# BRIARPATCH[1]

## The Nature of Law and Legal Practice

### Wrong Questions Get Wrong Answers; Bad Contracts Cause Bad Outcomes

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**Wrong Questions Get Wrong Answers**

"Wrong questions get wrong answers." So said "Master Gregory" played by Jeff Bridges, in the recent movie "Seventh Son," (2015). Master Gregory was a self-defined "Spook" whose life's work was to slay evil beings. When his new apprentice "Tom Ward" played by Ben Barnes asked what happened to the previous apprentices (who were killed) and similar questions, Master Gregory answered "Wrong question! Wrong questions get wrong answers."

In law wrong questions get wrong answers. Often wrong questions have the "baggage" of false assumptions, misunderstandings or unrealistic expectations which can lead to bad outcomes. This article is about wrong approaches to law, specifically the "quick question" and "form contract."

Recently I received this email from a client:

Subject: Quick Question

> 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 6weeks 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?

If I were not a lawyer and I was in the client's situation I probably would be doing the same thing and asking a similar question. An email like this is not unusual and there is nothing wrong or reprehensible about it. The problem is that this approach, as with form documents, just doesn't work. In this article we examine some of the reasons why.

I don't know for certain what this client meant by the words "quick question." In general, I believe the clients mean one or more of the following:

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[1] This article is one of three on the subject. The companion pieces to this article are "*Ode to the Common Man*" and "*The Falsity of Forms, Ten Things You Need to Know about Business Contracts.*"

They really do want a quick response, they want the answer "off the cuff" without turning the issue into a research project or they want a free answer. But, lying beneath the "quick question" is the unstated (likely unrealized) premise that a "quick question" implies a quick answer or a belief that a quick answer is possible. It doesn't and it isn't. Here, is my email response to the client's question:

I am guilty of asking my accountant a "quick question," so I do it to, but I smile when a client has a "quick question" in law because law is complex and there is always 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 standard 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.
    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.
3. Under the garageman's lien statute the garage may hold the vehicle for payment.
    a. If payment is not made within 20 days, then
    b. After 10 days notice to the owner,
    c. The garage may sell the vehicle at public auction for payment,
    d. The excess funds after payment from the sale being paid to the vehicle owner.
    e. 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 2a. 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 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 3e.

The shop's first response will almost certainly 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 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.[2]

Without studying the above answer 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 (which took a bit of time because while colloquially called "mechanics liens," strictly speaking under Arizona law "mechanic liens" refer to the liens of subcontractors on construction projects while the liens by repair shops are called "garageman's 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 re 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;

[2] 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.

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).

In a similar vein, yesterday (June 2015) I attempted to answer an online inquiry about the right of a co-producer and ex-business partner to obtain access to and use of jointly prepared videos. The facts and question comprised six or seven lines. The answer ran to about 4000 words and involved analysis, formulations and a brief exposition of what I called the "co-authorship" stratagem, the "business divorce" scenario, and the "sue and discover" gambit.

After spending roughly one and a half hours on this preliminary analysis, I attempted to submit my answer. It was rejected because it exceeded the authorized word limit. I shortened the answer three times, and in doing so each time was forced to omit valuable information and considerations. Finally, after the third rejected submission I realized that I just could not shrink the answer further without giving an incomplete answer, which would be a wrong answer. This would violate the "First do no harm" rule as well as breach the ethical duty of competence. (My qualification of the answer "for informational purposes only, not legal advice" was one of the first redactions I was forced to make.) So, rather than provide an incorrect answer I deleted it, gave the questioner my email address, and said I would provide what was left of what I had written by email.

***The Nature of the Law***.

A. The Law is Complex

Cases can be incredibly complex. Even in a small case where because the dollar amount in question is low one might expect the answer to be easy, the fact pattern may be complicated; thus, causing in turn extensive legal research, "case work up" and complex legal analysis. Attorneys learn the hard way that small cases do not equate to small fees or legal work.

Overall, working in the law is like pulling a thread. One fact or issue may lead to an inquiry, research and analysis of two or more others.[3] One can spend weeks before research and analysis gel in one spot.[4] Even then, there is

[3] For example, a recent case, involving copyrights on a song in the movie "Selma," involved overlapping statutes and case law going back to 1906.

[4] One of the sad ironies in legal practice is that in a tough case we keep searching for the right statute or good court decision. As a result in a tough case it may take three or more times as long and cost three or more times as

almost never a "definitive answer" and obvious winning argument on an issue. This lack of a definitive answer opens the door to a counter-argument. In the law, a counter-argument virtually always exists. Making these counter-arguments is what litigation attorneys do.

B. The Law Can Be Inconsistent

One reason that finding and providing a quick *answer* in law (as opposed to general information), is so difficult is because the law is not a logically ordered system. The law is a briarpatch, a thicket of old, new, overlapping, and sometimes inconsistent statutes and case law (published court decisions) evolving over time which must be constantly checked, analyzed, reconciled and argued. As the great jurist Oliver Wendell Holmes Jr. is famous for saying:

> The life of the law has not been logic; it has been experience... The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. *The Common Law* (1881), p. 1.

C. The Law is Voluminous, Unknown and Unknowable

Lawyers, of course, study law in law school. But, they don't learn -- and law schools don't teach -- "the law." There would be too much of it, even if such a thing existed. One look at a major law school library demonstrates this.[5] What lawyers learn in law school are:

(1) The major practice areas of law, their schematic and prominent principles,
(2) How to find the law, i.e. how to access and find what they need in the "briarpatch," and
(3) How to think like appellate lawyers (by reading one higher case and court decision after another).

D. The Law is Dynamic

The law is dynamic. The only "constant" of law is change. Lawyers check current statutes and case decisions before giving advice. The court decision of yesterday may change, and may already have changed. Sometimes the court's new case decision will seem inconsistent with or contrary to what it

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much to compose a weak argument, or find that we have no credible argument at all, than it does with a good case with more readily discoverable and favorable authority.

[5] Langdell Hall, the Law Library of Harvard Law School has over 300,000 titles in just its collection of *rare* books.

previously held – reflecting an evolving society and public policy. In every practice area of law cases are decided and published daily. The increasing amount and pace of change challenge our abilities of immediate recollection and application.[6]

E. Each Legal Matter is Different

The facts of each case are different. One fact can change the outcome. For example, the text book I used to teach business law at ASU[7] included a case where McDonald's was sued because its employee, tired from working triple overtime, caused a fatal accident. McDonald's defended saying, in effect: "Nobody made him work overtime. He volunteered. In a free society he had the right to make his own decision. We can't be the 'parents' of our workers. We do not have sufficient knowledge of their lives, it is not our place to be that involved in our workers' lives, and workers don't like it when employers are 'paternalistic.' And, it is bad public policy." But, McDonald's lost. How can that be? The answer is that the employee in question was a minor; thus, greater monitoring and care was required. This one fact changed the outcome in the face of compelling practical and public policy arguments to the contrary.

F. The Law Responds to Technology and Social Change.

Since the industrial revolution, if not before, the law has been "chasing" technology and reacting to the social change caused by it. The corporation as a legal entity existed before the Industrial Revolution; but, the need for large physical plants, with specialized equipment, division of labor, and layers of organization financed by third-party investors made the corporate form of business organization and finance perfect for the times.

Similarly, most decisions involving data and other electronic intangibles have been decided under the Uniform Commercial Code (UCC) for the sale of goods. (a prime example of which is furniture, equipment and goods you buy in a store). The UCC itself arose from the Uniform Sales Act of 1906. The obvious question is: "Why are legal questions relating to advanced technology being decided in accordance with the UCC which was designed for the sale of goods?" The answer is that there was no other law widely recognized and readily available. (And, by the time statutes were written to deal specifically with

[6] Atul Gawande 2011 The Checklist Manifesto: How to Get Things Right Picador (Kindle Edition)
[7] Barrett, The Honors College, W.P. Carey School of Business, Arizona State University.

software and other data-related questions it was too late; a whole body of case law existed applying the UCC.)

G. The Legal Issues, and Their "Framing" Change

Sometimes, even after exhaustive research, the attorney cannot find the answer she wants or needs. In that case the attorney may look to change the issue. The premise is: "Control the issue, control the outcome." Formulation and presentation of the issue is the "looking glass" the attorney uses and asks others to accept.

H. The Legal "Answer" May Not Be Worth its Cost

Under a cost-benefit analysis the answer to some legal questions may not be worth the time and money required for a thorough analysis and case work-up, even if the client has adequate funds for the legal proceedings (which often is not the case). For example, the above-referenced client who asked the quick question regarding the repair shop's actions did not pursue the matter, at least not by taking legal action.

I. Performance Matters in Law

One attorney or client may have a better argument or day in court than the other. My firm has had clients with the better case on the merits who lost because, in spite of our counseling and admonitions, came across as incredible "buttheads" on the stand. Uncertainty of answers and outcome are "constants" of the legal system.

J. The Story is the Thing to Catch the Conscience of the Jury

Legal advocacy is a battle of stories. The attorneys point to different facts and law to support their view of the case. A party with weaker facts may prevail because of favorable law, or vice versa. To create a compelling, persuasive story the attorney needs a "winning issue;" i.e. one with favorable law on the facts and legal issue presented. The case outcome will depend on opposing counsel's, or the judge or jury's, acceptance of the argument and story presented -- or if not acceptance, then opposing counsel's respect for the argument and concern that it creates an adverse or uncertain outcome.[8]

**Bad Contracts Cause Bad Outcomes**

The quick contract or legal document, i.e. form, suffers from the same false premises and problems as the quick question. Contracts have consequences and bad contracts have bad consequences. Just as the "quick question" conception of law leads to wrong answers, a "quick form" approach to contracts and legal documents can have life-changing negative consequences.

In medical practice while certain vitamins and herbs are sold over the counter, the most potent drugs and medical procedures are left to physicians, pharmacists and other medical professionals. The public is protected from most ways of doing themselves and others substantial and permanent harm.

The same is not true with law and legal documents. In a client consultation it is not unusual for us to discuss a dozen practical and legal points that need to be addressed to define and enforce the relationship and expectations of the parties. Yet, one can go online to buy a form for a trust, a non-disclosure agreement or business contract without providing any information about the parties' objectives and intent, without receiving adequate or even *any* consultation and advice about the meaning and proper use of the document(s), and without any attempt by somebody to tailor the documents to the client's needs on the facts or particular situation.

With a form document the client has no way to know what is missing, to know whether the document makes the best use of local law in the situation, or to evaluate whether the form properly captures the essence of the deal both as it is and as it should be. This absence of knowledge and expertise is dangerous because ignorance (i.e. not knowing) is dangerous. Online legal question and answer sites, and form contract and document sites, like LegalZoom and Rocket Lawyer, may not just be a bad deal; they can be positively harmful with life-altering negative business and personal consequences.[9]

***Conclusion, The Law As Advocacy***

[9] "Transactional lawyer" has been listed as one of the trades or professions that will disappear within 15 years. This is unfortunate. The notion that something is quick and easy does not mean it is competent or not harmful. Given the personal and societal harm, e.g. the excruciating time, turmoil and expense of litigation, not to mention businesses harmed, if not lives ruined, caused by the "Dick and Jane" approach to legal questions and documents, which this and other law firms see "everyday," I am surprised and perplexed that the unauthorized practice of law has not been more regulated by Congress and state legislatures as well as enforced by the American Bar Association and the State Bar Associations. They seem to be "fiddling while Rome burns" as the legal profession is being destroyed to the public detriment.

To apply the wisdom of Master Gregory, cited above, "asking for 'the' answer in the law is the 'wrong question.' As explained by Justice Holmes, *supra*, the Law is not mathematical. It is unlike our conception of physical science wherein the "answer" is awaiting discovery.

Because the only "constants" of law are changing facts, countervailing and evolving law, seemingly never-ending argument and uncertainty of outcome, the "answer" to most questions in law is that there is no (definitive) answer (or form document), certainly not one somewhere "etched" in the fabric of the Universe. The "quick question" is based on the false assumption that there is a quick answer, when in truth there may be no definitive or "known known" answer at all.[10] Even if we have the "correct answer," we may not know that we do. What we have left, then, is an analysis of the strong and weak arguments[11] and the need to tailor our work to the situation at hand.

The "take away" from this article is this:

1. The quick question is a wrong question because it implies the existence of a simple, definite, easy to find answer. In fact there may be no definitive answer at all, particularly one that does not take time to find and does not evolve over time. It is the evolving nature of law that requires attorneys to do legal research, even on the same issues in every new case.
2. The quick question is often based on a false conception of the law as a science with "answers out there" waiting to be discovered. There aren't.
3. The quick question may even be based on a "Dick and Jane" conception of the law in which everything is easy and requires no particular education, knowledge and experience. This raises the corollary points that legal work is not that quick and easy, which is discussed in my article "*Ode to the Common Man,*" and that contracts are not forms, which I discuss in my companion piece "*The Falsity of Forms, Ten Things You Need to Know about Business Contracts."* You may get a copy of these articles on this Site (i.e. the firm website) or from the firm at thefirm@azbuslaw.com.

[10] The term "known knowns;" that is things that we know we know came from Secretary of Defense Donald Rumsfeld in a press briefing in 2002.

[11] Epistemologically, without intending to adopt a philosophical position, what I am describing is a theory of legal relativism; that is, the law as having no absolute truth. To quote William James, a founder of the philosophical school of "Pragmatism": "Truth is what works."

4. Bad contracts cause bad outcomes. The "form as contract" approach is based on the false (perhaps unrecognized) assumption that contracts are fungible, i.e. one is good as another. Legal contracts are like shoes. One pair does not fit everyone nor is it suitable for all occasions. Moreover, with contracts, as with litigation, the attorney is an *advocate. She is not completing a form; she is representing you.*
5. The wrong approach causes wrong answers and bad outcomes which can cause life-changing personal harm.
6. It is for these reasons that the online legal question and answer sites, which I discuss above, and form documents from LegalZoom and Rocket Lawyer are often not just a bad idea, but also can be harmful. Their use is based on the "wrong questions" of "What's the answer?" and "What's the Form?"

Bottom line, a good legal answer or a good legal contract or document are the product of lawyer advocacy. The best outcome comes from the lawyer's tailoring of the work product to the facts to achieve the "best fit," not from any objective, let alone simple, reality of question, answer or form.