PRESIDENT
John C. Simons
Hoagland, Longo, Moran, Dunst & Doukas, LLP
40 Paterson Street, Box 40
New Brunswick, New Jersey 08903
(732) 545-4717
(732) 545-4579 FAX
john_simons@hlmdd.com

PRESIDENT ELECT
Thomas D. Robertson

VICE PRESIDENTS
Michael J. Marone
Suzanne M. Marasco
Demetrios C. Batsides

SECRETARY/TREASURER
John D. North

CHAIR/PAST PRESIDENT
Louis J. DeVoto

TRUSTEES
Christopher R. Carton
Hon. James D. Clyne
Hon. Marina Corodemus
William O. Crutchlow
Karl F. Friedrichs
Hon. C. Judson Hamlin
Craig S. Hilliard
John E. Hogan, Jr.
Richard V. Jones
Hon. John E. Keefe, Sr.
Donald W. Kiel
Robert A. Kirsch
Hon. Jack L. Lintner
Anthony V. Locasio
Stephen R. Long
Diane Magram
Diana C. Manning
Sheralyn Mar
Harry D. McEnroe
Chad M. Moore
Christopher J. O'Connell
Paul A. O'Connor, III
Anne M. Patterson
Christopher S. Porrino
Gerald J. Resnick
Michael R. Ricciardulli
Daniel M. Santarsiero
Cynthia Andras Satter
Rubin M. Sinins
Edward G. Sponzilli
Peter J. Torcicollo
Hon. M. Allan Vogelson
Richard J. Williams, Jr.
Charles E. Woolson
Michael B. Zerres

Parliamentarian
Edwin R. Matthews

P.O. Box 184
West Allenhurst, NJ 07711
Telephone (732) 517-1337
Fax (732) 531-0397
e-mail: gwbtanj@aol.com
www.tanj.org
Executive Director
Ginny Whipple Berkner

October 13, 2009

Via: Federal Express Overnight Mail

Mark Neary, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
25 W. Market Street
Trenton, New Jersey 08625-0970

Re: Guido v. Duane Morris, LLP, et al.,
Appellate Division Docket No. A-1162-08T3
Attorney Collateral Account No. 140924

Dear Mr. Neary:

On behalf of Trial Attorneys of New Jersey, I enclose for filing the original and nine copies of the following:

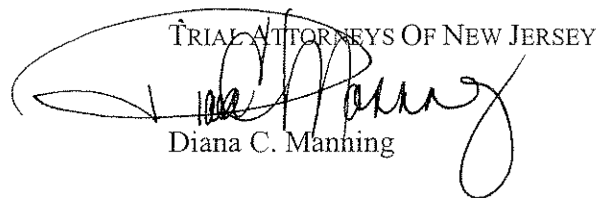
1. Notice of Motion for Leave to Appear as *Amicus Curiae*;
2. *Amicus Curiae* Brief Of Trial Attorneys Of New Jersey In Support Of Defendants-Movants Duane Morris, LLP, Frank A. Luchak, Esq. And Patricia Kane Williams, Esq.'S Motion For Leave To Appeal; and
3. Certification of Service.

Please charge the above-referenced Attorney Collateral Account for your filing fee. Please also return the additional copy of the enclosed to me in the self-addressed, stamped envelope provided.

Should the Court require any further information, please do not hesitate to contact me at 973-660-4439.

Respectfully submitted,

TRIAL ATTORNEYS OF NEW JERSEY



Diana C. Manning

DCM/bsj
Enclosures
cc: Joseph P. La Sala, Esq., w/enc., via Federal Express
Donald P. Fedderly, Esq., w/enc., via Federal Express
John C. Simons, Esq., w/enc.
Thomas Robertson, Esq., w/enc.

Trial Attorneys Of New Jersey
P.O. Box 184
West Allenhurst, New Jersey
(732) 517-1337
Proposed Amicus Curiae

JOSEPH M. GUIDO and TERESA GUIDO, husband and wife, Plaintiff, v. DUANE MORRIS, LLP, a Limited Liability Partnership, FRANK A. LUCHAK, ESQ., PATRICIA KANE, ESQ., and JOHN DOES 1-10, Defendant.	SUPREME COURT OF NEW JERSEY DOCKET NO.: Civil Action APPELLATE DIVISION DOCKET NO.: A-1162-08T3 SAT BELOW IN THE APPELLATE DIVISION: Hon. Ariel A. Rodriguez, J.A.D. Hon. Alexander P. Waugh, Jr., J.A.D. SAT BELOW IN THE LAW DIVISION: Hon. Edward M. Oles, J.S.C. **NOTICE OF MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE**

TO: Joseph P. La Sala, Esq.
McElroy, Deutsch, Mulvaney & Carpenter, LLP
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962
Attorneys For Defendants
Duane Morris, LLP, Frank A. Luchak, Esq., and Patricia Kane Williams, Esq.

985299_1

Donald P. Fedderly, Esq.
Law Offices of Donald P. Fedderly
88 Bartley Road
Flanders, New Jersey 07836
Attorney For Plaintiffs

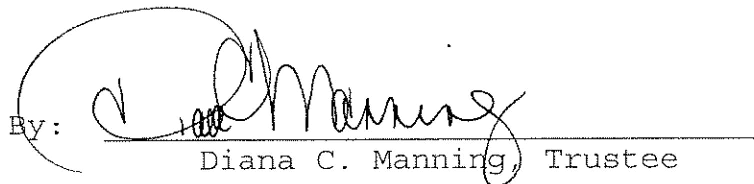
COUNSEL:

PLEASE TAKE NOTICE that Trial Attorneys Of New Jersey ("TANJ") hereby moves for an Order permitting TANJ to appear in this matter as *amicus curiae* pursuant to R. 1:13-9, to submit a brief in the form submitted herewith, and to participate in oral argument;

PLEASE TAKE FURTHER NOTICE that in support of this motion TANJ will rely on Brief of *Amicus Curiae* Trial Attorneys Of New Jersey submitted herewith.

Respectfully submitted,

TRIAL ATTORNEYS OF NEW JERSEY
Proposed Amicus Curiae



By: ______________________
Diana C. Manning, Trustee

Dated: October 13, 2009

Trial Attorneys Of New Jersey
P.O. Box 184
West Allenhurst, New Jersey
(732) 517-1337
Proposed Amicus Curiae

JOSEPH M. GUIDO and TERESA GUIDO, husband and wife, Plaintiff, v. DUANE MORRIS, LLP, a Limited Liability Partnership, FRANK A. LUCHAK, ESQ., PATRICIA KANE, ESQ., and JOHN DOES 1-10, Defendant.	SUPREME COURT OF NEW JERSEY DOCKET NO.: Civil Action APPELLATE DIVISION DOCKET NO.: A-1162-08T3 SAT BELOW IN THE APPELLATE DIVISION: Hon. Ariel A. Rodriguez, J.A.D. Hon. Alexander P. Waugh, Jr., J.A.D. SAT BELOW IN THE LAW DIVISION: Hon. Edward M. Oles, J.S.C. **CERTIFICATION OF SERVICE**

Diana C. Manning, being of age, certifies as follows:

1. I am an attorney-at-law of the State of New Jersey and a member of the law firm of Bressler, Amery & Ross, P.C. I am a Trustee of the proposed *amicus curiae* Trial Attorneys of New Jersey.

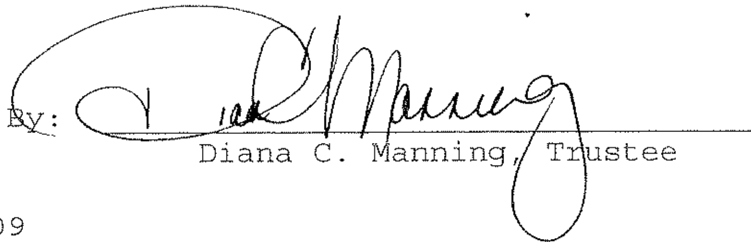
1. On this date I caused to be served via Federal Express Overnight Delivery to the Clerk of the Supreme Court, State of New Jersey, Hughes Justice Complex, 25 West Market Street, Trenton, New Jersey 08625-0970 an original and nine copies of Notice of Motion for Leave to Appear as *Amicus Curiae; Amicus Curiae* Brief Of Trial Attorneys Of New Jersey In Support Of Defendants-Movants Duane Morris, LLP, Frank A. Luchak, Esq. And Patricia Kane Williams, Esq.'S Motion For Leave To Appeal; and this Certification of Service.

2. I hereby further certify that on this date two copies of the within papers were served via Federal Express overnight mail to:

Joseph P. La Sala, Esq.
McElroy, Deutsch, Mulvaney &
Carpenter, LLP
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962
Attorneys For Defendants
Duane Morris, LLP, Frank A.
Luchak, Esq., and Patricia
Kane Williams, Esq.

Donald P. Fedderly, Esq.
Law Offices of Donald P. Fedderly
88 Bartley Road
Flanders, New Jersey 07836
Attorney For Plaintiffs

3. I certify that the foregoing statements are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.



By: ______________________
Diana C. Manning, Trustee

Dated: October 13, 2009

PRESIDENT
John C. Simons
Hoagland, Longo, Moran, Dunst & Doukas, LLP
40 Paterson Street, Box 40
New Brunswick, New Jersey 08903
(732) 545-4717
(732) 545-4579 FAX
john_simons@hlmdd.com

PRESIDENT ELECT
Thomas D. Robertson

VICE PRESIDENTS
Michael J. Marone
Suzanne M. Marasco
Demetrios C. Batsides

SECRETARY/TREASURER
John D. North

CHAIR/PAST PRESIDENT
Louis J. DeVoto

TRUSTEES
Christopher R. Carton
Hon. James D. Clyne
Hon. Marina Corodemus
William O. Crutchlow
Karl F. Friedrichs
Hon. C. Judson Hamlin
Craig S. Hilliard
John E. Hogan, Jr.
Richard V. Jones
Hon. John E. Keefe, Sr.
Donald W. Kiel
Robert A. Kirsch
Hon. Jack L. Lintner
Anthony V. Locasio
Stephen R. Long
Diane Magram
Diana C. Manning
Sheralyn Mar
Harry D. McEnroe
Chad M. Moore
Christopher J. O'Connell
Paul A. O'Connor, III
Anne M. Patterson
Christopher S. Porrino
Gerald J. Resnick
Michael R. Ricciardulli
Daniel M. Santarsiero
Cynthia Andras Satter
Rubin M. Sinins
Edward G. Sponzilli
Peter J. Torcicollo
Hon. M. Allan Vogelson
Richard J. Williams, Jr.
Charles E. Woolson
Michael B. Zerres

Parliamentarian
Edwin R. Matthews

P.O. Box 184
West Allenhurst, NJ 07711
Telephone (732) 517-1337
Fax (732) 531-0397
e-mail: gwbtanj@aol.com
www.tanj.org
Executive Director
Ginny Whipple Berkner

October 13, 2009

Via: Federal Express Overnight Mail

Mark Neary, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
25 W. Market Street
Trenton, New Jersey 08625-0970

Re: Guido v. Duane Morris, LLP, et al.,
Appellate Division Docket No. A-1162-08T3
Attorney Collateral Account No. 140924

Dear Mr. Neary:

On behalf of Trial Attorneys of New Jersey, I enclose for filing the original and nine copies of the following:

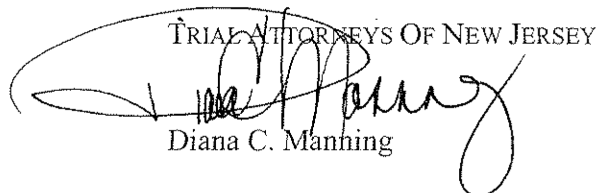
1. Notice of Motion for Leave to Appear as *Amicus Curiae*;
2. *Amicus Curiae* Brief Of Trial Attorneys Of New Jersey In Support Of Defendants-Movants Duane Morris, LLP, Frank A. Luchak, Esq. And Patricia Kane Williams, Esq.'S Motion For Leave To Appeal; and
3. Certification of Service.

Please charge the above-referenced Attorney Collateral Account for your filing fee. Please also return the additional copy of the enclosed to me in the self-addressed, stamped envelope provided.

Should the Court require any further information, please do not hesitate to contact me at 973-660-4439.

Respectfully submitted,

TRIAL ATTORNEYS OF NEW JERSEY



Diana C. Manning

DCM/bsj
Enclosures
cc: Joseph P. La Sala, Esq., w/enc., via Federal Express
Donald P. Fedderly, Esq., w/enc., via Federal Express
John C. Simons, Esq., w/enc.
Thomas Robertson, Esq., w/enc.

Trial Attorneys Of New Jersey
P.O. Box 184
West Allenhurst, New Jersey
(732) 517-1337
Proposed Amicus Curiae

JOSEPH M. GUIDO and TERESA GUIDO, husband and wife, Plaintiff, v. DUANE MORRIS, LLP, a Limited Liability Partnership, FRANK A. LUCHAK, ESQ., PATRICIA KANE, ESQ., and JOHN DOES 1-10, Defendant.	SUPREME COURT OF NEW JERSEY DOCKET NO.: Civil Action APPELLATE DIVISION DOCKET NO.: A-1162-08T3 SAT BELOW IN THE APPELLATE DIVISION: Hon. Ariel A. Rodriguez, J.A.D. Hon. Alexander P. Waugh, Jr., J.A.D. SAT BELOW IN THE LAW DIVISION: Hon. Edward M. Oles, J.S.C. **NOTICE OF MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE**

TO: Joseph P. La Sala, Esq.
McElroy, Deutsch, Mulvaney & Carpenter, LLP
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962
Attorneys For Defendants
Duane Morris, LLP, Frank A. Luchak, Esq., and Patricia Kane Williams, Esq.

Donald P. Fedderly, Esq.
Law Offices of Donald P. Fedderly
88 Bartley Road
Flanders, New Jersey 07836
Attorney For Plaintiffs

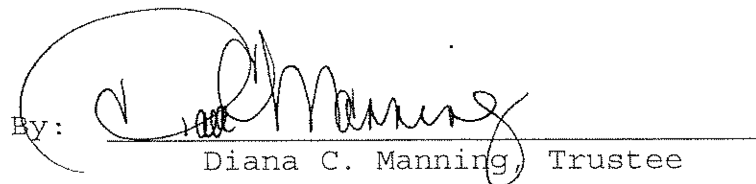
COUNSEL:

PLEASE TAKE NOTICE that Trial Attorneys Of New Jersey ("TANJ") hereby moves for an Order permitting TANJ to appear in this matter as *amicus curiae* pursuant to R. 1:13-9, to submit a brief in the form submitted herewith, and to participate in oral argument;

PLEASE TAKE FURTHER NOTICE that in support of this motion TANJ will rely on Brief of *Amicus Curiae* Trial Attorneys Of New Jersey submitted herewith.

Respectfully submitted,

TRIAL ATTORNEYS OF NEW JERSEY
Proposed Amicus Curiae



By: Diana C. Manning, Trustee

Dated: October 13, 2009

Trial Attorneys Of New Jersey
P.O. Box 184
West Allenhurst, New Jersey
(732) 517-1337
Proposed Amicus Curiae

JOSEPH M. GUIDO and TERESA GUIDO, husband and wife, Plaintiff, v. DUANE MORRIS, LLP, a Limited Liability Partnership, FRANK A. LUCHAK, ESQ., PATRICIA KANE, ESQ., and JOHN DOES 1-10, Defendant.	SUPREME COURT OF NEW JERSEY DOCKET NO.: Civil Action APPELLATE DIVISION DOCKET NO.: A-1162-08T3 SAT BELOW IN THE APPELLATE DIVISION: Hon. Ariel A. Rodriguez, J.A.D. Hon. Alexander P. Waugh, Jr., J.A.D. SAT BELOW IN THE LAW DIVISION: Hon. Edward M. Oles, J.S.C. **CERTIFICATION OF SERVICE**

Diana C. Manning, being of age, certifies as follows:

1. I am an attorney-at-law of the State of New Jersey and a member of the law firm of Bressler, Amery & Ross, P.C. I am a Trustee of the proposed *amicus curiae* Trial Attorneys of New Jersey.

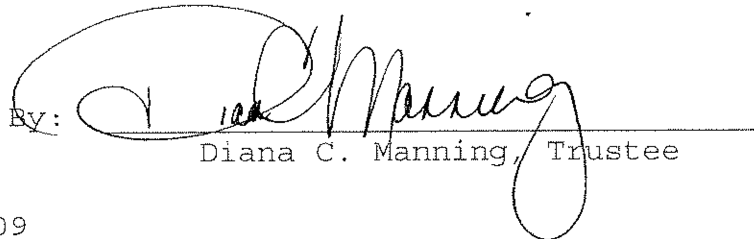
1. On this date I caused to be served via Federal Express Overnight Delivery to the Clerk of the Supreme Court, State of New Jersey, Hughes Justice Complex, 25 West Market Street, Trenton, New Jersey 08625-0970 an original and nine copies of Notice of Motion for Leave to Appear as *Amicus Curiae; Amicus Curiae* Brief Of Trial Attorneys Of New Jersey In Support Of Defendants-Movants Duane Morris, LLP, Frank A. Luchak, Esq. And Patricia Kane Williams, Esq.'S Motion For Leave To Appeal; and this Certification of Service.

2. I hereby further certify that on this date two copies of the within papers were served via Federal Express overnight mail to:

Joseph P. La Sala, Esq.
McElroy, Deutsch, Mulvaney &
Carpenter, LLP
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962
Attorneys For Defendants
Duane Morris, LLP, Frank A.
Luchak, Esq., and Patricia
Kane Williams, Esq.

Donald P. Fedderly, Esq.
Law Offices of Donald P. Fedderly
88 Bartley Road
Flanders, New Jersey 07836
Attorney For Plaintiffs

3. I certify that the foregoing statements are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.



By: ______________________________
Diana C. Manning, Trustee

Dated: October 13, 2009

JOSEPH M. GUIDO and TERESA GUIDO, husband and wife, Plaintiffs, v. DUANE MORRIS, LLP, a Limited Liability Partnership, FRANK A. LUCHAK, ESQ., PATRICIA KANE, ESQ., and JOHN DOES 1-10, Defendants-Movants.	SUPREME COURT OF NEW JERSEY DOCKET NO. Civil Action DOCKET NO. BELOW A-1162-08T3 SAT BELOW IN APPELLATE DIVISION: Hon. Ariel A. Rodriguez, J.A.D. Hon. Alexander P. Waugh, Jr., J.A.D. SAT BELOW IN LAW DIVISION: Hon. Edward M. Oles, J.S.C.

AMICUS CURIAE BRIEF OF TRIAL ATTORNEYS OF NEW JERSEY IN SUPPORT OF DEFENDANTS-MOVANTS DUANE MORRIS, LLP, FRANK A. LUCHAK, ESQ. AND PATRICIA KANE WILLIAMS, ESQ.'S MOTION FOR LEAVE TO APPEAL

TRIAL ATTORNEYS OF NEW JERSEY
P.O. Box 184
West Allenhurst, New Jersey
(732) 517-1337

On the Brief:
Diana C. Manning, Esq.

988067_1

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

LEGAL ARGUMENT 4

POINT I 4

NEW JERSEY'S STRONG PUBLIC POLICY FAVORING SETTLEMENTS REQUIRES THAT LEGAL MALPRACTICE PLAINTIFFS ALLEGE OBJECTIVE DEVIATIONS FROM THE STANDARD OF CARE WHEN CLAIMING IMPROPER ADVICE IN CONNECTION WITH A SETTLEMENT. 4

A. The Issues Raised In This Appeal Are Of Significant Importance to the Bar, Litigants, and the Judicial System.................. 4

B. Factual and Legal Background....................... 6

C. The Appellate Division Decision Will Have Significant Impact on the Trial Bar and Court Calendars.................................. 8

D. The Appellate Division Decision Undermines the Integrity of the Judicial Process............. 10

E. Allowing These Plaintiffs' Claims to Proceed Undermines the Integrity of the Mediation Process................................ 14

POINT II 17

THE SUPREME COURT SHOULD ADOPT A COURT RULE REQUIRING LEGAL MALPRACTICE PLAINTIFFS ALLEGING MISUNDERSTANDING OF A SETTLEMENT TO FIRST SEEK ENFORCEMENT, MODIFICATION, OR VACATION OF THE SETTLEMENT IN THE COURT OF ORIGINAL JURISDICTION. 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page

State Cases

Lehr v. Afflitto,
382 N.J. Super. 376 (App. Div. 2006) 14, 15

Puder v. Buechel,
183 N.J. 428 (2005) 10, 11, 14

Ziegelheim v. Apollo,
128 N.J. 250 (1992) 2, 6, 9, 10, 12

State Statutes

N.J. Const. art V, §2m ¶3 17
N.J.S.A. 2A:23C-6(c) 8, 16

State Regulations

R. 1:13-9 4
R. 1:40-1 14
R. 5:3-5(a)(10) 14
R. 5:4-2(h) 14

PRELIMINARY STATEMENT

The rights of litigants who allege they settled a matter based on improper advice of counsel must be balanced with the overarching goal of protecting the integrity of the judicial system. Because the motion for leave to appeal filed by Duane Morris, LLP, Frank A. Luchak, Esq. and Patricia Kane Williams, Esq. ("Duane Morris") raises issues that impact the courts, litigants and counsel, Trial Attorneys of New Jersey ("TANJ") requests leave to file an *amicus curiae* brief.

As Robert Frost expounded upon in "The Road Not Taken," it is human nature to wonder if a different path would have lead to an improved outcome. After a settlement, litigants are often haunted by the road not taken. Before an agreement is reached, most parties recognize the possibility that their claim or defense will be rejected. Once a matter is resolved, however, it is all too easy to forget the risks and conclude that a better deal could have been negotiated or that a trial would have lead to a better result. It is against this backdrop that every legal malpractice claim alleging improper advice in connection with a settlement is juxtaposed.

The Appellate Division's decision has the potential not only to increase legal malpractice claims, but to undermine the integrity of the judicial system. Following the court's reasoning, almost any case can be settled and then reconstituted

as a legal malpractice claim through subjective claims of improper advice. Although this Court declined to hold that a settlement bars a legal malpractice claim in Ziegelheim v. Apollo, 128 N.J. 250 (1992), the touchstone of the Court's decision was the requirement that particular facts in support of a claim be articulated. The standard is an objective one. Here, the plaintiffs do not assert deviation from an objective standard, but rather, make the subjective assertion that they did not understand the effect of the information presented to them.

Allowing subjective claims such as plaintiffs' to proceed will have significant impact on the trial bar and the judicial system. With the spectre of a future legal malpractice claim, lawyers will recommend trial over settlement if the client hesitates about resolution. Increased trials will have a direct impact on our already overburdened and understaffed courts. If a case does settle, lawyers will request a plenary hearing to put the settlement on the record. At that hearing, lawyers will be forced to ask questions that infringe upon otherwise protected attorney/client communications.

The decision also undermines the integrity of the trial court. The central allegation of malpractice is directly at odds with testimony given under oath, and on which the trial

court relied. Effectively, the trial court's approval of a settlement could be rendered meaningless.

This is also true of the mediation process. Mediation is intended to assist the parties in resolving their dispute, often at the beginning of discovery. The effectiveness of mediation as an alternative dispute resolution tool is undermined if parties can simply disavow an agreement by asserting years later that they "did not understand."

In order to preserve the integrity of the litigation process, legal malpractice claims relating to improper advice regarding settlement should only be allowed to proceed when a plaintiff can articulate an objective deviation from the standard of care, such as a failure to discover information. Subjective claims that are personal to the litigants, such as the one asserted here, should be precluded.

Given the broad impact of the Appellate Division's decision, TANJ submits that the Court should grant Duane Morris's request for leave to appeal.

LEGAL ARGUMENT

POINT I

NEW JERSEY'S STRONG PUBLIC POLICY FAVORING SETTLEMENTS REQUIRES THAT LEGAL MALPRACTICE PLAINTIFFS ALLEGE OBJECTIVE DEVIATIONS FROM THE STANDARD OF CARE WHEN CLAIMING IMPROPER ADVICE IN CONNECTION WITH A SETTLEMENT.

A. The Issues Raised In This Appeal Are Of Significant Importance to the Bar, Litigants, and the Judicial System.

Trial Attorneys Of New Jersey ("TANJ") requests leave to appear as *amicus curiae* because the issues presented in the pending motion for leave to appeal raise issues of significant importance to the members of the New Jersey bar, the litigants they represent, and the integrity and efficiency of the judicial system. TANJ respectfully submits that the judgment of the Appellate Division should be reversed.

An applicant seeking to appear as *amicus curiae* must state with specificity: (1) the identity of the applicant; (2) the issue to be addressed; (3) the nature of the public interest implicated by the issues presented; and (4) the applicant's "special interest, involvement or expertise in respect thereof." R. 1:13-9. A court "shall grant the motion if it is satisfied under all the circumstances that": (1) the motion is timely, (2) the proposed participation will "assist in the resolution of an issue of public importance," and (3) no party to the litigation will be unduly prejudiced. Id.

TANJ is an organization of approximately 800 attorneys who represent plaintiffs and defendants in civil and criminal matters in New Jersey. TANJ is dedicated to promoting the interests of the public at large, the interests of the litigants involved in civil and criminal cases, and the interests of the bench and bar. As such, it is uniquely positioned to articulate the negative impact of the Appellate Division's decision on civil litigants, the attorneys who appear on their behalf, as well as the judicial system itself.

The Appellate Division decision significantly erodes the finality both litigants and attorneys expect from the settlement of litigated matters. Further, the attorneys of this State are unduly prejudiced when, despite assurances of a client's understanding of a settlement, they face exposure to subsequent legal malpractice claims when a client subsequently claims to have misunderstood the settlement's terms and/or its effect.

TANJ is an organization comprised of individuals most significantly affected by the decision at issue. Accordingly, TANJ respectfully submits that it can effectively address the issues of public importance raised by the instant matter fully mindful of its acknowledged charge to protect the interests of the public at large, litigants, and the members of the bench and bar.

B. Factual and Legal Background.

For over seventeen years, this Court has recognized limited claims for legal malpractice stemming from improper or insufficient settlements. In permitting such claims, however, this Court made clear that generalized assertions are not enough. Claimants were directed to articulate specific facts to support claims of attorney incompetence. Attorneys were put on notice that malpractice claims could be avoided if settlements were explained in open court and clients testified to their understanding and assent on the record. See Ziegelheim v. Apollo, 128 N.J. 250, 267 (1992).

The attorneys here did much more than simply put the settlement on the record to insure their clients' informed and voluntary acceptance. Indeed, the factual background is compelling.

The parties negotiated, without the assistance of counsel, many of the terms plaintiffs now disavow. Upon learning of the parties' agreement, counsel advised plaintiffs, in writing, that they did not recommend the terms. Plaintiffs opted to proceed anyway. A settlement was placed on the record. Counsel reiterated his reservations about the terms. Plaintiffs had a change of heart.

A second action was filed. The parties participated in a mediation for 13 hours, ultimately resolving the case. At the

time of the mediation, plaintiffs had drafts of the proposed agreement for several months. After sleeping on the agreement, the parties put the settlement on the record the next day. The mediator appeared in court and assisted in putting the agreement on the record. The trial court conducted *voir dire*, and specifically questioned plaintiffs about their understanding and assent. Both plaintiffs testified that they, in fact, understood the agreement.

Now, plaintiffs seek redress from their counsel, claiming they did not understand the consequences of the agreement, a contradiction from their testimony in court. As set forth in the Complaint in only a cursory fashion:

> Defendants further failed to exercise the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession similarly situated, and failed to employ reasonable care and prudence in connection with their representation of Mr. and Mrs. Guido, in that, among other things, Defendants failed to advise them of each of the foregoing consequences to them, and instead counseled them to enter into the settlement.

37a (¶48). Plaintiffs make this bare allegation - unsupported by any facts -- despite having the imprimatur of the mediator, a retired judge, and the approval of the trial court on the record.

In its ruling, the Appellate Division held that plaintiffs did not have to attempt to vacate the settlement in the trial

court before bringing this malpractice action, in effect sanctioning a claim based on nothing more than the quintessential "he said, she said" allegation. The two non-interested parties who might shed light on the plaintiffs' understanding, the trial court and the mediator, would most likely be unavailable to testify in this litigation, even if the mediator was not deceased. See N.J.S.A. 2A:23C-6(c). TANJ submits that this type of subjective claim does not meet the criteria required to maintain a legal malpractice action.

C. The Appellate Division Decision Will Have Significant Impact on the Trial Bar and Court Calendars.

To protect themselves against subjective legal malpractice claims, trial attorneys will have no choice but to recommend going to trial if clients are unsure about settlement. More cases will only settle at the courthouse steps, and even then, counsel are likely to ask for a plenary hearing. At the plenary hearing, lawyers will have no choice but to ask questions that infringe upon otherwise protected attorney/client communications in order to fully explore the parties' understanding of the terms. This puts attorneys in a conflict with their clients at the time of settlement.

The facts in this case exemplify the difficulty presented. Plaintiffs put their assent to the settlement on the record in open court. As the trial judge specifically inquired:

> Thank you. Will you please be seated. Mr. & Mrs. Guido, you've had an opportunity to come to court on two or three occasions. You've also had settlement discussions on your own and you've also had the assistance of Judge Havey in mediating this and bring closure in accordance with the terms that were described in court. Do you understand the terms?

Da272. Both plaintiffs testified that they did. Both plaintiffs also testified that they agreed to be bound by the terms. Id. Finally, the court inquired whether the plaintiffs were in reasonably good health so that nothing would impact their ability to accept the responsibility for the terms, "as well as the fruits of this agreement." Id. Again, both plaintiffs testified that they were in good health and that they did accept responsibility for the settlement terms. Now plaintiffs assert that they did not understand the effect of the settlement.

If, as the Appellate Division opinion infers, a judge must do more than this to bring finality to a matter, the inquiry is bound to infringe upon confidential discussions between the attorney and client. This puts both the court and counsel in a difficult, if not untenable, situation.

As this Court acknowledged in the Ziegelheim decision, one of the purposes of putting a settlement on the record is to avoid future malpractice claims. Counsel should not have to request, however, that a client waive privileged communications

in order to protect against future litigation. To avoid such a conflict, if parties testify on the record that they understand the terms of a settlement, they should be precluded from asserting in a subsequent litigation that they really did not understand the terms without submitting objective evidence to support a *prima facie* case.

D. The Appellate Division Decision Undermines the Integrity of the Judicial Process.

A party is generally precluded from settling litigation and then seeking to recoup perceived deficiencies in the settlement through a legal malpractice action. As recognized by this Court, "[f]or nearly forty-five years, New Jersey courts have found that the 'settlement of litigation ranks high in [the] public policy.'" Puder v. Buechel, 183 N.J. 428, 437-38 (2005)(citations omitted). "This practice preserves the 'right of competent, informed citizens to resolve their own disputes in whatever way may suit them.'" Id. at 438. Where the parties to litigation have reached a settlement, one "should not be permitted to settle a case for less than it is worth … and then seek to recoup the difference in a malpractice action against [the] attorney." Id. at 443.

The Puder decision reinforced the longstanding legal premise set forth in Ziegelheim v. Apollo, 128 N.J. 250 (1992) that a litigant's subsequent dissatisfaction with a settlement

does not subject his or her attorney to liability for malpractice. While the Appellate Division has cautioned that Puder should not be construed as a broad grant of immunity to legal malpractice defendants, its basic premise in precluding malpractice claims based on subsequent dissatisfaction with a settlement remains firm.

Here, the attorneys with the defendant law firm advised plaintiffs twice that they should not agree to any limitations on their voting rights in the corporation. Plaintiffs ultimately ignored that advice. Now they assert that they did not understand the impact of the settlement, despite testifying under oath that they did understand it.

The Appellate Division concluded that plaintiffs were not required to return to the trial court because there was no basis to believe that the General Equity judge would have set aside the settlement. The Appellate Division considered the extensive settlement negotiations, the mediation that preceded settlement, and the fact that the judge had already enforced the terms when the parties had difficulty reducing the agreement to writing. Evaluating those factors, the court concluded that plaintiffs had no reasonable expectation of success.

What the Appellate Division did not consider was the impact bypassing the trial court had on the integrity of its decision. Plaintiffs may have had no reasonable expectation of success,

and the trial court may have denied the application, precisely because plaintiffs understood the terms of the agreement. Based on its interactions with the parties, counsel, and the mediator, the trial court may have been in the best position to make findings regarding plaintiffs' understanding. By bypassing the trial court, the import of acceptance of the settlement on the record is eroded.

Moreover, by allowing plaintiffs to circumvent the trial court, plaintiffs are put in a position where they have nothing to lose and only the opportunity to gain. If the settlement was vacated, they would have to litigate the underlying claim, which could be rejected. By seeking recovery in a legal malpractice action, plaintiffs' position in the underlying claim remains static, but they have the opportunity for a recovery in the pending malpractice action.

The attorneys, on the other hand, are put in the difficult position of having to disprove subjective allegations. In most circumstances it is difficult to prove what another person did or did not understand.

This is quite different from the circumstances in Ziegelheim. Mrs. Ziegelheim made particular and objective allegations. She alleged that the attorney did not discover assets, the attorney did not provide her with correct information regarding the amount of the marital estate she could

expect to receive, and the attorney did not insure that the written agreement comported with the oral agreement. The key was the failure to provide the litigant with the proper information to be considered at that juncture in the litigation. There was nothing subjective about the allegations of negligence.

Here, plaintiffs do not contend that they made the decision to settle based on incomplete discovery or an improper evaluation of the claim. Rather, plaintiffs contend that they did not understand the consequences of the agreement they said they understood while in open court. While a trial court does not usually *voir dire* a party regarding the quantum or quality of information provided by counsel, the court does ask the litigants if they understand the terms of the settlement. To allow a party to disavow testimony in the trial court in order to pursue a separate legal malpractice case is to allow a party to play "fast and loose" with the judicial system. As this Court recognized in the Puder decision, counsel, along with all the parties to a litigation, are entitled to rely on the expectation that voluntary statements before the trial court conclusively resolve a matter. See Puder, 183 N.J. at 445.

E. Allowing These Plaintiffs' Claims to Proceed Undermines the Integrity of the Mediation Process.

Since 1992, it is well-settled that Complementary Dispute Resolution Programs (CDR) are an "integral part of the judicial process intended to enhance its quality and efficacy." R. 1:40-1. As an integral part of the process, attorneys are expected to become familiar with the programs and advise their clients of its availability. Id. In civil actions, a judge may require the parties to attend a mediation session at any time. R. 1:40-4(a). In matrimonial actions, retainers must describe dispute resolution options and attorneys must certify in the pleading that the litigant has been advised of the CDR alternatives. R. 5:3-5(a)(10) and 5:4-2(h). Parties are required or encouraged to explore these options because conclusive settlement ranks high in the public policy of this State.

In order for procedures such as mediation to be effective tools for resolution, litigants must have confidence in the process. Confidentiality is critical. As the Appellate Division recognized in Lehr v. Afflitto, 382 N.J. Super. 376, 391 (App. Div. 2006):

> The issue of the confidentiality of mediation proceedings is a matter of great public and systemic importance.... Underpinning the success of mediation in our court system is the assurance that what is said and done during the mediation process will remain confidential, unless there is an express waiver by all parties or unless the

> need for disclosure is so great that it substantially outweighs the need for confidentiality. The mediation process was not designed to create another layer of litigation in an already overburdened system.

(internal citations omitted). Allowing claims like those of the plaintiffs herein to go forward will have a chilling effect on the effectiveness of mediation.

Creating a situation where counsel may attempt to call a mediator as a witness in a subsequent legal malpractice action would serve to erode the appearance of impartiality. In many instances, attorneys are already familiar with the mediator. Claims of bias by clients/litigants can be expected.

As the Lehr Court recognized,

> If mediation confidentiality is important, the appearance of mediator impartiality is imperative. A mediator, although neutral, often takes an active role in promoting candid dialogue "by identifying issues [and] encouraging parties to accommodate each others' interests." To perform that function, a mediator must be able "to instill the trust and confidence of the participants in the mediation process. That confidence is insured if the participants trust that information conveyed to the mediator will remain in confidence. Neutrality is the essence of the mediation process." Thus, courts should be especially wary of mediator testimony because "no matter how carefully presented, [it] will be inevitably characterized so as to favor one side or the other."

Lehr, 382 N.J.Super. at 394-95 (citations omitted).

Considering that most mediators are practicing lawyers or retired judges, it is easy to forecast that plaintiffs in legal malpractice cases will characterize testimony in support of the lawyers as biased against them. Requesting that mediators provide testimony impacts the integrity of the proceeding.

Pursuant to the Uniform Mediation Act, although there is no absolute privilege conferred in connection with a malpractice action, a mediator may not be compelled to provide evidence. N.J.S.A. 2A:23C-6(c). In order to avoid that possibility, mediators may require that counsel sign a mediation agreement agreeing not to subpoena the mediator to testify in a subsequent legal malpractice action. This puts lawyers in a difficult position. If a mediator refuses to provide testimony, the lawyer is prevented from adequately defending against a "he said, she said" type of malpractice claim.

This case was mediated for at least 13 hours, and the mediator came to court to assist in putting the settlement on the record. Allowing a malpractice claim to proceed on nothing more than the allegation that plaintiffs did not understand the effect of the settlement undermines the integrity of the mediation process itself.

POINT II

THE SUPREME COURT SHOULD ADOPT A COURT RULE REQUIRING LEGAL MALPRACTICE PLAINTIFFS ALLEGING MISUNDERSTANDING OF A SETTLEMENT TO FIRST SEEK ENFORCEMENT, MODIFICATION, OR VACATION OF THE SETTLEMENT IN THE COURT OF ORIGINAL JURISDICTION.

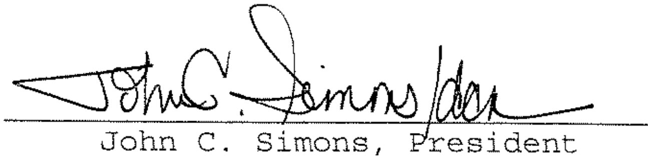
TANJ respectfully submits that the problems raised by the Appellate Division's decision may be appropriately addressed through an exercise of this Court's extant power to promulgate Rules governing the practice and procedure in New Jersey courts. N.J. Const. art VI, § 2, ¶ 3. Specifically, TANJ respectfully submits that litigants should first be required to seek enforcement and/or a modification of a settlement before the court of original jurisdiction, and that failure to do so within two years of the settlement would preclude the filing of a legal malpractice action premised on an alleged misunderstanding of a settlement's terms. Such a Rule would provide the consistency and finality both litigants and attorneys expect from a settlement agreed to and accepted on the record before a court of this State.

CONCLUSION

For all of the foregoing reasons, Trial Attorneys of New Jersey respectfully requests leave to appear as *amicus curiae* to submit the within brief and to present oral argument if it is requested by this Court.

Respectfully submitted,

TRIAL ATTORNEYS OF NEW JERSEY
Proposed Amicus Curiae

By: 
John C. Simons, President

Dated: October 13, 2009