



High-Tech Intimidation, Stress & the Public Official

(MCLE Specialty Credit – Legal Competence Issues)

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**HIGH-TECH INTIMIDATION,
STRESS, &
THE PUBLIC OFFICIAL
(An Introduction)**

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HIGH-TECH INTIMIDATION, STRESS, & THE PUBLIC OFFICIAL (An Introduction)

If there were a City Attorneys' Department Credo, it would be this:

It is better to be right than to be City Attorney.¹

Imbedded in this statement is an understanding of the human vulnerabilities we bring to our profession. Serving as city attorneys is not only our profession but these are our jobs. This is how we earn a living, feed and house ourselves and our families, maintain health insurance, and save for our retirement. While most of us are grateful to have found an interesting, meaningful way to make our living, few among us don't also have to work. Therein lays the vulnerability: we have jobs that we must be willing to lose in order to do them well.

Excellence in the city attorney profession demands that we be independent, even though we naturally depend on the living we make from our jobs. We work for elected officials who answer to the often fickle, sometimes short-sighted electorate. More than one city attorney has fallen into the trap of trying to please an upset neighborhood or a determined council majority by overemphasizing weak legal theories to justify outcomes that conflict with emerging case law. But far more often city attorneys have taken the heat for unpopular but accurate assessments of the law, sometimes leading to their dismissal as city attorney.

Political courage is a job requirement for a city attorney. The City Attorney Track for this conference started on Wednesday with an exploration of the city attorney's key relationships in city hall (with the city manager, with the city clerk, with the individual councilmembers). Through those relationships, the city attorney can create the bonds of trust that assist in effectively providing legal advice to the city. This final program of the City Attorney Track introduces skills and resources to hold true to the City Attorneys' Department Credo even in the face of mean tweets, social media attacks and other public shaming and cyberbullying.

¹My gratitude to Natalie West, former city attorney for Navato and Brentwood and past President of the Department (1986-1987) for passing along to me this credo.

Haters Gonna Hate

Public shaming is older than the Scarlet Letter and, as a behavior modification tool, has a long and controversial history of successes and tragic failures. For our purposes here, the important aspect of public shaming is its powerful threat. No one – innocent or guilty – wants his or her reputation dragged through the mud in the public square. The Information Age² has turned out to also be the Disinformation Age. There is no truth filter on internet publication and the fact that material may be published anonymously decreases the “source’s” accountability for the information. It is easy for disgruntled citizens – whether their gripes are legitimate or not – to publicize their grievances. And don’t we city attorneys know it.

City attorneys know we are going to work in a fish bowl. Indeed, extending the analogy, our role may be to help keep the glass bowl clean so the public’s view is unobstructed. We do this by offering Brown Act training and advice, Political Reform Act training and advice, Public Records Act training and advice, Ethics and AB1234 trainings, and through our daily interactions with city staff and the public toward open, transparent government. Operating in the public sphere is a key component of the city attorney role and, unlike private attorneys, we most often deliver our advice in public.

Practicing law in public comes with the job. The public has a right to question the city attorney’s advice and even urge that it be ignored. But the Information Age has ushered in new platforms that allow detractors who attack the *city attorney* and not the advice an opportunity to intimidate or humiliate. It is the normal, natural desire not to be humiliated or subject to public scorn and unwanted public attention. That is what supplies cyberbullies with ammunition.

²“The Information Age (also known as the Computer Age, Digital Age, or New Media Age) is a period in human history characterized by the shift from traditional industry that the Industrial Revolution brought through industrialization, to an economy based on information computerization.” See https://en.wikipedia.org/wiki/Information_Age

“The modern age regarded as a time in which information has become a commodity that is quickly and widely disseminated and easily available especially through the use of computer technology. Information has a unique quality as a resource and a commodity, the utility of which, in combination with its other values, is so pervasive as to result in the now common appellation given to the period of history ahead as ‘the information age.’” — Encyclopedia of Library and Information Science

Again, practicing public law has always come with the public attention and the possibility of negative attention – deserved or undeserved. Let’s take a quick tour through the ages of public meetings to see how the vulnerability has evolved.

Yesteryear: A meeting noticed by a mimeographed agenda tacked to a bulletin board outside city hall would convene in a room with folding chairs. Public microphones were often available and the entire audience was in the room. If you did not attend and you wanted to know what happened, you could read the written minutes approved at a subsequent meeting. Maybe, a newspaper reporter would be present to report the actions of the meeting. There was no playing to the camera but a crowd might use heckling or clapping to pressure public officials beyond the authorized methods of participation. After the meeting, a concerned citizen might write a letter to the editor of the local newspaper, which might get printed, or tell friends and neighbors impressions of the meeting and actions of public officials.

Innovations of the Digital Age: The Brown Act was amended a few years ago to require meetings to be noticed on a city’s website. *See* Gov’t Code §54954.2(a). In addition, most local newspapers in addition to publishing in print (typically weekly) now maintain a regularly updated website that will publicize agendas. Beyond that, many cities have their own Facebook, Twitter, iLegislate, YouTube, and other social media platforms through which meetings are publicized in advance. Plus, many individual councilmembers and community activists will republish on their own accounts a meeting agenda or about a specific agenda item (usually accurately). The meetings are often shown live and later rerun on local or cable TV. Cablecasts and broadcasts have been replaced or supplemented with live webstreaming and on-demand video which dates back many years now for most agencies. So participants can watch themselves and others over and over. Letters to the editor have been replaced or supplemented with post-meeting email blasts (sometimes to huge numbers of people), Facebook posts, Tweets (sometimes live, contemporaneous commentary), posts in comment sections of online “newspapers” and local Patch or other media sites, on blogs or dedicated websites.

Many members of the City Attorneys Department may remember that a particularly agitated community member went to the effort of preparing an email group consisting of every city attorney in the state and then bombarded their inboxes with lengthy recitations of events and alleged legal malpractice by his city attorney. Since then blast emails have become much more common and many of us have been the object of brutal and unfair comments published widely. Of course – and again for the purpose of this session – the possibility of such email blast looms ever presently.

And then there are the “Mean Tweets” often sent under pseudonyms, sometimes amusing, often inaccurate, occasionally downright slanderous, but always mean and hurtful. Some detractors have actually set up web sites to keep an ongoing criticism of a public official, complete with doctored pictures and inflammatory text.³

This virtual megaphone that allows unaccountable criticism to be levied at individuals (including public officials) is so prevalent that a catchphrase emerged to indicate a disregard for hostile remarks addressed towards the speaker: *Haters gonna hate*.

The Practice of Public Law Requires a Conscious Understanding of the Threat and a Purposeful Decision to Put the City’s Interests Above All Else

We all face the possibility of being the object of a cyberbully or the subject of a social media drubbing. As city attorneys (or other public officials), we probably increase the odds a bit. But as lawyers, we owe our clients a duty of loyalty that requires us to face down our reticence to do our jobs under such stress. There are certainly remedies and strategies for dealing with actual instances of this type of harassment. For this particular session, we focus on being conscious of the threat as a source of stress in our profession and the tools for addressing the stress in order to perform our professional obligations competently (and be happier).

Ethical standards for California lawyers are derived mainly from the Rules of Professional Conduct of the State Bar of California. Public lawyers are governed by the Rules and the ethical standards of the profession. See e.g., *People ex. rel Deukemejian v. Brown* (1981) 29 Cal.3d 150 (Bar rule prohibiting taking of a position adverse to a client precludes Attorney General from suing client department on a matter on which he advised that department); accord *Santa Clara County Counsels Association v. Woodside* (1994) 7 Cal. 4th 525, 548 (“duty of loyalty for an attorney in the public sector does not differ appreciably from that of the attorney’s counterpart in private practice”). In addition to the Rules, California lawyers are subject to common law standards. *Santa Clara County Counsels Association, supra*.

Public lawyers have special ethical obligations to further justice. The heightened ethical responsibilities of government lawyers apply whether they are prosecuting

³The Internet is chock full of less harmful examples as well. For instance, check who got the upper hand in the rivalry between Harvard and Yale by typing this in your browser: safetyschool.org

criminal actions or representing the government in a civil action. *People ex. rel Clancy v. Superior Court* (1985) 39 Cal. 3d 740, 745. California courts have relied on the ABA Model Code's Ethical Considerations to define the city attorneys' duties, including EC 7-14, which provides, "[a] government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results." See, e.g., *People ex rel Clancy v. Superior Court* (1985) 39 Cal.3d 740, 746 (contingent fee arrangement creates conflict for public lawyer); *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871 (city attorney may not argue parking not required where he knows the city determined there was a shortage).

We bring these high ethical standards to representation of the city. Rule 3-600 governs the ethical obligations of a lawyer who represents an entity rather than a natural person. The client in such a representation is the entity itself as embodied in the "highest authorized officer, employee, body or constituent overseeing the particular engagement." As we know, as city attorneys, if we are aware of the conduct of city official or employee which may be or is a violation of law "reasonably imputable to the organization" or "is likely to result in substantial injury to the organization," we may take the matter to the "highest internal authority within the organization" but may not disclose any confidential information beyond the organization. Our recourse if we cannot persuade those in command to change course? The city attorney retains the right to resign employment.

So all of this culminates in the City Attorneys' Department's Credo (*it is better to be right than to be city attorney*) and a lot of potential stressors. And with that, we turn to Richard P. Carlton, Director, Lawyer Assistance Program, of the State Bar of California.



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Frazzle or Focus: How to cope with the unique challenges of legal practice

By Richard Carlton, MPH

Acting Director, State Bar Lawyer Assistance Program

Ever wonder why do so many legal professionals struggle with anxiety or depression?

Though we have heard a great deal about the prevalence of substance abuse problems in the legal profession, depression may be even more common in the attorney population than substance abuse issues. A study of 12,000 adults by a team of researchers from Johns Hopkins University discovered that among all the occupational groups represented in that large sample, attorneys had the highest prevalence of signs and symptoms of clinical depression. The rate of depression among the attorneys studied was 3.6 times the norm for all occupations.¹ What accounts for such a high prevalence of mood disorders in the legal field? Can the answer be found in the challenges associated with legal practice alone, or is something else at play here?

Is it nurture or nature that determines which of us will struggle with disorders like anxiety, depression, and substance abuse? Scientists say it is a little bit of both. Some of us are born with a particularly brain chemistry that makes us more susceptible to these problems. Most of us face challenging circumstances from time to time, but only a small portion of us become anxious, depressed or turn to alcohol or drugs to cope; the factor that often determines how we react to these problems appears to be the particular brain chemistry we inherited. The brains of those of us who inherit a susceptibility to anxiety and/or depression react to challenges in life in a manner that produces or exacerbates these symptoms. It seems unlikely therefore that the stress of legal practice alone accounts for the high incidence of anxiety and depression among legal professionals.

Those of us who work with legal professionals who struggle with anxiety, depression and substance abuse believe that self-selection contributes to the high incidence of mental health problems in the profession. For reasons that we don't yet fully understand, some individuals who are susceptible to experiencing substance use and mood problems are

also drawn to the practice of law. The same personality traits that are over-represented in the populations of adults recovering from substance-related disorders and mood disorders—high achievement orientation, perfectionism, obsessive-compulsive—are also common in the legal community.²

Law School Professor and Psychologist Susan Daicoff explains that the law school experience further exacerbates these tendencies, often producing increased aggression under stress, a preference for competition versus cooperation, and a failure to rely on natural sources of social support from one's peers.³ Her study also revealed high rates of anxiety and depression symptoms in the cohort of students she followed for three years, and other studies of law school populations have produced similar results.

Lawyers are taught to anticipate and prepare for a whole range of problems that non-lawyers are generally blind to—even far-fetched outcomes need to be considered. When Professor Martin Seligman followed and repeatedly assessed the Virginia School of Law 1990 class for three years he discovered that the most pessimistic students in that class performed the best on all the standard measures of law school performance. These traits that help lawyers to be good at their profession may make many miserable when applied to their personal lives.⁴ Professor Lawrence Krieger states in The Hidden Sources of Law School Stress, “thinking like a lawyer is a legal skill, not necessary a life skill.”⁵ Studies have shown that lawyers tend to be competitive and prefer analytical thinking over the expression of feelings (both their own and others). These traits are often effective when applied to professional practice but rarely produce positive results in personal relationships.

A closer look at depression

Depression associated with a significant personal loss or bereavement is normal, and not considered a clinical condition unless it lasts for a period of months. Of greater concern is the presence of the above symptoms in the absence of any obvious event or trigger, or symptoms that don't go away. Common forms of depression include a Major Depressive Episode, characterized by some or all of the above symptoms lasting two weeks or longer; and Dysthymia, characterized by less severe, but chronic symptoms lasting two years or longer. Dysthymia can be insidious. Many people cope with depressive symptoms for years before recognizing or acknowledging that they have a condition that isn't going to abate without help.

Depressed and potentially suicidal individuals often exhibit changes in their mood, appetite and energy level, which can be noticed by colleagues, friends and family members and should be a matter of concern. Common symptoms of depression include:

- feelings of hopelessness;
- restlessness and irritability;
- fatigue or weakness;
- inability to concentrate;
- loss of appetite; and
- diminished interest in sex and recreation.

Depression sufferers undergoing treatment typically experience a marked decline in the severity of symptoms. Treatment usually consists of psychotherapy, medication, or a combination of the two. People with depression often begin to see positive results within a month of beginning treatment.

How can attorneys cope with stress?

Absence of control over the outcome of one's efforts, inadequate time to complete work satisfactorily, constant pressures to produce faster, the adversarial nature of most legal work, the dire consequences of an error in judgment or oversight—all are common sources of considerable stress in legal practice. In a recent sample of North Carolina lawyers, 31 percent of the respondents strongly agreed or agreed with the statement “I often feel worried or anxious.”⁶ Still, the majority of attorneys learn to cope successfully with these challenges.

The human brain is hardwired to scan the environment for threats. This is a survival mechanism that stems from a time when predators were plentiful. What was originally referred to as the “fight or flight” reaction in our nervous system is now referred to as the **Three Fs**: *fright*, fight or flight. We not only scan for very real threats, we also tend to worry about possible negative outcomes. When you add this evolutionary tendency to the training all legal professionals receive, namely to anticipate and prepare for all possible negative scenarios, you wind up with a lot of stress. No wonder most legal professionals complain about stress.

The tendency of our brains to constantly return attention to the scariest thoughts not only creates an unnecessary level of stress, it also distracts our attention from addressing the important matters at hand. The best anecdote I know of for this dysfunctional brain function is the mental discipline of “paying attention,” which can be gained from devoting time to one of the many available ***mindfulness practices***.

Mindfulness is about learning to focus our attention on something that is right in front of us or happening in this very moment. Studies have shown that mindfulness practice can have a whole host of benefits including stress reduction, beneficial changes in the immune system, and enhanced memory/attention skills.

The Lawyer Assistance Program

Established by the California Legislature in 2001 (Business & Professions Code §§6140.9, 6230-6238), the Lawyer Assistance Program is a confidential service of the State Bar of California. Staffed by professionals with many years of experience assisting the legal community with personal issues, the LAP provides assistance to attorneys whose personal or professional life is being detrimentally impacted by substance abuse, other compulsive behaviors, and/or mental health concerns such as depression and anxiety.

The statute that created the program (SB 479, Burton) states that it is the “intent of the legislature that the State Bar of California seek ways and means to identify and rehabilitate attorneys with impairment due to abuse of drugs or alcohol, or due to mental illness, affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety.”

The LAP is a comprehensive program offering support and structure from the beginning stage of recovery through continuing care. It includes:

- individual counseling;
- expert assessment and consultation;
- assistance with arrangements for intensive treatment;
- monitored continuing care;
- random lab testing;
- professionally facilitated support groups; and
- peer support groups.

The program also works with family members, friends, colleagues, judges and other court staff who wish to obtain help for an impaired attorney. Attorneys may self-refer into this program or may be referred as the result of an investigation or disciplinary proceeding (B&P Code § 6232). In some cases, monitored participation may result in a lower level of disciplinary action. When requested by an attorney who is facing disciplinary charges and whose practice has been impaired by personal problems, the LAP can monitor the attorney's continuing recovery for the State Bar Court's alternative discipline program and for the probation unit.

One of the unique characteristics of this program is that the confidential nature of participation in the program is mandated in the statute that created the program. The fact that an attorney is participating in the LAP is confidential (B&P Code § 6234). No information concerning participation in the program will be released without the attorney's prior written consent.

In addition to providing with professional assistance, the LAP also offers free short-term consultations concerning any personal issue as well as consultations with career consultants who specialize in working with attorneys looking to kick-start or change the course of their legal career.

Getting Help

Attorneys may be less likely to take care of themselves than medical doctors and other professionals. Mental health professionals have observed that attorneys, who are trained to be impersonal and objective, often apply the same approach to their personal problems and are reluctant to focus on their inner emotional lives. Some attorneys believe they should be able to handle their personal problems just as effectively as they handle their clients' problems.

Emotional distress, if not managed or treated, can lead to adverse impacts on an attorney's professional practice, clients, colleagues and personal life. Concerned colleagues and friends, therefore, should encourage a depressed or substance abusing attorney to seek professional help from available resources such as the LAP.

Legal professionals need an assistance program specifically geared to the unique pressures of legal practice and to the unique recovery support needs of attorneys. The Lawyer Assistance Program is that resource for all legal professionals licensed by the State Bar. Call toll-free 877-LAP 4 HELP (877-527-4435) for confidential assistance for yourself, a friend, colleague or a family member. Check us out at www.calbar.ca.gov/lap

or watch our videos on *YouTube* by searching for California Lawyer Assistance Program.

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¹ Eaton, Anthony, Mandel & Garrison, "Occupations and the Prevalence of Major Depressive Disorder," Journal of Occupational Medicine, 32 (11), 1079-1086 (1990).

² S. Daicoff, Lawyer Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses, Law and Public Policy: Psychology and the Social Sciences (2004).

³ Diacoff, note 4.

⁴ M. Seligman, *Authentic Happiness*, Free Press (2002).

⁵ Krieger, L., *The Hidden Sources of Law School Stress*, Lawrence Krieger (2014).

⁶ National Institute to Enhance Leadership and Law Practice (Buies Creek, North Carolina), *North Carolina Chief Justice's Commission on Professionalism, State of the Profession and Quality of Life Survey* (2002-2003).

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