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## “The Talk”

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An everyday reality of working with insureds at The Bar Plan involves assisting them when they first realize an error has occurred in a client representation. A natural human reaction is to hesitate to counsel the client about the occurrence and effect of the mistake. Contrary to the public's stereotype of attorneys as being unconcerned about their acts which harm a client's case, attorneys invariably feel awful when they recognize their mistake has impaired their client's cause. Also, as lawyers are accustomed to exerting control in the attorney-client relationship, suddenly not being in control can leave them feeling shaken and unsure.

As part of my initial conversation with insureds in these matters, it is inevitable that "The Talk," as we refer to it in-house, comes up. The Talk is that dreaded dialogue with the client where the attorney must explain that something has gone awry and the client may have a claim against the attorney. The purpose of The Talk is two-fold. First, the attorney's fiduciary duties to the client demand it, and second, when handled correctly, it can be a valuable asset in the management of the claim.

As a practical matter (rules notwithstanding), The Talk may be the point at which the Statute of Limitations clock starts ticking. Failing to have The Talk may toll that clock in some circumstances. Failing to have The Talk can potentially give rise to the appearance, whether warranted or not, that an attorney was trying to hide the fact of the error, and lead to the circumstance of a case that had at most a minimal value as a malpractice claim, taking on an ominous tone. Because of the lawyers' fiduciary duties to the client, failing to have The Talk can result in bar complaints, or, worse yet, disciplinary action.

However, having The Talk may actually facilitate an expeditious resolution of the claim. In our experience, clients regularly (although not, admittedly, always) accord respect for an attorney who owns up to mistakes. It is not unusual to see long-standing attorney-client relationships continue to thrive even in the face of an error because a client is impressed by the integrity demonstrated by their attorney.

Where possible, we strongly recommend having a face-to-face discussion with the client.

The topics addressed in that conversation should be first outlined in an agenda, developed by the attorney in advance of the meeting. The agenda aids the lawyer in keeping the meeting on track and insuring that the necessary topics are covered. The agenda, and notes taken by the lawyer during the meeting, then become the basis for the confirming letter. Clients generally react more positively to an in-person meeting than a letter out of the blue. Nurturing the client's goodwill in these circumstances may ultimately benefit everyone involved, most especially the client and attorney.

It is important to remember that The Talk does not include advising the client on their legal malpractice claim. Any such advice involves the attorney in a conflict of interest and seldom places the attorney in a positive light. The client should be told that it is appropriate for them to seek independent representation for such advice.

Because a lawyer's ethical obligations are implicated by The Talk, it is important to review the applicable ethics rules before undertaking this important discussion. State and local ethics advisory offices can provide assistance in answering questions about disclosure of the information or conflicts of interest. The Bar Plan's Claims and Risk Management Departments are also available to assist insureds in resolving these issues.