is not explicitly asked about.”<sup>318</sup>

## 3. Open-mindedness, curiosity, and creativity.

These qualities are grouped here because they overlap and because many attorneys explained themselves in this way. A lawyer who works with developers said: “I am constantly questioning why architects, engineers, or planners do something in a certain way, so we can unlock creative ways of meeting their goals while accomplishing those goals in a more sustainable fashion.”<sup>319</sup> Another described intellectual flexibility, imagination, and creativity as essential:

That’s why I like the work. We need to develop new answers to questions. It is not a field for lawyers who are comfortable doing the same thing year after year with the same forms. It is a field for people who are prepared to invent or be creative. Yet as a counterpoint, you can’t be operating in the ionosphere. You have to be realistic and pragmatic.<sup>320</sup>

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310. *Id.* at 34.

311. *Id.*

312. *Id.* at 12.

313. *Id.* at 33.

314. *Id.* at 34.

315. *Id.*

316. *Id.* at 33.

317. *Id.* at 35.

318. *Id.* at 34.

319. *Id.*

320. *Id.* at 33.

In the realm of environmental law, several lawyers said sustainability means thinking creatively about how to solve problems, and suggesting solutions that are different from what would ordinarily be considered:

You can't be focused on what not to do or how to stay in compliance. This is the big challenge I see for lawyers in sustainability. As a lawyer, you need to have the personality to go beyond compliance to help the client find ways to get things done, to find legal levers to help the client accomplish what they want. You can't simply say no. If you are working on obtaining a permit, you need to find a way to help the client meet the requirements in a more sustainable way.<sup>321</sup>

A good example of this creativity is provided by a lawyer in private practice with a municipal client.<sup>322</sup> The lawyer proposed a public-private partnership to enable the city to combine ground source geothermal energy recovery with subsurface storm water recharge basins.<sup>323</sup> Because the project would be privately owned but operated on behalf of the city, the owner would be able to take advantage of tax credits, and the city would be able to take advantage of private capital.<sup>324</sup>

One lawyer who counsels many small companies said it was not just necessary for the attorney to be creative.<sup>325</sup> The attorney must also have "a love of working with creative people. Some of the people I work with are the coolest people ever. Most of my developers are 'mom and pops.' They want to make money but they see themselves as stewards of the land and they want to create something enduring."<sup>326</sup>

#### 4. Patience.

Several emphasized the importance of being patient with clients, particularly when they are resistant or do not understand.<sup>327</sup> They emphasized the importance of explaining, translating, and clarifying issues related to sustainability. One said: "You have to keep winnowing down the negative conversation about why we would do that, and what are the benefits to us."<sup>328</sup>

#### 5. Good analytical and problem-solving skills.

One lawyer with significant experience working with major corporations said sustainable development is "multi-disciplinary and multi-focal."<sup>329</sup> The multiple focal points of sustainable development, of course,

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321. *Id.*

322. *See id.*

323. *Id.*

324. *Id.*

325. *See id.*

326. *Id.*

327. *Id.* at 33, 39.

328. *Id.* at 33.

329. *See id.*

are defined by its environmental, social, and economic dimensions.<sup>330</sup> This attorney emphasized the importance of “being able to take all sorts of information and synthesize it and critically evaluate it toward the end of solving a problem.”<sup>331</sup>

#### 6. Ability to think big picture and long term.

The multiple focal points noted above and the intergenerational aspect of sustainable development require lawyers who work in this area to approach problems from a broad perspective. The three pillars, one said, require “a much broader lens”—the ability to “connect seemingly disparate ideas and work areas”—and to break down silos.<sup>332</sup> From this perspective, for example, legal advice on forest protection is not just about the forest itself but also about economic development and community protection.<sup>333</sup> Another described “an ability to think about things at a meta or systemic level, and then drill down to components of that to more granular levels, and move back and forth between systemic and granular levels.”<sup>334</sup> Others emphasized the need to care about “long-term outcomes; you can’t just be focused on billable hours or the cheapest short-term outcome for your client.”<sup>335</sup> An attorney has to think about “what the world is going to be like in fifty or sixty years,” said another who worked with Native Americans.<sup>336</sup> This attorney explained that Native Americans “introduced me to the idea of thinking seven generations ahead.”<sup>337</sup> One said that some lawyers can do big picture thinking and some cannot:

A certain kind of lawyer does project finance and public-private partnerships. Some people are natural project managers. It involves keeping a number of large complex documents in mind and how they fit together. Some people do this well and some do not. Lawyers tend to be detail oriented and not big picture. To do project management, it helps to be a big picture person. It is not so different for sustainability.<sup>338</sup>

#### C. Most Rewarding Aspects of Sustainability Work

A great many of these lawyers identified the achievement of specific and positive results as the most rewarding aspect of their work related to sustainability. Many said they found it satisfying to explain sustainability projects to clients and particularly satisfying to convince clients who are either uninformed or skeptical. Others identified the work itself, saying it

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330. See *supra* Introduction.

331. Master Report of Interviews, *supra* note 68, at 33.

332. *Id.* at 49.

333. *Id.* at 33.

334. *Id.* at 34.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

is enjoyable and intellectually engaging. And some said the most rewarding aspect is working with likeable and talented people.

Many described the most rewarding aspect of their work in terms of specific projects or laws to which they contributed, where they made some positive difference. One said: "I am always flabbergasted by the incredible opportunities to do things that are more effective, save money, create local and lifelong jobs, and beautify neighborhoods."<sup>339</sup> Another lawyer said the work is "always about the good I'm doing. Understanding that there is actual good and bad that can be done is an important divining rod in what we do."<sup>340</sup>

Another attorney explained the potential for sustainability to accomplish good outside of the United States, particularly in developing countries where many of this attorney's clients operate:

On a global geopolitical level, it is the opportunity to create extraordinary good in places that should not have to experience primitive and benighted approaches, or walk the same resource-intensive pathways to prosperity for their people, as developed countries did. There are generation-skipping technologies and theories. If an advanced solid waste sorting technology could be implemented in Nairobi, for example, you could remanufacture or up-manufacture up to ninety-five percent of what is currently being disposed of.<sup>341</sup>

They expressed this in terms of "helping the community,"<sup>342</sup> "contributing toward nudging the world in the direction it should be going,"<sup>343</sup> or making the state "a better place to live."<sup>344</sup> One explained sustainability-related legal work in terms of "making a positive difference in the world for mankind and the environment, beyond solving a narrow legal problem."<sup>345</sup> Another likes "the idea that by helping clients reuse existing property and infrastructure, I am not contributing to metastasizing urban sprawl that chews up greenfields."<sup>346</sup>

Many attributed this ability to do this kind of work to their clients. "You collect enough clients that want to do the right thing," said an energy finance lawyer, "then you get to do the right thing most of the time."<sup>347</sup> This lawyer added that it is "getting better all the time."<sup>348</sup>

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339. *Id.* at 36.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.* at 37.

347. *Id.*

348. *Id.*

While many find satisfaction in getting specific projects done, others expressed satisfaction in drafting laws that are subsequently enacted, or in helping to get those ordinances or laws adopted. One attorney who helped write the regulations for a five-cent tax for plastic bags for a major city said that “seeing this in operation is amazing.”<sup>349</sup> Another—whose work in drafting and implementing laws at the state level has led to significant reductions in that state’s greenhouse gas emissions—has found such “structural reform” especially satisfying.<sup>350</sup>

Some were nonetheless bluntly cautious or circumspect about the limits of what they are helping to achieve. Many cast their work in terms of reducing negative impacts rather than in terms of achieving positive impacts. One lawyer actually makes a difference “on some days.”<sup>351</sup> Another sometimes influences a client “to do something that has decreased their footprint.”<sup>352</sup> Still another found it satisfying when “you can make progress. It is all a drop in the bucket. But it is progress.”<sup>353</sup> A lawyer who specializes in sustainable community-development projects said:

The thing I find most rewarding is when we get to create a project that truly makes the community better than it would have been without the project. This is a really high standard. So much development diminishes the community. It is so hard to deliver development that not just sustains but makes things better. That is the standard I strive for when working for sustainable development.<sup>354</sup>

Others find satisfaction in explaining to clients why more sustainable approaches are better and how they will work. One enjoys “persuading companies to invest in a new technology that is truly better, safer, and more efficacious than something that has been used for years.”<sup>355</sup> Another who specializes in legal work related to sustainable communities said, “The part I love the best is rolling out that master plan with the client, and spending hours talking about the possible things that could happen with this property.”<sup>356</sup> Many find particular satisfaction in convincing skeptical clients. This explanation is illustrative: “I love it when people who are so certain that what they want to do is right for the world realize that a lower cost, less intrusive solution is in fact better for the environment.”<sup>357</sup>

Some attorneys emphasized that they find the work enjoyable and intellectually engaging. “It is fun,” one attorney said.<sup>358</sup> Another described

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349. *Id.* at 36.

350. *See id.* at 37.

351. *Id.* at 36.

352. *Id.*

353. *Id.* at 37.

354. *Id.*

355. *Id.*

356. *Id.* at 36.

357. *Id.*

358. *Id.*

it as “an endless horizon. That’s the most exciting thing. It is just beginning, and you can’t see where it will go.”<sup>359</sup> Another, with a long and diverse career in the public and private sector, said:

What is wonderful about this field is that it so diverse. It never ceases to engage me intellectually. My career has been very multidimensional—it has been sustaining and nurturing. I can’t think of another career that has been as sustaining and challenging. By contrast, I know a lawyer who has been a bankruptcy lawyer for thirty-five years, and this has been a very static area of law. Sustainability is a very dynamic area of law, policy, and thought leadership.<sup>360</sup>

Another explained the work in terms of tracking social expectations concerning business performance on sustainability:

Something I particularly enjoy is being a trend spotter—where societal expectations are trending. Companies need to comply with mandatory standards but also with developing and evolving standards. I am a curious person and find the work intellectually stimulating. I also feel I am playing a part in defining and refining the core performance expectations for companies—not just law and policy but also what they expect they should do. Playing a role in that conversation is very rewarding.<sup>361</sup>

Some expressed their greatest satisfaction in terms of the people with whom they get to work. One explained this as “having a community of people in your office who I can work with to realize the vision of sustainability.”<sup>362</sup> Another said: “People who work in sustainability tend to be very nice. This is not a joke; it is true. They are interested in cooperation, working across department lines, and encouraging departments to look at alternatives and options to be more sustainable.”<sup>363</sup> Several commented on the great talent of the people with whom they work. One enjoys mentoring “young millennials who are ‘wicked smart’ to assist in getting things done.”<sup>364</sup> One lawyer responded to the question of what is most rewarding or satisfying by saying:

Everything. It does not get any better than this. I get out of bed at six thirty in the morning and think about how fast I can get to the office. When I started this work, I got completely overwhelmed and a bit depressed. At a certain point, we made a conscious decision to stop focusing on the negatives. We explain issues factually, and then we dive into the solutions. We don’t talk about whether a company is good or not. I prefer not to talk to people who aren’t interested in working on

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359. *Id.*

360. *Id.*

361. *Id.* at 37.

362. *Id.* at 36.

363. *Id.* at 37.

364. *Id.* at 36.

solutions. We work with great people and all of the great ideas that can get a business to the triple bottom line.<sup>365</sup>

#### *D. Least Enjoyable or Most Frustrating Aspects of Sustainability Work*

Many lawyers reported that they found little or nothing unpleasant or frustrating about their sustainability work.<sup>366</sup> Others answered by talking about work–life balance, time sheets and billing, the administrative aspects of big-law-firm practice, or their organization’s lack of resources—none of which are directly related to sustainability work.<sup>367</sup>

But the great majority of these lawyers did not feel this way, and there was a great range in the aspects of their practice they find least enjoyable or most frustrating. Some were frustrated with clients that did not understand or support sustainability. Others identified public opposition based on ideology or misrepresentation, or simply public ignorance of basic science and environmental policy, as the least enjoyable part of their practice. Some are frustrated with the slow pace of progress, particularly on energy and climate change. And some find legal barriers to sustainability the most frustrating aspect of their practice, and the time and difficulty of accomplishing sustainability activities and projects. As will be seen below, there is some overlap between these aspects of legal practice and what these lawyers see as the greatest obstacles to sustainability.

Many complained about some of their clients, often distinguishing between clients they enjoy working with and clients they do not enjoy working with: “I meet clients who want to be best in the field and clients who are dragged into the field kicking and screaming,” one attorney explained.<sup>368</sup> A common complaint from these lawyers is about clients engaged in “narrow, short-term thinking.”<sup>369</sup> One attorney described such clients as “focused purely on minimizing short-term cost—how much you pay to settle the case or close the deal, and how much you pay your lawyer to do it.”<sup>370</sup> Another common complaint is clients who lack a basic “understanding of science and policy behind sustainability and environmental protection” (e.g., climate change, chemical loading),<sup>371</sup> or who resist attorney suggestions “based not on facts but on politics.”<sup>372</sup> The attorneys said that these and other factors often mean that those clients are not interested in analyzing a problem from a sustainability perspective, or looking at the additional options that a sustainability analysis would provide.<sup>373</sup>

365. *Id.* at 37.

366. *See id.* at 38–39. One responded, “I really can’t say.” *Id.* at 38.

367. *See id.* at 38–40.

368. *Id.* at 40.

369. *Id.* at 38.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* at 38–40.

An attorney who has worked extensively on cleaning up contaminated sites explained these problems in terms of the “limited role of the attorney in big picture decision making.”<sup>374</sup> This attorney said:

When I talk to clients about what they are going to do next, after the property is cleaned up, about whether they are going to do a green building, etc., that falls on deaf ears. There is a perception that energy efficiency and green building are more expensive than they really are. My overall frustration is not getting a place at the table in the overall conversation.<sup>375</sup>

Another attorney explained that the least enjoyable aspect of working with clients is the patience it requires. Yet, this attorney said that sometimes patience pays off:

I have had to be patient with individuals within companies and with companies themselves. All are at different stages of their sustainability journey. There is often dissonance between what needs to be done and what companies and individuals are able to do. But when people understand what they can do, and what they can encourage other people to do, they move pretty quickly. It is waiting for the “aha” moment that is the hardest thing to do. When that happens, it is extraordinarily wonderful; the best thing ever. We spend a lot of time thinking about how to get people to the “aha” moment faster.<sup>376</sup>

Another group of these lawyers said that the most frustrating aspect of their sustainability work is public opposition, based on ideology or out-right misrepresentation, to specific proposals or projects. A lawyer who does considerable legal work for solar industry clients complained about the “blowback that the industry gets from people who are not knowledgeable.”<sup>377</sup> In one case, this lawyer’s client proposed a solar energy project for a school system that had demonstrable economic advantages, but one school board member was simply opposed to solar energy.<sup>378</sup> Another echoed that point in describing the least enjoyable aspect of sustainability work:

Ideological intransigence; that’s number one, head and shoulders above everything else. It is a whole cluster of things. If I have an American value, it is that we recognize problems soberly and solve them intelligently. When people talk about socialism, conspiracy, property rights—this requires an entirely differently skill set, and it impedes problem solving.<sup>379</sup>

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374. *Id.* at 39.

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.* at 38.



One complained about the “Not In My Back Yard” (NIMBY) phenomenon that occurs on some of the land use projects on which this attorney works:

The most frustrating thing is when individuals or communities use legitimate sustainability issues to mask raw NIMBY-ism. Say a community really does not want adjoining development to happen. So, they raise issues about trees or endangered species that they have not cared about historically; they simply don't want development on the adjoining property. We can't work out a compromise on that issue because they are using it as a blocking issue. This gives a bad name to legitimate issues, because developers and engineers then see these simply as things to stop the project.<sup>380</sup>

Another framed the least enjoyable aspect of the work in terms of polarized national politics, particularly the people who are “utterly cynical”<sup>381</sup> in their opposition to specific EPA proposals:

It is hard enough to do this without fighting people who are lying. It's not just climate change. It is the assertion that a new EPA rule will bring the economy to a halt, when the reality is that the new rule will make us better off and not worse off. It is not only bad earth science; it is bad economics.<sup>382</sup>

Another group of lawyers said that what they liked least was not public opposition but rather the lack of public understanding. For some, this is based on the same concerns—about the lack of basic science and environmental-policy knowledge—as their clients. For others, there is a distinct regional dimension to this ignorance. One attorney who frequently travels to California says sustainability “is in the dark ages in my home state.”<sup>383</sup> In this attorney's view, that ignorance translates into having fewer clients available for sustainability-related legal work.<sup>384</sup> Another attorney does not enjoy the “need to win the same battles over and over again.”<sup>385</sup> This attorney explained: “You can go to the state legislature and argue that energy efficiency would save money and reduce emissions. Then five years later you have to go back and defend the same program because it is threatened with budget cuts.”<sup>386</sup>

For many attorneys, limited progress and the slow pace in moving toward sustainability are the most frustrating or least enjoyable aspects of their sustainability work, particularly work on energy and climate change. One found it frustrating that sustainability “is viewed as secondary and

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380. *Id.* at 39.

381. *Id.*

382. *Id.*

383. *Id.* at 38.

384. *See id.*

385. *Id.* at 40.

386. *Id.*

superfluous, or an afterthought, as opposed to ingrained in everything we are doing.”<sup>387</sup> Another who “learned about global warming in college in 1977” said, “we have been talking about the world of closed systems since the 1970s, and I wish we were farther ahead.”<sup>388</sup>

One group of lawyers identified legal barriers, and the time and difficulty of getting sustainability projects and actions done, as the part of their work that they liked least. Within this group, a common complaint heard is that the laws themselves get in the way. One criticized a township code that requires LEED projects to get a variance for energy-efficient lighting and waterless urinals, rather than simply allowing them.<sup>389</sup> The need to get a variance, of course, adds time and expense to these projects because of the need to prove that a variance is warranted.<sup>390</sup> A land use lawyer frequently butts against “wrongheaded legislation that won’t let us do the best possible plan,” such as requirements for more parking spaces than are needed for a particular place.<sup>391</sup>

For others, the difficulty of navigating existing laws and policies to get more sustainable projects and activities approved is what they like least. One complained how it is difficult to satisfy all stakeholders for a proposed project or activity, saying that “ninety-nine percent of the time not everyone is going to be happy.”<sup>392</sup> Another complained how bureaucracy and lengthy review processes for complex projects (in a municipal setting) can “wear you down.”<sup>393</sup> This lawyer said it can also wear clients down.<sup>394</sup> Hopefully, the lawyer added, they “stay the course, and stay enthusiastic.”<sup>395</sup>

One attorney’s work towards more sustainable outcomes repeatedly puts that attorney in the position of doing something for the first time, and not only for clients.<sup>396</sup> The attorney installed six geothermal wells at home for heating and cooling, and subsequently received six water bills from the city. Then the attorney then had to work to get a city ordinance changed to fix the problem.<sup>397</sup> The attorney said that this takes a personal toll; trying to be sustainable is unnecessarily difficult.<sup>398</sup>

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387. *Id.* at 39.

388. *Id.* at 38.

389. *Id.*

390. See JOSEPH WILLIAM SINGER, PROPERTY 648–49 (Vicki Been et al. eds., 3d ed. 2009).

391. Master Report of Interviews, *supra* note 68, at 38.

392. *Id.*

393. *Id.* at 40.

394. *See id.*

395. *Id.*

396. *Id.* at 39.

397. *Id.*

398. *Id.*

## VI. FUTURE OF SUSTAINABILITY IN LAW PRACTICE

The future of sustainability in law practice depends on answers to two questions: What are the major obstacles? Where are the jobs?<sup>399</sup>

### A. Roadblocks to Sustainability

The question about the major obstacles to sustainability elicited many of the same answers as the question about the aspects of sustainability work that lawyers find least enjoyable or most frustrating. But the question about greatest obstacles to sustainability is less subjective and invited a broader perspective than a lawyer's own practice. Perhaps for that reason, the range of answers focused primarily on two points: public opinion and the limits of existing law.

Many said that public opinion is an obstacle because of public ignorance, providing many of the same explanations described above (e.g., ideology, lack of basic understanding about science and the environment).<sup>400</sup> This, others said, contributes to the slow pace of change, which was also discussed above.<sup>401</sup> But many attorneys see the biggest obstacle to sustainability in terms of a personal unwillingness on the part of the public to make changes in their lives. People "have a hard time changing habits."<sup>402</sup> Another attorney said: "We have a consumer mindset. I grew up with parents of the Great Depression, and we were encouraged to save and reuse. How do you inculcate a philosophy of the light footprint? People talk the sustainability talk, but they don't walk the talk."<sup>403</sup> One described "personal avarice and selfishness" as obstacles to sustainability.<sup>404</sup>

Other lawyers pointed not to ignorance or unwillingness to change but to numerous incorrect mental models or understandings of sustainable development. They said that a major source of misunderstanding is rooted in the perceived economy versus environment aspect of environmental regulation. One attorney said people see environmental regulation "as just environmental, without looking at social and economic benefits. Some people simply do not see connections. They might do better with environmental regulation if they saw social and economic benefits."<sup>405</sup>

399. This Part is thus comprised primarily of answers to Question 12 ("What do you see as the greatest roadblocks to sustainability?") and Question 13 ("Where are the jobs in sustainability and law?" (current and future)) in the Appendix. See *infra* Appendix.

400. One attorney added that "people are too busy doing what they are doing to sit back and think about what they are doing." Master Report of Interviews, *supra* note 68, at 41. Another said the basic obstacle is the "lack of ability to show in one to five minutes what people can do to effect positive change at home, church, synagogue, school, or work. How do you get person, organization, community, or business involved? Everyone looks at each other, and no one moves." *Id.*

401. See *supra* Section V.D.

402. Master Report of Interviews, *supra* note 68, at 42.

403. *Id.* at 43. Another attorney explained that it is "hard to persuade the average person they should lead a sustainable lifestyle." *Id.* at 41.

404. *Id.* at 42.

405. *Id.* at 41.

A lawyer who works with many businesses said people often believe that “profitability and sustainability are at opposite ends of the spectrum. That is wrong but that is absolutely how it works, and it grows out of environmental regulatory experience.”<sup>406</sup> Instead of putting profitability and sustainability at opposite ends of a line, whereby one grows as the other diminishes, this lawyer uses a coordinate grid with a horizontal X-axis representing profitability, and a vertical Y-axis representing sustainability. The grid shows how high-values for both profitability and sustainability are possible.<sup>407</sup> “I draw pictures like that because it helps people understand it.”<sup>408</sup>

Another obstacle is based on the view that sustainability should be supplanted by resilience, particularly as the climate changes and the need to protect structures and systems from disruption becomes more evident.<sup>409</sup> But one lawyer explained how both views are necessary:

Sustainability and resilience are different. I can take an industrial user and put them completely off the grid on a more sustainable platform, say biomass. Then I do resilience analysis and determine that a system with only one source of power is less resilient than the grid with many generation sources. Greywater reuse<sup>[410]</sup> is much more resilient than rainwater capture. We have to pay attention to when we are charting for resilience and when we are charting for sustainability.<sup>411</sup>

Still another obstacle to sustainability is based on the incorrect understanding that sustainability is unnecessary, more expensive, or both. One lawyer has had “clients, who are not qualified to do LEED building, say it is too expensive or cannot be done.”<sup>412</sup> Many of these clients have constructed buildings in a conventional way for decades, and do not see the need for change.<sup>413</sup> This attorney could not convince the environmental section of his state bar association to support changes in the state’s building code to support LEED certification.<sup>414</sup> In a somewhat similar vein, another attorney explained the greatest obstacle as short-term thinking about sustainability and energy-efficiency investments.<sup>415</sup> While the benefits of such investments last for decades and create cost savings far in excess of their initial investment, this attorney said that many businesses will not

406. *Id.*

407. *Id.*

408. *Id.*

409. Dernbach & Cheever, *supra* note 6, at 279.

410. “Greywater is gently used water from your bathroom sinks, showers, tubs, and washing machines. It is not water that has come into contact with feces, either from the toilet or from washing diapers.” *About Greywater Reuse*, GREYWATER ACTION, <https://greywateraction.org/greywater-reuse> (last visited Sept. 19, 2017). Greywater can be reused for watering or irrigation, among other things. *See id.*

411. Master Report of Interviews, *supra* note 68, at 42–43.

412. *Id.* at 41.

413. *See id.*

414. *Id.*

415. *Id.* at 43.

undertake energy efficiency unless their savings repay the initial investment within eighteen months.<sup>416</sup>

The biggest challenge, a finance attorney said, is “changing various cultural attitudes.”<sup>417</sup> This attorney explained: “If you go to a hotel and tell them you will save them five million dollars in their energy bill” with energy-efficient retrofits, “there is no one whose job it is to think about this.”<sup>418</sup> The attorney said that many universities are thinking about this, but they are the exception.<sup>419</sup> “At high levels at many corporations, they get it but they do not get it several levels down” in the organization.<sup>420</sup> In energy-efficiency finance, it is more important “to get customers to feel safe doing this new thing than to get finance itself. Financing is more mechanical; you don’t have to fight entrenched skepticism.”<sup>421</sup> The attorney further said that changing these attitudes will require not only a new generation of environmental professionals but also “a new generation of clients” and “customers of clients.”<sup>422</sup>

The other basic obstacle to sustainability, cited by these lawyers, is limits in existing law. One type of obstacle that some recounted, which was described above, occurs when the law itself prevents or impedes a desired project or activity.<sup>423</sup> But many lawyers see the limits of existing law in broader terms. For many environmental lawyers, environmental law is a necessary but insufficient condition for sustainable development. “Our environmental laws were written in the 1970s and early 1980s,” one attorney said.<sup>424</sup> “They don’t incorporate sustainability. They are narrow, siloed, media specific, and don’t take into account net environmental and social impact. We have an outdated environmental legal system and a political system that is too polarized to fix it.”<sup>425</sup> Another explained the limits of environmental law in terms of the underpricing of resources, such as water, which means that “people are not incentivized to save or protect” those resources.<sup>426</sup>

The missing ingredient, many said, is legal rules providing a structure that guides and encourages sustainable behaviors and projects. According to one lawyer, this includes specific standards “against which we can calibrate our actions to that which we should be achieving.”<sup>427</sup> For this lawyer, the specific problem is the way in which the EPA implements certain laws, including the lack of measurable standards relating to sustainability:

416. *Id.*

417. *Id.* at 42.

418. *Id.*

419. *See id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. *See supra* Section V.D.

424. Master Report of Interviews, *supra* note 68, at 42.

425. *Id.*

426. *Id.* at 43.

427. *Id.* at 42.

Without question, the rigid adherence to the way we've always done it at EPA staff level is frustrating. I adore all of the people we work with, but some in the federal agencies are not as aware of new technologies as they could be. There is an information gap, a lack of scientific awareness. Beyond that, there is sometimes a resistance to doing things differently than they have always been done. When you put in an application for a new chemical, there is an optional field question about pollution prevention. Even when you do fill in that field, there is no standard against which EPA program people measure the value of that information. Our chemical could be ten out of ten here, and the incumbent technology awful. But from an advocacy perspective, there is no demonstrable, measurable standard against which to advocate for the preferability of that chemical.<sup>428</sup>

Interestingly, an EPA attorney made a similar point but in a different context. The least enjoyable thing for this attorney is people who cannot get past the broad definition of sustainability stated by the Brundtland Commission.<sup>429</sup> We need to "get past 'kumbaya,'" the attorney said, explaining that the Brundtland Commission's definition is "too abstract to be meaningful to a lawyer."<sup>430</sup> The challenge, this attorney added, is to figure out what sustainable development should mean in specific contexts.<sup>431</sup>

A lawyer with substantial corporate experience said the biggest problem in achieving sustainability is

the absence of universally applied standards or metrics so that sustainable behavior is properly rewarded, and capital can be appropriately allocated in the global market. There is a lot of work ongoing in that area, but that is the issue that needs to be solved. Once that is solved, that is your ultimate top-down answer to sustainability. Everybody would aspire to be in that choir.<sup>432</sup>

### *B. Jobs in Sustainability and Law*

The importance of knowing where to find sustainability-related legal employment is obviously important to law students and lawyers who are seeking such work. It provides many insights into how many jobs there are, what kinds of jobs there are, how to break into the field, and what to expect in the future. And yet it also sheds considerable light on what it means to practice law related to sustainability.

Among the lawyers interviewed for this Article, many said that legal jobs related to sustainability are everywhere, but they are not ordinarily labeled as such. Rather, these lawyers said sustainability is or should be a critical part of all legal work. Many identified specific workplaces (e.g.,

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428. *Id.* at 39.

429. *See id.* at 38.

430. *Id.*

431. *See id.*

432. *Id.* at 41.

in-house counsel) or subjects (e.g., climate change) that are particularly amenable to sustainability-related legal work. At the other end of the spectrum, however, are lawyers who say there is little or no work, in part because of competition from consultants and other nonlawyers.

Many of these lawyers believe that sustainability-related legal jobs truly are everywhere, but that sustainability is not a subject like environmental law or energy law. Echoing the point frequently made when they described their own work, they said that they see sustainable development as a tool,<sup>433</sup> lens,<sup>434</sup> or prism<sup>435</sup> that can be applied to all areas of law. To no small degree, these jobs are created by the lawyers who fill them based on the sustainability expertise they develop, as well as their ability to generate and maintain client interest in sustainability.<sup>436</sup> As one attorney explained:

There is not a sustainability niche as its own niche. Sustainability can, however, be embedded in lots of areas of legal practice. It may come in on a remediation issue or permitting issue. Sustainability can be a significant part of the practice of a real estate lawyer; brownfields law is a perfect example of sustainability. Corporate lawyers have to think about the supply chain. It is not stand-alone; it is a skill or competency that people ought to have in a lot of different areas of legal practice. A lawyer who can use knowledge of sustainability effectively—not just spotting issues and telling a client what they can't do—but also finding opportunities and being forward looking—that's the skill. But that is just being a good lawyer. Can you help the client get toward what they want?<sup>437</sup>

A lawyer with substantial experience in corporate law said there will be more such jobs in the future:

As the world changes to embrace sustainability principles, the legal jobs will change everywhere. It will be infused in so many elements of corporate behavior that it will become a language you need to be familiar with, to speak, to do the job you are doing, just as you need to understand math to do the things you do. That flavor will be in every legal job. That will be the evolution of sustainability-related entities and objectives, percolating into societal behavior, corporate behavior, and interpersonal behavior.<sup>438</sup>

An energy finance attorney explained the availability of legal jobs in terms of the necessary and inevitable transition toward sustainability:

There is a huge amount of work. Over the next twenty years, if we do it right, we are going to remake the entire economy. The grid will work

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433. *Id.* at 45.

434. *Id.*

435. *Id.* at 7.

436. *See id.* at 44.

437. *Id.*

438. *Id.*

differently. There will be a lot more behind-the-meter energy generation. There will be a whole new level of communications connectivity that goes along with energy connectivity. People are rebuilding the food chain, and lots of other things are going on. It is doing all of the things that lawyers do but with a certain consciousness about what you are doing. If that is what your client's goals are, you can help them achieve their goals.<sup>439</sup>

"This is a great time to be a lawyer," one said.<sup>440</sup> Another explained: "Sustainability aspects of all projects will require lawyers to negotiate, to draft, to counsel, to implement, and to do all those things. You will also need lawyers to deal with problems that occur."<sup>441</sup>

These jobs involve a wide variety of different areas of law.<sup>442</sup> Of these, climate change, renewable energy, energy efficiency, and environmental law were frequently mentioned.<sup>443</sup> Other lawyers mentioned finance, business and human rights, SEC disclosure, development of new companies, real estate and land use, green-leasing, and sustainable communities.<sup>444</sup> A land use lawyer explained: "They are all over the place—real estate, land use, energy, environment, international, and combinations of the above. They are in business counseling, business acquisitions, insurance, and finance, including mortgages and general due diligence work. I'm just getting started."<sup>445</sup>

The specific places where sustainability-related legal work is more likely to occur also vary considerably, according to the combined answers of these lawyers. Some law firms are doing more of this work than others; as indicated earlier, many lawyers publicly characterize themselves as doing sustainability-related legal work.<sup>446</sup> Several attorneys suggested in-house positions with either corporations or governments.<sup>447</sup> A corporate social responsibility lawyer explained:

The expansion of social equity within sustainability has resulted in new types of positions. If you put social equity in sustainability, there is an expansion of roles for lawyers. Most of the expansion I've seen in sustainability positions has been inside corporations. Since 2008, there are a lot more sustainability positions that lawyers can fill that exist in large-scale corporations.<sup>448</sup>

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439. *Id.* at 46.

440. *Id.*

441. *Id.* at 45.

442. *See id.* at 44–49.

443. *See id.*

444. *See id.*

445. *Id.* at 44.

446. *See supra* Part I.

447. Master Report of Interviews, *supra* note 68, at 45–46.

448. *Id.* at 46.



Among government opportunities, several attorneys mentioned in-house positions for municipalities. An attorney for a major city that is committed to sustainable development said the city received seventy resumes when it posted a water and storm water legal job with a major sustainability component.<sup>449</sup> Another lawyer said that there are many sustainability-related legal tasks at the local level, but cautioned that “local government attorneys may be doing standard subdivision work eighty percent of the time, and sustainability work twenty percent of the time.”<sup>450</sup>

Several attorneys mentioned working for nongovernmental organizations oriented toward sustainable development, and one works at such an organization.<sup>451</sup> These organizations may or may not involve the actual practice of law, including litigation. This attorney’s organization “employs a bunch of lawyers in our policy program and disclosure work.”<sup>452</sup> Another option that several mentioned is using legal and advocacy skills in contexts where one is not strictly practicing law.<sup>453</sup> “These jobs and few and far between,” one lawyer said, “but you are advantaged if you have a legal background, because some of what you touch is regulatory in nature.”<sup>454</sup>

In answering the question about where sustainability-related jobs are, many of these lawyers offered advice to would-be lawyers in sustainability work. Much of this advice mirrored what others said about the nature of legal work related to sustainability—that it is a lens or prism through which to analyze problems in any field.<sup>455</sup> “Young people tell me they want to be a sustainability lawyer,” an attorney with many corporate clients said.<sup>456</sup> “And I tell them to become a corporate lawyer, and then look for ways to affect every business in a more sustainability-related way.”<sup>457</sup> One said the same point can be made for other fields: “Take what is otherwise a traditional environmental or real estate, land use, or insurance job, and figure out a way to bring these ideas into your work, and push the envelope.”<sup>458</sup> Another explained this challenge to young lawyers against the background of a substantial increase in corporate sustainability reporting that has occurred in recent years, thanks in part to the standardization of reporting and auditing.<sup>459</sup> This lawyer said:

A young lawyer wanted to work on sustainable corporate reporting, but she wouldn’t have been hired by a Fortune 500 corporation be-

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449. *Id.* at 47.

450. *Id.* at 46.

451. *See id.* at 45.

452. *Id.*

453. *Id.* at 45, 47.

454. *Id.* at 44.

455. *See supra* Section VI.B.

456. Master Report of Interviews, *supra* note 68, at 44.

457. *Id.*

458. *Id.* at 44–45.

459. *See id.* at 47.

cause she didn't have enough expertise in conventional corporate reporting. So, her choice was to work on conventional corporate reporting and work toward sustainable corporate reporting, or do niche work as part of a larger team. The question is: How much time do you want to spend doing things you don't want to do in order to do things you do want to do? There are a few pure positions but they are hard to come by.<sup>460</sup>

As several lawyers acknowledged, they or others have essentially created their own jobs in this way. A corporate social responsibility lawyer said, "A lot of people who are in this space created their own jobs. It requires a lot of persistence and resilience."<sup>461</sup> If you want to work on climate change, another said, "jobs are where you create them."<sup>462</sup>

At the other end of the spectrum, a smaller number of those interviewed said that there are few, if any, jobs in law related to sustainability. "There is more traction in sustainability in engineering or science," an environmental attorney said.<sup>463</sup> "It seems very soft in law right now."<sup>464</sup> Another environmental lawyer said: "I've been trying to broaden my practice into the sustainability arena, and I really haven't found anything out there."<sup>465</sup> One lawyer has tried and failed to convince colleagues at that lawyer's firm, as well as other firms, to embrace sustainability:

Most law firms have not figured out how to monetize sustainability. Until they do, they are not going to pay attention. I've had those conversations, and advocated that every firm should have a sustainability practice group, but it is hard for them to make money doing that. If they can't make money or commit to pro bono, how can you convince people to do it?<sup>466</sup>

As several attorneys see it, the lack of legal jobs is due in no small part to competition from consultants or nonlawyers. This lawyer's explanation is illustrative:

When this all started, a sustainability lawyer might be the only sustainability person in the room. Now, there are consultants and internal sustainability staff and officers at corporations who have their own sustainability expertise at less cost. That has lowered the number of opportunities for sustainability lawyers.<sup>467</sup>

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460. *Id.* at 46.

461. *Id.* at 47.

462. *Id.* at 44.

463. *Id.* at 46.

464. *Id.*

465. *Id.*

466. *Id.* at 45.

467. *Id.* at 46.

## CONCLUSION

In a fundamental sense, this Article is about the role of law and lawyers in achieving the transition to a sustainable future. The lawyers who do sustainability-related legal work tend to have a solid operational understanding of what sustainable development means and requires. They do a wide variety of legal work in many legal fields for a diverse range of clients. Their clients often come to them precisely because of their sustainability expertise, and they have developed savvy ways of raising sustainability issues and options when their clients come to them for other reasons. They find ways of reducing the adverse environmental and social impacts of their clients' actions, and find ways to create positive impacts. They are also maximizing environmental, social, and economic opportunities for their clients, and identifying better choices (if the client is open to those opportunities and choices). They have come to sustainability by a variety of routes, but they are passionate and knowledgeable in what they do. And they tend to recognize that sustainability can be part of every legal practice.

But it should also be clear from the variety of views expressed in this Article that they do not all think exactly the same way about sustainable development or the role of sustainability in law practice. And readers with experience in the practice of law, particularly environmental law, will have almost certainly recognized that some of what these lawyers describe in sustainability terms is the same kind of work that was described decades ago, in terms of cost savings or protection of the client's legal position by going beyond compliance.<sup>468</sup> A lawyer who works with business start-ups described the role of attorneys in this transition by contrasting attorneys who see sustainability as a form of compliance with existing laws, and those who (like this lawyer) see the need for laws and lawyers that support and encourage sustainable development at the necessary scale:

When I started this, I looked at law firms and consultancies and banking firms, to see what they were doing. Sustainability covers it all. My working hypothesis is that most lawyers are adopting that brand to primarily describe an environmental regulatory practice rather than a corporate innovation or client-focused sustainability perspective. From the client's perspective, they are interested in sustainability as a regulatory compliance matter, trying to minimize the regulatory burden on their clients. There is a big disconnect in capitalism that requires a least common denominator—environmental law. But these regulations are not aspirational; they are a bare minimum.<sup>469</sup>

Some of what these lawyers describe in sustainability terms is almost certainly a relabeling of work that was previously described in other terms.

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468. BRUCE SMART, BEYOND COMPLIANCE: A NEW INDUSTRY VIEW OF THE ENVIRONMENT (1992).

469. *Id.* at 48.

And some of the work described here is more modest—the use of sustainability to achieve compliance with environmental laws by cheaper and more efficient methods. But much of it is more far reaching—helping companies, businesses, and governments to achieve their ambitious sustainability goals, or nudging them to understand how a sustainability perspective can reduce the environmental and social harms they would otherwise create and even create economic, environmental, and social benefits. Given the magnitude of the climate change challenge and other sustainability issues, the aspirational part of sustainability almost certainly represents the future direction of laws and lawyers.

For all of these lawyers, however, sustainable development provides a common perspective and set of principles to guide decision making. All of them see how it leads to better decisions, however much they or others might wish to see even better decisions or see better decision making employed at a vastly greater scale. By understanding what they all do, we better understand how law and lawyers can contribute to a more sustainable society.

## APPENDIX

## SUSTAINABILITY IN LAW PRACTICE

## QUESTIONS FOR LAWYERS

Name:

Title and Employer:

Phone:

Email:

Date:

1. How long have you been in this position?
2. What kind of work do you do, and who are clients?
3. How did you get interested in sustainability?
4. What is your understanding of sustainability?
5. Under what circumstances do your clients raise sustainability issues with you?
6. Under what circumstances do you raise sustainability issues with your clients?
7. When you talk to clients about sustainability, what do you say?
8. Apart from client counseling, what type of other legal work do you do on sustainability?
9. What personal or professional characteristics are most essential to your sustainability work?
10. What do you find most rewarding about your sustainability work?
11. What do you find least enjoyable or most frustrating?
12. What do you see as the greatest roadblocks to sustainability?
13. Where are the jobs in sustainability and law? (current and future)