What to Expect
When You're Expecting (or Not Expecting) to See a Lawyer
And How to Deal With It
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I. How the Law and a Lawyer Works

A. The First Thing You May Feel is Shock

Perhaps because they have never thought about it, clients who have not used or dealt with a lawyer before may not know one or more of the following characteristics of law and legal practice:

1. Adversity. The law is always adversarial, not just in litigation but also in transactions, e.g. contracts. That a "lawyer drafted it" does make it better than a form but that does not mean it is good for you. From the opposing lawyer's perspective, who is acting in the interest of his or her client, the best contract may be the one that is so against your interests that, figuratively speaking, you "breach it when you sign it." Obviously, if a contract favors one side much more than the other, then the future outcome can be forecast, if not pre-determined, by the deal. Two corollaries of this "adversity principle" are:

a. A one-size-fits-all form does not work. It completely misses the point of how law works, including how contracts are negotiated and drafted, and

b. A good contract is tailored to your objectives. Your attorney seeks to get terms favorable to you while opposing counsel does likewise.

2. Complexity. I have written on this subject in other articles: Briarpatch,[1] etc. A quick question doesn't mean a quick answer and wrong questions get wrong answers. [2] I return to this subject later on below.

3. Limitations. The attorney or firm may not be available. I am amazed that clients believe we are like the lonely "Maytag Repairman" (of 1990's advertising) just sitting here waiting for their call. The reality is that work tends to flow to the top; that is, the better firms are in high demand. In our firm we may get a dozen calls a day. Each is a client with a story to tell. That takes time, the work that follows takes time, and it follows work already in the system (more on this topic in the discussion or Work and Pipeline below).

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[1] From my article "Briarpatch, The Nature of Law and Leal Practice" available at the firm or at azbuslaw.com/ Publications/Articles.

[2] From my article "The Maytag Repairman, The Art of War & The Practice of Business Law available at the firm or at azbuslaw.com/Publications/Articles.

4. Appointment scheduling delays. Expanding on the "Maytag Repairman" point, it is not unusual for a client to fly in from, say Wisconsin, then call and say I want to come in and see you about the contract you are drafting. This is fine if we can schedule the appointment in the normal course of business, typically the next day or so. But often they mean "today." This causes problems because the attorney, having no prior knowledge of the client's desire for an appointment, may be booked up with work, be working under deadline in another matter or have other, conflicting appointments. Had the client called the firm from Wisconsin, when he booked the flight, then we could have scheduled an appointment in advance and the attorney would be ready for it.

5. The attorney may not be in the office. Complicating the ability to schedule "on the spot" appointments is the increased use of flex time and remote office work. Technology has rendered personal attendance optional in many cases. With clients we have matters from around the country and in Arizona where the client has never been in our office; we have never met the client in person. Instead, we meet by phone, Skype or email. We prefer to meet them in person but this is not always practical. With attorneys more and more clients and matters are handled remotely. The attorney may work from home on certain days or after certain hours and may not even be in the office on the day the client wants a same day or "walk in" appointment.

Hopefully, understanding the above "availability" points will help avoid frustration for both the client and the attorney.

6. Cost. For reasons explained below, the typical cost of any kind of legal representation is in the thousands, not hundreds. Outrageous? It depends. Legal expenses are like any other kind of business investment. The client analyzes the cost-benefit as well as the risk of action or non-action. More on this in Section IIB (Front-End Loaded) and IIE (the Process) below.

B. Legal Work is Front-End Loaded

Clients often do not realize the "Work," defined below, required by legal practice. Potential clients ask: "How much does it cost to draft a letter or a settlement agreement?" This is the wrong question and, as I discuss in the Briarpatch article cited above, "Wrong questions get wrong answers." The reason it is the wrong question is that the attorney has no idea whether the case is just starting or is at the end. For example, it is not unusual for a client to call and ask how much it will cost to draft a business dissolution or partnership buy-out agreement. Sometimes the client, through inexperience, does not realize that the letter or agreement can create issues which require substantial negotiation, if not litigation.

What often happens, of course, is that the devil is in the details, and the contract cannot be drawn until disputes are resolved or litigated. In a partnership dispute or "business divorce," this can lead to the hiring of forensic accountants, appraisers, or other experts, and "the beat goes on." A divorce can cost you $150.00 if there is nothing to fight over, or $150,000 (or more) if there are kids, a dog and a substantial estate.

Legal work is front-end loaded. The client may be particularly unaware of "all the work that must be done before anything is done;" that is, before we begin interaction with the other side. In legal representation -contract or litigation – as in a war, one does not just run out on a" battlefield" and "start shooting." Analysis of the deal or dispute is necessary. In transactions, the attorney must know the facts, including the content and significance of other documents, as well as understand the client's objectives. In litigation, the attorney and client may spend weeks assembling and reviewing the documents and the witnesses, and preparing the arguments and case strategy. With both transactional work and litigation this includes an analysis of the case from the other side's perspective as well. Being ill-prepared harms the client. This is a variation of the medical motto "*Primum non nocere*," that is, first do no harm.

C. Avoiding the Wrong Question

Returning to the "Wrong Question:" The correct approach is to tell the attorney: "These are the facts, case history and documents. This is what I want. What can I do?" (Sub-text: What can *you* the attorney do)?" In litigation or dispute resolution to answer this question the attorney needs to review the pertinent documents, your chronology or explanation of events, and to research current case law to confirm no decision has changed the law on the facts. Then, at our firm we prepare a list of options, their pro's and con's and a recommendation, subject to the final discussion with and approval of the client. Like a chess game, we don't move a piece until the case has been considered for our end and from that of the other side.

Working up the case well from the beginning allows us to proceed with knowledge and power all the way through. Factual or legal assertions by opposing counsel can be challenged or corrected on the spot. This keeps the case moving in the right direction. For example, I represented an ex-CEO against the semi-conductor company that ousted him. Because our firm and opposing counsel knew the law well in this area, we were able to settle the case in ten days.[3]

D. What the Client Sees/Gets is the Tip of the Iceberg

A lawyer's "Work," with a capital W, consists of a great deal of work behind the scenes. For example, the firm had a client who was an older worker who had been laid off, perhaps in violation of federal law, the Age Discrimination in Employment Act, etc. But the client did not want to prejudice a $100,000 severance pay offer. To determine what to do, we first had to determine what we could do under the facts and applicable law. The facts went back 20 years; the law had nuances to be considered. This led to a 10-page Table of Facts, Law and Comments ("Table"). We devised three options, discussed the pros and cons of each, and after speaking about them with the client made a final recommendation. The letter took about 45 minutes to draft. The Table and discussions leading to the letter took over eight hours. This is the "Work."

[3] I talk about this in my article "Let Us Now Praise Opposing Counsel" available at the firm or at azbuslaw.com/ Publications/Articles.

E. The "Quick Question" Fallacy

Then we have the "Quick Question." There ain't no such thing if by quick question you mean a quick answer. I have written on this subject before.[4] Here is an excerpt from the "Briarpatch" article.

I received an email something like this from a good client:

> I sent one of our company vehicles into a shop for some repairs / upgrades. The vehicle was in good running condition when I dropped it off. I was told it would be complete in approximately 2 weeks. For a period of 6 weeks after that I was calling them and not getting any information. People were supposed to check and call me back and never did. After 6 weeks I told them to put it back together and return it to me, that due to the time frame and lack of communication I'd rather them not even make the repairs. They told me that they planned to charge me for disassembly and reassembly even though they had accomplished nothing. Do I have any legal recourse here?

The problem with the "Quick Question" is that there may not be a quick answer. Here, is my email response to the client's question:

I am guilty of asking my accountant a "quick question," so I do it too, but I smile when a client has a "quick question" in law because law is complex, there is nearly always "something else to consider" and an argument on the other side, particularly if they have a good attorney.

Here, I would work through it like this:

1. By contract, the right to repair (I assume you signed the authorization form) implies the right to payment.
    a. But payment implies work of workmanlike quality by industry standards which would include reasonable timeliness.
2. By statute, ARS §33-1022, the agreement to charges for work, parts, supplies and storage confers the right to impose a garageman's lien. Complicating the matter is that these are often called "mechanics liens," but that is not technically correct. In Arizona, a mechanics lien is a construction lien. Garageman's liens are also called "artisans' liens." This area is a good example of "unknown unknowns" to borrow Donald Rumsfeld's phrase. One can't get into the matter without knowing something about it or spending a lot of time looking and learning.
3. What, then, is the lien and how does it work?
    a. Some repair shops treat the contract as an absolute right to payment and lien.
    b. They assume their rights to lien regardless of whether the work has been done properly, timely, or at all.

[4] From my article "The Maytag Repairman, The Art of War, & The Practice of Business Law" available at the firm or from the website azbuslaw.com/Publications/Articles.

c. Under the garageman's lien statute, the garage may hold the vehicle for payment.
d. If payment is not made within 20 days, then:
(i) After 10 days' notice to the owner,
(ii) The garage may sell the vehicle at public auction for payment,
(iii) The excess funds after payment from the sale being paid to the vehicle owner.
(iv) The statutory bias is to protect the "workingman."

4. There is no case law immediately available on the issue, so we would have to research it, but the repair shop's apparent interpretation of the statute, as stated in 3a above, seems questionable because:

a. The repair order is a contract (work & parts for money) and service contracts require substantial performance, which was not done here. In fact, it appears they did not even start the work for which they were hired. For these reasons they appear to have breached the contract, so arguably would not be entitled to the lien.
b. Every contract in Arizona has the covenant of good faith implied into it which means honesty and fair dealing. It does not seem honest or fair to demand money for work not done, or even started.
(i) They will point to the disassembly and "down time" of re-assembly and argue they should be compensated for that, or the lien would apply, but arguably:
(ii) They assumed the risk of their own non-performance when they disassembled the vehicle. They knew the work being done and not done and controlled both;
(iii) You had neither knowledge nor control,
(iv) Even though you called and tried for six weeks to get information (i.e. tried to get knowledge and get things under control), so have no acts to be accountable for (except the repair order, which they breached).
c. You received no benefit from the work. A similar statute regarding lien on construction projects includes "improvement," i.e. work done on the real property, as a condition of the lien. But,
d. You face the statutory bias stated above in 3(d)(iv).

The shop's first response will almost certainly be to attempt to hold the vehicle for payment. If you are going to dispute payment then you need to be prepared to call the bluff by raising points 4a-c. (You could do this personally first, but it would probably take our law firm's letter to raise the stakes high enough for them to capitulate. In a similar recent case regarding delay and nonperformance of a contract to upgrade a food truck we threatened specific performance and a claim for lost profits. This led to conversations and a favorable and fairly immediate settlement. But it cost our client several thousand dollars in attorneys' fees for demand letters and follow-up to get there. (In that case the cost was worth it because of the lost food truck profits.)

So, can they do what they are doing? On the merits probably not, but you likely will have to go through the "Process" (i.e. the time, effort and cost of position statements, argument, and negotiation, which hopefully lead to realization and resolution) to get them to realize that. Let me know if you want us involved. Thanks.[5]

Without studying the above answer – or confirming it is correct -- you can get the idea (that I am trying to convey). To be correct and "do no harm," the answer to this "quick question" required at least the following:

1. Reviewing and understanding the facts;
2. Finding the right statute because liens by repair shops are called "artisan" or "garageman's" liens, not "mechanics" liens;
3. Reviewing, understanding, and analyzing the statute;
4. Researching, reviewing and analyzing the annotations and case law relating to the statute;
5. Application of the statute and case law to the facts, thoughts and analysis regarding same;
6. Derivation, formulation and composition of our arguments;
7. Derivation, formulation and composition of *their* arguments;
8. Comparison and consideration of the strengths and weakness of the opposing arguments.
9. Consideration of possible responses and counter-response;
10. Calculation of best case, worst case and likely outcome;
11. Cost-benefit considerations, and -- although not done here in an email because it would be premature without discussion and consultation with the client:
12. Recommendation(s).

This is another example of what I call the Work. Put a dozen or so questions on the lawyer's desk and you begin to have a serious practice.

F. The Process

I talk about this subject more in my article "Follow the Money," [6] but one way to understand the "Process" is this. The client might have the best claim on the merits in the history of law, say a Supreme Court case right on point. The lawyer may work up the case a draft the best demand letter in the history of law. But, if the other side has, say $100,000 of your money (or would owe

[5] This was the relatively immediate response. It could not be and was not intended as an answer and advice, which probably would require a consultation. Its intent was to provide some general information that perhaps the client could use. For the reasons discussed below immediate answers like this may be both wrong and incomplete.

[6] Follow the Money, available at the firm or from the website azbuslaw.com/Publications/Articles.

same) it is not going to just answer and say "OK, you're right. Here is your $100,000." Rather, regardless of the merits, the opposing party is much more likely to hire an attorney. The cost-benefit analysis is that it is worth spending, say, $10,000 for legal counsel if I can reduce the claim to $75,000. Likewise, to get back/pursue the money owed it makes sense for my clients to invest money to see if they can do better than $00.00, which is what they have now. Somewhere between $00.00 and $100,000 is a settlement amount and getting to that amount is the Process. Unfortunately, because that is the way things work in the real world the client may have to spend $10,000 to get some amount, say, $75,000. This Process is what answers the client's question: "Why do I have to spend a damn thing when I know I'm right."

G. Untangling the Necklace

I have heard that dealing with some legal matters is like "untangling a necklace." This is an apt description because sometimes by the time the client realizes she needs, and in some cases becomes desperate enough to hire, legal counsel, things are really a mess – an "all the King's horses and all the King's men" kind of situation. Clients ask "Can you win the case or fix this?" Almost always a lawyer can make things better, but sometimes where the client, for example, has signed documents she shouldn't, proceeded without signed documents, or in other ways proceeded without the advice of counsel, a "win" may be to make things better. And, sometimes not even that is possible. The way to avoid this less than optimal outcome is:

A. See an attorney about any business transaction
B. And if things are "going south" see the attorney early, right away, now, so he or she can prevent or mitigate the harm before it occurs.

Doing this is not only better; it is cheaper. The firm has nice offices, I tell clients we pay for them with fees from clients who do not follow the above advice.

H. Accept Responsibility; It's Your Case, Own It

Sometimes, in an "untangling the necklace" situation and kind of case, the client has false expectations and is disappointed with the firm, or think we failed them, if we do not get things back to where they should have been. Sometimes, where an attorney is working outside of his practice area, which I run into sometimes in business law, there can be bad results that could have been avoided. But, almost always, more than 90% of the time, the case does not go well because the client brought the attorney an impossible situation. If you smoke for 20 years and get cancer, it is not the doctor's fault if you don't get well. Similarly, if you do not act like a prudent business person would going in, then you are probably not going to have the perfect outcome coming out. Garbage in, garbage out, so to speak. We can do better than "garbage out," but you get the point.

I. Lack of Knowledge

A major cause of the "tangled necklace" situation is lack of knowledge. We don't know what we don't know ("unknown unknown's as Donald Rumsfeld, Secretary of State in 1970's would say).

I talk about the problem at a more practical level in my article "One Minute Lectures,[7]" using the example of the client who on his own negotiated a large contract with a law firm. The problem is the client worked with what was "on the page;" he did not realize that important provisions were not in the contract at all. This is what I call "The Documents Look OK to Me Fallacy." Complicating the lack of knowledge about the contract was the client's assumption that I could get the document at 3:00 and have my review done by 5:00 so he could close the next morning. This is unrealistic. (Please see Sections on the Work and the Pipeline above). And, is what I call the "You Don't Want a Lawyer; You Want a Priest" fallacy.

In, say, 7 out of 10 cases leading to dispute the problem is caused by the actors' lack of knowledge of the law and the legal consequences of their actions. Clients just do stuff, having no clue about what they are doing. Exaggerating to make a point, the fact that the document is in English and the parties are speaking English does not mean that clients understand the document or what is going on. Unless the client is a business lawyer or an extremely experienced business person who has been in and through this situation before, the client will probably make serious mistakes, some life-altering and some which cannot be undone. Simple example: This week a client bought a business that required a high degree of training, but unlike most business sales contracts, her contract did not have training and transition provisions. She did not use a lawyer in the transaction, so now she has big problems.

II. Deciding What to Do.

A. Strategic Considerations: The Reagan Doctrine[8]

The over-arching principle of the so-called "Reagan Doctrine," as paraphrased and tailored to law below, is *coherence*; that is, consistent action to defined objectives for the action and the overall mission (case matter). Key questions of the Reagan Doctrine are as follows:

1. Is the objective for this action clearly defined and the results reasonably achievable – in a phrase, do we know what we are doing and why?

2. Is the contemplated action likely to achieve or materially serve the above defined objective?

3. Have you thought this through?

    a. Have you searched for and eliminated the "first do no harm" (Don't stick your foot in it) landmines?

[7] Available from the firm or at our website at azbuslaw.com/Publications/Articles

[8] This line of thinking appears to have evolved out of the Vietnam war and US actions in Lebanon during the Reagan administration, but this formulation seems to have been developed by General Colin Powell, Chairman of the Joint Chiefs of Staff, during the George Bush administration.

b. Have you analyzed the practical, real world "white hat" business implications or consequences? *Rarely* is it possible to apply 100% "black hat" law and legal advice in the context of business reality.

c. What are the alternatives – are they known and understood?

4. Have the gains and risks (of the contemplated action and its alternatives) been analyzed?

5. Does the contemplated action serve the case "mission," defined as the client's final objective, i.e.:

a. How the client wants the case to turnout, and

b. What the client wants, and expects, from us?

6. Is there a defined Exit Strategy, e.g.

a. If litigation ensues does a settlement on reasonable terms seem possible, and when?

b. In negotiation of a contract or a case, does this position forego and/or minimize the feasibility of other options?

B. Cost-Benefit Analysis and Other Considerations; Decision Rules

Generally, I use or recommend a three-stage process for determining whether to proceed with a matter (usually litigation):

1. Is the money available? If the case would cost more than the client's ability to pay – which it often does – then end of story. If funds are available:

2. Does the case make sense under a cost-benefit. Is one spending, say, $10,000 for $10,000 or $10,000 for $100,000? In a nutshell is this case a good investment of time and money.

3. If the client does not act, how will the client feel about that now or later? Often the client has been seriously harmed and has strong feelings about the case. The client could also have remorse years from now and wonder what may have happened. Under either of those circumstances, just walking away may not be an acceptable option. For this reason, we often do a case work-up and demand letter, if for no other reason than to learn the other party's position from its response. This allows the client to have a better idea of how things would go in litigation

and the information received allows the firm attorneys to further evaluate the case and advise the client of its options.[9]

III. Final Thoughts.

A litigation case often has a transaction problem underlying it. Thus, the litigation case may lead to the drafting of new contracts or other documents. Sometimes, better contracts can prevent litigation. Please consider the following from Sun Tzu's The Art of War:

> A physician who belonged to a family of healers in ancient China was once asked which one of his three brothers applied the most wisdom in the healing arts. The famous doctor of ancient China replied,
> "My eldest brother sees the spirit of sickness and removes it before it takes shape, so his name does not get out of the house."
> "My second brother cures sickness when it is still extremely minute, so his name does not get out of the neighborhood."
> "As for me, I puncture veins, prescribe potions, and massage skin, so from time to time my name gets out and is heard among the lords."
>
> {From Sun Tzu's The Art of War. Translated by Thomas Cleary. Shambhala, Boston and London, 1991.}

Please note that, as expressed in the Art of War, for the client, eliminating problems before they occur is the best option. In today's predatory and litigious society, the longer one is in business the greater the likelihood of litigation. Over a period of years, it is virtually unavoidable. Unfortunately, clients often wait until there is a serious problem – which may be a life-altering event such as loss of the business or livelihood -- before seeking legal advice and preparation of their business formational and operational documents. This is a tragedy that does not need to happen. Transactional fees are typically a fraction of litigation costs. And, investing in what I have called the "legal brick house" is an investment both in the business and for the future. If you are in business or starting one, then find a lawyer who meets your expectations and go from there.

Here, at the firm we don't mind if our wisdom "does not get out of the house" in the sense referred to above. In fact, we call this "the call not made;" that is, from or by the other party to the contract or document. Our objective is that if and when an issue arises out of the contract or other document and the adverse parties take the document to their attorney, their attorney will tell them that they have no case or that given the uphill battle under the contract or document, the cost-benefit of the case is so poor that entering into litigation is not a good business investment.

[9] These options and other litigation-related materials are discussed in my article "Follow the Money," available from the firm or the firm's website at azbuslaw.com/Publications/Articles.

It is difficult to over-estimate the benefits of good legal work, whether transactional or in litigation. Knowing how lawyers and the law work can give you a distinct advantage, in business, and in life.