

Special Advertising Supplement

A TEXAS LAWYER ROUNDTABLE SERIES:  
ENERGY/ENVIRONMENT

# It's Not Easy Being Green.



BROWN  
McCARROLL, L.L.P.



GARDERE WYNNE  
SEWELL LLP



SUTHERLAND ASBILL  
& BRENNAN LLP



GREENBERG  
TRAURIG, LLP



LYONDELLBASELL  
INDUSTRIES

JUNE 30, 2008 • VOL. 24 • NO. 13

**TEXAS LAWYER**  
Common law. Uncommon knowledge.  
ALM



## Some People Talk Green. We Live It.

GT shareholder David Ronn doesn't just advise energy companies on making their businesses greener. David and his family live in Houston's first LEED-H – that's Leadership in Energy and Environmental Design for Homes – certified house. Thanks to solar panels, low-e windows and other technologies, it's about 60 percent more efficient than a conventional home. Reducing your carbon footprint, while also decreasing costs – now that's something to feel green about.

GT's energy attorneys advise clients on:

Alternative energy projects | Carbon credits | Climate change issues | Corporate and transactional matters  
Environmental permitting | Litigation and dispute resolution | New energy technologies | Oil and gas exploration  
and production | Project development and financing | Regulatory compliance and governmental affairs | Tax planning

**GT** GreenbergTraurig

[www.gtlaw.com](http://www.gtlaw.com)

[1750 ATTORNEYS IN 29 OFFICES\* | USA LAW FIRM OF THE YEAR, 2007 CHAMBERS GLOBAL AWARDS†]

Prior results do not guarantee a similar outcome. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ©2008 Greenberg Traurig, LLP. Attorneys at Law. All rights reserved. Contact: David Ronn in Houston at 713.374.3500. \*These numbers are subject to fluctuation. †Greenberg Traurig was selected by Chambers and Partners as USA Law Firm of the Year, 2007. Photography by Dennis DeSilva of [www.BlueLemonPhoto.com](http://www.BlueLemonPhoto.com).

Polar bears are now protected due to climate change, the Supreme Court addressed the issue of global warming, gas prices are skyrocketing out of control, and everyone is talking about alternative energy sources and going “green.” So, it seems pretty clear there are a lot of issues on the forefront in the areas of energy and the environment. So with it being such a hot topic, the business department of *Texas Lawyer* gathered some of the top environmental and energy law experts to discuss these complex intertwined issues. The following discussion has been edited for length and style.

**MIKE ANDROVETT, moderator, attorney, journalist and owner of Androvett Legal Media & Marketing, Dallas:** . . . *I would like to start our conversation today by having each of you introduce yourself and talk a little bit about the nature of your work. What is the typical day at your job? Joe, if I could ask your indulgence, would you start us off today?*

**JOE F. SPEELMAN, associate general counsel, LyondellBassell, Houston:** A lot of you might know us as Lyondell. It merged just before the end of last year with a European and Asian company called Bassell, and we’re now a huge company with a ton of debt, like everyone else. My responsibilities are litigation, compliance and security for that entity. A day in my life, well, that’s pretty interesting. I’ve got about 15 major pieces of litigation pending around the country, everything from public nuisance, MTBE litigation and anti-trust cases pending in various places. I have about 30 internal investigations I have to manage across the corporation. And then I worry about whether or not our facilities are secure and whether we’re in compliance with various laws in various countries, and whether or not we’re subject to being attacked by people who like to blow up oil companies and chemical companies for whatever their motivation may be. So a day in my life is a little bit of all of that, and that typically involves about five major joint defense groups, where you spend more time worrying about and trying to deal with your codefendants in your joint defense than you do with the plaintiffs, and things of that sort.

**GERALD J. PELS, partner, Sutherland Asbill & Brennan LLP, Houston:** I chair the environmental department at Sutherland Asbill & Brennan LLP. What I do on a daily basis is to a large extent a lot like my colleagues. I work routinely on projects involving siting and permitting of energy, manufacturing and other types of facilities, and defending those facilities from permit challenges, and enforcement actions brought by regulatory authorities. We also evaluate options for energy investment from a legal perspective, assist clients in evaluating facilities and transactions for acquisition, and evaluate overall environmental risks and work to develop risk management strategies. I also work on a regular basis, with litigators at my firm, tag-teaming on a variety of types of environmental litigation, whether it’s citizen suit defense, Superfund actions and things of that nature. So my practice is very varied too, and every day is different.

**MARIANNE CARROLL, partner, Brown McCarroll, L.L.P., Austin:** I head up the energy practice. I also am chair of the administrative law practice. We do electric and telephone regulatory and environmental. I’m an energy lawyer. We also do labor and employment in our administrative law practice. I, and the lawyers who work with me, have a long history with the Public Utility Commission. That commission regulates just about everything that’s happening in the power industry, as well as telecom, although there’s much less happening on the telecom side these days. We assist our clients with all sorts of regulatory proceedings, certifications, investigations and enforcement actions, very much like Gerry’s practice on the environmental side. We also represent a lot of clients with respect to M&A activities. We’re a Texas law firm and we focus on Texas. For example, two of the largest utilities in the country were planning to merge a couple of years ago. We handled all the Texas aspects of that merger because both of the companies have generating assets here. We do a lot of power plant development, and there is a lot of that going on right now with respect to every kind of technology, from nuclear to gas to coal to wind and solar. I’m also the executive director of Texas Competitive Power Advocates, a trade association of 15 companies that own and operate almost all of the generating assets in Texas except for those owned by TXU and municipal and co-op utilities.

**RICHARD O. FAULK, partner, Gardere Wynne Sewell LLP, Houston:** I’m the firm-wide Chair of Gardere’s Litigation Department in its Dallas, Houston, Austin, and Mexico City offices. For some reason, the firm, looking at the current predominance of “green” issues, decided that it was good to have an environmental litigator as Chair of its Litigation Department. I’m also board certified appellate lawyer. Other than supervising over 100 litigators and dealing with their special problems, my practice is exclusively environmental litigation — and has been for 31 years. Right now, thanks to Joe and others, we’re dealing intensely with public nuisance litigation around the country. Plaintiffs’ lawyers are expanding that tort to eclipse product liability and bring virtually every non-fault cause of action under an environmental umbrella. I also chair the firm’s Climate Change Task Force and the Public Policy Litigation group, a part of the governmental affairs group, which deals with legislative reform issues, amicus brief writing for various organizations in state and federal courts around the country.

**DAVID L. RONN, shareholder, Greenberg Traurig, LLP, Houston:** We’re a firm of about 1800 lawyers worldwide. I work in the corporate securities group. So, I’m a little bit of a black sheep on this panel as the non-environmental or regulatory lawyer. I do work in the energy field and also the technology field doing M&A, securities, private/public offerings for mainly energy firms. I have a niche in that I do a fair amount of master limited partnership work, particularly in the midstream area. Also, I represent a variety of technology companies, particularly in the alternative energy space. I have done some solar, a little bit of wind, biodiesel and a variety of others. I’m also a member of our Israel practice and, as such, work extensively with Israeli companies developing alternative technology that they’re trying to bring to the United States and more and more to China. Then finally, maybe in part, the reason why I’m here is, besides my work, I also live a little bit on the climate change side of the world in that we just built the first LEED-certified home in the City of Houston. We can talk a little bit more about that, also.

**ANDROVETT:** *Panel members, when the energy roundtable last convened — and Marianne, I believe you were on this panel last April — the consensus was that energy law was a*



## MARIANNE CARROLL,

a partner in the Austin office of Brown McCarroll, L.L.P., counsels retail providers, generators, marketers and customers with respect to the Texas electric power industry. Her practice focuses on the review, negotiation, and drafting of legislation, regulations, agreements and protocols affecting participants in the Texas wholesale and retail electric power markets. Carroll also provides regulatory advice and counsel to equity investors, lending institutions and project developers in connection with the development, construction financing, acquisition and sale of electric generating plants and other utility assets in Texas. She also represents clients before the PUC in rulemaking proceedings and contested cases, including transmission line certification applications, and at the Electric Reliability Council of Texas (ERCOT). Carroll has been active on behalf of the independent power industry in the proceedings undertaken to restructure the wholesale market and to implement retail customer choice in ERCOT. She is currently the Executive Director of the Texas Competitive Power Advocates.

*booming area of practice. We talked quite a bit about the Barnett Shale development, the easy availability of investment capital and the development of alternative energy production. We also talked a little bit about climate change. Perhaps a lot has changed in a year. Panel members, what's the legal landscape in 2008 as you see it?*

**PELS:** One of the more obvious and important things that transpired in the last year was the *Massachusetts v. EPA* decision. In that case, the EPA was called to task regarding whether it should regulate or even has the authority to regulate greenhouse gases at the tailpipe. At its heart, the case was a standing case and the United States Supreme Court found that Massachusetts had standing, and held that greenhouse gases were indeed a pollutant as defined within the Clean Air Act — not that that's a reach, because if you look at the broad definition, any gunk in the air is going to be a pollutant. Further, the Court called the EPA to action to determine whether or not greenhouse gases were, in fact, going to constitute an endangerment to health and welfare. And we're still waiting for word of that from the EPA. In fact, there should be proposed rule making coming out fairly soon to help answer that question. That's a very important case.

**FAULK:** Things are definitely not the way they were. In my view, climate change is the controlling legal issue for the next decade, perhaps the next century. Business decisions, litigation decisions, tax decisions and securities decisions are going to be influenced by the climate change issues. These include emissions of greenhouse gases and how they're going to be regulated through cap and trade policy. Any company that wishes to exploit opportunities in the energy sector must be aware of the tremendous risks and opportunities raised by climate change. Whereas climate change legal issues seemed on the far horizon probably a year ago — an ethereal thing that people really didn't have to worry about — anyone who's read the Lieberman-Warner Climate Change bill needs to reconsider. Cap and trade will be here, not this year but sometime in the next administration, and lawyers need to inform their clients about it.

**RONN:** We can't lose sight of the fact that this is an election year. And I think that in part, some of the issues that are finally coming to the forefront, that really Rick was talk-

ing about in the context of climate change, really had to be consumer driven. And because it was consumer driven and there's an election year, it's a hot topic. For instance, yesterday, the chairman of the House Ways and Means Committee just introduced a bill to extend some of the renewable tax credits. Those deal with a variety of the energy topics and we can get into that some more. But, in some respects, the politicians are now trying to use the climate change issue as a little bit of a political football. I believe that it is going to be a dominating issue, but I think it has finally reached the level of public consciousness that is really starting to make a difference.

**CARROLL:** I would add that in the midst of this political attention to climate change and the impending legislation and litigation associated with climate change affecting our industry, we are also anticipating huge population growth, particularly here in Texas. I was at a fundraiser for David Dewhurst yesterday where he talked about predictions showing the Texas population doubling in the next 30 years. Doubling. You can imagine what challenges that brings to a state where the politicians are fundamentally opposed to raising taxes, but where we must ensure that we have power sources available to accommodate such growth. Moreover, world demand is driving up prices for all of the materials that go into building a power plant, no matter what kind of power plant technology we're looking at, and world demand is also creating shortages in those materials. Fuel prices are also going up, as everyone knows. Labor prices are going up. And all of that means we're going to see higher prices for electricity. That is going to be a hot topic at the next Texas legislative session, where members are sure to try to do something to try to hold down electricity prices. I don't think you can hold down prices by government fiat and still expect this industry to grow like it needs to in order to reliably accommodate population and economic growth.

**ANDROVETT:** *Since last year there's been a lot written about the credit crunch that started as a subprime credit crunch and now has extended beyond to other areas of the lending and servicing industry. Has that had any impact as yet on the development of energy?*

**CARROLL:** I recently worked on a financial closing for a company that is redeveloping a couple of power plants here in Texas. They aren't using new technology. It's combined

cycle, gas fired technology. Obtaining debt financing should have been easy. But the amount of equity that the borrowers had to contribute was almost 50 percent. So that tells me credit remains tight and debt financing is difficult.

**RONN:** There's no question about that. The deal flow has slowed specifically because of the credit aspects that are going on out there. Really, on the M&A side of the ledger it has not as much affected investment in new technology because, of course, those kind of investments are generally more equity driven or venture capital debt perhaps. But it has unquestionably slowed the ability for people to reach out and do deals or even think about what they're going to do, specifically because of the equity requirements that are required.

**ANDROVETT:** Go ahead, Joe. And after you give the answer, I want you to react to this notion of every few years we go through this outcry that energy prices are high, government gets involved and we need windfall profits taxes or we need to impose some pressure downward on prices. Talk a little bit about that after you answer about how an energy company navigates that as it continues to do business.

**SPEELMAN:** I agree with what's been said about slowdown of transactions. But the most important thing that you need to focus on is why. That's because we nearly had a financial meltdown in our entire system about two months ago. It was closer than a lot of people think. There's virtually no credit available for a lot of things. Let me give you an example. In the last two months, the price of crude has gone from \$110 to about \$127. On the average, anybody that is buying crude oil that uses it as a feedstock, has to have working capital in order to buy that. The requirement for working capital, which means money in the bank, goes up \$40 million for every \$1 rise in crude oil. So in the last two months you've seen a movement from \$110 to \$127. What that does is take investment capital out of the economy into a working capital pool in order for companies to continue to operate. Now, that's going to have an impact. It's already had an impact. It's going to have a larger one. So to answer the previous question, Mike, it's clear that that impact has been felt and was not intentional. And let's wrap the end of this up. What we haven't even seen yet is the main event, and that is the plaintiff bar's contribution to this entire process, which will be to try and swoop in

and do a low-side pass or drive-by shooting on the entire financial system. There's a public nuisance case filed by the City of Cleveland against all of the major banks, and while it's possible that the banks — in fact, some people working for those banks probably have committed good old-fashioned fraud; so, public nuisance is probably not the way to deal with that. But that is the way we will see it done. We will see the blunt instrument of litigation utilized on top of everything else. So add to that the fact that we haven't even seen the main event.

**ANDROVETT:** Let's talk now about climate change litigation. Richard, you authored an article, "Stormy Weather Ahead? The Legal Environment of Global Climate Change." If I might, let me just excerpt from that. You write, "Whether one believes is a matter of science the problem of climate change is real or imagined, exaggerated or understated, there is no doubt that the legal storm has already broken. And those legal issues present real risks and real benefits that can only be ignored at our client's peril." What did you mean by that?

**FAULK:** I was as serious when I wrote those words as I've been about anything I've written in the last 31 years. The legal storm of climate change, make no mistake about it, is here. Entrepreneurial firms, whether under contingent fees or pro bono, are filing lawsuits around this country against the auto industry, against energy companies, against governmental authorities, and oil companies, such as ExxonMobil and others, seeking damages for public nuisance arising from climate change. They claim that the nuisances are created by those entities' contribution to global warming through their releases of greenhouse gases. Now, that's just the litigation side — direct claims against persons allegedly responsible for climate change. The indirect issues are even more troubling. Some of you are aware of the permit opposition litigation that Susman Godfrey pursued last year on behalf of a number of cities pro bono against TXU. That litigation, and the resulting uncertainty about whether the permits would be issued, depressed TXU's stock to the point that a "green knight" — that's another one of my favorite terms — from Colorado was able to come in and take over the company. They then pursued the exact business model that the permit opponents desired. That was construed as a victory for the cities and environmental groups who pursued that



## RICHARD O. FAULK

is the Chair of the Litigation Department of Gardere Wynne Sewell LLP, which maintains offices in Dallas, Houston, and Austin, Texas, as well as in Mexico City. He also leads the firm's Climate Change Task Force and is co-chair of the firm's Diversity Committee. Faulk concentrates his personal practice in complex environmental litigation, including class actions and other "mass tort" cases involving multiple plaintiffs and defendants. He is a board-certified specialist in federal and state appellate practice and has argued cases before numerous federal and state trial and appellate courts, including, most recently, the U.S. Supreme Court in *Cooper Industries v. Aviall Services Inc.* Faulk has published more than 30 scholarly articles in his areas of practice, including his most recent articles with his partner John Gray, "Stormy Weather Ahead? The Legal Environment of Global Climate Change."



## GERALD J. PELS

is a member of the energy and environmental practice group and chairs the environmental practice for Sutherland Asbill & Brennan LLP. His practice focuses on all aspects of environmental law including environmental compliance, counseling, litigation, permitting, enforcement defense, emergency response, disaster management and brownfields redevelopment. Pels is a former adjunct professor at South Texas College of Law, where he taught environmental law and an Advanced Hazardous Waste Seminar for seven years. Pels is recognized by Chambers and Partners as one of America's leading environmental lawyers (2004-present) and is listed in The Best Lawyers in America, 2006-2007. Pels was also named as one of the Best Lawyers in Houston by *H Magazine*. Pels is a member of several environmental and industry organizations, including the Greater Houston Partnership's Environmental Advisory Committee and the Association of Chemical Industry of Texas.

litigation. Although the issue was resolved by the threat of that litigation — not on the merits — it led to a transaction that otherwise would never have occurred if someone had not had the bright idea to oppose permits on global warming basis. The last thing, and probably the most important thing that's happened in climate change litigation, happened yesterday — when the department of the interior decided to list the polar bear as a threatened species under the Endangered Species Act. I gave a speech about this around a year ago, and there were a lot of chuckles in the audience. The polar bear is now five times more populous now than it was 40 years ago. How can you have an endangered species when the species is increasing? Well, the Department of the Interior in the Bush Administration — a conservative administration — listed the bear yesterday. And what does that mean? That means that the Endangered Species Act, which is referred to as the “Pit bull” of environmental law — because once it gets its teeth into you, you can't get rid of it — is now going to influence all the major regulatory decisions and all the major administrative actions that are made in dealing with greenhouse gas emissions in the United States of America — to protect the polar bear. The Department of Interior secretary, Mr. Kempthorne, says, “Well, we're going to take administrative measures to kind of forestall all this.” Well, guess what? That's really not possible, in my view, because the Endangered Species Act is, as he referred to it, one of the least flexible acts ever passed by the United States Congress. So this issue is going to be the driving force for all sorts of litigation — challenging greenhouse gas emissions in permits, public nuisance litigation, anytime its necessary to recall the impact of greenhouse gases on global warming. Polar bears are cute creatures when they're little; but when they grow up, they are big and dangerous. Climate change is a very appealing issue. Green is an appealing color. But green also has teeth, and we need to see that — because it's on the way. So the legal storm is here folks. And you, your clients, your shareholders and other people that you're advising need to be acutely aware of it — because every single legal reform that has passed to make our judicial system and our other systems more conservative is in danger of being trumped by the green flag of climate change. And I'm not exaggerating.

**PELS:** Rick, I have to agree with you on two counts. First, I would never chuckle at a polar bear. They are pretty darn tough. Second, I think there will be an interesting wave of climate change litigation, and the theories that we're seeing are not even that novel. What we're seeing is an overlay of theories that have been used in other litigation being applied to alleged climate change damages. Let me give you a very interesting example. There's a case that was filed in, I believe, the Northern District of California, it's the *Kivalina* case. In that case, the claim is that global warming has contributed to an island becoming inundated, and the residents of that island are suing based upon claims involving global warming. In addition to the public and private nuisance claims that you would expect, their primary claim is conspiracy, basically a cover-up theory. This claim brings in elements that we saw in the tobacco litigation. And the claims are being made against a lot of the major oil companies. In essence, the theory is that these companies continue to produce greenhouse gases through their operations and products while they conspire to cover up the issue. I read an article on the case, and it is kind of interesting that it is being characterized as the “most dangerous case in America.” What the plaintiffs are trying to set up is kind of a damned-if-you-do, damned-if-you-don't-type scenario. Some of the evidence used to support their claims is actually publications put out by a number of the industrial companies where they acknowledge that they're trying to become “green.” The plaintiffs latch onto corporate statements and inferences that connect becoming green with the need to minimize greenhouse gases. At the same time, the plaintiffs are also going back and looking at statements made by these same companies where they were casting doubt on global warming. So the publications espousing a need and effort to become green are used as statements evidencing responsibility and liability, and the other statements made previously casting doubt on global warming are used as evidence of an industry-wide conspiracy. So it's fascinating litigation. There are also other types of potential theories of recovery and claims out there. Certainly, one that comes to mind could be a products liability-type theory, such as what we saw with MTBE, where arguments could be made that certain fuels are defective products because of the manner in which they release, or the

amount of greenhouse gases that are released. But I agree with you, Rick. There are a lot of opportunities for the plaintiffs bar to become very heavily involved in this area.

**ANDROVETTI:** *Let me back up a couple of steps. And pardon the pun, but is the jury still out on this notion that maybe global warming is not a man-made phenomenon or have we cleared that hurdle? I know there's going to be another in a long line of reports later this year that will declare that, "No, global warming is a man-made phenomenon." However, can you find a conflicting report? As I'm hearing you talk, it sounds like that course really is at the bar already.*

**FAULK:** Let me just address it this way. Each of the three existing presidential candidates has acknowledged man-made contribution to global warming. Most recently McCain this week gave a speech in that regard.

So, when you talk about "the jury being out," what's really happening may not be what matters. The reality that matters may be the political reality that Congress is hearing and the presidential candidates are hearing and espousing. This is an issue that is taught to children in nursery school.

And they grow up with these issues. And whether they are true or not, there is a widespread belief that anyone who goes in and tries one of these cases has to dispel. As we all know, when you try a lawsuit to the jury, you've got to figure out what their fixed beliefs are before you can hope to persuade them. And this is a pervasive belief in society. As a practical matter, unless we're really terribly interested in doing the mother of all *Daubert* hearings, I don't think that that debating science is the highest priority we're concerned about in planning activities for our clients.

**SPEELMAN:** We're at that intersection of law and belief. In almost all the articles I'm beginning to see talk about the end and everything else, but let's go back and look at this. First of all, I agree with Rick that intellect and science can be and periodically are overwhelmed by our legal system. What's

it overwhelmed by? It's overwhelmed by popular beliefs, some of which are religious in character. Not nature to character. In other words, a friend of mine once characterized the environmental movement as the modern urban atheist religion because, it has a belief and it has a lack of science to support it, all those things that you attribute normally to religion. But let's examine a couple of things. First of all, Greenland is called "Greenland" even though it's covered with snow, and it's white. I wonder why that is? And the answer is every 1500 years or so for as far back as we can determine, this Earth has warmed itself and will do so again. In fact, we're overdue for that. Greenland will indeed become green again, and then later it will become white again. That will happen. There are contributions being made. There's no question about it. First of all, you want to go purely on

the science, MTBE wouldn't be the pariah that it is.

Because of all the additives that you put in gasoline, that's the only one that is not a carcinogen. And yet it's the one that's being commercially banned by the plaintiffs bar. Why is that? Because routinely processes in this country, belief systems, overwhelm our law and overwhelm our

intellect. And we're not making progress when that happens. So my comment is, no, I don't think the jury is in on what is causing climate change, but I think the verdict is in, in other words, irrespective of the science. The science will become irrelevant. A friend of mine wrote a book called, "The Death of Science," and the premise of that book is simply this: Science is irrelevant. Science is managed by the plaintiff's bar. Science is managed by non-governmental organizations. And results are developed. For example, see what it is that the ethanol lobby has done to show you that a known carcinogen is better in your gasoline than one that's not. That is managing science, folks. And it's managed. And, therefore, it is dead. It is a victim of our legal system and how it operates.

**ANDROVETTI:** *So in advising a company*



## DAVID L. RONN

is a shareholder in the Houston office of Greenberg Traurig, LLP and has experience in a wide-range of corporate and securities matters, with concentrations in the energy and technology industries. As the owner of the first LEED-H certified home in Houston, he has worked with green building issues, including coordination with Mayor Bill White's green building task force. Areas of experience include representation of public and private entities (including securities offerings and mergers and acquisitions), master limited partnerships, energy trading, special committees in conflict situations or investigations and representation of venture capital investors and start-up entities. Ronn is also a member of the firm's Israel practice and spoke at the Israel Prime Minister's first Alternative Energy Conference in November 2006. He has been selected as a "Texas Super Lawyer" from 2005-2007 and was recognized by The Best Lawyers in America in 2008. Ronn received his J.D. from the University of Houston Law Center, his M.B.A. from Tulane University and his B.A. from Rice University.

"One of the interesting things about the climate change arena that's going on is that there are some incredible opportunities out there. And, just like any difficult situation, it not only creates problems, it creates opportunities."

— David L. Ronn



## JOSEPH F. SPEELMAN,

associate general counsel, Litigation Security and Compliance with LyondellBassell Industries, is one of the nation's most experienced and successful legal executives. As a native of Kansas with a distinguished military and corporate record, his leadership has transformed and inspired his staff and outside counsel to achieve extraordinary victories in all types of controversies. During his many years with Lyondell, Speelman developed a unique record of success by using effective plaintiffs' counsel in complex disputes. He also developed relationships with outstanding defense counsel who shared his philosophy. The pursuit of these aims produced a culture that accepts risks and values victories far more than mere results. In the course of his responsibilities, he has successfully presided over claims involving antitrust, complex environmental issues, mass tort litigation, internal corporate investigations, and complex international claims. While at Lyondell, Speelman has reduced total litigation costs by 80% — a noteworthy accomplishment in an age of escalating expenses.

*going forward, it sounds like you've identified a threat but not necessarily the why parameters of that. How do you go about either informing a company of the upcoming threats, and then how do you also manage your shareholder and your investment expectations going forward?*

**SPEELMAN:** Well, from a shareholder standpoint, my advice is to go private, which we did. And it's great. We don't have to worry about public shareholders. There are two things you should do to avoid litigation or the impact of it in this country. One, change the name of your company periodically because the plaintiff's bar can't find you. The other thing you have to do is go private, because there is a process out there that is very highly manipulated by the plaintiff's bar that has, as part of its angle, to put pressure on publicly traded companies. Now, if you're not publicly traded, you're immune to that pressure, and that's significant. You can make more reasoned judgments about litigation. So my comment about it is I think you're going to see more people going private, and you're going to see the obvious advantage to that.

**RONN:** Let's take the positive side of it for a second. It's not that I don't agree with some of the things that have been said, but I think from an advising a company perspective, it's also where are you going and what are the opportunities out there that present themselves for business. And one of the interesting things about the climate change arena that's going on is that there are some incredible opportunities out there. And, just like any difficult situation, it not only creates problems, it creates opportunities. As Rick mentioned earlier, whether cap and trade shows up, there's some incredible opportunities out there. CO2 sequestration, if that comes to the fore, would double the number of pipelines in this country over the next 15 years. That, for the energy industry, is a wonderful opportunity. One of the other ways to deal with climate change is just the efficiency of our systems. With coal, you only end up with about 5 or 10 percent of the energy produced by coal reaching the end user. Our systems are incredibly inefficient. So from a technology perspective and from an opportunity perspective, the companies that are looking and understand that this is the landscape, can look five or ten years down the road and figure out where are the areas that we need to be in or how can we change

our systems so that we can be on top. I think there are some really nice opportunities for those kinds of companies.

**CARROLL:** We represent an energy company that builds power plants. They were among the first independent power plant developers to come into Texas. They are nimble, they're very smart, and they've remained a privately held company. They come in to a market early, see opportunities and they build a power plant appropriate for the times. They are watching all the activity around climate change, and they believe that there will be some sort of national legislation for a cap and trade program, and they've decided to be ready for it. They have announced a plant that they're preparing to build out in West Texas near the Sweetwater area. It will burn coal and it will capture the CO2 on a commercial scale, which has not been done before. They are going to pipe the captured CO2 to West Texas oilfields, which are very close to that area, and use it for enhanced oil recovery. They anticipate about 17,000 tons a day of CO2, which can produce two barrels of oil. At a hundred dollars a barrel, that's more than a billion dollars a year in increased domestic oil production. They believe that the climate change legislation is going to increase the price of electricity, enhancing their revenues for the 600 megawatts of electricity they will produce. And they hope to earn early allowances. So they see opportunity in climate change legislation and are stepping up to the plate. They have filed their permit application with the TCEQ. They are continuing to watch what happens with the Lieberman-Warner bill, and they are poised to make a decision to go forward or not by the end of 2009.

**FAULK:** I sound like a doomsayer, but litigators at law firms are usually the last people clients want to talk to. The best advice coming out of this panel and other law firms is to "be ready for this." And you can get ready for this. There is a major energy company in this city that has actually gone through and knows its carbon footprint nationally — all the way down to the carbon emissions from its tailpipe emissions from its forklifts at its facilities. They have complied with the strict California standard, and they have done it nationally. You cannot measure what you don't monitor — so monitoring is a good start. A lot of people, consultants, law firms such as ours, are cooperating on carbon au-

dis do clients will know their situation when cap and trade comes in sometime in the next year or so. There are huge opportunities out there for clients to make money from cap and trade, but if you're waiting to see what's going to happen in Washington, to see what the bill really looks like, you're going to be so far behind that some of these more advanced companies are going to be way ahead of you. There is a competitive opportunity here, but you have to be ready to take advantage of it.

**ANDROVETT:** *I feel obligated a little bit, since we don't have a plaintiff's personal injury attorney on the panel here to play devils advocate. In light of your comments, a plaintiff's lawyer might say, "Well, hearing what you're saying, that being green is actually good business. And at the least, if you're doing all the right things, that's good business; and at the most, what's wrong with doing the right thing if it helps you escape liability? Why are we having this conversation? Why don't energy companies don't just do the right thing?"*

**SPEELMAN:** I've got an observation. Doing the right thing is great. It makes you feel good to go home and go to school and do the right thing. Listen, I'll tell you about the right thing. The right thing is to try to find something to extend the pool of gasoline, make it larger so that the cost goes down. That's the right thing. And do it with something that is better than what's in the gasoline and more efficient, makes the gasoline burn better and more complete, which reduces emissions out the tailpipe. That's a good idea. That's doing the right thing. And that's an idea that I just described that the Sierra Club, ten years ago, said was one of the ten best ideas ever to come out of industry. That's doing the right thing. And now we call that product MTBE, and it's being sued. What's interesting is: Where did they go after they got finished? They, being the refineries got tired of being sued for having MTBE in their gasoline so they said we're not going to use it anymore. We're going to use ethanol. Okay? That's doing the right thing. There we go. Let's get some bio-fuels going here. That's great, man. Nobody can complain about that. That's really doing the right thing. Okay. Now we have governments in India and China seizing warehouses where they have rice stored, because they don't have enough food. We have people in Kansas, Nebraska and South and North Dakota planting corn instead of wheat. Now, red winter wheat, in those states I just de-

scribed, is perfect, and that was the bread basket of the world. We were able to provide not only food for this country, but for the whole world at a reasonable price, which after all is something we ought to try to do. That is "the right thing." That's no longer the case. People are growing corn, which they have to irrigate, which means they have to go into the ground water. And it's already being depleted. What are they growing the corn for? Why are you growing corn in Kansas on un-irrigated land that used to grow wheat? The answer is they can sell the corn to ADM, and they can make ethanol and put it in the gasoline. And you know what? Somebody is going to get sued for putting ethanol in the gasoline because of the moral issue of whether or not we should drive a car or feed people. And the plain fact of the matter is doing the right thing shifts about every 15 minutes. So, I wish there was a legal standard that we could define and hang onto, because if we could do that, then the plaintiff's bar would have a legitimate basis. I think doing the right thing is just a way to issue an indictment on current behavior, no matter what it is.

**FAULK:** Let me make a little more substantive approach from a legal standpoint. And it's an important one. The tort of public nuisance, as it's now being advocated in the United States in the states of Rhode Island, California, Ohio and other places, has nothing to do with doing the right thing. The tort of public nuisance, as being defined and advocated there, basically says the only thing that matters is whether you have produced or created a situation that is unreasonable for the public to bear. It doesn't matter whether you knew what you were doing was wrong. It doesn't even matter whether you were negligent or not. What matters is the condition. So what's being advocated these days is not anything dealing with blameworthy conduct. Blameworthy conduct is out the window. That's their goal. Why in the world are they suing the mortgage industry in Cleveland, Ohio, over subprime issues? The reason is they don't want to have to prove fraud. That's why. They want to use public nuisance because, in their view, public nuisance doesn't require blameworthy conduct. This is an absolute monster of a tort, and those aren't my words, those are the words of the New Jersey Supreme Court — which rejected the tort, as argued in that state, because it was so amorphous, so vague, so difficult to apply, that it



## MIKE ANDROVETT

is in business to make sure that his lawyer clients get positive news coverage and their law firms are marketed effectively through advertising and public relations. Androvett is the founder of Androvett Legal Media & Marketing, the largest public relations and advertising firm in the Southwest exclusively devoted to lawyers and the legal profession. Established in 1995, Androvett Legal Media serves the specialized needs of law firms in communications with outside audiences, including news media coverage, brochures and Web sites, and sophisticated advertising of all kinds. Androvett's firm assists lawyers in virtually all areas of practice while observing the highest ethical standards. Lawyers and their clients who receive media training from Androvett Legal Media are much better prepared to deal with reporters and TV camera crews. And, as a former chairman of the State Bar of Texas Advertising Review Committee, his expertise and experience is essential to firms seeking to comply with the state rules governing lawyer advertising. Androvett and his team take the mystery out of public relations and advertising by recognizing law firms' true goals and providing the know-how to make them happen. He can be reached at [mike@legalpr.com](mailto:mike@legalpr.com) or 214-559-4630.

## ENERGY/ENVIRONMENT

would be a monster that would devour the whole law of tort. Well, think about that. Apply that to yourself, sitting there operating your chemical plant or refinery in compliance with an existing permit, releasing emissions of greenhouse gases. Do you think that this tort is going to excuse you from creating a public nuisance because you're complying with an existing permit? Think about it — because it's being advocated that permits do not matter. What matters is whether you've created a harm to the general public. I'm not saying that's right. I'm not saying that's necessarily the law, but the law is in a state of flux over this issue. Major coalitions now exist, one being the Coalition for Public Nuisance Fairness in Washington, D.C. They're taking action to bring this issue to the fore. And it needs to be publicized — because if we really care about doing the right thing, doing the right thing should matter when it comes to liability.

**PELS:** This may not be exactly on point, but there is a certain unintended consequence that is often lost on many. That is, while the concept of doing the right thing is important, we need to recognize that at some point the burden will in all likelihood ultimately be passed on to the consumer. I guess where I'm going with this is that as gasoline prices get higher and higher, we will hear a mantra that we need to do something to mitigate those costs.

The focus rightfully becomes alternative-type energy sources. But as more and more conventional sources of energy are challenged by environmental groups, by the plaintiff's bar, and things of that nature, the alternatives are not necessarily ready. They're not proven, and there will be increased costs associated with their development and use. The facility that Marianne mentioned on which her client is working is a great idea, and it's great technology. It's probably going to be one of the first plants of its nature, but the cost per megawatt is higher than conventional power facilities, and that will ultimately have to be passed on. Let's take it a step further. If the

cost to build facilities like these in the United States is increasingly high and the return is less, where will United States investment dollars go? China is building coal plants, including IGCC plants, like they're going out of style. So that's an unintended consequence. Clearly, while we are talking about doing the right thing, there has to be a balance. Joe mentioned the ethanol issue. Well, there has been an increased emphasis on ethanol and what happened to grain prices, to rice prices. I think ultimately where we end up is to meet the energy needs, there needs to be a balance. We need to see how all of these types of energy sources fit within a reasonable portfolio to satisfy our power needs.

**ANDROVETTI:** *Marianne, as the average price of a gallon of gas is now something like \$3.63, how does that dynamic that he described play into, say, wind energy?*

**CARROLL:** Well, there's been a huge rush of investment capital to alternative sources of energy. I went to a conference in New York

City the summer before last on renewable energy finance. It was

a ballroom in the Waldorf Astoria that was probably at least ten times as big as this, and it was packed with suits. Wall Street money is crazy for renewable energy. There were people from all over the world in the energy finance sector and in the development sector, talking about deals. We

have recently started representing

the Solar Alliance, a group of manufacturers looking to Texas for the development of large, utility scale and rooftop solar facilities. First Solar's stock price rose 1700 percent since January of 2007. So there is a lot of money going into these industries, and it's an exciting space to be in. We are representing a client who sold his wind energy company to Babcock & Brown, a large, multi-national infrastructure construction company. Babcock & Brown is now a major player in wind development. Along with PPM, Babcock is building a 200 megawatt wind power project on the Kennedy Ranch in South Texas. Both of those wind power projects, as well as the transmission facilities to interconnect these

projects to the grid, are located entirely on the Kennedy Ranch. Well, it turns out that their neighbor, the King Ranch, doesn't like wind turbines. The King Ranch put together a consortium of Audubon Societies, and they call themselves the Coastal Habitat Alliance. You can go on the Web, [coastalhabitatalliance.com](http://coastalhabitatalliance.com). They are alleging that these wind projects will be interfering with the great migrations of birds that fly down through South Texas on their way to South America. And they're worried about avian mortality. And my client is saying, "I was in the oil business, successfully sold my company, and retired early to do art for a couple of years. I was flying from England to the United States one day and looked out the window to see all these wind power projects along the coast of England. I thought, how perfect. I'm going to get into that business and do the right thing by the environment." And now he is being sued by the Coastal Habitat Alliance. The CHA tried to stop construction of the transmission for the wind farms by intervening in the PUC approval process, saying they were affected persons just because they enjoy birds. The Public Utility Commission denied them standing to intervene on that basis, recognizing that such precedent would jeopardize all the transmission construction for all the wind projects out in West Texas. So the CHA is now suing my client in federal court under the Coastal Zone Management Act. They have also threatened to sue under the Clean Water Act and the Endangered Species Act. That's just an example of what happens when you think you're doing the right thing.

**RONN:** Maybe one more thought on that topic. I may be in the minority here, but I think high gas prices are great and not from the gasoline company perspective. But the answer is we're really stupid race of individuals. I mean, we don't do anything unless a 2 by 4 comes and hits us across the forehead. And high gas prices are the 2 by 4. And so I'm sure a lot of y'all read Tom Friedman, who a year or two ago was advocating a dollar gasoline tax. Well, we ended up with it, without the money in necessarily the government's hands, which may end up being a good thing. I think the issue is that we're not going to change the way we operate without making significant investments in technology and without changing the way that we do things from a technological perspective. Look, wind and solar and geothermal, et

"I don't think you can hold down prices by government fiat and still expect this industry to grow like it needs to in order to reliably accommodate population and economic growth."

— Marianne Carroll



# THE COMING STORM

Legal Knowledge. Human Wisdom.

# GARDERE

Austin | Dallas | Houston | Mexico City | [gardere.com](http://gardere.com)

## Are you ready?

Environmental issues loom on the horizon for many businesses. Despite the growing buzz, do you fully know the implications for your company? The actions you take now will determine how you'll weather the storm.

Gardere attorneys are experienced in new and developing areas of environmental regulation, with expertise encompassing the entire range of environmental, toxic tort and oil and gas litigation.

In a climate of change, the forecast is uncertain. Survival comes with preparation.

[www.gardere.com/climatechange](http://www.gardere.com/climatechange)

## ENERGY/ENVIRONMENT

cetera, are great, but right now they are just a drop in the bucket on the energy side of things. And we are not going to totally get rid of our oil or coal dependence, and we probably shouldn't. But there are different ways to go about doing it. So whether that becomes some kind of nanotechnology that ends of taking over the way we run the grid, whether it ends up being a variety of efficiency technologies, the benefit that we're going to see from these high gas prices is not only from the consumer's perspective, demanding that you end up with, for instance, better efficient automobiles or electric vehicles. Some have said that in another 15 years we may have double the number of electric vehicles on the road than we have as the total number of automobiles today. But, then, how do you deal with the electricity? So it really is an efficiency concept as to where we're going. The high gasoline prices really make a difference in being able to shove us in, "the right direction."

**SPEELMAN:** What you're talking about, I don't disagree that sometimes all our entire culture has lurched in reaction to things, whether it's a war in Europe or something else. We've lurched, and that's forced technological innovation. But do you know what innovation requires? Innovation requires at its base that innovation be allowed to happen. Some of the companies represented here today were very innovative in trying to find ways to make gas better. Now, those are foot-steps. They're not giant leaps. But that's how innovation gets done. But if you get sued at every step of the way with a blunt instrument called a lawsuit, then after a while innovation goes away. Now, here's the problem. I would agree that it would be great if we could move in a direction where we have better energy that is better for us and cheaper. But how are we going to get there? We're not going to get there unless somebody comes down in a spaceship and says, "Hey, we found out about it a hundred thousand years ago, and you can have it for free." Unless that happens, we're going to have to do it ourselves and we have

to have an innovation. Innovation is taking place right now. It's in Europe. It's in the Middle East. It's in China. It's not here. You want to know why? Because the only thing besides jazz that is uniquely American is the American plaintiff's bar, and it is overwhelmingly inhibiting our ability to be innovative people. So I like what was said

"The only thing besides jazz that is uniquely American is the American plaintiff's bar, and it is overwhelmingly inhibiting our ability to be innovative people."

— Joseph F. Speelman

about innovation, the need, it shoves us. But the equal shove in the other direction is the blunt instrument of the lawsuit, which kills innovation. And we've got to stop that, folks. I mean, just think about it. It makes sense.

**ANDROVETT:** *I'm sure some of you on the panel may take exception to this, but as I'm looking at this litigation, even surviving summary judgment is a major pain for a corporation who now has to go through discovery and all that entails. But as I'm looking in these climate change cases, since we're talking about lawsuits, it seems to me as a lawyer that there's some real causation problems at many levels. There's a lot of fanfare when the lawsuits are filed, but I'm not seeing, at least yet, companies paying big amounts that would inhibit innovation or original thinking. Am I wrong about that?*

**FAULK:** Let's just look at it this way. There have been four to five major climate change actions filed in the United States, all of which at least have been dismissed at the early stages because of political question issues, justiciability issues or standing questions. None of those cases have yet reached past the threshold to get to the merits of the controversy. Virtually all of these cases have been filed in federal court. None of those submissions have gone to plaintiff-friendly state courts, for example. And so, yes, climate change litigation is probably two to three years old. But it's a little bit early to say that these threshold defenses are always going to work. Virtually every major defendant wants them to work

— because what happens when they don't? Well, the answer is — discovery happens. And the best example of that happened in the TXU litigation. The biggest break in that case occurred when the administrative judge in Austin, Texas, allowed plaintiffs to do discovery against TXU on climate change and greenhouse gas issues. That was difficult discovery. That was intensive and expensive and hard-nosed discovery. And I've had private conversations with counsel in those cases to verify that was a huge issue in the case. And if you look at the Kivalina case that's filed out in San Francisco, which we were talking about a while ago, the pleadings in that case against ExxonMobil and some of the other companies are quoting materials from their web sites. If they have access to that, what's going to happen when you get past the threshold and get into the gnarls of discovery? Now there are companies sitting in this room who are not going to be intimidated by that issue. But I will tell you, after 31 years of representing companies, that not all companies are willing to stand up and fight all the way through a nasty discovery battle that drags through all of your company's corporate history. That is expensive, and it is difficult. So once we get into discovery issues — and a lot of people hope we don't — and once you get to the summary judgment stage, there is going to be a reckoning as to who's going to stay in the fold and fight it and who is not. And those who fall out are going to be financing the next range of lawsuits coming down the pike. It's a slippery slope. So yes, there's not

"I think there will be an interesting wave of climate change litigation, and the theories that we're seeing are not even that novel."

— Gerald J. Pels

much going on as far as anybody paying a lot of money yet in climate change litigation — unless you consider the TXU intimidation to be a major result, which I do.

**SPEELMAN:** One observation. I think we've already seen innovation squashed to some extent. The people in France pay much less per kilowatt for electricity in their grid than we do. And the reason why is they committed to nuclear power a long time ago. They weren't as overwhelmed by self-doubt about the innovation as we were. And they didn't have a developed plaintiff's bar that snuffed that out. So, as a result, they now have a

competitive advantage. And we're now talking about nuclear power again. And I predict that will be short-lived, because people will threaten litigation to stop that development. So I think that's an example that comes to mind immediately of a situation where innovation has already been snuffed out.

**ANDROVETT:** . . . *David, in your introductory comments you were talking about building a LEED-compliant home. Can you talk a little bit about that and some of the benefits and also challenges for not only you but then your clients in building compliant, LEED-compliant, so-called green buildings.*

**RONN:** Sure. For those of you who aren't familiar, LEED is Leadership in Energy and Environmental Design. It's an organization that has been certifying commercial buildings for quite a while. They just started up their LEED-H or LEED-Homes program. My house was the pilot home for the southwest for that LEED-H program. It was really an interesting process, and it gave me kind of an interesting insight into where public sentiment is. When we started planning this house, now almost four or five years ago, in Houston, it was pretty difficult to find people, subcontractors, builders, that knew anything about what was going on in trying to build a green house. We didn't live in Austin. We didn't live in California. It was a different environment. And that has changed dramatically. The LEED-H program actually didn't kick in until we had already started construction. So we worked with them to be able to help define the criteria by which you could be certified. And there are various levels of certification. There's certified, silver, gold and platinum. Our house made the gold level. But it really isn't that difficult. What it really is about is thinking about what you're doing from not only an energy perspective but from a water perspective and from a garbage perspective. I think you may have noticed, for instance, every new building built on the Rice University campus now is required to be LEED certified. I think the main benefit of the LEED program is it now gives both commercial and residential builders and owners a guideline. You don't have to do everything. And some of the stuff is, grant you, a little bit out there, but it depends on what you want to do and how much you want to spend, what your budget might be, how you make it work. What's nice is now there is this criteria list that you can look through

and think about, "Okay. Well, instead of ordering marble from Italy, where the marble has to come all the way across the ocean, and there's a lot of energy expended to do that, maybe I can use a different kind of material that's produced right here in Texas." Those are the kind of ideas that come across in thinking about what you're doing. I recognize I'm maybe a little more on the strong side here, but I truly believe that we can change things one house or one building at a time. The whole green movement, if you will, or the climate change concept, is not going to be one idea. It's going to be a mixture of a lot of ideas. One piece of that, as we talked about a little bit, was energy efficiency. You just make little changes. For instance, it's not a LEED concept, but the state of California changed most of their public lighting to LED lighting. They're saving an enormous amount of dollars and CO<sub>2</sub> emissions with respect to the creation of that lighting aspect. So those are the kind of things that you can think about.

The difference that I saw between when we started building the home to today is that the resources now are available out there to be able to accomplish those kinds of goals without really hitting your head against a wall in a very difficult fashion. So it's here. It's still moving. We've worked with the City of Houston. They formed a green task force. As y'all know, Mayor White is very much in favor of these concepts and came out to the house to take a look. They're thinking about changing some of the building codes. When the inspectors show up at the home, they're say: "How do you do this? What do you do there?" And so it was quite an educational process. But I think that's what it's going to take. It's going to take people one at a time educating their neighbors.

**ANDROVETT:** *You are a pioneer. No doubt about it. I can just imagine the extra time and effort that that took to get accomplished.*

**RONN:** It was a blast. We had a great time.

**ANDROVETT:** *How long did it take you?*

**RONN:** The actual construction took 17 months, but the planning before that

probably took, oh, maybe about two-and-a-half years.

**AUDIENCE MEMBER:** *I have a question about cap and trade. I've been to several seminars, and I've come to the conclusion that it's a money-making proposition that the legislature wants to pass. And why have any cap at all? Can't we just go forward with trying to do something where we don't have these issues and find some way that every single industry doesn't have to trade for caps? That everything goes into something that is more environmental, more of the cycle of life where one complements another? What's your bend on that?*

**ANDROVETT:** *And for our readers, quick summary of cap and trade, whoever is going to volunteer to weigh in.*

"Every single legal reform that has passed to make our judicial system and our other systems more conservative is in danger of being trumped by the green flag of climate change."

— Richard O. Faulk

**FAULK:** Cap and trade is simply defined as this: It caps the amount of greenhouse gas emissions that you can produce. And to the extent that you can produce less greenhouse emissions under the cap, that generates credits or allowances

that can be traded to people who exceed the cap to reduce their responsibility. The program therefore reduces the overall amount of greenhouse gas emissions. It's a very elegant and simplistic solution, supposedly, to a very complex problem. Capping is politically a real deal. That is the entire goal — to somehow reduce overall the amount of greenhouse gas emissions in some sort of measurable way. Legislatively and politically, there has to be a measurable reduction to greenhouse gas emissions. Legislatively and politically, there must be a market-based solution that gives people financial incentives to comply. And that solution supposedly has bipartisan support. We're going to regulate you, but we're also going to give you a chance to trade and make some money. But that's not the most efficient and effective way to get this done. The most efficient and effective way to get it done is to enact a carbon tax — to make sure that people are taxed according to their production. That gives people an incentive to pay less taxes. But that program has not been accepted. Certainly, Lieberman-Warner doesn't have that

## ENERGY/ENVIRONMENT

program. And what's even more interesting is that Lieberman-Warner does not contain a preemption provision that says that once you're regulated by the feds and you've done cap and trade by the feds, you're home free. No. The Lieberman-Warner expressly allows the states to regulate in a stricter manner. So guess what? You're going to comply with Lieberman-Warner, as currently phrased, and then you're going to have to comply with cap and trade provisions in the regions that band together in the states. In California alone, for example, you could literally have a multitude of compliance issues. You're absolutely right. It's not the most ideal situation. It's not even the best situation. But it is the situation that's going to pass, and unfortunately it's going to pass unilaterally before the United States, China and India ever come to grips with the fact that we're going to lose our competitive advantages in the world. China and India are going to produce a great deal more greenhouse gas emissions, and we're going to produce a great deal less because we force our companies to do so. Our economy is going to suffer and theirs is going to boom. These are an inevitable consequence — a political inevitability that's going to be very difficult, if not impossible, to derail.

**PELS:** I'm not prepared to agree with Rick that a tax on emissions is the most efficient and practical way to ensure emissions reductions. One of the intents behind a cap and trade program, as outlined in the Lieberman-Warner bill, is an approach to give industry a reasonable amount of flexibility to determine how they will be able to reduce greenhouse gas emissions. A tax, for example, might not actually result in a reduction of emissions, but, in fact, could leave us with a situation where certain businesses are deciding that it may be more cost effective for them to pay the tax — and imagine this — pass on those charges to the consumer. The cap and trade program will and should actually result in a net decrease in emissions. In fact, we've had programs like that locally. We have it here in Texas for NOx emissions and particularly in the Houston/Galveston nonattainment area. We've used a similar-type program under the Clean Air Act for NOx and SO2, and they have been fairly successful in reducing emissions and creating a market for allowances so that industries, while they learn how to effectively reduce their emissions, can remain in compliance

with the law. I can't say what will work effectively, but certainly cap and trade systems are used throughout Europe for greenhouse gases. Regardless of where we stand politically on the issue, I do agree with Rick that a freight train is coming. A bill like Lieberman-Warner probably will end up being pushed through Congress, albeit not this year.

**AUDIENCE MEMBER:** *My question is directed to Marianne Carroll. Texans are very proud of the competitive electric market that we have. What changes do you foresee — and I'd be interested in the perspective of other panelists — to deal with climate change in that competitive electric market?*

**CARROLL:** Well, let's talk about solar for a minute. There was a solar forum at the state capitol at the end of last month. We represent so many generators, so many technologies, but we had not heretofore represented solar, and they were a new client. And so I signed up for the solar forum and went. I expected to see a lot of beards and Birkenstocks there — and there were some. It was Austin, after all. But, I was surprised to also see that the gathering was highly business-focused. It was in the capitol building, so there were some members of the Legislature present, along with their aides, expressing great interest in renewable technologies other than wind. We've already seen an enormous amount of wind power being built, primarily out in West Texas. But large-scale wind development has begun to exhibit some operational concerns, and that, along with higher electricity prices (driven primarily by the price of natural gas) has served as a stimulus for other renewable technologies. The interest of the legislature, the interest of the industry, the interest of the money people, is turning to other technologies, like solar. Solar is — as I heard many times at the solar forum — where wind was six years ago. It's the dawn of that industry. So I see that as a real change. I see other technologies, too, being explored. There are some CAES projects — compressed air energy storage — that have been proposed for Texas for a long time. They just haven't been economical before, but now there's a renewed interest. In particular, I think we're going to see some more interest in CAES because that is a great way to kind of counterbalance, or “store, the wind energy. The wind blows at night when we don't need as much energy, and it blows in the spring and fall when we don't need as much energy. The peak periods for electricity

demand are summer and sometimes in the winter. With CAES technology, you can use wind energy to pump air into underground caverns at night, and then let it out to run a turbine during the day when the wind isn't blowing. So those just a few of the industry changes and opportunities that I see, many of them the direct beneficiaries of climate change awareness.

**RONN:** I agree with a lot of that. I think you're going to see a lot of creativity in the electricity industry from a marketing perspective. Whether that means decoupling, so you've decoupled revenues from rates so that they're not necessarily just trying to sell more electricity. But there's a variety of things, particularly in the competitive market, that I think are going to come down the road, not only from the renewables perspective, but just as we've talked about a couple of times, from an efficiency, rate-making perspective and then from an alternative fuels perspective.

## SPECIAL THANKS TO

ANDROVETT LEGAL MEDIA &amp; MARKETING

BROWN MCCARROLL, L.L.P.

GARDERE WYNNE SEWELL LLP

GREENBERG TRAUIG, LLP

LYONDELLBASSELL INDUSTRIES

SAPIRE SEARCH GROUP

SUTHERLAND ASBILL &amp; BRENNAN LLP

FOR THEIR SPONSORSHIP OF THIS ROUNDTABLE

A woman with short dark hair, wearing a black blazer over a black top, a pearl necklace, and a ring, is smiling and holding a glowing lightbulb in her right hand. Her left hand is on her hip. The background is white.

# MARIANNE CARROLL IS FULL OF BRIGHT IDEAS.

AND WE HAVE ATTORNEYS JUST  
LIKE HER ALL OVER TEXAS.

Marianne Carroll  
Attorney  
Administrative Law/Public Utilities

# Conserve Energy. Let us do the work for you.



A strong legal team is an essential aspect of corporate strategy and for firms, the competitive edge. Companies and firms often need specialists with exceptional industry knowledge, and experienced energy lawyers are in high demand and short supply.

Our energy practice spans the industry, including:

- **Exploration and Production**
- **Gathering, Processing, Storage and Transportation**
- **Refining and Petrochemicals**
- **Energy Commodities Trading**
- **Gas and Power Regulations**
- **Renewables**
- **Power Generation, Transmission and Distribution**
- **Legislative Affairs**
- **Oil and Gas Field Services**
- **Compliance**

With offices in Houston, Dallas and Austin, we've successfully completed search assignments for companies and law firms in the state and around the country – from the general counsel to the staff attorney level, and for partners, associates and of counsel. Our clients include domestic and international corporations, both publicly traded and privately held, as well as law firms of all sizes.

**When it comes to energy, let the experts find the experts.**

For more information and additional opportunities, please visit  
[www.sapiresearch.com](http://www.sapiresearch.com).

**Courtney Sapire, Esq., Sharon Aboussleman, Esq.** Houston | Dallas | Austin **866.413.2868**