



Center for a Sustainable Future  
Indiana University South Bend

**Sustainability and the Law**  
**CSF White Paper No. \_\_\_\_\_**  
**(February 14, 2011)**

**Scott A. Loitz**  
**Partner, Jones Obenchain, LLP, South Bend, Indiana**

## **Executive Summary**

Sustainability is quickly becoming an integral part of educational institutions, businesses and many aspects of society. The legal profession is beginning to incorporate sustainability into not only the law office environment but also into legal education and the practice of law. Certain areas of law are adapting to incorporate sustainability concepts. Other programs have developed to address the traditional definition of sustainability- policies and strategies that meet society's present needs without compromising the ability of future generations to meet their own needs.<sup>1</sup>

The legal profession is a business. The triple bottom line of people, planet and profit has been a part of the legal profession for years. However, for some attorneys and law firms, these concepts are just now being implemented not only how they practice law but also how they run their businesses.

This paper will address efforts being made by law firms to become more sustainable, the impact of sustainability on legal education, and changing practices to help people better solve their problems.

## Introduction

This paper will present an overview of how lawyers and law firms are implementing sustainability into their businesses, and how law schools and the legal profession are adapting to sustainability and efforts to improve the experiences of people in solving their problems.

## Law Firms and Sustainability

In 2008, Meritas, an established global alliance of independent, full-service law firms founded in 1990, published a Green Guide for Lawyers, drafted by attorneys from the member law firms.<sup>2</sup>

The guide incorporates sustainability and triple bottom line concepts in an effort to provide law firms with areas in which they can either enhance their sustainability efforts or develop programs to become more sustainable.<sup>3</sup> It also attempts to incorporate the triple bottom line with respect to employees, the practice of law, and physical office space.<sup>4</sup>

Many of the concepts contained in the guide are not new or radical. They incorporate common sense ideas which make both economic and practical sense. These concepts include carpooling, use of public transportation, buying and reusing reusable mugs and glasses as opposed to paper or Styrofoam, and installing water filters rather than resource-wasting and landfill expanding individual sized plastic water bottles.<sup>5</sup>

Other basic office concepts which easily apply to any office setting include the use of environmentally friendly cleaning products, recycling, purchasing recycled paper products, printer cartridges and toners and turning out lights when not in use.<sup>6</sup>

Law firms, unlike many other businesses, are well known tree killers. Although the United States Federal Courts and many state and local courts are now using electronic filing to reduce the use of paper, the vast majority of legal work is still processed with paper. Utilizing two-sided copies whenever possible may not at first appear to be a radical or innovative idea, and while some may complain that this makes review of files and documents more confusing, this one small change will save untold forests of trees.<sup>7</sup>

In a green law office, attorneys are encouraged to perform a certain number of hours of *pro bono* (“free of charge”) services to environmental or sustainability organizations, as well as educating their clients and the public about these organizations through sponsored events, discussions or newsletters.<sup>8</sup>

Law firms are also encouraged to work with property managers or building owners to conduct energy efficiency audits, including the use of energy efficient appliances, water saving measures and reducing the amount of power used. Just as turning off the lights in unused offices and work spaces easily saves energy costs, so can powering down computers or installing motion sensitive switches in little used areas.<sup>9</sup>

The suggestions made with respect to the profit portion of the triple bottom line include law firms tracking their employees own energy and transportation consumption, water usage, energy costs and paper usage. Firms are also encouraged to engage in socially responsible investment options offered to employees through their 401(k) or other investment plans offered by the firm.<sup>10</sup>

Finally, law firms are encouraged to join other partnership programs, including Waste Wise, Green Powered Partnership through the U.S. EPA, to encourage sustainability among all sizes of law firms.<sup>11</sup>

The largest association of attorneys in The United States, the American Bar Association, has also recently established a Climate Change, Sustainable Development and Ecosystems Committee to better serve its members and their clients.<sup>12</sup>

### **Sustainability in Legal Education**

In many respects, the practice of law is reactive rather than proactive. Legal education is no different. Law schools in certain areas of the country have recently started offering classes and programs which business schools, including MBA programs, have been offering for some time. Various sustainability subjects in the business context, including triple bottom line accounting, contracting issues, securities law, supply chains of major companies and reporting the actual results of triple bottom line accounting are all part of incorporating sustainability into business and, by extension, the schools that teach business.

These concepts are starting to be studied by law schools in the forms of seminars and programs. Two of the law schools which have offered programs in sustainability related issues are the Lewis and Clark Law School in Portland, Oregon and Willamette University in Salem, Oregon.<sup>13</sup> Arizona State University is also developing a sustainability related program.

One of the first law school courses taught regarding sustainability was a seminar at the Lewis and Clark Law School in 2009 by Professor Amy Bushaw, who specializes in business law, and Professor Dan Rohlf, who specializes in environmental and natural resources law. These professors are teaching this seminar in the Spring of 2011. Just as sustainability is not limited to one area, the

seminar will focus on many different areas of law and sustainability as they relate to business, real estate, the environment and related legal issues, including contracting, land use and tax law.<sup>14</sup>

As sustainability continues to grow and encompass many areas of our economy, it is anticipated that sustainability related legal education will be offered at more law schools across the country.

## **The Sustainable Practice of Law**

The traditional definition of sustainability recognizes that all of society's needs must be met now and in the future. Society's needs include being able to live and work in environments that contain appropriate rules and regulations which bring order to our lives and businesses. Just as law schools have started incorporating sustainability into legal education, attorneys have also been adapting their practice areas to address the new challenges and impacts created by sustainability. Legal principles and regulations that have evolved over the years are now being revised to reflect the changes brought on by sustainable concepts.

For example, insurance claims for damages to business income and property damage or loss purportedly caused by the effects of climate change have raised questions and disputes of whether such events are covered by insurance policies. These disputes have started working their way through the court system. Also, existing standards and regulations are being revised to address changes to agriculture and business practices, among others, brought on by implementing sustainable concepts.

The push for clean energy and specifically the development of wind farms in Indiana and other states over the last few years is an excellent example of adapting existing areas of law to address new issues. Attorneys representing municipal bodies such as a county board of commissioners have adapted existing building and land use codes and ordinances, and in some cases created new ones, to allow clean energy technology to operate. Landowners and wind power companies have had to alter the traditional forms of land use agreements and create new provisions to adapt to the unique aspects of wind farms. Utilities are revising the way they do business with customers, changing and creating new regulations or policies to allow for or expand the ability of utilities to purchase energy from their customers.

Established principles of contract law are being adapted to address clean energy use in buildings including historic places which have greater restrictions on use or alteration. Companies have started contracting with building owners, institutions and businesses to reduce energy usage and costs in exchange for payments oftentimes tied to the actual reduction in cost. Land use contracts regarding wind

power must address events decades in the future related to the decommissioning of wind farms and removal of equipment to restore the land to its original condition.

As of late 2010 no litigation had been instituted against wind farms in Indiana related to claimed adverse consequences such as noise pollution or visual disturbances. This will likely change and when lawsuits do arise, the legal theories and defenses advanced will be based upon the evolution of law from earlier cases involving former “new” technologies such as claims against railroads involving land use, noise, damage and disruption caused by the iron horses.

As disputes arise and move through the legal system, the procedures for litigating and trying these cases will also be governed by existing rules of evidence and procedure. In Indiana, the alternative dispute resolution form of mediation has been widely used in non criminal matters for over sixteen years. It is now a well accepted method of resolving civil disputes including personal injury, contract, real estate and business litigation. The results are that many cases which used to be tried to judges and juries are now settled by the parties themselves with the assistance of a neutral attorney that serves as the mediator. The many benefits of mediation include an outcome that all parties agree upon. This results in less stress, less cost and less risk than trial.

Many of these new disputes will also eventually be resolved through mediation and means other than trial. The constant with all of these issues and disputes will be the role of the attorney in prosecuting and defending those involved.

Almost everyone knows a “good” lawyer joke. In my opinion, many of these jokes have developed because lawyers often help us through extremely difficult times in our lives. These jokes are perhaps a way to help us better cope with the emotions associated with these experiences. When we think back in our own lives to when we have required the use of an attorney, it has likely been an association with a less than pleasant experience. These could include the death of a loved one, divorce, being charged with one or more crimes, accidents and business deals gone sour.

The fundamental problems people face have not changed. These concepts and programs are attempting to achieve resolution by involving people to work together to solve their problems rather than having a decision made for them.

## **Collaborative Law**

Collaborative Law is one area in which attorneys have attempted to have a more positive impact- helping people get through difficult times in their lives with less stress and confrontation.

Collaborative Law is a way of practicing law where the attorneys for both parties to a dispute agree to assist their clients in resolving conflicts and reaching agreements using cooperative strategies rather than adversarial techniques and litigation.<sup>15</sup> In many cases, one of the only experiences a person will ever have with an attorney is if their marriage ends in divorce. Collaborative Law is based upon lawyers working together with their clients outside of the courtroom. In fact, the key to this concept is the promise that the lawyers will not engage in litigation if they are retained collaboratively.<sup>16</sup>

Collaborative Law was the brainchild of Stuart G. Webb, an attorney in Minneapolis, Minnesota. He had practiced family law for many years and, as is the case with many attorneys engaged in family law, was becoming burned out due to the adversarial nature of the practice. Since 1990, he has practiced Collaborative Law exclusively.<sup>17</sup>

Conflicts are a part of human life as well as people's work lives. For most, conflicts are not due to the actual day to day work itself, but instead involve disputes with co-workers. For many attorneys who focus their practice on the adversarial system of litigation, including family law attorneys, their work involves trying to resolve other people's problems. In the case of divorce, these problems are magnified as they involve personal relationships which have broken down, as well as the very real effects that divorce has on a family and the children, who oftentimes are unaware of anything taking place other than mom and dad fighting all the time.

Collaborative Law begins, as many attorney-client relationships do, with an initial conference. The attorney must assess whether or not the particular case would be appropriate for collaboration and, if so, to educate the client as to whether this is something they want to participate in. If the client decides to attempt the collaborative route rather than the traditional adversarial option, the client's spouse must also agree with the idea. The client must also understand that he or she will be more involved than the normal, traditional divorce case in working with their attorney to resolve the couple's problems.<sup>18</sup>

If the husband and wife both agree to use the collaborative process, they along with their attorneys participate in a series of meetings which include exchanges of information. They work to reach an agreement regarding all the aspects of their divorce together, rather than fighting it out in court and having the judge make these important decisions for them.<sup>19</sup>

If during this process one or the other spouse decides that they do not want to participate in the process, the attorneys must withdraw their representation. The couple will then each retain new counsel who will proceed with the case in the

normal procedure of hearings and ultimately trial, after which the judge will decide their fate.<sup>20</sup>

The Collaborative Law process, as outlined above, is designed to allow the parties themselves, working with their attorney, to make decisions that will impact their everyday life in settings that are far less confrontational and formal than a court room.

In a recent interview, Mr. Webb described the phenomenal growth of Collaborative Law both in the Minneapolis/St. Paul, Minnesota area as well as globally. There are now approximately one hundred sixty attorneys in the Minneapolis/St. Paul area that practice Collaborative Law. The atmosphere in which Mr. Webb and others practice is much more energetic and collegial. This is not only improving the ways in which peoples' problems are resolved but also greatly improving the quality of life of the attorneys helping them. Collaborative Law is now being practiced in many areas of Europe and Australia.<sup>21</sup> A uniform set of laws regarding Collaborative Law has been developed over the last few years and more information regarding this and related information can be found at [www.collaborativepractice.net](http://www.collaborativepractice.net).

One of my law partners, Mark Phillipoff, focuses most of his practice on family law. He was one of the first in the South Bend/Mishawaka, Indiana area to receive Collaborative Law training in 2007. Today there are approximately fifteen attorneys in the South Bend/ Mishawaka, Indiana area that have received this training. Mr. Phillipoff estimates approximately 10% of his family law practice currently uses the collaborative process.<sup>22</sup> The evolution of this concept has been gradual. This different way of practicing law will hopefully continue to find more and more proponents in the years to come.

### **Restorative Justice and the Mediation of Bullying**

Restorative justice emphasizes repairing the harm caused by crime.<sup>23</sup> This concept was the basis for the Truth and Reconciliation Commission in South Africa and became part of post-genocide reconciliation in Rwanda. Restorative justice has led several states to change their laws, including juvenile laws, to incorporate concepts of restorative justice. As more states begin to support such concepts, more of the key figures in the criminal justice system, including prosecutors, judges, public defenders, police officers, and victim advocates, will hopefully begin to effect changes in the system from within.<sup>24</sup>

Over the last several years, bullying has far too frequently garnered national media attention. Unfortunately, some bullying has led to disastrous consequences, including suicide committed by the individuals who were the target of bullying.



In October 2010, bullying and the aftermath of attempting to resolve the issues involved in a Massachusetts incident resulted in the alleged bully committing suicide.<sup>25</sup>

This incident highlighted the concern that when attempting to resolve the issues created by bullying, the welfare and well-being of both the bullies and their targets need to be taken into account. Barbara Coloroso noted following this incident that schools should institute “restorative justice” to support both the victims of bullying as well as the bullies.<sup>26</sup>

Restorative practices have become popular in schools and universities as alternatives to suspension and expulsion.<sup>27</sup> Thomas D. Sebok, Director of the Ombuds Office at the University of Colorado at Boulder, has studied whether or not bullying behavior in the university setting could be mediated.<sup>28</sup> Mr. Sebok helped start a restorative justice program at the University of Colorado at Boulder in the late 1990’s. While he successfully facilitated a bullying situation which led to a significant improvement of the relationship between the bully and his target, Mr. Sebok advised that in his experience such disputes are rare.<sup>29</sup>

Sebok notes in his recent article on this topic that he has served as a university ombudsman and has found mediation is often effective to help staff and faculty manage their workplace disputes. These disputes include issues of communication, respect, and trust.<sup>30</sup> The American Arbitration Association (AAA) and Alternative Dispute Resolution Consortium (ADRC) recommended that colleges and universities provide mediation as an option for faculty members who believe they are being bullied by colleagues.<sup>31</sup>

The Workplace Bullying Institute (WBI) has defined bullying as:

“...repeated health – harming mistreatment of one or more persons (the targets) by one or more perpetrators which take one or more of the following forms: Verbal abuse; Offensive conduct/behaviors (including nonverbal) which are threatening, humiliating or intimidating and; Work interference-sabotage-which prevents work from getting done.<sup>32</sup>

The most common western approach to dealing with wrongdoing, especially in the criminal justice system is based upon concepts of retributive justice. This includes seeking to determine whether any laws or policies have been violated, who is guilty of violating them and what the punishment should be for these violations.<sup>33</sup> Restorative justice, on the other hand, views wrongdoing as behavior that harms individuals and communities rather than as violations against “the state.”<sup>34</sup>

A restorative approach which could be used in bullying cases would focus on identifying: who has suffered harm by bullying; exactly how he/she/they were harmed; and how to best repair that harm. One restorative practice to address bullying is victim – offender mediation.<sup>35</sup>

This type of mediation focuses on the individual engaged in the bullying, as well as the focus of the bully's actions. Another approach includes friends and family members of both victim and offender, as well as any others affected by the bullying.<sup>36</sup>

These restorative practices could be useful for addressing workplace bullying using a model that has been used at the University of Colorado – Boulder. To be successful, the process would have to be voluntary for all of those involved. The person who bullies must acknowledge their actions and agree not to continue. This would be an alternative to formal procedures and only available when the parties agreed to the conditions.<sup>37</sup>

Just as with Collaborative Law, if these conditions were not agreed to by all, if there is no agreement reached, or if the agreement was broken, a mechanism would be required to be in place to refer the matter to someone with authoritative authority to conduct an investigation and issue sanctions.<sup>38</sup>

Those involved in potential mediation of bullying would have to be fully advised of the requirements of the process and agree to specific requirements of any such mediation conferences.<sup>39</sup>

## **Conclusion**

The legal profession has started to implement sustainable concepts not only in the physical spaces of law offices, but also in the way attorneys are educated, as well as adapting their practice areas to incorporate sustainability. Sustainability influenced legal concepts are proving successful to help people in the ways they solve their problems.

I anticipate such concepts may continue to be incorporated into other practice areas to better assist people which will in time improve society. By enhancing the people portion of the triple bottom line to improve their experiences with the legal system, both the legal system and society will achieve greater sustainability. Just as with other industries that are adapting to sustainability and concepts associated with the triple bottom line, the legal profession faces its own challenges to attempt to change perceptions and ways of doing things. By incorporating changes such as those discussed in this paper, significant improvements can be made to our society with the aid of the legal profession.

## Notes

---

- <sup>1</sup> <http://www.epa.gov/sustainability/basicinfo.htm> (Dec. 16, 2010).
- <sup>2</sup> <http://www.meritas.org>. The Meritas home page contains a link to the Green Guide for Lawyers under the Resources Section (Dec 16, 2010).
- <sup>3</sup> Id.
- <sup>4</sup> Id.
- <sup>5</sup> Id.
- <sup>6</sup> Id.
- <sup>7</sup> Id.
- <sup>8</sup> Id.
- <sup>9</sup> Id.
- <sup>10</sup> Id.
- <sup>11</sup> Id.
- <sup>12</sup> <http://www.abanet.org/envIRON/committees/climatechange> (Dec. 16, 2010).
- <sup>13</sup> Telephone Interview with Amy Bushaw, Law Professor, Lewis and Clark Law School (Dec. 16, 2010).
- <sup>14</sup> Id.
- <sup>15</sup> Stuart G. Webb and Ron Ousky, Collaborative Family Law Seminar Materials used at Indianapolis, Indiana, Nov. 29-30, 2007.
- <sup>16</sup> Id.
- <sup>17</sup> Id.
- <sup>18</sup> Id.
- <sup>19</sup> Id.

- <sup>20</sup> Id.
- <sup>21</sup> Telephone Interview with Stuart G. Webb, Attorney at Law (Jan. 24, 2011).
- <sup>22</sup> Interview with Mark J. Phillipoff, Attorney at Law (Jan. 21, 2011).
- <sup>23</sup> <http://www.restorativejustice.org> (Dec. 17, 2010).
- <sup>24</sup> Gordon Bazemore, Restorative Justice Offers a Better Way to Cope with Crime, SCOPE Blog (Mar. 30, 2010).
- <sup>25</sup> Shelley Murphy, *Specialists Say Bullies Also Need Attention*, *Boston Globe*, (Nov. 29, 2010).
- <sup>26</sup> Id.
- <sup>27</sup> Thomas D. Sebok, Can Bullying Be Mediated, Workplace Bullying Institute Blog (Dec. 8, 2010).
- <sup>28</sup> Id.
- <sup>29</sup> Telephone and email interviews with Thomas D. Sebok, Director of the Ombuds Office at the University of Colorado at Boulder (Jan. 28, 2011 and Feb. 9, 2011).
- <sup>30</sup> Thomas D. Sebok, Can Bullying Be Mediated, Workplace Bullying Institute Blog (Dec. 8, 2010).
- <sup>31</sup> Id.
- <sup>32</sup> Id.
- <sup>33</sup> Id.
- <sup>34</sup> Id. cf. James Rachels, "Punishment and Desert." In *Ethics in Practice*, ed. Hugh LaFollette (Malden Massachusetts: Blackwell Publishers, 1997) (p. 466).
- <sup>35</sup> Id; cf. Mark Umbreit, B. Vos, R. Coates and E. Lightfoot, "Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls." (*Marquette Law Review*, Volume 89, Winter 2005) p. 254
- <sup>36</sup> Id. cf. Mark Umbreit, *The handbook of victim – offender mediation: An essential guide to practice and research* (Jossey – Bass Publishers, San Francisco, 2001) (p. xxxvii).

<sup>37</sup> Id. cf. H. Zehr, *The Little Book of Restorative Justice* (Good Books, Intercourse, 2001) (p. 44)

<sup>38</sup> Id.

<sup>39</sup> Id.

## Bibliography

---

American Bar Association,  
<http://www.abanet.org/environ/committees/climatechange> (Dec. 16, 2010).

“Green Guide for Lawyers.” Meritas,  
<http://www.meritas.org> (Dec. 16, 2010).

Rachels, James, “Punishment and Desert.” In *Ethics in Practice*, ed. Hugh LaFollette (Malden, Massachusetts: Blackwell Publishers, 1997, p. 466.

Restorative Justice Online,  
<http://www.restorativejustice.org> (Dec. 17, 2010).

Sebok, Thomas D., “Can Bullying Be Mediated.” *Workplace Bullying Institute Blog* (Dec. 16, 2010).

Umbreit, Mark, B. Vos, R. Coates and E. Lightfoot, “Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls.” *Marquette Law Review*, Volume 89, Winter 2005, p. 254.

Umbreit, Mark, “The Handbook of Victim – Offender Mediation: An Essential Guide to Practice and Research” (Jossey – Bass Publishers, San Francisco, 2001, p. xxxvii.

United States Environmental Protection Agency,  
<http://www.epa.gov/sustainability/basicinfo.html> (Dec. 16, 2010).

Webb, Stuart G. and Ron Ousky, Collaborative Family Law Seminar materials used at Indianapolis, Indiana, November 29-30, 2007.

Zehr, H., “The Little Book of Restorative Justice” (Good Books, Intercourse, 2001, p. 44).

## Appendix

---

### Printed Resources

Rachels, James, "Punishment and Desert." In *Ethics in Practice*, ed. Hugh LaFollette (Malden, Massachusetts: Blackwell Publishers, 1997, p. 466.

Umbreit, Mark, B. Vos, R. Coates and E. Lightfoot, "Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls." *Marquette Law Review*, Volume 89, Winter 2005, p. 254.

Umbreit, Mark, "The Handbook of Victim – Offender Mediation: An Essential Guide to Practice and Research" (Jossey – Bass Publishers, San Francisco, 2001, p. xxxvii.

Webb, Stuart G. and Ron Ousky, Collaborative Family Law Seminar materials used at Indianapolis, Indiana, November 29-30, 2007.

Zehr, H., "The Little Book of Restorative Justice" (Good Books, Intercourse, 2001, p. 44).

### Online Resources

American Bar Association,  
<http://www.abanet.org/environ/committees/climatechange> (Dec. 16, 2010).

"Green Guide for Lawyers." Meritas,  
<http://www.meritas.org> (Dec. 16, 2010).

Restorative Justice Online,  
<http://www.restorativejustice.org> (Dec. 17, 2010).

Sebok, Thomas D., "Can Bullying Be Mediated." *Workplace Bullying Institute Blog* (Dec. 16, 2010).

United States Environmental Protection Agency,  
<http://www.epa.gov/sustainability/basicinfo.html> (Dec. 16, 2010).

### Interviews

Telephone Interview with Amy Bushaw, Law Professor, Lewis and Clark Law School (Dec. 16, 2010).

Interview with Mark J. Phillipoff, Attorney at Law (Jan. 21, 2011).

Telephone and email interviews with Thomas D. Sebok, Director of the Ombuds Office at the University of Colorado at Boulder (Jan. 28, 2011 and Feb. 9, 2011).

Telephone Interview with Stuart G. Webb, Attorney at Law (Jan. 24, 2011).