## Chapter 3

**ALTERNATIVE, JUDICIAL AND**

**ONLINE DISPUTE RESOLUTION**

*Why do we not want to go to court?*

**I. Overview**

One of the most prevalent myths in the folklore of law and lawyers is found in the dramatization of trials. In the world of pop culture, no one knows who really did it until the end when a surprise witness shows up to "finger" the bad guy. Regardless of the outcome, the process is always full of glamour and intrigue.

Welcome to Real World 101! A trial rarely resembles the goings on found in the entertainment media. Trials are long, tedious, emotionally and financially draining processes for all parties concerned. In many ways a trial represents a failure by the parties to reach some sort of satisfactory solution of the issue beforehand. Rarely do the parties actually want to go through the machinations of being led through a labyrinth of pleadings, motions, and the like, feeling all the while totally dependent on the sometimes questionable competence of their attorneys. Unlike the make-believe world of entertainment, the job of an attorney is to keep his or her client out of court. The attorney’s professional advice should anticipate and resolve potential legal problems before, rather than after, the fact.

Assume a dispute does arise which cannot be avoided. The first step taken may not be at the courthouse door. Because of all the frustrations associated with the trial process, one of the fastest growing arenas of law-related activities is found in alternative dispute resolution mechanisms. The more traditional methods are arbitration and mediation. In both cases, a disinterested third party is called in to assist the disputing parties. With arbitration, the parties agree to be bound by the arbitrator. In mediation, the third party acts to bring the parties together but cannot bind them to an agreement. Newer mechanisms include judicial referees, fact-finders, and ombudsmen. In addition, most governmental agencies have internal administrative remedies available for resolution of problems persons may be having with the agency. If none of these out-of-court methods are feasible, the court trial process comes to the fore.

**II. Hypothetical Multi-issue Essay Question**

Mr. Cav E. At-Emptor is fed up. He has suffered through the ownership of a model XXX Luxmobile auto since he bought it new from Loud and Obnoxious Motors nine months ago. The car has spent more time in the repair shop than on the road and is now out of warranty. Mr. At-Emptor still owes over four years worth of payments on the car and has decided he is tired of paying for the car twice—once to buy it and once again to repair it. His sales contract has a clause allowing for arbitration of disputes on a voluntary basis through an automobile industry-funded panel. Mr. At-Emptor decides not to take advantage of this procedure. He cites the "lemon law" and seeks a full refund instead. Assuming this law requires the consumer to use all noncourt measures first, what can Mr. At-Emptor do?

**III. Outline**

Anatomy of a Lawsuit

Pretrial Litigation Process

Pleadings (possibly e-filing)

Complaint – must be filed within the statute of limitations

Answer

Discovery

Discover relevant facts

No Surprises 🡪 depositions, interrogatories

Note: executive calendars are judged using a multifactor approach

Dismissal and Pre-Trial Judgments

Settlement Conference

Trial

Motions

For judgment on the pleadings

For summary judgment

For judgment notwithstanding the verdict

Anatomy of a Jury Trial

Jury selection

Opening statement

Plaintiff’s case

Defendant’s case

Rebuttal and rejoinder

Closing arguments

Jury instructions

Jury deliberations

Verdict

Entry of judgment

# The Appeal

## In a civil case, either party can appeal the trial court’s decision once a final judgment is entered

## In a criminal case, only the defendant can appeal

## An appellate court will reverse a lower court decision if it finds an error of law in the record

### It will generally not reverse a finding of fact 🡪 In Weisgam v. Marley Company, however, the Supreme Court noted that an appellate court may enter judgment against a jury-verdict winner with proper determination.

### Types of Alternative Dispute Resolution

## Arbitration

## Conciliation

## Fact finding

## Judicial referee

## Mediation

## Minitrial

Small claims court

All-business courts

# Arbitration

## Arbitration is a form of ADR in which parties choose an impartial third party to hear and

## decide the dispute

## Many contracts require that disputes arising out of the contract be submitted to arbitration

# Mediation and Conciliation

## Mediation

### A form of ADR in which the parties choose a neutral third party to act as the mediator

### of the dispute

## Conciliation

### A form of mediation in which the parties choose an interested third party to act as the mediator

# Minitrial

## A minitrial is a session, usually lasting a day or less, in which the lawyers for each side present their cases to representatives of each party who have authority to settle the dispute

# Fact-Finding

## Fact-finding is a process where the parties hire a neutral person to investigate the dispute

## The fact-finder reports his findings to the adversaries and may recommend a basis for settlement

# Judicial Referee

Parties to Dispute Resolution

Judges/Justices 🡪 administer

Lawyers 🡪 advocate/counselor

Jury 🡪 petit: trier of fact; grand: investigates, indictment

Plaintiff/Petitioner 🡪 brings case

Defendant/Respondent 🡪 parties against whom case is brought

**IV. Objective Questions:**

**Terms:**

1. The party accusing the defendant of a legal wrong is called the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

2. In addition to a defendant's answer, a defendant may cite why her action was justified or that the statute of limitations has run. This additional statement is called an \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

3. The act of other parties taking an interest and becoming involved in a lawsuit is called \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

4. A pretrial motion that asserts that there are no factual disputes to be decided by the jury and that the judge should apply the relevant law to the undisputed facts to decide the case is called a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

5. A petitioner must file a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ to ask the Supreme Court to hear a case.

6. A \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ establishes the period during which a plaintiff must bring a lawsuit against a defendant.

**True/False:**

1. \_\_\_\_ In a diversity case, all plaintiffs must be citizens of the same states as the defendants.

2. \_\_\_\_ A federal tax court is a court of general jurisdiction.

3. \_\_\_\_ To be granted a jury trial, both parties must agree to and request a jury trial.

4. \_\_\_\_ In a criminal case, only the defendant, and not the prosecutor, can appeal a case after the trial

court's final judgment.

5. \_\_\_\_ Generally, courts are inclined to uphold arbitration decisions rather than overturn them.

6. \_\_\_\_ In mediation and conciliation, the third party renders a decision.

7. \_\_\_\_ Whether an issue is subject to arbitration is a matter for the arbitrator to decide.

8. \_ Obtaining personal jurisdiction in Cyberspace is a cut-and-dry problem.

**Multiple Choice:**

1. Plaintiff Paul decides to sue Defendant Dan. The suit involves a car accident between Paul and Dan. Paul must:

A. File a reply.

B. File an answer.

C. File a complaint.

D. None of the above.

2. Assume the same facts as in question 1. Once Paul initiates the suit by filing the first document, Dan must:

A. File a reply.

B. File an answer.

C. File a complaint.

D. None of the above.

3. Assume the same facts as in question 1. Dan now decides the car accident was really Paul's fault. Paul has already initiated his lawsuit. What must Dan do to assert his claim against Paul?

A. File a reply.

B. File a cross-complaint.

C. File an answer.

D. None of the above.

4. Assume the same facts as in question 3. After Dan asserts his claim against Paul, what must Paul do?

A. File a reply.

B. File a cross-complaint.

C. File an answer.

D. None of the above.

5. Assume the same facts as in question 4. Paul believes Dan's claims are ridiculous. Paul enters a motion stating that there are no factual disputes, but only a disagreement over the relevant traffic laws. Therefore, Paul asks that the judge apply the law and decide the case. Paul's motion is a motion for:

A. Discovery.

B. Intervention.

C. Summary judgment.

D. None of the above.

6. Assume the same facts as in question 5. Now assume that before Paul initiates the suit in court, the two decide to resolve their dispute outside of court since litigation is so costly. Paul and Dan agree to have a neutral third party decide the dispute and render a decision. Paul and Dan have elected to resolve the dispute by:

A. Mediation.

B. Minitrial.

C. Judicial referee.

D. Arbitration.

**V. Answers to Objective Questions:**

**Terms:**

1. *Plaintiff.* This party carries the initial burden of proving the alleged wrong.

2. *Affirmative defense.* An affirmative defense will, in effect, add an additional burden of proof to the opposing party's case.

3. *Intervention.* Intervention allows public interest groups to take part in court cases that have socio-economic implications for society as a whole.

4. *Motion for summary judgment.*  This motion has also been disparagingly referred to as "being laughed out of court."

5. *Petition for Certiorari*. If the court decides to review a Writ of Certiorari will be issued.

6. *Statute of Limitations*. Plaintiff loses right to sue if suit is not filed within this period.

**True/False:**

1. False. The opposite is true.

2 False. The tax court only deals with tax issues.

3. False. Only one party must request a jury trial.

4. True. In a civil case, either party may appeal the trial court's decision.

5. True. Generally courts show great deference to arbitration decisions in order to promote alternative dispute resolution.

6. False. In mediation and conciliation, the third party acts as a communication channel but does not render a decision. The parties must come to settlement on their own.

7. False. Whether an issue is subject to arbitration is a matter for the courts, not the arbitrator, to decide.

8. False. State courts are all over the place. Special application of the “minimum contacts” standards will be needed.

**Multiple Choice:**

1. C. A complaint is a document filed by the plaintiff that defines the problem. A is incorrect because a reply is an answer in a cross-complaint situation which the original plaintiff files to the cross-complainant. B is incorrect because an answer is a document filed by the defendant in response the plaintiff's complaint.

2. B. Once Paul files the complaint, Dan must file an answer, which is a response to Paul's complaint that must be filed with the court and served on Paul. A is incorrect because a reply is an answer in a cross-complaint situation which the original plaintiff files to the cross-complainant. C is incorrect because a complaint is the document filed by Paul that defines the problem.

3. B. A cross-complaint is an addition to Dan's answer that says Dan was injured by Paul, not vice-versa. A is incorrect because a reply is an answer in a cross-complaint situation which the original plaintiff files to the cross-complainant. Here, Paul would file a reply. C is incorrect because an answer is a response to the plaintiff's complaint that must be filed with the court. Although a cross-complaint is an addition to Dan's answer, B is the correct answer since it more specifically answers the question.

4. A. A reply is an answer in a cross-complaint situation that the original plaintiff (Paul) files to the cross-complainant (Dan). B is incorrect because a cross-complaint is the addition to Dan's answer that said Dan was injured by Paul, not vice-versa. C is incorrect because an answer is Dan's response to Paul's complaint.

5 C. A motion for summary judgment is a pretrial motion that asserts that there are no factual disputes to be decided by the jury and that the judge should apply the relevant law to the undisputed facts to decide the case. A is incorrect because discovery is a process during which both parties engage in various activities to discover facts of the case from the other party and witnesses prior to trial. B is incorrect because intervention is the act of other parties taking an interest and becoming involved in a lawsuit.

6. D. Arbitration is a form of alternative dispute resolution in which the parties choose an impartial third party to hear and decide the dispute. A is incorrect because in mediation, the third party does not render a decision, but rather helps the parties come to a resolution themselves. B is incorrect because a minitrial is a short session in which the lawyers for each side present their cases to representatives of each party who have the authority to settle the dispute. C is incorrect because a judicial referee is a court appointee who conducts a private trial and renders a judgment.

**VI. Answers to Essay Question:**

The vast majority of consumer complaints are resolved outside the court system. It is in the best interests of business goodwill to cultivate the loyalty of happy customers. It is never too late in the dispute process to reach some sort of private settlement. Unfortunately, the more time and money that is spent on the issue, the greater the likelihood of both sides hardening their positions. There is an optional arbitration provision available to Mr. At-Emptor. He may not trust this mechanism based on his negative experience with his car and the dealer. Although contractually optional, he may have to use the arbitration procedure as a precondition to being able to file a complaint in court under the state lemon law. Connecticut and California have recently incorporated such provisions in their versions of lemon laws.