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**INSIDE THIS ISSUE**

[Page 1](#)

Annual Dinner

[Page 2](#)

2016-17 Membership Dues  
RCBA Awards 2016

[Page 3](#)

Journal Ad Rate Sheet 2016

[Pages 4-5](#)

Commercial Litigations  
Issues of Interest

*Submitted by:*

*Paul Savad, Esq.,  
Susan Cooper, Esq.,  
Joseph Churgin, Esq.*

[Page 6-7](#)

Small Estate Article

*Submitted by:*

Keith J. Cornell

[Page 8-9](#)

Major Sponsors

~  
Advertising

[Page 10-11](#)

Natalie Couch Award

~  
Advertising

[Pages 12-13](#)

Free CLE

~  
Advertising

[Page 14-15](#)

CLE Corner

~  
Classifieds

# SEPTEMBER 2016 NEWSBRIEF



1893 - 2016

## ANNUAL DINNER

**THURSDAY, OCTOBER 27, 2016**

6:00 P.M. – Patriot Hills Country Club

*Featuring*

**GUEST OF HONOR**

**HON. PREET BHARARA, ESQ.**

United States Attorney, Southern District of New York

*And*

**LIFETIME ACHIEVEMENT AWARD**

**RECIPIENT**

**DIANA W. RIVET, ESQ.**

*And*

**Inaugural NATALIE COUCH AWARD**

**RECIPIENT**

**PHYLLIS B. FRANK**



# Rockland County Bar Association

337 North Main Street, Suite 1; New City, NY 10956; rocklandbar.org

Dear Colleagues,

This is a friendly reminder that it is time to pay your 2016-17 RCBA Membership Dues if you have not already done so.

Annual Dues for 2016-17 for regular Members is now \$190.00.

Please send in your Membership Renewal Form now if you have not done so already.

If you have any questions about your Membership, please contact Manuela Gomez, Program Coordinator, at [manuela@rocklandbar.org](mailto:manuela@rocklandbar.org), or call Manuela at 845-634-2149.

Thank you!  
RCBA

## RCBA AWARDS 2016

### THE LIBERTY BELL AWARD

**Dr. Frances E. Pratt**

*Presented at Law Day, May 2, 2016*

### THE STERNS AWARD

**Brian K. Condon, Esq.**

*Presented at Installation Dinner, June 23, 2016*

### THE BALSAMO AWARD

**Donald S. Tracy, Esq.**

*Presented at Installation Dinner, June 23, 2016*

### THE LIFETIME ACHIEVEMENT AWARD

**Diana W. Rivet, Esq.**

*Presented at Annual Dinner, October 27, 2016*

### THE INAUGURAL NATALIE COUCH AWARD

**Phyllis B. Frank**

*Presented at Annual Dinner, October 27, 2016*



1893-2016

ROCKLAND COUNTY BAR ASSOCIATION, INC.  
 337 NORTH MAIN STREET - SUITE 1  
 NEW CITY, NEW YORK 10956  
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**2016 Souvenir Journal**  
**Hon. Preet Bharara, Esq.**  
**Guest of Honor**

The Lifetime Achievement Award:

**Diana W. Rivet, Esq.**

The Inaugural Natalie Couch Award:

**Phyllis B. Frank**

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***DATE OF ANNUAL DINNER: THURSDAY, OCTOBER 27, 2016***

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Call us with your questions: Manuela Gomez – 845-634-2149

Rockland County Bar Association

337 North Main Street, Suite #1

New City, New York 10956

**COMMERCIAL LITIGATION ISSUES OF INTEREST**    September 2016  
Submitted by Paul Savad, Esq.  
Chair, Commercial and Corporate Law Committee,  
Joseph Churgin, Esq., and Susan Cooper, Esq., of  
SAVAD CHURGIN, LLP, Attorneys at Law

Your client is a member of a two-member LLC. The other member made over \$400,000 of unauthorized withdrawals from the LLC's account, and transferred the funds to a corporation owned by the other member. You commence an action naming the LLC as plaintiff, and naming the other member and his corporation as defendants. You plead causes of action for conversion, piercing the corporate veil of the defendant corporation, and fraudulent conveyance under the Debtor Creditor Law. The defendants move to dismiss the action for failure to state a cause of action, arguing that the complaint does not identify the LLC's account number or the specific amount withdrawn, does not allege facts to support piercing the corporate veil, and your client is a necessary missing party.

Will you defeat the motion to dismiss?

The answer is *no*.

In *926 Port Chester Management Group LLC v. Slabakis*, 513900/15, NYLJ 1202762718971, at \*1 (Sup. Ct. Kings Co. June 29, 2016), one member of the LLC (Friedberg) commenced an action in the name of the LLC against the other member of the LLC (Slabakis), Slabakis' wife (Redding), and their corporation (Informat) for misappropriation of the LLC's property and funds for their personal use. The complaint pleaded causes of action for conversion, unjust enrichment, fraudulent transfer pursuant to Debtor Creditor Law § 274, and to pierce the corporate veil.

The defendants moved to dismiss the action in its entirety, pursuant to CPLR § 3211(a)(3) (lack of capacity to sue), (a)(7) (failure to state a cause of action), and (a)(10) (a missing necessary party). Feinberg submitted an affidavit in opposition. The Court first examined all causes of action under 3211(a)(7) for failure to state a cause of action. The Court acknowledged that the test is "whether a cognizable cause of action can be discerned from the four corners of the complaint, not whether the claim has been properly stated, citing *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 (1976).

The Court dismissed the claims for conversion, noting that money may be the subject of a cause of action for conversion only when it can be described, identified, or segregated in the same manner as specific chattel, citing *Republic of Haiti v. Duvalier*, 211 A.D.2d 379 (1<sup>st</sup> Dep't 1995). The allegation that the defendants made over \$400,000 of unauthorized withdrawals from the LLC's account was insufficient to state a cause of action without identifying the account number, the location of the account, and the number and amounts of withdrawals, in either the complaint or Friedberg's affidavit.

The unjust enrichment claims survived, properly alleging that all three defendants received funds known to have been wrongfully obtained from the LLC's account .

The claims for fraudulent conveyance under Debtor Creditor Law § 274 were dismissed. There was no required allegation of an independent debt to the plaintiff (only the debt created by the withdrawals), and there was no allegation of how many withdrawals were made, citing *UBS Sec. LLC v. Highland Capital Mgmt., L.P.*, 30 Misc.3d 1230(A) (Sup. Ct. N.Y. Co. 2011).

The claim that Informat is the alter ego of Slabakis and Redding was dismissed. The allegations were conclusory without sufficient details. In any event, piercing the corporate veil is not a cause of action. It is a *mechanism* to hold an individual responsible for corporate actions.

The Court denied dismissal under CPLR § 3211(a)(3) (lack of capacity to sue). The defendants argued that since Friedberg and Slabakis each held 50% of the LLC's membership interests, the LLC was acting ultra vires, and Friedberg was required to bring a derivative action, as held in *Executive Leasing Co. v. Leder*, 191 A.D.2d 199, 200 (1<sup>st</sup> Dep't 1993). But the defendants failed to produce the operating agreement or any other proof of the respective ownership interests necessary to prove lack of capacity.

Finally, the Court rejected the argument that Feinberg was a necessary missing party. Friedberg's mere status as a member was not sufficient. Nor did the defendants establish that complete relief could not be achieved without the presence of Friedberg, citing *Smith v. Pasqua*, 110 A.D.3d 710 (2d Dep't 2013).

*The lesson?* To avoid dismissal of causes of action in a commercial complaint for insufficiently pleaded facts, use a check list of the necessary elements for each cause of action pleaded, and allege detailed facts supporting the defendant's wrongful acts and damages.

## THE SMALL ESTATE PROCEEDING AND USE OF THE SMALL ESTATE AFFIDAVIT - CLOSELY RELATED, BUT DIFFERENT.

By Keith J. Cornell

### INTRODUCTION

As many practitioners are aware, the Surrogate's Court Procedures Act ("SCPA") provides a simplified method of obtaining the appointment of an estate administrator so long as the value of the assets do not exceed \$30,000. The "Affidavit in Relation to Settlement of Estate under Article 13" can be used for filing with the Surrogate's Court to obtain the appointment of a so-called "voluntary administrator." This is a DIY process which is user-friendly and the forms and DIY program can be found on the OCA website.

Not only is that simplified small estate proceeding available for settling estates, but SCPA 1310(2) has an even simpler method of obtaining the distribution of certain assets of a decedent called the "small estate affidavit."

These two methods are frequently confused. The SCPA 1310 small estate affidavit requires no court involvement whatsoever and can be used to obtain the release of decedent's funds not to exceed \$30,000 from a bank or other depository.

Currently, New York State Assembly Bill No. A2827 which has been referred to the Judiciary Committee proposes increasing the small estate limit on SCPA 1301(1) from \$30,000 to \$100,000.

### VOLUNTARY ADMINISTRATOR APPOINTMENT

The "Affidavit in Relation to Settlement of Estate Under Article 13" (Form SE-3A) can be filed in Surrogate's Court together with the decedent's death certificate to obtain the appointment of a voluntary administrator. The application requires specifically reciting the assets of the decedent which require administration. This process is available only in situations where assets requiring administration are valued at up to \$30,000. Even if there is a will, this simplified method can be used to obtain the appointment of a voluntary administrator rather than having to engage the more complex probate process to appoint an executor.

### THE SMALL ESTATE AFFIDAVIT PROCESS

If you thought that was easy, you'll really like the next alternative. If the assets do not exceed \$30,000 in value, there is no need to have a voluntary administrator appointed and using the SCPA 1310 small estate affidavit to obtain release of assets is all that is necessary.

The following is a quick look at the process:

#### 1) Release of up to \$30,000.

Upon the death of a spouse, the surviving spouse may present the 1310 affidavit to a bank or banks and obtain payment from the decedent's account(s) of up to \$30,000.

#### 2) Release of up to \$15,000.

After 30 days have passed from the date of death, up to \$15,000 can be obtained in this manner by the following persons in order of priority: spouse, children, parents, siblings, nieces, nephews, or a creditor who has paid the funeral expenses.

#### 3) Release of up to \$5,000.

After six (6) months following the death, up to \$5,000 can be obtained by distributees or a person who paid the funeral expenses.

While SCPA 1310 provides for the use of the small estate affidavit, banks and other "debtors" of the decedent (as defined in SCPA 1310 1(b)) may be unfamiliar with this process. Financial institutions usually understand how to deal with an appointed administrator or executor, or voluntary administrator, but use of the small estate affidavit may require educating the institution.

SCPA Article 13 was intended to create a simple and inexpensive settlement process.

### ASSETS WHICH VEST AUTOMATICALLY

To a large extent, SCPA Article 13 is intended to dovetail with Estates, Powers and Trusts Law 5-3.1. EPTL 5-3.1 provides that certain assets of a decedent are not deemed estate assets, but vest in the surviving spouse, if any, or decedent's children under 21.

These assets are:

- 1) all household utensils, musical instruments, sewing machine, jewelry, clothing, etc. not exceeding \$20,000 in value.
- 2) the family bible, other religious books, family pictures, books, computer tapes, discs, audio tapes, record albums, etc.
- 3) domestic and farm animals and a 60 day supply of food for them; farm machinery, one tractor, etc.
- 4) 1 automobile not exceeding \$25,000 in value.
- 5) Cash and cash equivalents not exceeding \$25,000.

The value of these categories is cumulative, therefore the total value cannot exceed \$25,000.

### TRANSFER OF AUTOMOBILE TITLE

In Rockland County, we are not seeing many issues regarding transferring the title to the family car. However, it is not unusual for a decedent to hold title to a car in his or her name. NYS DMV has a simple title transfer method which is designed to effect the terms of EPTL 5-3.1. DMV Form MV-349.1 entitled "Affidavit for Transfer of Motor Vehicle" can be used to re-title a car to a surviving spouse or, if none, to children less than 21 years old.

Interestingly, although EPTL 5-3.1 only refers to spouse and children under 21 the DMV also will permit the transfer of title from a decedent to any "next of kin" of the decedent. (See Form MV-349). The statutory and regulatory authority permitting such transfers is unclear.

### CONCLUSION

Any practitioner dealing with estate settlement matters should be familiar with the provisions of SCPA Article 13 and EPTL 5-3.1 to help clients easily and quickly settle small estates and/or access assets rapidly.



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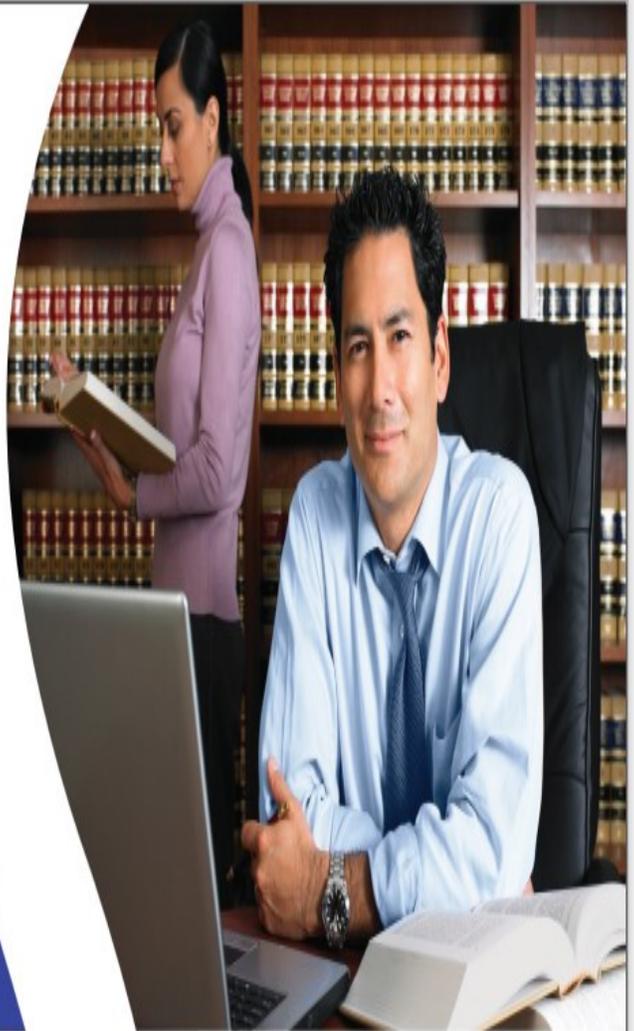
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**INAUGURAL NATALIE COUCH AWARD**  
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*The Natalie Couch Award was created by the RCBA Board of Directors in July, 2016. The first recipient of this prestigious award will be Phyllis B. Frank, Associate Executive Director of VCS, Inc.*

Natalie Couch was, among other things, a trailblazer. She was the first woman to practice law in Rockland County. She was also the first woman to win election as President of the Rockland County Bar Association.

And when the initiative to extend the right to vote to women passed in Rockland County in 1918, Natalie Couch cast the first vote.

Almost 100 years later, the RCBA Board of Directors, at their July 2016 Board Meeting, passed a resolution creating the Natalie Couch Award.

The Award description reads:

*"This award is dedicated to the memory of Natalie Couch, a pioneering member and president of the Rockland County Bar Association, who was a voting rights advocate and an influential community leader. The honoree should be someone whose own accomplishments have served to inspire others to overcome prejudice and barriers in attaining their goals for the benefit of our community."*

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## COMMITTEE CORNER

### Personal Injury & Compensation Law

September 20, 2016 @ 5:30 p.m.

at

Rockland County Bar Association Offices  
 337 N. Main St—Suite 1  
 New City, N.Y. 10956

### Grievance Committee Meeting

October 17, 2016 @ 6:00 p.m.

at

Rockland County Bar Association Offices  
 337 N. Main St—Suite 1  
 New City, N.Y. 10956

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**REPRESENTING CLIENTS IN FAIR HOUSING**  
**AND FAIR LENDING CASES**

**Synopsis:** An updated review of the Fair Housing and Fair Lending Laws, including recent decisions and activities at HUD, mortgage lending, insurance, real estate development, apartment management, brokerage services, and purchase and sale of homes, condos, and co-ops, with particular emphasis on the effect of statutes and regulations such as the Americans with Disabilities Act, the Equal Credit Opportunity Act, the Civil Rights Act, and the Fair Housing Act.

**Date:** **Wednesday, September 28, 2016**  
**Time:** 6:00 p.m.– 9:00 p.m. (*Registration 5:30 p.m.*) (*dinner*)  
**Level:** Transitional/Non-Transitional  
**Speaker:** **Professor F. Willis Caruso, John Marshall Law School, Chicago, Illinois**  
**Place:** Sonoma Grille, 200 Thiells Mt Ivy Road, Thiells, NY 10984  
**Cost:** **FREE**  
**Credits:** 3 CLE Credits: 2.5 Professional Practice/Skills; .5 Ethics

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**MEMO****TO ALL RCBA COMMITTEE CHAIRS & VICE- CHAIRS**

The Association is seeking articles from your committee for publication in the Bar's monthly Newsletter. The membership would greatly benefit from your input and would appreciate it. The article does not have to be complicated or long - a succinct piece of general interest and importance would be best. If you are able to submit an article for the Newsletter it should be sent via email to [Manuela@rocklandbar.org](mailto:Manuela@rocklandbar.org) by the 15th of the month so that the Executive Board may review it. Thank you!

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**If anyone has read a book that they would like to recommend, please write a short review for publication in our Newsletter.**

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# CLE Corner

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**Synopsis:** An updated review of the Fair Housing and Fair Lending Laws, including recent decisions and activities at HUD, mortgage lending, insurance, real estate development, apartment management, brokerage services, and purchase and sale of homes, condos, and co-ops, with particular emphasis on the effect of statutes and regulations such as the Americans with Disabilities Act, the Equal Credit Opportunity Act, the Civil Rights Act, and the Fair Housing Act.

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**Cost:** FREE  
**Credits:** 3 CLE Credits: 2.5 Professional Practice/Skills; .5 Ethics

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## CLE REQUIREMENTS

Newly admitted attorneys must complete 32 credit hours of accredited “transitional” education within the first two years of admission to the Bar. Sixteen (16) credit hours must be completed in each of the first two years of admission to the Bar as follows: 3 hours of Ethics and Professionalism; 6 hours of Skills; 7 hours of Practice Management and/or areas of Professional Practice.

Experienced Attorneys must complete 24 credit hours of CLE during each biennial reporting cycle: 4 credit hours must be in Ethics and Professionalism. The other credit hours may be a combination of the following categories: Ethics and Professionalism, Skills, Practice Management or Professional Practice.

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Attorney Wanted: New City Law Office seeking an attorney with matrimonial and family law experience, full time, trial experience a plus, Spanish speaking a plus, admitted to Southern District of NY a plus. Call 845.639.4600 or fax 845.639.4610 or E-mail: [michael@demoyalaw.com](mailto:michael@demoyalaw.com)

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Experience necessary, salary negotiable. Please provide cover letter and resume to the Rockland County Bar Association.

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With office in New City seeks a Successor Attorney for his General Practice consisting primarily of Real Estate, Wills, Trust and Estates. Please call (845) 623-8055 Fax (845) 623-2219

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**NEW CHAPTER**

We are pleased to announce the beginning of a new chapter in a distinguished career: ADAM K. KURLAND, ATTORNEY AT LAW, P.C. has opened its offices in the space formerly occupied by Fenster & Kurland LLP, conveniently located at 337 N. Main Street, Suite 11, New City, New York. Adam K. Kurland, Esq., a lifelong Rockland resident, continues to offer his expertise in commercial and residential real estate, business and corporate matters as well as civil litigation. Mr. Kurland and his professional, courteous staff combine steadfast attention to detail with the ability to treat their clients' needs with the care and compassion they would afford their own family. Call or email Adam today: (845) 638-4700 / [akurland@akkpc.com](mailto:akurland@akkpc.com).

**RELOCATIONS**

Eugene Passman, Esq.  
55 Old Turnpike Road # 606  
Nanuet, N.Y. 10954  
845 357-1071

**RELOCATIONS**

Law Office of Brian Berkowitz  
222 North Main Street  
New City, NY 10956  
(845) 638-9200 (phone)  
(845) 570-2013 (fax) \*  
[Brian@Berklaw.com](mailto:Brian@Berklaw.com)

The Rockland County Department of Law is seeking candidates for a part-time Collection Attorney. Approximately 20 hours per week required in the County Attorney's office. Must be a Rockland County resident. Minimum 3 years' experience in debt collection or litigation. Anticipated compensation is flat fee with bonus structure and no out of pocket expenses. Office telephone and support staff to be provided. Please send resume, to:

**G. Mercedes Felix**  
**Confidential Secretary to County Attorney**  
**Rockland County Department of Law**  
**11 New Hempstead Road**  
**New City, New York 10956**  
**[felixm@co.rockland.ny.us](mailto:felixm@co.rockland.ny.us)**