

# ENVIRONMENTAL LEADERSHIP

## Think Like a Lawyer?

The modern environmental movement was based on the emergence of new laws and regulations sparked by public outrage over pollution. Attorneys were at the center

of the action from day one. Lawsuits brought by early activist nongovernmental organizations (NGOs) such as the Natural Resources Defense Council (NRDC) helped form the basis for the environmental regulations that exist today.

To those who are familiar with this historical context, the premise of this column—that “thinking like a lawyer” can impede as well as support sustainability—may seem odd indeed. But the reality is more complex than it may appear. The ramifications of legal thinking on organizations’ decision making may help explain some of the sustainability dynamics that are in play today.

### Green Lawyers: Needed and Scorned

Kermit the Frog would agree that “it’s not easy being [a green attorney].” Environmental lawyers, like all attorneys, are often on the receiving end of scorn and ridicule. There are scores of Web sites specializing in lawyer jokes and cartoons. Lawyers make up approximately half of the U.S. Congress—and we all know where Congress ranks on the public’s favorability rating scale today.

### *Will tomorrow’s attorneys help or hinder sustainability?*

Maybe you’ve heard the joke about the client who asked for a one-armed attorney. He said he was tired of lawyers who covered their bases by advising him “on the one

hand . . . but then on the other hand.”

Or perhaps you’ve heard someone joke that lawyers are just fine as a group, but then ask, “Would you want your daughter to marry one?” Let me note here that my daughter married one, and I still speak to her.

The police face similar scorn when they hand out speeding tickets. However, when there are major issues involving public safety and health that directly affect you, your family, or your business, police officers and attorneys are the most welcome individuals on earth.

### Changing Issues, New Needs

At the start of the environmental movement, the pollution issues were obvious. They were literally in your face (and up your nose). The benefits that green attorneys provided were unquestionably welcome.

But as the most pressing pollution concerns were addressed, regulations started to focus on

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**Richard MacLean**

subtleties involving trace contaminants and imperceptible degradation that can occur over generations. And that's when things started to get much more complicated.

Organizations of all types started hiring lawyers to handle regulatory compliance and to protect themselves from potential liability. Lawyers who specialized in environmental issues were no longer crusaders, but part of the legal and business establishment.

Nowadays, some would argue that environmental lawyers are like the successful candidate for an accounting job who, when asked during the interview, "How much is 2 + 2?" responded,

"What number did you have in mind?"

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The NRDC currently employs more than 300 lawyers, scientists, and policy experts. Thousands of other governmental and nongovernmental organizations also hire attorneys to promote their goal of a "sustainable" future. But sustainable for whom or what? And how should society go about achieving sustainability?

Many lawyers also work for the "opposing" side, within corporations, trade associations, and think tanks. Some policy organizations, such as the Property and Environment Research Center (PERC), promote what they call "free market environmentalism."<sup>1</sup>

Who is right? Ideally, in the grand scheme of things, the issues will all work themselves out over the long term through the political process, at levels ranging from the local to the international. But leaders in corporations, regulatory

agencies, NGOs, communities, and political bodies must struggle with these issues in real time.

Everyone claims to be pursuing the common goal of a sustainable future—while employing armies of lawyers to protect their organizational interests. So what are the potential downsides to "thinking like a lawyer" in today's rapidly changing business and political climate?

### **How Defensive Should You Be?**

In a commentary entitled "Don't Put Nuttin' in Writin,'" posted on The Green Tie (the official blog of the National Association for EHS & Sustainability Management), Stephen Evanoff noted, "Much of what we put in writing has the potential to find its way into litigation." He went on to state, "I think it's good practice to review e-mails on issues that have even a remote possibility of being discovered as part of the legal proceeding, before hitting the send key."<sup>2</sup>

In a follow-on comment, William D'Alessandro, in his capacity as executive editor of *Crosslands Bulletin on Business, Law, and the Environment*, stated, "Every EHS manager must think like a lawyer. They used to, years ago. They still must." In a separate communication, D'Alessandro (in his capacity as an attorney) was even more emphatic:

EHS managers are duty bound to think like lawyers. It is essential, but of course, not sufficient. A wider vision and other talents are necessary. But if EHS managers cannot think like lawyers, or they do not have a lawyer by their side as a trusted adviser and close friend, one can pretty well assume they are utterly incompetent at their jobs.<sup>3</sup>

Good advice. But could defensive positioning and risk aversion be carried to the extreme? You have the right to remain silent, as it were, but can necessary communications—the much-

desired transparency so often spoken about—suffer as a result?

### **Hired Guns?**

Attorneys are expected to protect the interests of their clients, whether the client is a private citizen, a corporation, a government entity, or some other organization. In criminal cases, public defenders are required to defend even those accused of the most horrific acts.

Some lawyers laughingly (but tellingly) refer to themselves as “hired guns.” They see their role as exploring every available legal avenue to represent their clients and minimize risks to the client’s interests. Juries and (eventually) voters are supposed to sort out the final conclusions.

But this process can become debased. Attorneys can manipulate juries and win acquittals for defendants who go on to commit crimes again. Companies can escape liability for their share of corporate messes by exploiting legal loopholes. Think, for example, about corporations that are 100 percent in compliance with the applicable laws but still fail miserably on corporate governance. In many cases, even the most egregious corporate violators of the public trust can honestly say, “We did everything according to accounting standards and SEC requirements.”

### **Going Beyond Compliance—But How Far Beyond?**

Today, of course, leading companies understand that compliance alone is not enough. Modern corporations are evaluated not by what they have to do, but by what they should be doing.

BP is facing this dilemma with respect to its disastrous oil spill in the Gulf of Mexico, which began when the Deepwater Horizon drilling rig exploded and sank. One of the revelations to come out about the spill was that the company and its contractors had not equipped the rig with a second, backup blind shear ram (a device that

is intended to cut off the flow of oil from a well in case the blowout preventer fails to work). Such redundancy is now common on new oil drilling rigs, but it was not required under U.S. law.<sup>4</sup> So BP and its contractors may be able to say that they were in compliance with U.S. requirements. But does this matter in the court of public opinion?

Given the position BP is in, many attorneys may advise their corporate clients to adopt the most conservative practices all the time, everywhere. But this may not be the best solution either. Weak CEOs can be paralyzed into inaction by attorneys who point out every possible downside to any new business venture.

By contrast, successful corporations often succeed precisely because they take bold action.

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### **Sustainability Management and Reporting: Lawyers as Allies and Gatekeepers**

When environmental managers are seeking to implement new programs that are required by regulation, or when they are trying to obtain funding for new capital equipment that is needed to comply with legal mandates, having company attorneys on their side can be an ideal situation.

But environmental managers can also be frustrated by lawyers who act as gatekeepers on new programs. This is particularly true with respect to initiatives involving information disclosure, corporate reporting, or commitment to specific goals and targets.

I have repeatedly encountered well-intended “censorship” by attorneys who edit corporate reports, resulting in watered-down, vague communications to stakeholders and employees. From their perspective, these attorneys are protecting the company and doing their job. Ironically, however, their

legally inspired circumlocutions may simply provoke more suspicion and worry among stakeholders, confirming in people's minds that the company is less than truthful and not to be trusted.

### **Making the Right Decisions—and Making Decisions the Right Way**

Ultimately, those who are entrusted with leadership of the organization are the ones who have responsibility for making key decisions. This is true whether the organization is a corporation, a government agency, or a civil society group.

Crucial decisions should not be based solely on the regulatory requirements that happen to pre-

vail at the time. Leaders should also consider common practices in their industry, think about whether their decisions will pass the “front-page test” of public opinion, and weigh what is morally and ethically right. They cannot simply

leave decision making up to the lawyers.

### **When Risk Aversion Leads to Risk Creation**

The decision-making process can become perverted when an organization's attorneys act as firewalls, cutting off access to higher management in an attempt to shield leaders from liability for sensitive issues. Should one of those issues later erupt into a public crisis, such a lawyer-driven process can allow the organization's CEO to deny all knowledge of deliberations on the subject. But it also can deprive top management of crucial insights that might have allowed the organization to avoid the crisis in the first place.

A lawyer-dominated organization is particularly problematic for environmental, health, safety, and sustainability professionals, who typi-

cally rank lower down on the corporate ladder. Indeed, they sometimes are required to report in through the legal hierarchy.

### **Law Is Not Enough: Sustainability and Business Ethics**

All too often, business ethics are interpreted within the narrow confines of existing regulations. But the issues that organizations face today are far too complex (and are moving far too fast) to be captured fully by codified rules. The difficulties can be particularly acute in an area like sustainability because opinions can vary so much, even with respect to basic issues such as how terms should be defined and which approaches to use.

Some interesting insights on sustainability and ethics were included in a recent speech given by Professor Dan Shilling to the Sandra Day O'Connor College of Law at Arizona State University. He stated:

Today, programs still frame sustainability as problem-solving through technology: build a better windmill. The approach makes sense: it's linear, measurable, and offers assurance that crises will be averted by new tools. No one begrudges the engineering underway, but, as [Aldo] Leopold cautioned, tools only create more tools, not the wisdom to use them: “We end, I think, at what might be called the standard paradox of the twentieth century: our tools are better than we are . . . . They suffice to crack the atom, to command the tides. But they do not suffice for the oldest task in human history: to live on a piece of land without spoiling it.” When Leopold returned from Hitler's Germany in the mid-30s, where he saw superb science absent an ethical compass, he began to connect land use and society, writing: “To change ideas about what land is for is to change

ideas about what anything is for.” Bringing this perspective to bear on sustainability, investigating its place in society, adds an element of critical reflection that disturbs the typical utilitarian approach.<sup>5</sup>

Later in the same speech, Professor Shilling quoted Ralph Waldo Emerson, who said, “The man who grasps principles can successfully select his own methods. The man who tries methods, ignoring principles, is sure to have trouble.” And still later he quoted historian Donald Worster, who said, “We are facing a global crisis today, not because of how ecosystems function but rather because of how our ethical systems function.”<sup>6</sup>

Clearly these words are applicable not only to lawyers, but also to engineers such as myself and, for that matter, to all leaders. It is an area seldom reflected upon in discussing regulations and sustainability.

Green marketing typically is steeped in glowing terms about “our commitment to the future,” but one wonders how well these core principles are truly integrated into day-to-day decision making. Once again, BP serves as a timely example: Public contrition and pledges to improve safety in the wake of well-publicized disasters (including a petroleum refinery explosion in Texas and oil pipeline spills in Alaska), followed by questionable decisions regarding the Deepwater Horizon oil rig just a few years later.<sup>7</sup>

### Missing the Big Picture

It is telling that BP could claim to be improving its safety record at the time the Deepwater Horizon sank. Indeed, executives from the company reportedly were onboard the rig the day it exploded, in part to celebrate the fact that “Deepwater Horizon was the first rig to go seven years without a lost-time accident.”<sup>8</sup>

A narrow, legalistic focus on bean counting the number of work hours that employees lose to

accidents clearly can miss much larger dangers. As a *New York Times* article noted:

“The way safety is measured is generally around worker injuries and days away from work, and that measure of safety is irrelevant when you are looking at the likelihood that a facility like an oil refinery could explode,” said David Michaels, assistant secretary of labor for occupational safety and health. “This is comparable to saying that an airline is safe because the pilots and mechanics haven’t been injured.”<sup>9</sup>

### Beyond Risk Aversion

The impression readers may be getting from this discussion is that, while lawyers were at the forefront of progress on environmental, health, and safety concerns in the past, when issues could easily be codified, they now specialize in circling the legal wagons around their organizations. Admittedly, this can be true in many cases.

But it is also a fact that many lawyers are taking the lead in promoting the sustainability agenda. For example, two of the most widely read books on environmental management and sustainability were written by my colleagues, attorneys Frank Friedman<sup>10</sup> and William Blackburn.<sup>11</sup>

Commenting on the issues discussed in this column, Frank Friedman told me the following:

I believe my strength, first as a lawyer then as a manager, was to be a risk manager. It is far easier to say “no” than to take risks. However, lawyers and business managers need to understand the full implications of a decision before they take risks. The

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danger today is that too many lawyers and business managers are narrowly focused and don't understand the full panoply of potential risks or benefits. There may, for example, be a litigation risk in taking an action, such as engaging in environmental auditing, but practicing preventive law (and management) is usually more effective.

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I still think of the commercial for an oil filter, "Pay me now or pay me later." The manager needs to understand the law and its broader implications, and the lawyer needs to

understand the broader business issues in the context of the law.<sup>12</sup>

Bill Blackburn offered further insights on these points, saying:

The best business lawyers think like business people and consequently are not risk averse. The risk-averse lawyer shuns transparent sustainability reporting and sensitive expressions of compassion for others harmed by the company. The enlightened lawyer sees these measures as ways to strengthen the credibility and reputation of the organization, motivate constructive improvement from within, and in the long run help prevent costly legal and public relations disasters.<sup>13</sup>

**Sustainability and the Law: Looking Toward the Future**

Law schools are beginning to recognize that they have a duty to prepare the next generation

of lawyers with an understanding of sustainability. They realize that the subject involves much more than just codifying and enforcing new regulations—the traditional ground of environmental attorneys.

For example, the Sandra Day O'Connor College of Law at Arizona State University recently held a "National Summit on Law and Sustainability" to help conceptualize how the school's new program in law and sustainability can operate as a more comprehensive paradigm that encompasses more than simply environmental law.

What was significant is that the event was highly integrated and inclusive. It featured not only a cross-section of attorneys (both academic and practicing), but also nonlawyer practitioners within corporations, government, consulting firms, and policy centers. The emphasis was on governance structures, incentives, changing perceptions, and the ethical dimensions of law and sustainability.

According to College of Law Dean Paul Schiff Berman, these are the sorts of contributions a comprehensive program in law and sustainability can make. "What would it mean," he asked the summit attendees, "not just to think in terms of passing environmental statutes, but to instead seek to build sustainability principles into the very DNA of legal systems? This is the necessary next step for law thinking in this area."

**Concluding Thoughts**

For those of you who are not attorneys, now may be a good time to sit down and have a frank discussion with the lawyers who support your organization. Let them know that, on matters concerning sustainability, you want them to consider both the positive and the negative aspects of thinking like a traditional lawyer.

For those of you who are attorneys, this may be a good opportunity for self-reflection. How

can you do a better job of protecting your clients from legal liability—without allowing risk aversion to create the potential for even greater perils down the road?

## Notes

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9. See note 7.
10. See Friedman, F. B. (2003). *Practical guide to environmental management* (9th ed.). Washington, DC: Environmental Law Institute.
11. See Blackburn, W. R. (2007). *The sustainability handbook: The complete management guide to achieving social, economic and environmental responsibility*. London, UK, and Sterling, VA: Earthscan Publications.
12. E-mail communication with author dated May 30, 2010.
13. E-mail communication with author dated May 30, 2010.

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