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Ethics Emergency Survival Kit The Scouts are Right: Be Prepared!

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Table of Contents

I.	Introduction	1
A.	Driver Training and Defensive Lawyering	2
B.	The Emergency Kit in the Trunk of your Vehicle	2
II.	Your Ethics Emergency Survival Kit	2
A.	If in an entity, utilize in-house assistance as quickly as possible	2
B.	Resources available from your professional liability carrier	3
C.	Learned Colleagues - an opportunity and a warning	3
D.	Social Media Lawyer Groups - A Serious Warning	3
E.	Pay an Expert	4
F.	Don't Pay an Expert - SBOT Ethics Helpline	4
G.	ABA, Out-of-State and Texas Formal Ethics Opinions	4
III.	Tips for Minimizing the Risk of Appellate Ethics Emergencies in the First Place	13
A.	Choose Better Clients	13
B.	Anticipate (and Defuse) Appellate Emergencies in your Written Representation Agreement	14
C.	Learn from other Attorneys' Ethical Mistakes	33
	Bonus Material - Why You Should Have a Comprehensive Representation Agreement	36

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I. Introduction

It is Monday afternoon at 4:30 p.m., before a Thursday morning oral argument in the court of appeals. You want to spend the next day or so refining your planned submission to the Court. However, that is not to be. Your increasingly nervous client insists on meeting with you to provide last minute “instructions” before argument. Despite your protests, the client will not be deterred. During the meeting, the client instructs you to argue key trial court testimony in a particular manner. You glance through the reporter’s record on your laptop and explain to the client why the client’s version of the testimony is not accurate. The client is adamant that you must argue the trial court testimony in a manner that he described. You explain that your duty to the court prohibits you from making false statements about the trial court record. The client does not care. “Either argue the case the way I have instructed you, or you and your law firm will be sued if I lose.” To paraphrase Karl Malden, the long-time spokesperson for American Express Travelers Checks, “What will you do? . . . What will you do?” <https://www.youtube.com/watch?v=JTtdVoF5I2Y>

If a last minute ethics emergency such as is described above has never happened to you, consider yourself fortunate. A legal database search for cases in which clients have sued lawyers for legal malpractice, breach of fiduciary duty, and related causes of action will reveal that this is one area of law that seems to be very active in recent years. This is particularly troubling because many disputes between attorneys and clients are subject to mandatory arbitration clauses and never even make it into the public law databases. The bottom line is that ethics emergencies do occur. When they do, your prior preparation to deal with them could mean the difference between legal malpractice or not, loss of your law license or not, damage to your professional reputation or not, or a ruinous finding of breach of fiduciary duty or not.

“Wait a minute, Scott,” you say, “the whole point of emergencies is that you never know when they will occur. How can I prepare for something when I don’t know when or how it will happen?”

This question can be answered the same as: “How do I minimize the chance that I will be in a motor vehicle collision, and if I am, how can I maximize the chance that I will survive it?”

A. Driver Training & Defensive Lawyering

What is the best way to survive a car crash? Avoiding getting in a crash in the first place. To that end, beginning drivers and drivers who wish to avoid a conviction for certain motor vehicle infractions, may take a class in driver training. In such a class, drivers are taught defensive techniques and strategies that minimize the probability of getting into a car crash in the first place. Avoiding getting into a car crash in the first place is the #1 way to ensure surviving a car crash.

What is the best way to survive an appellate ethics emergency such as set forth in the introduction to this paper? Not to get in one in the first place. There are defensive techniques and strategies available to you to minimize the probability of getting into an appellate emergency, whether of the client's making or otherwise. Those are addressed in Section III of this paper.

B. The Emergency Kit in the Trunk of your Vehicle.

Let's say that you practice all of the safe lawyering techniques discussed in Section III of this paper. Despite all that, the client walks into your office and demands you misrepresent the trial court record at oral argument in 3 days, and threatens you with a lawsuit if you do not. This is analogous to doing everything reasonably within your power to avoid the car wreck in the first place, and now you are looking to minimize damage and harm using the tools available to you. In the context of a car crash, your emergency kit might include first aid supplies, a tool kit, a warm blanket, road flares, jumper cables, a functioning and properly inflated spare tire, bottled water, snacks, a portable air compressor, an extra cell phone battery, extra prescription medication, and access to On-Star automatic crash response, among other things. What might you have in your appellate ethics emergency tool kit?

II. Your Ethics Emergency Survival Kit

A. If in a law firm, corporation, or governmental entity, utilize in-house assistance.

If you are part of a law firm, a corporation, or a governmental entity, you may have a supervising partner, a section head, or firm managing partner who is designated to assist when ethics emergencies arise. The time to determine the proper course of action within your organization is not during an actual appellate ethics emergency. Information about chain of command during emergency situations should be made part of all new attorney orientation. If it is not, be sure to ask what your organization expects from you in the event you find yourself in an ethics emergency. While your initial reaction to an ethics emergency may be shame and fear that make you want to keep the problem to yourself, that is often the worst thing you can do. Find out what resources are available to you within your firm or organization in the event a problem arises. And when you avail yourself of them, document your attempts to do so for future reference.

B. If you have professional liability insurance, check with your carrier.

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