

EXHIBIT A

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

FRANK FRASCOGNA

Plaintiff

-VS-

Index No. 2004/8335

**BROWN, CHIARI, CAPIZZI & FRASCOGNA, LLP,
JAMES E. BROWN, DONALD P. CHIARI and
SAMUEL J. CAPIZZI**

Defendants

**RAYMOND L. FINK, ESQ.
HARTER, SECREST & EMERY, LLP**
Attorneys for Plaintiff

**RICHARD T. SULLIVAN, ESQ.
HARRIS, BEACH LLP**
Attorneys for Defendants

MEMORANDUM DECISION

FAHEY, EUGENE M., J.

Background

Plaintiff attorney, Frank Frascogna, a named partner in Brown, Chiari, Capizzi & Frascogna, LLP, commences this action against the other named partners, attorneys James Brown, Donald Chiari, and Sam Capizzi and the law firm Brown, Chiari, Capizzi & Frascogna, LLP.

Plaintiff Frascogna, in claiming to be a general partner in the law firm, alleges that the partnership underwent a dissolution upon his withdrawal from it on April 21, 2004 and

that he is entitled to a dissolution pursuant to Sections 62 and 63 of the New York Partnership Law and an accounting .

Plaintiff Frascogna also brings a claim for breach of fiduciary duty.

A trial was held on June 27, 28, 29 and July 11 and 12, 2006, on the single question: Was Plaintiff Frascogna a general partner in the law firm Brown, Chiari, Capizzi and Frascogna, LLP? The Court was not called on to consider any questions relating to the partnership's dissolution, the partnership's value and division of partnership assets which await further proceedings.

The Court answers the question presented in the affirmative. Plaintiff Frascogna was a general partner in the law firm from the partnership's formation in December, 1997 and therefore is entitled to an accounting.

Testimony

1. Frank Frascogna - Plaintiff. Frank Frascogna testified that he had been an attorney since 1981 and was employed with the law firm of Siegel, Rosenthal in the ten (10) years prior to the fall of 1996, when he talked to Defendant Brown and joined the law firm of Brown and Mohun as an associate.

Plaintiff Frascogna testified that he had discussed Defendant Chiari joining the firm in the fall of 1997 and that there were other discussions about putting together a formal partnership of the attorneys doing personal injury work and finding an alternative place for Michael Mohun, Esq., because he did not do that kind of work; that Defendant Capizzi was included in the discussions; that Mr. Brown was interested in managing the

firm and did not want the four of them to share equally in the firm's income; that he remembered the original breakdown as 30% for Mr. Brown and 30% for Mr. Chiari; 26% for himself and 14% for Mr. Capizzi.

Plaintiff Frascogna testified that they registered the firm name of Brown, Chiari, Capizzi and Frascogna in December, 1997, after discussions among the four of them; that there was no formal written partnership agreement; that they used the full name on their letterhead, their retainer agreements, and the sign in front of the building on Brunswick Drive in Depew, and in some announcements and notices in early 1998; that he understood he was a partner and that he would be responsible for the debts along with the others; that he received K-1 partners tax reporting documents through 2004, records which listed him as a general partner until 2003 and 2004 when he was listed as a limited partner.

Plaintiff Frascogna also testified about receiving a \$20,000 check from Jim Brown relating to the closing out of Mike Mohun's interest in the Brunswick Road operation which he endorsed and gave back to Mr. Brown; that Mr. Brown contributed money for their initial operating capital and they also opened a line of credit of \$500,000; that there were several other attorneys associated with the firm during that time; that either Jim Brown or the bookkeeper brought the credit application to him and the other three, and that he understand he was a guarantor on the loan; that the firm had accounts at HSBC and M&T, with signature cards for each of the four designated as partners; that he purchased some items for the firm with his credit card and was reimbursed by the firm.

The witness further testified that they had had discussions about a pension plan and eventually put together a profit-sharing plan and that he and Sam Capizzi were designated as trustees for the plan; that there were also discussions about death benefits that went to a handwritten plan for the protection of any partners' estate should he pass away for a period of eight years and signed by the four of them; that he had been involved in naming the firm; that, especially in the beginning, they were all involved in deciding about year-end bonuses and hiring and marketing decisions.

The witness further testified that one of the marketing decisions was to shorten the name to Brown, Chiari; that Exhibit 43 was a Business Certificate for Partners where the four of them certified that they were conducting business as a member of a partnership under the name Brown, Chiari, Capizzi & Frascogna, LLP, doing business as Brown, Chiari, signed and duly filed with the Erie County Clerk's Office on March 19, 2002.

The witness further testified that at the beginning or end of 2001, that he and Jim Brown had a discussion about adjusting his draw of 26% down to 20% because Mr. Brown did not believe that the malpractice cases – his department – had been that productive and that the witness was not happy about that and told Mr. Brown and they agreed on 20%; that they had probably drawn \$7,000 a month and usually twice-a-year draws coinciding with how much was in the till; that Jim Brown had the bulk of the operational day-to-day managerial responsibility; that toward the end of 2003, that Don Chiari told him that he needed a reduction of his interest in the firm down to 14% and that it would apply to that year retroactively; that he was not happy about it; that Mr. Chiari

said to him "where else are you going to make \$300,000 to \$400,000 a year"; that they talked about it the next day; that he wasn't happy; that Mr. Chiari tried to placate him; that he discussed the matter with Mr. Brown; that he didn't talk to Mr. Capizzi until he gave notice in March of 2004; that he told him he just couldn't accept it; that he did not know when he decided he ought to leave; that he wrote a letter, marked as Exhibit 21, in which he indicated that they needed to wind up the firm's affairs; that he did not have the partnership's returns, only his K-1's; that he was approached by former clients after he left the firm; that he felt the decision was imposed upon him and that the first time anyone represented to him that he wasn't a partner was when he received the answer to his complaint.

On cross-examination, Plaintiff Frascogna testified that he had testified that he had a 26% interest in the firm; that he had discussed the matter during his examination before trial and had testified that compensation issues changed initially; that they had percentage interests in net revenue; that on the formation of the partnership interest his percentage of net income was 26%; that 20% was the draw in distribution from the net income of the firm; that he brought over cases and experience that had value; that he considered cases that he brought over to be a capital contribution; that he indirectly received compensation for cases that settled or were resolved because all the money went into a single pot; that he got a net amount percentage of all the monies that he had; that he understood that Mr. Capizzi owned 14% in 1998; that he testified at the EBT that Mssrs. Brown and Chiari were initially 30% owners; that after Mr. Chiari's EBT testimony

that Mr. Brown started out at 40% and that he and Mr. Chiari were close to the same percentage; that he did not really agree that the new firm was primarily a continuation of the old Brown and Mohun firm; the firm would not exist without Mr. Brown and what he had, but that it was also put together to move forward pretty much exclusively into personal injury in a big way with three other lawyers; that he did not say that on January 1, 1998, he owned 26%, and that Mr. Brown made himself a minority partner and Mr. Frascogna paid nothing for that; that Mr. Brown was a minority owner as of that date; that most of the cases that were transferred to the new firm came from Mr. Brown's old firm; that the witness brought three cases of which one was successful; that he did not pay Mr. Brown anything for his 26% interest in the firm; that the complaint claimed that each had a 25% interest; that he believed that came from a tax document; that he had never seen a partnership tax return until after he left the firm; that his K-1 described his partners' percentages in the firm as various; that he had no idea what that meant; that he did not know whether it was true that he had a 25% interest in the firm; that it was not his understanding; that his income is determined at the end of each year; that it was revisited or reduced from 26 to 20 and again at the end of 2003, that there were no contributions to capital listed on his K-1 for 1998; that it said he had a negative capital account, which was also true for 1999 which he had a negative capital account of \$30,555, and negative numbers for 2000, 2001, 2002 and 2003 working down to \$8,000 and then zeroing out; that he was never a partner at Siegel, Rosenthal; that he was never a partner at Brown and Mohun, though he might have been held out that way; that on January 1st, 1998, he

received a 26% interest in the firm and did not pay any cash for it; that the one case he brought in netted a couple of hundred thousand dollars; that Exhibits B and C were K-1 tax documents for him for 1996 and 1997 from Brown and Mohun; that his partnership interest there was listed as various; that his arrangement with Mr. Brown when he joined Brown and Mohun was more or less that he would be compensated fairly; that he had sort of a base salary; that he did not know if his K-1 tax reporting was the same from Brown and Mohun to Brown, Chiari, & Capizzi & Frascogna; that he would consider the amount of money involving 30 Brunswick a capital contribution and the credit card usages; that he had a rudimentary understanding of what was meant by a capital contribution; that he did not know what happened to the \$20,000 he received from 30 Brunswick; that he felt it was going back to the firm; that he had no direct knowledge who owned 30 Brunswick; that he did not know if the \$20,000 contribution appeared on any tax records; that he did not ask anyone to look at the partnership tax returns; that he trusted that he was receiving 26%; that he assumed what he was told was what was happening and there were times when he knew what the amount was that was being divided and the amount he got was the correct percentage – 26% or 20%.

The witness also testified that the "death agreement" said that, in the event of death of any partner, that the partners would pay the estate of the deceased partner a certain percentage of firm income; that there was no mention of firm assets; that it was tied to firm income; that he was trustee of the firm's pension and profit sharing system; that Exhibit 19 contained summary plan descriptions of both; that Mssrs. Brown and

Capizzi were listed as the plan trustees; that the Exhibit did not have his name on it; that he had testified that he was a trustee at some time; that he also said he had almost nothing to do with it; that at a certain point Mssrs. Brown and Chiari became equal partners; that each had 30%; that he was unhappy that his share was reduced and that he thought it was fair that the two received equal percentages; that Exhibit 22 was the firm's partnership return for 1998 showing gross income of \$1,787,007.00 and net income of \$1,350,177.00; that part of that money represented cases brought over from Brown and Mohun; that his total was \$163,108.00, which would not be 26%; that there was some kind of "trueing up" for a bigger case that Jim Brown had that had settled the year before and it was more or less agreed that Mr. Brown would benefit from that; that his 1998 K-1 said his interest in the firm was various.

The witness also testified that Exhibit 23 was the firm's partnership return for 1999 showing \$3,487,896.00 of net income; that his ordinary income was \$736,000.00 or so with a line for withdrawals and distribution of \$713,000.00; that he had no reason to believe it wasn't 26%; that he had no reason to question it; that he was losing track of the first year he started receiving 20%; that he thought it was 2001; that in April, 2004, it was 14% which he did not agree to; that he expected to be receiving a substantial distribution from the firm in January through April, 2004; that Mr. Chiari wrote him a check, a loan which he later believed was later charged to income; that he had told Mr. Chiari that he had tuition payments for his son; that withdrawals and distributions were \$178,000.00 for 2004; that he received monthly draws then of \$7,000 per month; that the distribution

check was a total of \$135,000.00 for the first quarter ; that he assumed was based on 14% of the net income.

The witness further testified that he believed Mr. Brown had a 40% share in the firm or maybe 30; that to some extent the firm was a carryover of the Brown and Mohun firm of which Mr. Brown was a principal; that he was clearly the main man; that as of January 1, 1998, the new firm was doing the old firm's work, but with a twist, to become more of a personal injury firm; that he did not know Mr. Brown's compensation for transferring the files to the new firm; that he did not know the Partnership Law; that he also believed Mssrs. Chiari and Capizzi were owners of the firm; that he had no other agreements for partnership dissolution of the firm upon the death of a partner; that he worked on a case involving a disabled boy who needed a supplemental needs trust down in Chautauqua County before Judge Gerace which settled, which was originally a Brown and Mohun case, working with Mr. Brown; that he received commissions from the trusteeship and endorsed the checks back to the firm and then caused the checks to go over to him after he left; that Exhibit 13 was the line of credit from November 4, 2003 and that later he asked to be released from the line of credit and he was released by the summer of 2004.

In examination by the Court, the witness testified as to why there was no formal partnership agreement; that it evolved in the way that Mr. Chiari and he and Mr. Brown wanted it; that he wanted to become a formal partner; that they did not discuss it nor did they memorialize the percentages; that it was all verbal; that he did not remember the

four of them ever discussing the percentages together; that the three of them might have discussed it together.

On re-direct examination, the witness testified that the taxpayer identification number on the Brown and Mohun partnership tax return was identical to the one used for Brown, Chiari, Capizzi & Frascogna and that he had no idea if there was any sort of written partnership agreement for Brown and Mohun when he joined the firm; that nobody told him about the percentages of ownership interests between Mr. Brown and Mr. Mohun; that he did not believe he had an ownership interest in that firm; that there was nothing in the Brown and Mohun-related tax returns to show a positive or negative capital account; that neither Mr. Capizzi nor Mr. Chiari appeared to contribute capital; that referring to Exhibit 24, the firm's partnership tax return for 2000, that page 19 is marked as "Partner's Summary"; that it listed the four of them as partners and showed the beginning profit ratio, the beginning loss ratio and the beginning ownership ratios all at 25%.

The witness further testified that he believed Bob Sommer of Brock, Schechter; that Exhibit 25, the partnership return for 2001, that its partnership summary was identical; that Jim Brown's typed name was in the signature column; that Sam Capizzi's K-1 was attached to Exhibit 25 and showed a beginning capital account of negative \$15,000.00 and an ending capital account of negative \$23,000.00; that Don Chiari's K-1 showed a negative balance beginning at negative \$27,000.00 and ending at negative \$48,000.00; that he thought it was 2000 when Mr. Chiari became an equal partner with Mr. Brown;

that as to Mr. Chiari's K-1 for 2003 attached to Exhibit 27, it was \$3,252.00 in brackets at the beginning and \$32,552.00 negative at the end; that as to the "death agreement", that the calculation in terms of a percentage of the firm's income was the same for all four of them; that it required the remaining partners to make the payments to the estate of the deceased partner; that he believed that the survivors would be responsible; that they each signed it.

The witness also testified that after opening up the line of credit in late 2003 he and Don Chiari discussed a further reduction in his percentage; that he felt there were partnership funds owed to him when he left the firm; the money that was retroactively taken from him – over a hundred thousand dollars – and against his wishes and the proceeds of some cases had come in to him that stayed there and settled; that as to the \$40,000 loan that there were a serious of other loans; that his loan was zeroed out.

On re-cross examination, the witness testified that Mr. Brown told him that the \$20,000.00 was to purchase an interest in the building and told him that he was now an equal owner of the building; that referring to Exhibit 24, page 19, that the case distributions were not on a 25% basis; that the \$540,500.00 he made that year was not 25% and that when his share was reduced from 26% to 20%, he did not ask for that in writing.

2. Robert Sommer - C.P.A. Robert Sommer testified that he is a Certified Public Accountant associated with Brock, Schecter and Polakoff, a local accounting firm, now as a partner and formerly as an associate for a total period of 29 years; that he received

his CPA license in 1980; that he focuses primarily on income taxes, including a wide variety of business clients, including partnerships, limited partnerships, and limited liability partnerships; that he would give advice to clients as to the forms of business entities under which they ought to operate on a fairly frequent basis; that he might look into clients' agreements or articles of incorporation; that he himself did not do much audit work, but he does do tax planning; that he prepares the Subchapter S corporate and LLP K-1 forms; that he verified the owners of businesses by looking at the legal documents or asking personnel or whoever they dealt with; that a K-1 would normally be issued to a partner in a partnership; that a 1099 would generally be issued to an independent contractor for payments made; that W-2 forms are generally issued to employees of the entity; that normally an entity is not required to withhold taxes for a recipient if a 1099 or K-1 form; that an exception would be where a 1099 is issued without an identification number.

The witness further testified that he had known Jim Brown for close to twenty (20) years doing his personal and business tax returns and starting with Brown and Mohun; that he did not know whether it had a written partnership agreement; that he was familiar with the name Brown, Chiari, Capizzi & Frascogna; that the individuals practiced law together as a partnership because he filed a partnership tax return every year and the four names were on the letterhead; that he saw no documents registering the partnership; that Brown and Mohun was a predecessor; that at one time Mr. Mohun left the firm and then others came into it; that he did not know if Brown and Mohun ever

dissolved; that he did not prepare a final tax return for it, which ought to have been done if they dissolved; that each partnership utilized the same tax identification number as a carryover number from 1997 to the 1998 return which was the first year he prepared a return for Brown, Chiari, Capizzi and Frascogna; that Brown and Mohun were the partners for Brown and Mohun; that he uses the same partnership return, a 1065 form, whether it be a general partnership or a limited partnership; that he understood the members or partners to be the four of them because they were practicing law together and their names were on the letterhead; that he was sure he would have been instructed to file a partnership return by Mr. Brown; that he prepared K-1's; that his work product for 1998 was not available; that he had work product for the subsequent years and the returns; that Jim Brown signed them as general or limited liability company member; that he spoke to Carol Cofed; that the firm was a cash basis taxpayer; that assets reflected on the returns for Brown and Mohun were carried over to Brown, Chiari, Capizzi & Frascogna; that it was the same entity and reflected an ownership of real estate on its returns, some \$334,000.00 in depreciable assets; that he believed this was 30 Brunswick; that in 2002, they went to 5775 Broadway and that building was included in their partnership assets; that the risk of ownership was with the partnership; that his methodology for preparing the K-1's was to start with the partnership's net income; that the allocation to the partners depended on their cash draws for the year; that the practice did not instruct him as to what the percentages should be; that he did not inquire into methodology; that as to Exhibit 25, the 2000 return and the partners summary on page

19; that it showed four partners, their identification number, beginning profit ratio, beginning loss ratio, ownership ratio, beginning capital, capital contributions and cash distributions; that he had no idea who inserted the numbers; that they were not consistent with the cash distributions to partners because their income varied throughout the year so that the summary was in conflict with the K-1's; that as to page 29 at box A, he indicated that Mr. Frascogna was a general partner as opposed to a limited partner or a limited liability company member because he believed he was a partner in the firm, and he did not check box marked limited partners and he did mark "various" as the interest referencing profit sharing, loss sharing and ownership/capital; that they varied based on the cash distribution for the year; that he did not ask the partners what their percentages were supposed to be; that he did it on his own; that referencing box F – partner's share/liabilities – that there was a right-side number of \$41,596.00 for Mr. Frascogna for his share of liabilities – some \$164,000.00 is liabilities for pension and profit sharing accruals (\$145,000.00) and payroll tax liabilities (\$19,000.00).

The witness further testified that he computed a partner's capital account from the beginning of the year through the end – for example, Mr. Frascogna – showing a beginning of negative \$30,555.00, capital contributions of \$8,516.00, partner's share of basic income \$646,975.00, withdrawals and distributions of \$548,500 and ending capital account of negative \$23,564.00; that he could not tell the source of the capital \$8,500.00 capital contribution from the return; that actual cash deposits, property contributions and purchases, a partner's interest would all qualify; that referencing Exhibit 28, the 2003

partnership return, that Mr. Brown's K-1 and the others all checked the limited partners box; that he thought that was a mistake; that they all ought to be marked general partners; that there was a step-up in basis as to the Brunswick property because he believed Mssrs. Chiari, Capizzi and Frascogna bought out Mr. Mohun's interest in the building; that they each paid \$20,000.00 to Mr. Mohun; that he did not know the basis for that; that Exhibit 31 was the draw and income analysis for 2000; that the sums of \$25,000.00 for the four was a loan on behalf of the partnership apparently to an outsider; that it looked like from Exhibit 31 that Mssrs. Capizzi, Frascogna and Chiari were each charged with \$10,000.00 of income for a building purchase and relating to Mr. Mohun.

The witness further testified that Exhibit 28, the 2004 tax returns, schedule L, showed loans, client disbursements and a loan at the beginning of the year to Mr. Frascogna for \$40,000.00 which was reduced to zero at the end of the year; a loan to Mr. Capizzi for \$18,000.00 reduced to zero at the end of the year and a zero balance for Mr. Chiari at the beginning and \$43,678.00 at the end of the year; that client disbursements negatively affected the net income of the firm; that he believed the disbursements should be "expensed" when the case settled; that it would require an amended return; that he discussed the matter with Mr. Brown; that prior to that they had been "expensed" on an annual basis; that no one ever told him that Mr. Frascogna was not a general partner.

3. James E. Brown - Defendant. James E. Brown testified that he was an attorney admitted to practice law in New York State since 1973; that he shared space in the Walbridge Building for a year or two after that and then opened an office at 36

Brunswick in Lancaster with Norm LeBlanc for a short period of time, then owned the building solely; that he began to develop a personal injury practice out of his general practice so that, around 1980, it was about 80% of his practice; that he and Mike Mohun worked as partners from the early 1980's until 1997; that Mr. Capizzi joined them in the late 1980's doing personal injury, something Mr. Mohun was not interested in; that he initially got a small salary and bonus; that he was a partner; that everybody got a monthly draw; that once or twice a year, there was a distribution, compensation based on how people had done and how the firm had done; that originally he determined it, then he shared the decision with Don Chiari and now he did it; that he and Mr. Mohun ended owning both Brunswick properties; that he generally agreed with Frank Frascogna about when he joined the firm; that he told him he couldn't guarantee any significant income because they were still small; that he would do what was fair; that he first made around one hundred or eighty; that he joined Brown and Mohun; that he could only remember Mr. Frascogna bringing one case; that they had hundreds of cases; that he and Mr. Mohun decided to end their partnership; that this was in 1996 or 1997, before Mr. Chiari came in; that it was close in time; that the Brown, Chiari firm was a carry-over of Brown and Mohun; that it was his firm before Mr. Mohun, the same one he always had, the same files during the same week; that Mr. Frascogna never paid anything to enter the firm; that he was paid very substantial sums of money.

On examination by the Court, the witness testified that he had no written partnership agreement with Mr. Mohun; that he decided how the money would be

distributed at the end of the year; that he got hung up on the term partner; that he followed the same procedure with the subsequent partnership.

On continued direct examination, the witness testified that the practice of describing interests as various was carried into the subsequent firm; that he asked the fellows to give him an idea of the percentage of income and they would look at it and try to see if that would work as a guideline; that it never worked; that would have to have been insane to have given Mr. Frascogna an ownership interest in the files or assets in the firm; that he had a very successful, substantial practice with hundreds of files when Mr. Frascogna had one; that he filed a certificate evidencing a registered limited liability partnership with the four names, because Frank Frascogna was concerned and felt slighted and he said "fine, why don't we all put our names on together"; that he was more than happy to share the money that was being made with him as a partner as with Don Chiari and Sam Capizzi, but that Mr. Frascogna absolutely could not be an owner because why would he spend 25 years building up a practice and give it away in one day; that he made the income decisions; that the guidelines were violated the first year; that Frank Frascogna got much more than 26%; that Sam Capizzi got much more than 14% and he didn't get anything; that there wasn't enough money at the end of the year; that it was about a million three with about eight hundred for himself and only about five or six hundred to pay the three; that if he had followed his guideline of 40%, they would have made very little money; that to make sure Don Chiari was paid more than before and to make sure Sam Capizzi and Frank Frascogna were properly paid, he took it away from

himself; that Exhibit 22, the tax return for 1998, showed a million seven in gross income, including fees from Brown and Mohun, which more likely was not all of it because significant cases didn't usually settle in the first six months; that he shared the million three in ordinary income; that Mr. Frascogna's 26% would have been generated by Brown and Mohun work for which he paid nothing; that Sam Capizzi and Don Chiari were in the same position; that a number of years later, because Don Chiari was bringing in a lot of business and getting great results, that he didn't think it was fair that he was getting 40%, so he reduced it so that they were getting the same income interest; that he considered Mr. Chiari to be an equity owner; that he did not know where all the terms came from; that he did not consider Mr. Capizzi to be an equity owner; that it is his firm; that nobody had paid him for anything; that after filing the partnership certificate, he determined people's income; that he tried to balance things out; that Frank Frascogna did not play any role in the management of the firm; that he wasn't interested; that he did not get involved in the decisions about advertising; that there was no true consistency in the people's interests; that was an evaluation done on an annual basis; that he tried to be consistent with that; that he purchased Mr. Mohun's share in 30 Brunswick out of a case that had, for all intents and purposes, been settled after Don Chiari came in to the office, because Mike Mohun said he wanted to be bought out of his 50% of the building; that he didn't want to own the building 100%, so that he gave each of them a check for \$20,000.00 with which they bought out Mike Mohun's interest; that the deed was never

recorded; that it was his money, not firm money, that came from a case that belonged to him; that it had nothing to do with the law practice.

The witness further testified that the four of them never all met together to discuss the formation of a partnership; that they never had a written partnership agreement; that there would have been no point; that it was his office; that he had operated for many years the same way; that they never had discussions as a group about how much of the net each other would get; that Don Chiari was uncomfortable and asked that there be some sort of parameters; that he talked to Sam Capizzi and Frank Frascogna; that he asked each to put down on paper what they thought each individual should get, and that he then made a decision; that the percentages were simply guidelines; that he never told Mr. Frascogna that he had an ownership interest.

On examination by the Court, the witness testified his percentage was 40%; that Frank Frascogna and Don Chiari were around 24 to 26%, and Sam Capizzi was 10%, although he thought it was higher; that it was his decision.

On continued direct-examination, the witness testified the decision was his because it was his responsibility, because it was his firm; that Frascogna never said he owned an interest in the firm; that he never objected to the cuts in his percentage of income by saying that he owned a percentage of the firm; that they never discussed each having a 25% interest in the firm; that they limited Mr. Frascogna's participation in the management of the firm because it wasn't his; that he did not believe the apportionment of the income was arbitrary; that the "death agreement" came up after they looked at life

insurance; that he decided they would pay money each year out of the firm's income, because the cost of obtaining group life insurance was prohibitive; that they would earn over the percentages that they had been using for the prior years; that Mr. Frascogna never asked for a written termination agreement; that when Mr. Mohun left he did not receive an equity interest in the old firm; just his interest in the real estate and his files; that Brown and Mohun received nothing from cases that went to Brown, Chiari, Capizzi and Frascogna; that before they obtained the line of credit in 2003, they dealt with disbursements out of revenue; that disbursements from Brown and Mohun were carried over into the new firm; that they got the line of credit because disbursements had gone up and for tax planning purposes; that he did not recall discussing the questions with Mr. Frascogna; that they all discussed starting to advertise, but that he made the decision; that Mr. Chiari was a partner at the Roach firm, on the letterhead and that he brought some very significant files with him, 25 to 30 good files; that he did not discuss with Mr. Chiari and Mr. Capizzi them having an ownership interest in his firm; that Mr. Frascogna brought the Bonerb file with him when he joined Brown and Mohun; that it settled three or four years later; that the Giambra case involved a special needs trust that went to him and settled as a Brown and Mohun cases before Mr. Chiari joined him; that it was his practice that after a case settled that he was done with it and somebody else would finish it up; that he asked Frank Frascogna to do it and he was named a trustee, and the income was supposed to be for the firm; that after he left, Frank Frascogna had the fee go to him; that as to the December, 2003 decision to reduce Frank Frascogna's share,

he thought Don Chiari made the decision; that Don Chiari explained this to him and he agreed; that at that time the two shared those decisions; that he always thought Frank Frascogna had a lot of potential, but he was not a finisher; that malpractice cases are different and will not settle and he did not seem interested; that Frank Frascogna received a bonus on distributions just before he left in March or April, 2004; that he did not sell his interest in the firm to anyone, not in 1997, not ever; that Mr. Frascogna never had an interest in his law firm, he simply had an interest in the income.

On cross-examination, the witness testified he considered Mr. Mohun to be a partner of his, but with no interest in Brown and Mohun because it was his firm and Mr. Mohun came to him when he was still a law student; that he put him on the letterhead; that it sounded better; that there were not a lot of decisions to be made; that Brown, Chiari, Capizzi & Frascogna was a partnership; that he did not know what was meant by general partnership; that he was the only one who owned the assets; that the firm was designed to distribute income, not assets; that it had no assets; that the assets were all his; that the retainer agreements that clients signed were with Brown and Mohun, but were his assets; that they were his files; that Mr. Mohun had his files which he took with him; that he did not know precisely when Mr. Mohun left; that he was not part of Brown Chiari; that Mr. Mohun received K-1's for Brown and Mohun and received one for the 1998 partnership of Brown, Chiari, Capizzi & Frascogna, but that he was not there; that there was no dissolution of the first firm; that he did not do the paperwork; that it had tangible assets in the offices that he had purchased, including 30 and 36 Brunswick; that

the assets belonged to him; that he did not know what it meant to own a file; that the partnership was a distinct legal entity and not synonymous with himself; that if the firm owned something, it owned it, but that if he owned it, he owned it; that he did not really know how the accountant dealt with it; that some things are included in the tax returns because of ownership risk; that it was a matter of convenience to include them to depreciate them as assets on the tax returns; that he had been fairly successful as a businessman; that he was a little rough around the edges; that he understood a partner could contribute assets to a partnership that are the partnership's assets; that he did not think a partner owned an interest in the partnership's assets rather than owning the assets; that he understood how it worked for a partnership; that as to real estate, he thought it would be like they were tenants in common; that the law firm was an entity; that he did not know if the law firm owned anything; that when it was set up, it owned nothing; that it had no assets; that the files did not belong to it; that the firm had no assets; that it was a piece of paper signed on a particular date without any assets; that he did not give up his practice on his files; that it was a transfer for tax purposes; that no assets were transferred the day the certificate was signed and filed; that he was not contending that he was the only one that had an ownership in the law firm; that he was trying to explain that the assets that were used in the practice of law, the files that were used to generate money, were all his; that the question of who owned the legal entity; that if you can own a piece of paper, then four people owned a piece of paper; that Mr. Frascogna had an ownership interest in the piece of paper, not the assets; that he told the other three that

it came up with Don Chiari when he said that if it didn't work out, he could take back his files; that they did not discuss ownership of the firm; that the proceeds of the cases went to the firm with net income distributed at the end of the year; that the firm advanced money to those files; that it depended when it came to the new files; that the person who brought the file in, it was treated as his file; that if one left, he might like that file and there might not be a lien upon it; that it was hypothetical that he and Mr. Frascogna litigated over two files with Justice Mintz; that each would have an undefined interest in the file proceeds that the firm worked on; that when Mr. Frascogna was his partner, with respect to working on the files and with respect to income that was left at the end of the year, that he had a right to that; that they were all partners with respect to working on files and sharing in the proceeds; that the partnership paid for things after it was formed, had bills and a bank account; that he used the firm's line of credit to borrow money to pay his taxes for a day or so; that there was no rule against any of the four participating in management; that the four of them discussed operating the partnership under the name "Brown, Chiari"; that the four of them agreed to get the line of credit; that the bank required the four signatures; that the decision to advertise was painful and was a significant expenditure during those years; that the other attorneys primarily get profit sharing, net a regular salary; that they had considered opening additional offices in Orchard Park and Kenmore; that the discussions about how to use the money extended beyond the four to other staff members; that the discussion to put together a pension sharing plan was not objected to by anybody; that Don Chiari wanted Mr. Scinta to come

over; that Mr. Frascogna was held out to the public as a partner; that the tax returns did not make any distinction between them as to who was a partner; that he did not recall using the term "general partner"; that he assigned cases to Mr. Frascogna; that Mr. Chiari managed the malpractice cases; that Mr. Frascogna was involved in intake; that he had many ideas, but that he did not decide which cases they took; that he reviewed intake or might put them on Don Chiari's desk; that he might review them with other attorneys in the office, Jim Mucklewee or Michael Drumm; that most medical malpractice intakes are clearly not good cases, and some cases require group discussion; the case Frank Frascogna brought in settled for something less than two million; that the changing nature of legal practice made it necessary to advertise in the long run; that he would like to think it generated goodwill; that he was not sure what it really produced; that he did not have a list of cases that Frank Frascogna brought in; that there could be disputes over that; that there were targeted percentages from the four people; that he brought Don Chiari's up and his own down; that he was trying to put together a long term, reasonable arrangement; that he did not try to predict what the end of year net firm income would be; that the 1998 return, Exhibit 22, referred to five partners; that \$833,000.00, some 62% of the distribution that year, was to him; that \$50,000.00, 2% for Mr. Mohun, that \$163,108.00, some 12% for Mr. Frascogna, and \$181,000.00, some 14% for Mr. Chiari; that the numbers were not consistent with the guidelines reflecting due him the prior year and some others carried over from Brown and Mohun which were his; that after that he did not take 40%; that he was trying to get the ball rolling; that the Giambra case settled

for the high four hundreds as a medical malpractice case; that Frank Frascogna and Don Chiari knew what was happening; that he understood how to treat cash advances to clients and DR2-101.

The witness further testified referring to the 1999 return, Exhibit 22, that it was again a distribution to five partners, although not really a distribution to Mr. Mohun, of \$3,487,896.00; that his was \$1,529,710.00, or 44%; that Mr. Capizzi was \$425,173.00, or 12% and Mr. Frascogna was \$713,085.00, or 21%, and Mr. Chiari was \$819,964.00, or 24%; that the guidelines were never specifically followed; that this would have involved the Fahata cases which had been tried before and settled just before retrial, which might now explain why the numbers were out of whack; that he did indicate in the complaint that Mr. Frascogna was not a partner; that the distinction was between an equity interest and an income interest; that he had no idea how the Partnership Law treated equity and non-equity partners; that Mr. Frascogna was not a partner in terms of owning assets, files and equipment; that he was his partner under the LLP; that the files that were signed up under the LLP were not assets of the LLP; that he did not consider them to be assets; that the LLP had an interest in the fees that were earned, but the client was not owned by anyone; that the firm recognized goodwill and name recognition generated by the advertising, but it disappears immediately; that the accountant prepared the tax returns; that he made Mr. Chiari a partner in 1999 or 2000; that they were on an equal basis; that he told Mr. Frascogna about the change in status and Sam Capizzi too; that he was not giving up an interest in his files; that Mr. Chiari did not make any capital contributions at

that time; that the original retainer agreement used all four names, and after they adopted the d/b/a Brown, Chiari for the four names in 2002, that it was because Mr. Chiari didn't contribute any assets.

4. Frank Frascogna - Plaintiff - Continued Cross-Examination. On continued cross-examination, Frank Frascogna testified that he withdrew from the firm on April 24, 2004; that he met with a potential client named Catherine Goodwyn, a dentist in Orchard Park; that he did not recall his conversation with her; that he did not think she had a case; that there was no formal agreement, written or oral, that he would have an on-going interest in the firm cases in the event he left, outside his status as a partner in the firm and whatever rights that would give him.

5. Donald Chiari - Defendant. Donald Chiari testified that he is an attorney, licensed in New York since 1984, having graduated from the University of Buffalo in 1983; that he concentrated on personal injury first with Wayne Fried, Esq., then with Dan Roach, Esq., doing defense work, including trial; that they had no partnership agreement; that he left at the end of 1997 as he started to switch over to plaintiff work, which did not really work at the Roach firm; that he and Mr. Brown agreed to work together; that Mr. Brown had an on-going practice; that he knew that at the time that Mr. Mohun was on his way out; that Mr. Frascogna and Mr. Capizzi were there, with Teresa Walsh clerking; that when he left the Roach firm, he waived his interest in the corporation; that he took about 30 to 35 cases; that he thought 8 or 9 of them were substantial; that five were million dollar-plus cases; that those expectations were met; that talking to Mr. Brown, there was

no guarantee about income; that he had been making about \$110,000.00 to \$120,000.00 at Roach; that Jim Brown indicated he could do better than that; that Mr. Frascogna was working for Jim Brown at the time; that his agreement was that if he left, he would take his files; that he did not have not an interest in Jim Brown's files, which numbered around three hundred; that there was no agreement about any of them leaving and keeping an interest in the remaining files; that the firm did not share equally in firm income; that they were to share net income at the end of 1998, based loosely on percentages, and that Jim Brown ultimately decided what the percentages would be; that they discussed settlement monies that came in that year from Brown and Mohun and that he was concerned and Mr. Brown ultimately agreed that those were his and kept the money; that Mr. Brown did not share in the other incomes generated; that they split the 450; that two or three years later, at the end of 1999, that he began to get a lot of client and attorney referrals, and that Jim Brown said they should be equal; that at the beginning of 1998, Jim Brown had 40%, Sam Capizzi had 10%, while he had a couple of percentage points; that when his share increased, it came out of Jim Brown's; that Frank Frascogna was working exclusively on medical malpractice cases; that they all had monthly draws; that in 2002, 2003 he became concerned over Mr. Frascogna's performance at the firm; that the medical malpractice cases were not moving; that he expressed his concern to Mr. Frascogna, who said it was not his fault; that Mr. Frascogna went to verdict with two trials over the six years; that the witness would do three to five in a year; that he became involved in decision-making over the income shares about the time he heard Mr. Brown

agreed to split equally; that Frank Frascogna had no management role; that he discussed a reduction in Frank Frascogna's share in December, 2003; that there had been a problem with adjournments, which was expensive; that he had to push Mr. Frascogna to stop the adjournments; that his share went from 20% to 14%; that the earlier decision to go to 20% had been discussed by him and Mr. Brown and that Jim Brown had told Frank Frascogna that he did not remember any specific complaints; that he knew Mr. Frascogna didn't like it; that he never mentioned having an equal share; that he told Mr. Frascogna that the reduction really wasn't negotiable; that he told Mr. Frascogna they would do an early draw in April, which produced \$100,000.00 for Mr. Frascogna and he withdrew some weeks thereafter; that in December, the firm had loaned him \$40,000.00 out of the line of credit for buying a car, which was not paid back; that Catherine Goodwyn was a client with a medical malpractice case; that Exhibit F showed that she met with Frank Frascogna on April 14, 2004, and that he did not open a file; that he acquired an ownership interest in 30 Brunswick after the distribution of the \$20,000.00 checks, out of the Ferraro case, to buy out Mr. Mohun's equity interest in 30 Brunswick; that they later bought out Jim Brown's equity interest; that they then each had 25% of the building; that he never saw a deed; that Frank Frascogna was released from the line of credit by M & T Bank after he left the firm; that they released Mr. Frascogna from any outstanding obligation he had under the line of credit.

On cross-examination, the witness testified he was with the Roach firm for fourteen (14) years; that it was a professional corporation and he was a partner; that he

was the last shareholder admitted to the firm before he left; that his share might have increased after John Gallup, Esq., retired; that there were six (6) of them; that Dan Roach was the managing partner, that Alan Brown did a lot of managing in the last two years he was there; that he did not participate in management to a large extent; that his compensation came out of his shares and the arrangement of his files; that there was a year-end draw; that the shares he left were around \$75,000.00; that he took one defense case; that he believed he reached out to Mr. Brown to initiate joining the new firm; that he believed he also talked with Frank Frascogna about it in 1997 when they were on opposite sides as trial counsel; that he did not ask for financial data; that he had been at Jim Brown's big house; that they probably discussed the cases they were bringing over; that they discussed his name on the firm title, which was important to him; that he had been on the Roach firm's letterhead; that he expected to do better; that he considered the files to be his; that they were going into the pot; that he was happy coming in as a partner; that Mr. Frascogna and Mr. Capizzi were partners to the extent that they had a percentage of firm income; that neither generated a lot of files; that he expected the firm would generate new business; that he did not make a capital contribution; that he did not know whether the files would be considered as such; that he did not consider them that way; that they had about 150 medical malpractice files; that he knew the Pat Gronquist file, the Teale-Bradley file; that he did not know if they were generated by Mr. Frascogna, nor the Sadbrick file, nor Hanyseink, nor Hayden, nor Catherine Johnson, nor Kwiatkowski, nor Niedermeyer, Peter, Portis, Sanford, Schnetter, Stretch and a number

of other files; that he expected they would generate files; that the client belonged to whoever brought them in; that they would hope that everyone would bring in clients but that it did not work that way; that he never expected to be a partner as was described in the complaint, but partners in terms of sharing income; that the Portis file went with Mr. Frascogna; that it is in litigation; that he did not recall Mr. Brown ever telling him that he owned the firm; that he recognized Exhibit 1, the certificate of registration for Brown, Chiari, Capizzi and Frascogna, and was aware it had been filed; that it was signed by Mr. Capizzi and that Paragraph Six stated that all the partners were liable in their capacity as partners for the debts, obligations or liabilities of the registered limited liability partnership under Section 26-D of the Partnership Law and he did not dispute that; that the business certificate for partners, Exhibit 43, showed that the firm of Brown, Chiari, Capizzi and Frascogna, LLP, was going to conduct business as Brown, Chiari and dated March 19th, 2002; that he signed it; that it listed the four of them as partners conducting the business; that there was no reference to any one as an income partner; that DR2-106-7(c) forbade attorneys from holding themselves out as partners unless they were, and that was what they did; that none of the filed documents fully reflected their true relationship; that he did not know there was any provision in the Partnership Law for creating a non-equity class of partnerships; that he had read cases that talk about non-equity partners since Frank Frascogna sued them; that he knew generally about equity and non-equity partners before then; that he believed that the three of them were all generally satisfied with their shares as was initially set for them; that he had no initial

understanding of his responsibility for the firm, debts; that it was Jim Brown's firm; that the firm advanced disbursements that the client was obligated to repay; that he didn't see where that was an asset; that he did not know this stuff; that he did not have a business background; that Jim Brown made all the decisions at the beginning; that he was signatory on the law firm's bank accounts; that the firm expended significant monies on marketing; that Mr. Brown needed help on his files, which was why they joined ranks in the first place; that Mr. Frascogna's 25% share from the sale of 30 Brunswick was in an escrow account; that the rest went to pay down the debt on the new building; that they did not need Mr. Capizzi or Mr. Frascogna's consent to obtain the line of credit; that his net income for 2002 was \$931,021.00 and 2003 was \$1,018,806.00; that he and Jim Brown would dictate how Frank Frascogna would proceed on trials; that he hired Mr. Drumm and Mr. Mucklewee to remedy the situation in the medical malpractice department and that was one reason they reduced Frank's share; that he was not conversant with the Partnership Law when he verified the complaint; that the "death agreement" did not create what he would call an obligation for the other partners.

6. Samuel J. Capizzi - Defendant. Samuel J. Capizzi testified that he has been licensed as an attorney since January, 1989, after graduating from the University of Buffalo in 1988, joining Brown and Mohun and doing personal injury work with Jim Brown, while Mr. Mohun did criminal work and property work; that he first was a W-2 wage earner for the first year or two and then received K-1's, out of the net income with a regular draw and a year-end bonus determined by Jim Brown, which continues today;

that the firm Brown, Chiari, Capizzi and Frascogna, LLP, was formed for which he filed the business certificate; that he prepared it after Jim Brown asked him; that it did not describe the relationship among the four parties; that he did not disagree with Accountant Sommer's testimony that it was a carry-over; that it did not change things much with the new firm; that they had more people coming on to move the files which had been the problem; that the deal was that he would work on the files and they would share in the income; that Jim Brown made the decisions about how to run the firm; that a person could leave with his files; that the deal was not on paper; that the business certificate and partnership were in writing; that they never sat down as a group; that he and Jim Brown told him in late 1997 that he wanted to bring Don Chiari on and that he would continue to be paid the same way; that there would be guidelines; that they would put the firm together to make more income to get more out of the files; that he had talked to Jim Brown and it was clear to him that if he left, he could take his files with him; that he did not consider himself an owner of the firm because he didn't pay anything for it; that he acquired some property to buy out Mike Mohun's interest; that neither he nor Frank Frascogna participated in the management of the firm; that he learned that Jim Brown had decided that he and Don Chiari would be equal and that he did not object; that Frank Frascogna told him about his decision to leave in April, 2004, and his unhappiness with the cut in share; that he told Frank Frascogna that he thought it was economic suicide; that they were all doing so well; that he did not want him to go; that Frank Frascogna was

like him, he could not take firm files, just his files; that Frank Frascogna said it was not just about the money.

On examination by the Court, the witness testified that clients signed up with the firm; that there was no system of keeping track who brought in a client; that one might tell from the initial memo.

On cross-examination, the witness testified that he had spent his entire career with Mr. Brown and considered him his mentor; that he had a half-dozen business clients; that he might put together a d/b/a, usually for single individuals; that he had looked at the statute to make sure they complied; that accountants were usually involved; that he prepared Exhibit 1, the certificate; that Mr. Brown determined that they file for a limited liability partnership; that the four of them formed the LLP; that he understood the people had to be partners to comply with DR-102(c); that they complied, that nothing in the certificate stated out the relationship among the four; that he signed the affirmation in the motion for summary judgment; he stated that Brown, Chiari never operated as a partnership as stated in the complaint; but that it was a partnership, an income partnership; that he saw nothing at odds between Brown, Chiari never operating as a partnership and being a partnership, as they defined it; that he and the other three signed the business certificate for partners; that he and Frank Frascogna were trustees in the pension and profit sharing plan; that the list of owners on Exhibit 32 were the four of them; that it was not his handwriting; it had percentages of 36, 36, 14, 14; that partnership and company was different; that they all owned their investments into the

plan; that no one else was listed; that it reflected income; that he knew Frank Frascogna brought some cases in.

7. Frank Frascogna - Plaintiff - Rebuttal. Frank Frascogna further testified on rebuttal examination that he brought more clients in than alleged by Mr. Chiari; that he manages his files; on sur-rebuttal, he testified that he devoted the majority of his time to medical malpractice.

FINDINGS OF FACT

The Court credits the testimony of Frank Frascogna that he joined up with Jim Brown in 1997, during a time when Mr. Brown was putting together a law firm that would specialize in personal injury plaintiff's work; that the new firm would inherit a large number of files from Mr. Brown's former firm, Brown and Mohun, while Mr. Frascogna brought three files over from Siegel and Rosenthal and that he began working at the offices of the old firm at Brunswick in Lancaster; that he believed he received a 26% interest in the firm and a 26% share in the net income; that he never paid money to join the firm, but that the first tax returns for the partnership did show him with a negative capital account of \$30,555.00.

The Court finds that there was never a written partnership agreement as to the law firm of Brown, Chiari, Capizzi and Frascogna, but that, under the direction of Jim Brown, that Sam Capizzi filed a registered limited liability partnership in that name on December 11, 1997, which also listed all partners as liable in their capacity as partners for all debts, obligations or liabilities of the partnership. The Court also finds that Mr. Brown was the

"main man" and managing partner from the partnership's inception, although the others made some limited contribution to management until Mr. Brown began sharing management decisions with Mr. Chiari some years later.

The Court finds the following documents support the existence of a partnership with four partners:

1. All the partnership tax returns during the period in question, identifying the four as partners.
2. The Marine Midland Bank Certified Copy of Corporate Banking Resolutions, where the four partners signed off on broad authority for each of the partners to conduct transactions with the bank shortly after the partnership was formed.
3. The \$500,000.00 line of credit opened up with M & T Bank in 2003 for which all four partners obligated themselves.
4. The draft of the four partners, the so-called "death agreement", that in the case of one partner's death, the other partners would pay a full percentage of his share for that year, followed by two-third (2/3) of his share for year two; then one-half (1/2) for years three, four and five; then one-quarter (1/4) for years six, seven and eight.
5. The Business Certificate for Partners, certified by all four men that they agreed to conduct business under the d/b/a "Brown Chiari".

The Court also credits the testimony of Mr. Frascogna that he and Brown agreed, or alternatively that he agreed after being informed by Mr. Brown, that Mr. Brown would receive 40% of the partnership's net income; that he would receive 26%; that Mr. Chiari 24% and Mr. Capizzi 10%.

The Court also finds that as to the 1998 partnership returns, reflecting \$1,350,177.00 of partnership ordinary income, that the percentages of income do not

break down that way, with Mr. Brown's claim that he received no money for that year, in the face of \$833,117.00 of income, because the money came from a case that actually settled in 1997. In any event, for 1998, Mr. Mohun, the departing partner of the earlier firm, received \$50,000.00, Mr. Chiari \$181,000.00, Mr. Frascogna \$163,108.00, and Mr. Capizzi \$133,000.00, as determined by Mr. Brown; thus, Mr. Capizzi roughly 10%, Mr. Chiari and Mr. Frascogna significantly below 25%.

The Court also finds that the Partnership return of 1999, shows that the partnership net income was \$3,487,896.00, with Mr. Frascogna receiving some \$713,000.00 and the other three partners at \$1,529,710.00, \$819,964.00 and \$425,137.00, respectively.

The Court credits Mr. Frascogna's testimony concerning why he did not voice a complaint that the \$713,000.00 did not equal 26%, that he was happy with the amount.

The Court also credits Mr. Frascogna's testimony that he did not become unhappy until he was informed by Mr. Brown some years later that his share was reduced to 20% of the net income, presumably in 2001, when his income dipped to \$497,147.00 as opposed to 2000, when he earned \$548,500.00, a year when Mr. Brown received \$712,549.00, Mr. Chiari \$644,000.00 and Mr. Capizzi \$316,000.00. Though Mr. Frascogna was unhappy about the reduction, the Court is persuaded that he voiced no formal objection to the reduction, and can be said to have agreed to it.

The Court finds that the testimony of Jim Brown seldom contradicts the testimony in terms of chronology or hard facts, but almost invariably parts company as to

interpretation. Thus, the various 40%, 26%, 24% and 14% shares are described as guidelines that were never met, and that he ultimately decided who got what; that it was his firm because nobody paid him anything; that he was more than happy to share the income with them as partners, but that none of them were owners; that it was his firm, even after he and Mr. Chiari agreed to share equally in the income and decision-making; that he was the only one who owned the firm assets, the property and the files; and finally that the certificate/registration of the partnership was a piece of paper; that if you could say who owned the piece of paper, then the four of them owned a piece of paper (see generally Brown testimony of June 29, 2006, pp. 34-50).

The Court finds that the circumstances of Mr. Frascogna's joining up with Mr. Brown were that Frascogna had recently delivered a very large verdict to his previous law firm, for which he, as an associate, received \$25,000.00.

The Court also finds that at the same time Mr. Chiari joined up with Mr. Brown, bringing some thirty or more good cases, he gave up his partner status at the Roach firm.

The Court finds that both men fully intended to have partner status at the new firm and that in order to placate them at the beginning, that Mr. Brown made them partners, in the way New York law means partners.

CONCLUSIONS OF LAW

"The Partnership Law sets forth the rules regarding the rights and duties of partners, subject to any agreement between them" [*In re Witkind's Estate*, 167 Misc 885, New York City, 1938].

"A partnership is an association of two or more persons to carry out as co-owners a business for profit and includes for all purposes of the laws of the state, a registered limited liability" [Section 10.1 of the New York Partnership Law].

An oral partnership agreement for an indefinite period is considered to be a partnership at will. [*Rella v McMahon*, 169 AD2d 555 (1st Dept, 1991)].

The only remedy for a partner upon dissolution of a partnership is an accounting [*Kidz Cloz, Inc. v Officially for Kids, Inc.*, 320 Fsupp2d 164 (2004)].

Depending upon the agreements and rights as between them, the partners' intermingled interests, may be equal or unequal, and the respective interests and rights of the partners as a partnership can be determined only by a court of competent jurisdiction [*J.C.H. Service Stations, Inc. v Petrikes*, 181 Misc 401, 1944].

Whether or not a partnership exists, or a person is a member of a particular partnership is a question of fact. Thus, where a partnership relation and interest are claimed, the elements of a partnership must be shown. Factors to be considered include:

The intent of the parties (express and implied).

Whether there is joint control and management of the business.

Whether there is a sharing of profits as well as a sharing of losses.

Whether there is a combination of property, skill and knowledge.

[*Mariani v Summers*, 3 Misc2d 534, NY County, 1944],

Other factors include statements characterizing the relations as a partnership [*Napoli v Domnitch*, 34 Misc2d 237, 1962]; inclusion of name on partner certificate

[*Brodsky v Stades* (2d Dept, 1988] and holding themselves out as partners [*Kyle v Ford*, 184 AD2d 1036, 4th Dept, 1992].

The Court will apply these general principles of partnership law to the questions raised here.

Turning to the general standards of partnership law as relating to law firms, the Court first notes *Kirsch v Leventhal*, 181 AD2d 222, 3rd Dept, 1992, for the proposition that in the absence of a written partnership agreement that the filing of partnership income tax returns, the actual sharing of profits and the parties' holding themselves out as a law partnership, that the same amount to a *prima facie* showing that there is a partnership and that the burden of proof then shifts to the parties opposing the accounting.

The Court also notes *Mazur v Greenberg*, 110 AD2d 605, 1st Dept, 1985, *aff'd* 66 NY2d 927, where a lower court determination that the plaintiff was a partner entitled to an accounting was reversed. The facts there involved five original partners forming up under a written partnership agreement in 1967. In 1968, the plaintiff was admitted as an associate, and in 1973, he and four others requested to be named partners. The second group of five were allowed to share in the net profits (the plaintiff received 5%), but they were not given an interest in the capital account, nor were they responsible for the firm's rent or losses. The firm allowed them to be called partners and listed them as partners in Martindale-Hubbell, the firm letterhead and the firm's tax returns.

The *Mazur* court outlined the black letter criteria as stated in *M.I.F. Sec. Co. v Stamm & Co.*, 94 AD2d 211 at 214:

"Whether partnership status is enjoyed turns on various factors, including sharing in profits and losses, exercising joint control over the business, and making capital investment and possessing an ownership interest in the partnership."

The *Mazur* court concluded that the customary indicia were not all present, appearing to focus on the fact that the plaintiff was not responsible for losses, and that, although he exercised some control over the firm, that he had no capital investment, nor ownership interest in the firm.

The court concluded by noting that the arrangement appeared to be a precursor to today's law firm practice of two-tiered partnerships and "(i)t is especially worth noting that when the 1967 partnership agreement, executed only by the original five partners, was amended in 1976, only the surviving original partners signed it [*Mazur, supra*, at 606]."

The Court also notes the two cases cited by defendants: *Dwyer v Nicholson*, 193 AD2d 70, where the court found a written partnership agreement for handling firm assets upon dissolution by death and *Lynn v Corcoran*, 1994 WH 123519 (Sup Ct., Nassau County, 1994) denying summary judgment and ordering trial of the issue of the defendant's status. Thus, both cases are off-point and unhelpful.

Ellis v Abbey & Ellis, 6/7/99 NYLF 28, Col. 4, *aff'd* 271 AD2d 353, 1st Dept, 2000), another dissolution by death case, affirmed a referee's conclusions that, after balancing

the various factors, that the parties intended that there be a sole equity partner, the person owning the physical assets of the firm and making the vast majority of managerial decisions, while the other "partners" had no responsibility for the partnership loans, did not share equally in profits, but instead received a monthly draw and bonuses. Thus, *Ellis* raises one troubling question: If Section 10 of the Partnership Law defines partnership as "an association of two or more persons to carry on as co-owners a business", is not the proposition of a sole equity partner perilously close to sole ownership of the partnership, and thus a contradiction in terms?

There is therefore a pernicious impact to the term "income partner" as opposed to the terms "partner", "general partner", and "equity partner". The Court takes the term "income partner" as a term of art with its origins in law firms looking to create a category between partners and associates. Courts should be very leery about introducing the term in any case, where it is not already present in writing, or utilizing the term to produce one "equity partner" left standing. The problem with the term for legal analytical purposes: under the New York State definition of partnership in Section 10, Partnership Law, a partner is a co-owner, while an income partner, under law firm practice and the limited New York case law, is not. Therefore, under New York State law, an income partner, as opposed to the other sorts of partners above, is not a partner at all, while a partnership, with one co-owner, is not a partnership at all.

It is absolutely clear that the New York law does not contemplate a one-man partnership.

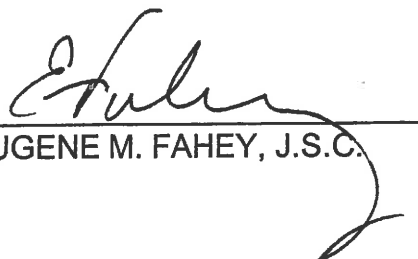
The Court again turns to *Mazur supra* to distinguish it. Unlike the plaintiff in *Mazur supra*, here there is written documentation that Mr. Frascogna was responsible for the partnership's obligations. Unlike the partnership for *Mazur supra*, here Mr. Frascogna was "present at the creation" of the partnership. Unlike *Mazur supra*, there are no written partnership agreements that Mr. Frascogna was not involved in as a signatory. And from its inception, Mr. Frascogna received a large share of the large net income of the new partnership.

When all is said and done, the only indicia of partner status not going Mr. Frascogna's way, his relative lack of say in management decisions, is insufficient to conclude that he was not a partner, particularly when that conclusion would lead to the conclusion, that at the beginning only Mr. Brown was a partner in the firm.

For the purposes of the Partnership Law, and from the totality of the circumstances, particularly Plaintiff Frascogna's responsibility for obligations and liabilities of the firm, Plaintiff Frascogna has demonstrated that he is a partner of Brown, Chiari, Capizzi and Frascogna and is entitled to an accounting.

Submit order upon consent of opposing counsel.

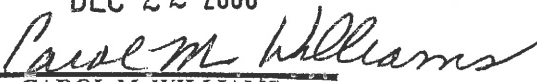
This matter is set down for a conference with Justice John M. Curran on **Tuesday, January 23, 2007 at 2:30 p.m.** in Part 4 at 92 Franklin Street.


EUGENE M. FAHEY, J.S.C.

Dated: December 22, 2006

GRANTED

DEC 22 2006

BY 
CAROL M. WILLIAMS
COURT CLERK