CHAPTER I
WHAT IS LITIGATION?

I. GENERALLY

Black's Law Dictionary defines litigation as a "contest in a court of justice for the purposes of enforcing a right." But litigation is more than just a "contest" to enforce a right — or expose a wrong. In medieval times, truth and justice were tested by wager of battle; brute physical force won the day or proved the rightness of one's cause. Sometimes it was trial by fire, or water, where the wrath or justice of God became the ultimate arbiter — if you survived. But to litigate is to really engage in an intellectual battle — it is the consummate test of adversarial skills where one must be quick, and yes, even crafty; where sometimes the ability to use "street smarts" in playing to a jury may decide the fate of the matter. Litigation is the adrenalin rush one gets in the presence of the jury, whether opening, summing up, or catching a witness in a misstatement. To litigate is to engage in the ultimate chess game — a strategy for winning and defeating your adversary. It is not for the faint of heart or those who easily crumble under pressure or those who cannot recover quickly from a momentary setback. It requires skill in terms of knowledge of facts and law but simultaneously employing psychology and skilled communication — the art of persuasion.

A litigant, for general discussion purposes, may be either a plaintiff or a defendant and is often referred to as a party. A party is a person in interest — one whose rights will be affected by the outcome of the litigation. A party may also be a witness, but a witness may also be a third person who has information concerning the subject matter of the litigation but who has no interest in the outcome.

The concept of litigation has developed over a long period of time and may be traced back to the beginning of time. Litigation is often referred to as "trial" and history notes that the term "trial" has taken various forms in which to resolve disputes between parties: "trial by fire," "trial by water," "trial by battle" and any number of methodologies employed to seek the elusive concept of "justice." Culturally speaking, every society has used trial in a different concept or context to a certain extent.

In today's modem age, we have developed the technique of trial and resolution of disputes through the availability of the judicial system. In the United States our system is a model of the English system. The United States is often referred to as the most litigious society in the world. Culture enters into the question of litigation. For instance, in Japan litigation is frowned upon. In the United States

however, every citizen, by virtue of the Constitution, has a right to trial and that concept is called due process. In the context of due process our system has developed an extensive system of rules of evidence. Added to those rules is the concept of discovery (discussed in Chapter VI), which provides for the exchange of information so that there are no surprises at the time of trial and all parties know what to expect and ensure fairness in the proceedings.

Finally, there is the verdict, which may to lead to a judgment favorable to either the plaintiff or the defendant. While in the case of the defendant the judgment may bring closure, for the plaintiff a monetary award may bring a new round of proceedings to enforce and collect the judgment.

But litigation does not come without costs. It is an expensive process and in some respects many Americans have been foreclosed from that process because they lack the funding to carry on litigation. To that extent we do not follow the English system, which awards attorneys fees to one who prevails in the litigation. That concept, in all probability, is a deterrent of sorts to those who would file a lawsuit and again, probably makes a litigant think twice before instituting a claim.

In our own system the Rules of Professional Conduct *(RPCs)* make specific provision for the basis on which a lawsuit may be brought. *RPC* 3.1, Meritorious Claims and Contentions, provides that "a lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Similarly, lawyers are under an obligation to expedite litigation. *RPC* 3.2. The provision of *RPC* 3.2 is noteworthy inasmuch as that particular rule provides not only that a lawyer take reasonable efforts to expedite litigation "consistent with the interests of the client" but "shall treat with courtesy and consideration all persons involved in the litigation process."

Because of the explosion of litigation, the legislature in the State of New Jersey created a statute governing frivolous litigation. That statute, *N.J.S.A.* 2A:15-59.1, *R.* 1:4-8 provides for the recovery of legal fees if in fact it is determined that the litigation was frivolously brought. It is noteworthy that the statute may and should be used as a defense if the defendant has reason to believe that there is not a meritorious claim.

Finally, we would be remiss if we did not consider the issue of Alternate Dispute Resolution (ADR). While litigation still consumes the bulk of the time of the judiciary, many commercial contracts

today provide for mediation or arbitration as an alternate route to resolving disputes. In fact, in New Jersey, the court system has for many years implemented ADR, also referred to as Complementary Dispute Resolution (CDR), in the court system as it related to personal injury actions and now commercial transactions prior to trial. While in most instances this is a non-binding form of resolution, the trend is to employ more ADR rather than less, but litigation will still be a primary vehicle for resolution of disputes between parties for many years to come. For information on mandatory arbitration and mediation, *see* Chapter VII, § C.

II. JURISDICTION & VENUE

Jurisdiction is the term that is commonly used to describe the court's power to hear and determine a case. There are three primary types of jurisdiction: a) personal jurisdiction; b) subject-matter jurisdiction; and c) *in rem* jurisdiction. An attorney must address the issue of whether a specific court has both personal jurisdiction and subject-matter jurisdiction in every case that is litigated. *See*, *R.* 4:4-4. The federal court equivalent to *R.* 1:4-8 is Fed. R. Civ. P. 11, which is applied similarly to matters pending before each of the U.S. District Courts throughout the country.

A. PERSONAL JURISDICTION

Personal jurisdiction refers to the court's authority to decide a matter and to exert authority over the individual or entity. For example, a court in New Jersey, either state or federal, has personal jurisdiction over every individual who resides in the state and every entity that is incorporated in the state or is found to be doing business in the state. A court may also have personal jurisdiction over an individual or entity if that person or entity has "minimum contacts" with the state that relate to the transaction or issue that gives rise to the lawsuit.

Minimum contacts are not easy to quantify or specifically identify other than on a case-by-case basis. Generally speaking, however, a person or entity has minimum contacts with a state if that person or entity could have reasonably foreseen that he/it would be held accountable for his/its activities in that state. For example, a national beverage company that is based in Atlanta, Georgia but sells soda in every state in the country should reasonably foresee that it would be accountable for its product in each state. Courts will exercise personal jurisdiction over these individuals and entities if doing so does not offend the court's notions of fairness and fair play. For example, a corporation will be found to have minimum contacts with the state if it does business in New Jersey, solicits business from New Jersey residents, or