

How a Citizen Took on the Oil Refinery

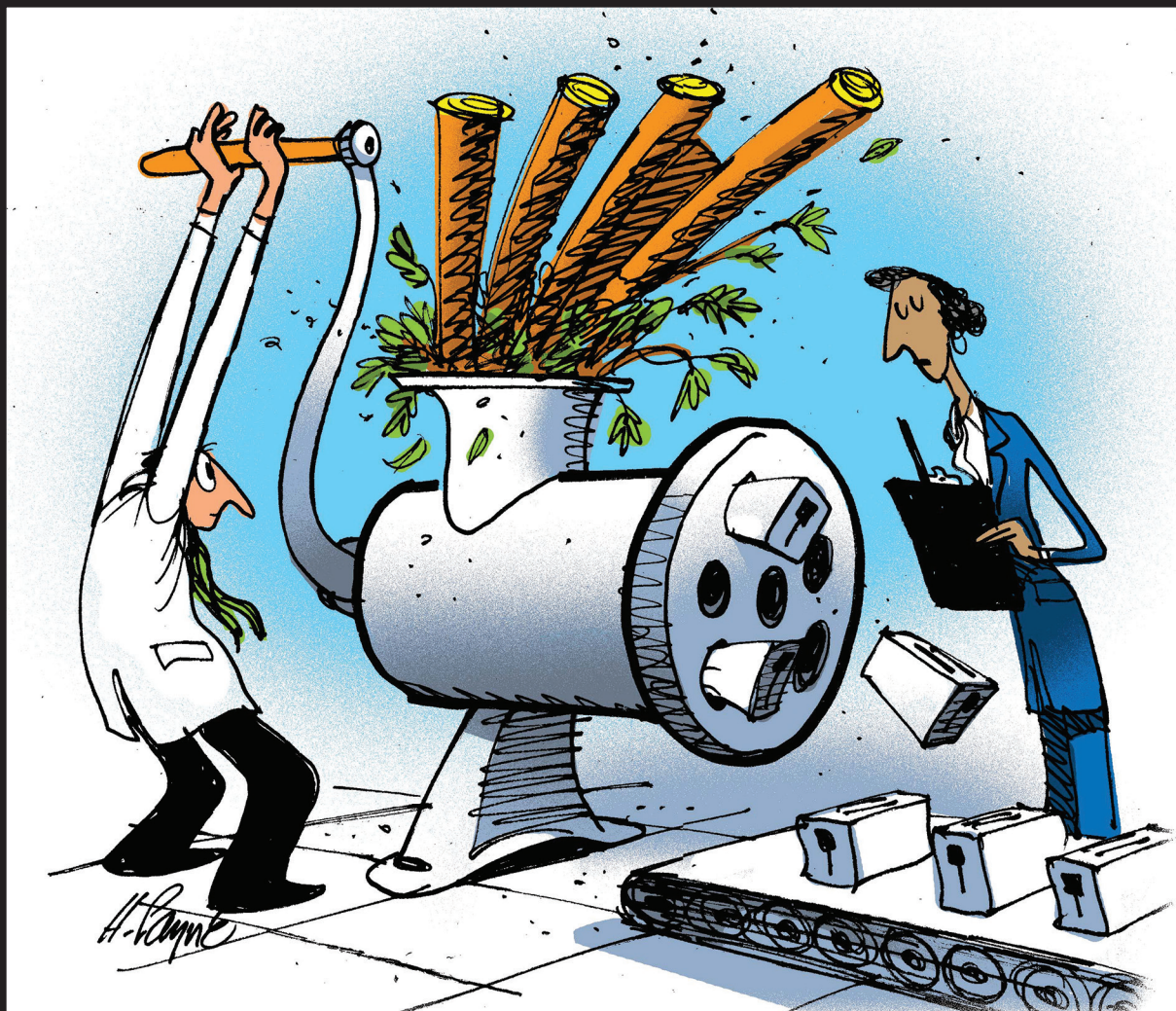
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The Environmental Law Institute's Policy Magazine for the Environmental Profession

Advocating for the Future

Attorneys in our varied roles need to step up and address the climate crisis for the sake of every person and for the public good. All lawyers must be sustainability lawyers now



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Carbon dioxide levels in the atmosphere are higher than they have been in three million years. Human influence on the climate is so great that we are probably moving into a new geological epoch, the Anthropocene. The effects of climate change — visible only to trained observers and in computer models several decades ago — are now apparent everywhere. And the best available science tells us we need to reduce greenhouse gas emissions to net zero or below across the globe by 2050, if not earlier, to avoid the worst effects of climate disruption. We have less than thirty years.

In this context, which has no precedent in human history, should lawyers just keep behaving the way we ordinarily behave, counseling clients, drafting legal documents, and litigating cases? Is that good enough? Are we called to do better — to be better?

The severity of climate change effects means that everyone is at risk and everyone should act to combat the threat. While attorneys are not affected more than others, they have the opportunity and, we argue, the *responsibility*, to confront this existential challenge and help achieve a better future. More than 1.3 million lawyers are licensed to practice in the United States. A fairly small share of these attorneys (about 64,000) identify environmental law as a practice area, according to the Martindale Hubbell directory. What would happen if a larger share of the nation's million-plus professional counselors takes constructive action to combat climate disruption?

There is widespread recognition that technology

developers, political leaders, educators, scientists, corporate leaders, planners, engineers, and activists have important roles to play in addressing climate change. And yet, the crucial role of lawyers is less widely recognized — even among lawyers themselves.

Ultimately, dramatic reductions in greenhouse gas emissions and systematic adaptation to climate change are not likely to occur without new and modified laws. Attorneys are needed to advocate, draft, help implement, and counsel clients about the many laws required at the federal, state, and local level. Legal changes are also needed in private law and governance — including supply chain contracts as well as certification, auditing, labeling, and reporting programs. Business clients and others rely on lawyers for advice on legal compliance, risk reduction, and other decisions that significantly affect the atmosphere's carbon load. Members of the bar are also in positions of influence in their communities. Leadership by every kind of lawyer is needed — including those in private and corporate practice as well as those in non-profit organizations, academia, and government.

The obligation to combat climate change is also based on the lawyer's responsibility for justice. The first sentence of the American Bar Association's Model Rules of Professional Conduct states that an attorney is "a public citizen having special responsibility for the quality of justice." The worst effects of climate change are, and will increasingly be, experienced by those with the least resources and thus among those with the greatest need for legal assis-

tance. As the climate crisis develops, the profoundly negative effects of climate disruption will increasingly challenge the stability of American democracy, the administration of justice, and the legal system that lawyers are sworn to uphold.

Long-standing rules of professional responsibility indicate that attorneys have a duty to explain climate change-related risks and opportunities to their clients. The Model Rules of Professional Conduct state that lawyers “shall exercise independent professional judgment and render candid advice. 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 client’s situation.” All states have adopted this rule. When attorneys conclude that climate change-related risks and opportunities exist, they have a duty to educate their clients about them.

Even though many rightly critique the legal profession as being far too slow in enlisting its members to lead in combating the climate crisis, there are some promising recent signs of progress. In 2019, the ABA’s House of Delegates — its chief policymaking body — adopted a resolution urging lawyers “to advise their clients of the risks and opportunities that climate change provides.” The resolution also urges “lawyers to engage in pro bono activities to aid efforts to reduce greenhouse gas emissions and adapt to climate change.”

The International Bar Association — the global counterpart to the ABA — adopted a “Statement on the Climate Crisis” in 2020 that builds on the ABA resolution. The IBA statement “urges lawyers, acting in accordance with their professional conduct rules and the rule of law, to consider . . . taking a climate conscious approach to problems encountered in daily legal practice.” This includes “advising clients of the potential risks, liability, and reputational damage arising from activity that negatively contributes to the climate crisis,” as well as acting “on a pro bono, volunteer or reduced fee basis, for those negatively affected by the climate crisis.”

The IBA statement also “urges lawyers, as influential figures and thought leaders within society, to live responsibly in the face of the climate crisis” by reducing “their environmental footprint” in “everyday actions” and by “supporting positive changes in the workplace, including adoption of more sustainable practices, such as greater reliance on electronic

file storage facilities and digital technologies, more energy efficient offices, and more climate-friendly travel and procurement choices.”

Importantly, the ABA resolution and the IBA statement support changes in law. The ABA urges all levels of government as well as the private sector “to recognize their obligation to address climate change and take action” to “reduce U.S. greenhouse gas emissions to net zero or below as soon as possible, consistent with the latest peer-reviewed science.” The IBA statement “encourages lawyers to engage with current and future legislative and policymaking efforts to address the climate crisis.”

Likewise, many of the mainstream businesses that attorneys represent are recognizing these realities and urging a better response. For example, in 2019 the Business Roundtable formally recognized that the purpose of corporations includes “embracing sustainable practices across our businesses” and that customers, employees, suppliers, and communities are to be considered essential stakeholders. In 2020, it issued a statement urging deep cuts in U.S. greenhouse gas emissions.

All of this suggests that professional and business norms are moving toward recognition that lawyers have a responsibility to combat climate disruption. This growing momentum comes from a variety of sources, including client interest in lawyer advisors who have knowledge and capability relating to climate change and sustainability. In addition, market forces are driving down the costs of clean energy and increasing the need for legal help with clean energy projects. Investors are increasing pressure on corporations to disclose the accelerating risks of climate change, and the public is demanding less-harmful consumer products. The election of Joe Biden and Kamala Harris, who campaigned on the most ambitious plan to address climate change yet put forth by any winning presidential ticket, adds to this momentum.

Law students and young lawyers, who want to make a contribution and to work in law offices or other organizations that value their views and aspirations, are an especially important force for recognition of an attorney’s responsibility. In October, an organization created at Yale, Law Students for Climate Accountability, published a first-of-its-kind scorecard on the role of 100 major U.S. law firms in climate change. It analyzed their litigation, transactional, and lobbying work, and assigned each firm a grade from A to F. These 100 firms, the report con-

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Imperatives for Action on Climate Change

TODAY, green lawyering can often mean doing your best to address climate change issues. Indeed, many scientists and economists view significantly reducing greenhouse gas emissions as essential for the health of both the environment and our nation's economy. The stated goal is reaching net-zero greenhouse gas emissions by mid-century, or "deep decarbonization." Lawyers have a key role to play in achieving this objective.

Within our nation's deeply divided politics, lasting solutions to climate concerns must be found. Much of this durability is likely to require solutions with bipartisan appeal. And a just carbon transition must not disenfranchise Americans, including those in inner cities, Appalachia, and various industrial and rural areas.

Though I work in Washington, D.C., my personal heritage is rust-belt Ohio. The decimation of industrial centers in the 1970s was not pretty to live through, making the fairness of a carbon transition of both societal importance and personal meaning. My perspectives here also come from lawyering in a variety of contexts: co-chairing a large law firm climate change practice, serving as a World Bank senior counsel on carbon finance, chairing the Climate Change and Sustainable Development committee of the American Bar Association, and working with an array of clients and lawyers.

Many carbon transformations can benefit a broad swath of Americans. Attorneys of all kinds should focus on these. The charge for lawyers — and policymakers — is to assess what can be done, learn the tool kit of policy and legal options, and bring about measures that are good for both the environment and economy.

Modelling and analysis of deep



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"Focusing on what is economic and sustainable allows us to move far and fast. Lawyers and other stakeholders should quickly work together to achieve these goals."

decarbonization in the United States point to several basic pillars. These include: deep decarbonization of the electric sector (which is well underway) and increased electrification and use of other lower carbon fuels; improving energy use efficiency; carbon sequestration through enhanced farming and forests and geologic sequestration; and reducing emissions of other, more potent greenhouse gases such as methane and fluorinated compounds. These pillars have been articulated in the federal government's 2016 Mid-Century Strategy for Deep Decarbonization and other subsequent analyses.

In addressing these pillars, lawyers have many varying opportunities to do good on climate change, often as natural extensions of their practices. Opportunities involve a broad array of legal work. The list includes project development, corporate advice, debt and equity, mergers and acquisitions, tax and securities law, litigation, energy and environmental regulatory issues, trade law, environment-social-governance advice, and various other aspects of advocacy and legal work. And opportunities arise in multiple economic sectors — electric power, transportation, manufacturing, tech, finance, agriculture, and others.

Focusing on what is economic and sustainable allows us to move far and fast. Difficult issues exist, to be sure, but proof of this practical approach is the dramatic carbon reductions in our nation's power sector that have taken place in the last 15 years, with broad recognition that electricity can be largely decarbonized, accompanied by various clean air benefits. Reframing or distilling climate change challenges into goals such as clean energy can make issues more manageable and likely to be agreed on, pairing metrics of investment returns, carbon reductions and sustainability.

Greed is not good. Doing good and doing well is very good. Market-based carbon regulatory approaches can be highly effective in deploying human and financial capital and technology to beneficial ends. This goes beyond traditional carbon pricing measures, though these can be quite important, to other market-aware approaches. Combined with additional targeted regulatory measures, carbon regulatory tools that take advantage of markets are likely key for our particular nation to durably address climate change and pursue sustainable development. Lawyers and other stakeholders should quickly work together to achieve these goals.

cluded, worked on 10 times more cases making climate change worse than they did on cases making it better. Only four firms received an A, while 67 received a D or F.

What, then, can attorneys do more of, or do differently, to combat climate change? The following suggestions are addressed to lawyers as professionals, citizens, family members, and members of various communities. These suggestions are illustrative, not exhaustive. They are intended to be both provocative and constructive.

To start, as part of their duty to clients and society, lawyers should work for better governance. It is impossible to address climate disruption and sustainable development unless we govern effectively at the federal, state, local, and international levels as well as in the private sector. Yet the level of partisan rancor and disagreement, particularly at the federal level and increasingly at the state level, makes it harder to address any significant issue effectively.

Better governance starts with adherence to the rule of law as well as the norms and guardrails that keep the machinery of government, commerce, and our legal system running. These norms include mutual respect, a willingness to seriously consider the views of others, respect for facts and science, civil discourse, and a commitment to the common good.

Lawyers should work toward better modeling of norms like these — in both public and private conversations, directly and explicitly emphasizing the importance of adhering to the rule of law and fact-based decisionmaking. They should maintain civil discourse and identify and even challenge those who reject or undermine foundational norms.

In addition to practicing and modeling civility, embracing sustainable development would help attorneys think more fully and clearly about legal options for the best course of action. Sustainable development is a lens or framework that lawyers can use to address nearly any issue, including climate disruption. The lens enables an understanding of the varied and cumulative risks and benefits inherent in a course of action that a client proposes. Rather than limiting the analysis to surface economic factors and clear legal risks, this approach goes deeper to help clients avoid costs and realize benefits. These benefits include opportunities to improve quality of life and combat the climate crisis. Thus, it is clearly advisable

that lawyers use the imperatives and facts behind sustainable development to educate their clients and organizational superiors.

When lawyers use sustainable development as a lens or framework, they see a wider range of legal tools to address a particular issue, including but not limited to environmental law. Because environmental law is necessarily and primarily regulatory, it tends to focus on what a client can or cannot do — including what permits are required, and what enforcement options are available. Ironically, many have come to believe that environmental regulation unnecessarily limits freedom. To the contrary, by protecting us from risks to health and other negative effects of pollution, environmental law helps secure the freedom of every citizen to live a long and fruitful life. The wider lens thus incorporates environmental law and is therefore additive because it puts more options and tools on the table — which is essential if we are to effectively address climate change. Sustainable development can redirect law to foster economic development along a new conceptual framework that treats development, equity, and the environment as mutually reinforcing rather than oppositional, supplementing and transforming traditional regulation.

How do lawyers acquire the skill, expertise, and knowledge to communicate sustainability choices to clients? A starting point is understanding what their clients do, what they want, and what they need. Counselors who do this work listen carefully to clients and learn the essentials of their clients' business and long-term goals and interests. They use their research and analytical skills to identify sustainability practices and principles that serve client needs and interests, flag negative effects as well as potential opportunities, and articulate legal options that incorporate sustainability principles. As time passes, and lawyers accumulate experience on these matters, they often find that new clients seek them out.

Lawyers can exercise such “thought leadership” without having decades of experience. Leadership, says James Strock, the first secretary of California’s Environmental Protection Agency, is about “inspir[ing] others to alter their thoughts and actions, in alignment with an empowering vision.” Many law students and younger lawyers aspire to make a difference in some leadership capacity. In the fall of 2020, more than 300 students signed up for a class called “Lawyers as Leaders” at Georgetown University Law Center — the most popular class in the school’s 150-year history.

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Meeting a Desire for Structural Change

OVER the last few years, as I reviewed volunteer projects to support, I have been restless. I have struggled when I considered any number of projects, within both the private and larger public sphere. Projects that might appear meritorious because an organization is well-known, well-funded, well-resourced may no longer match my expectations. The reason is that some organizations have historically only taken care of their own needs and ambitions with inadequate sensitivities to impacts on local inhabitants, indigenous flora and fauna, and habitat.

So what are my criteria for those unpaid projects that meet my needs? As challenged as our country and world are today, I seek volunteer work that makes me feel honorable. I need work that meets my desire for structural change, where the most marginalized populations and habitats are protected in a profound and not superficial way. Yes, I want to lead with my heart and spirit, and only then follow with my skills and talents.

Fortunately, I have found places that do allow me to fulfill my deep desire for joy and integrity in my volunteer work. So I will describe a few projects that happen to fit me. One is through the American Bar Association's Section of Environment, Energy, and Resources. I am working there with a committed team of attorneys and support staff under the vision of the leadership of our section to develop a pro bono program with the best of partner organizations. This initiative matches attorneys with volunteer projects. Our present and future partners have years of committed and humane programmatic actions that make better the lives of marginalized communities and the environments in which they live. They also have



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“Each of us has to decide whether or not to volunteer our time and our gifts that we have had the privilege to earn. I want to lead with my heart and spirit, and only then follow with my skills and talents.”

well-earned reputations for respect for those worlds that they impact. The leaders of these groups want to make a healthful and humane world that actually starts first and foremost with the local people, whether privileged or marginalized, flora, fauna, air, water, and land.

Other authentic and respectful projects are those that work not just in the eyes of the donor organizations and their volunteers, but also with the many members of the communities in which they place themselves. The usual approach has been to bring scientists from major institutions of higher education from developed countries to projects that they choose, lead, design, and judge for awards and grants in order to promote themselves, their careers, and charitable accomplishments. If there is any participation of local people, it is mostly at support levels with little chance for job advancement.

One additional organization that meets my criteria is based in New Zealand and another is in Ireland. They choose projects based on input from people living in the targeted area, projects often devised and led by the community members. Some of these projects provide opportunities for volunteers to live in the local communities or nearby field stations. These opportunities require a

willingness to learn and share skills and talents with a sense of humility toward those who live with fewer resources.

Although these organizations do not require legal counsel, the communities that they serve particularly value the skills an individual learns in law school and then exercises in legal practice. As an example, projects with New Zealand's International Volunteer HQ that would most benefit from attorney expertise are those that focus on NGO support in developing countries. There are a range of tasks required, such as business planning, grant writing, research, marketing, and fundraising. Volunteers can act as a business mentor providing guidance and assistance getting an NGO off the ground or taking it to the next stage. Assignments take place in locations all around the world.

I know that each of us has to decide whether or not to volunteer our time and our gifts that we have had the privilege to earn. There are competing needs on our limited time on Earth. I decided that it is necessary to my sense of self and my soul. The projects that appeal to me are those that work with a sense that all humans and their environments are worthy of generosity, equity, and fairness.

Attorneys must seriously consider working for, and supporting, legal efforts to reduce greenhouse gas emissions and adapt to climate change in their personal and professional capacities. One opportunity grows out of the comprehensive description and analysis of some 1,500 recommended legal tools to reduce greenhouse gas emissions in *Legal Pathways to Deep Decarbonization in the United States*, which was published by ELI Press in 2019, with Michael B. Gerrard and John C. Dernbach as editors. Federal, state, and local governments, and the private sector, need to adopt and implement such tools if we are to reduce greenhouse gas emissions to net zero or below by 2050.

The next stage of this project is drafting these recommendations as model laws that can be proposed, adopted, and implemented in various jurisdictions. More than twenty law firms as well as individual attorneys, law professors, and others are participating in this project on a pro bono basis. These model laws, in turn, are posted (with other resources) on a website created for that purpose, <https://lpdd.org>.

A striking aspect of this project is the participation of lawyers at all stages of their careers. Many retired attorneys, some of whom have not previously worked in environmental or energy law, including a judge and a recording industry lawyer, help manage this project. First-year associates at law firms also participate, helping to draft model laws pro bono. The project is an excellent example of an opportunity for lawyers to establish their careers along the path of thought leadership in addressing climate change. At some law schools, including Widener Commonwealth, Denver, and Vermont, students can take classes in which they draft model climate change and sustainability laws for local and state governments.

In addition to drafting model laws, another opportunity to make a difference is getting these or other proposed laws adopted. The Legal Pathways project is active in this as well. This work involves outreach to interested organizations, individuals, legislators, legislative staff, and media. And while Congress is obviously important, so are state legislatures and local governments. In fact, local government is a particularly important avenue for combating climate change and enhancing sustainability because local governments deal with the increasing number of climate-change-induced severe weather events; the need to repurpose commercial property as more people work and shop from home; and growing demand for walkable downtowns, mixed-use neighborhoods, and charging infrastructure for electric vehicles.

An important and sensitive issue is whether, when, and how lawyers should make the case for such actions in moral or ethical terms. To be sure, there are risks of an initial adverse reaction; clients and organizational superiors may have different views. Still, attorneys who listen carefully to their clients or superiors, and who develop good and trusting relationships with them, can carry out their duty to advise by identifying and connecting with specific values to help them maximize enlightened self-interest. Counselors who limit their arguments to law or include only economic, technological, or scientific analysis ignore the persuasive power of widely held ethical and moral norms. Principles such as intergenerational equity that are at the core of sustainable development have dramatic emotional and intellectual power when taken seriously. Pope Francis I explains intergenerational equity in a way that resonates within the Catholic religion as well as other faiths and philosophical traditions:

“Once we start to think about the kind of world we are leaving to future generations, we look at things differently,” the pontiff says. “We realize that the world is a gift which we have freely received and must share with others. Since the world has been given to us, we can no longer view reality in a purely utilitarian way, in which efficiency and productivity are entirely geared to our individual benefit.”

Other widely held values include the injunction to do no harm. Professor Victor Flatt, who teaches at the University of Houston Law Center, summarizes the moral norm underlying environmental law in this way: “no person should be allowed to harm another person for profit or benefit.” Additional powerful norms — many held by some traditional conservatives — include national security, conservation, prudent stewardship, accountability for the consequences of one’s actions, and the precautionary approach. Separately and together they can also help pave the way for political consensus.

Lawyers should consider building such principles into their explanation of various climate change options to clients, and in their advocacy on behalf of clients as well as to their organizational superiors. Again, context and audience matter, and sensitivity and mutual trust are required. Ultimately, clients have the final word, but many care about these principles. (For example, they care deeply about their own children.) Decisions that reduce greenhouse gas emissions and foster sustainability are more likely when decisionmakers understand the relationship

between their choices and the principles they hold close.

When members of the bar engage politically, they should include people with different perspectives, building alliances based on a shared understanding of the common good. Sustainable development should be capable of bridging the partisan divide, and there is evidence that it is already working, even where the term is not used. Because sustainable development seeks to further environmental protection, equity, and economic development at the same time, it requires the active and constructive participation of business — something that many in the business community recognize and appreciate. In fact, much environmental lawmaking over the past several decades has been directed at environmentally sustainable economic development. Statutes that require or encourage increased use of clean energy can be understood as climate change laws, but they can also be understood as economic development laws. These laws not only foster business growth, they create well-paying jobs.

Today, lawyers must also “walk the talk” on reduced greenhouse gas emissions and sustainable development. It is one thing to persuade clients and others to reduce their greenhouse gas emissions, and yet it is quite another to do it in one’s own office and at home. Such actions have both persuasive power and reputational benefit.

Attorneys, law firms, businesses, and organizations of all types should consider participating in one or more of the many efforts for walking the talk that already exist. For example, the Law Firm Sustainability Network, a nonprofit organization made up of firms as well as legal departments of major corporations, has launched the American Legal Industry Sustainability Standards, “a self-assessment tool that measures law firms’ implementation of environmentally friendly practices that promote energy efficiency, conservation of energy and resources, recycling, and related measures.” The organization also fosters information sharing on best practices.

The ABA Section on Environment, Energy, and Resources has partnered with LFSN to foster awareness of the standards and programs. The California Lawyers Association offers a set of model law office sustainability guidelines for reduced paper and energy use as well as purchase of more sustainable

products and services. In 2018, Lawyers for a Sustainable Economy, a partnership among 14 large private firms, Stanford Law School, and Stanford’s Precourt Institute for Energy, “committed to delivering \$23 million worth of free legal services by the end of 2020 to advance sustainability in energy, transportation, and land use.” For lawyers, walking the talk also means making similar efforts at home and through other organizations, and considering climate change and sustainable development in supporting political candidates and community initiatives.

Bar associations can do more to advance this work through resolutions, educational programming, organizing, and advocacy — at the international, national, state, and local levels. In 2009, the Oregon State Bar Association created the Sustainable Future Section — “the first state bar association section devoted to the relationship between sustainability and law.” Organizing and advocacy to accelerate the transition to a decarbonized and sustainable world would be particularly valuable leadership contributions.

Finally, lawyers should spread the word and organize others in ways appropriate to their circumstances. The challenges of climate change and sustainability are considerable, and so are the opportunities. But there is a finite and rapidly closing window for effectively addressing these issues. Like all professionals and all people, attorneys have a responsibility to preserve our planet and our quality of life. In our specific professional roles and, more broadly, as lawyers, we have a special responsibility for the quality of justice and the public good. We need to talk about these issues and how to address them, and encourage other lawyers of all races and backgrounds to participate. We also need to share legal tools and approaches that work, and support each other in doing so. It is not enough to do these things in our work or at home; we should step up our engagement with others.

On December 24, 1968, in lunar orbit, Apollo 8 astronaut William Anders photographed the Earth roughly 240,000 miles away. The picture, dubbed “Earthrise,” shows the grey lifeless Moon in the foreground with the Earth above and behind it — blue and green and alive and surrounded by dark space. More than fifty years later, Earth is still the only place we know where life exists. Notwithstanding remarkable success in implementing environmental laws, we face an existential threat from climate disruption. What will we as lawyers do, or do more of, or do differently, in response? **TEF**