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THE SURVEY OF NEW YORK PRACTICE

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INTRODUCTION*

In this first issue of Volume 60, *The Survey* examines a vari-

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* The following abbreviations will be used uniformly throughout *The Survey*:

New York Civil Practice Law and Rules (McKinney)	CPLR
New York Civil Practice Act	CPA
New York Criminal Procedure Law (McKinney)	CPL
New York Code of Criminal Procedure	CCP
Real Property Actions and Proceedings Law (McKinney)	RPAPL
Domestic Relations Law (McKinney)	DRL
Estates, Powers and Trusts Law (McKinney)	EPTL
General Municipal Law (McKinney)	GML
General Obligations Law (McKinney)	GOL
D. Siegel, New York Practice (1978)	SIEGEL
Weinstein, Korn & Miller, New York Civil Practice (1982)	WK&M
The Biannual Survey of New York Practice	*The Biannual Survey*
The Quarterly Survey of New York Practice	*The Quarterly Survey*
The Survey of New York Practice	*The Survey*

The Extremely valuable in understanding the CPLR are the five reports of the Advisory Committee on Practice and Procedure. They are contained in the following legislative documents and will be cited as follows:

1957 N.Y. Leg. Doc. No. 6(b)	FIRST REP.

ety of issues of recent importance in New York law. Among the cases considered is *Moustakas v. Bouloukos* in which the Appellate Division, Second Department, held that an attorney of record may not be dismissed unless the statutory procedures of CPLR 321 are followed. In *Moustakas* the plaintiff had discharged his attorney be means of a handwritten letter rather than in the manner prescribed by CPLR 321. In a memorandum opinion, the court deemed such a dismissal ineffective and permitted a recission of the settlement that was negotiated by the plaintiff per se.

In *Brandon v. Chefetz*, the Appellate Division, First Department, broadly construed Article 9 of the CPLR, holding that Article 9 could not be used to bar certification of plaintiff shareholders with substantially similar claims in actions against corporate directors. The *Brandon* court advocated a broad construction of Article 9 to ensure that injured parties would not be precluded from advancing their claims.

In this issue, *The Survey* also examines *People v. Lawrence*, in which the Court of Appeals refused to excuse a defendant's failure to make a timely motion to dismiss on speedy trial grounds even though the failure to make such a motion resulted from the trial judge's directive to defer the motion until after trial. The majority held that CPL section 255.20(3), which grants discretionary authority to courts to consider pre-trial motions any time prior to sentencing, does not apply to motions to dismiss on speedy trial grounds. Therefore, the defendant's failure to comply with the statutory procedures of CPL section 210.20(2) constituted a waiver of defendant's right to request a dismissal on speedy trial grounds. The dissent criticized the narrow construction of section 210.20(2) by the majority, arguing that section 255.20(3) is applicable to all pre-trial motions.

Finally, *The Survey* examines a recent clarification in the law concerning eavesdropping warrants. In *People v. Paluska*, the Appellate Division, Third Department, considered sections of the

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1958 N.Y. Leg. Doc. No. 13 ..... SECOND REP.
1959 N.Y. Leg. Doc. No. 17 ..... THIRD REP.
1960 N.Y. Leg. Doc. No. 120 ..... FOURTH REP.
1961 Final Report of the Advisory Committee on Practice and Procedure ..... FINAL REP.

Also valuable are the two joint reports of the Senate Finance and Assembly Ways and Means Committee:

1961 N.Y. Leg. Doc. No. 15 ..... FIFTH REP.
1962 N.Y. Leg. Doc. No. 8 ..... SIXTH REP.

CPL that authorize the issuance of eavesdropping warrants for a period of interception no longer than thirty days. Stressing the importance of strictly construing eavesdropping statutes, the court held that the thirty days begins to run on the day the warrant is issued unless the issuing court specifies another date of commencement in the warrant. The members of Volume 60 hope that the cases considered in *The Survey* will be of help and interest to the New York bench and bar.

CIVIL PRACTICE LAW AND RULES

CPLR 321: Remedy of rescission available to party who violates statute by negotiating settlement pro se without effectively discharging an attorney of record

CPLR 321[1] provides that a party to a civil action who appears[2] by counsel is prohibited from acting for himself in the action except by permission of the court.[3] Further, if a party wishes to ap-

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[1] *See* CPLR 321 (Supp. 1986). Section 321(a) of the CPLR provides:

> (a) A party, other than one specified in section 1201, may prosecute or defend a civil action in person or by attorney, except that a corporation . . . shall appear by attorney, except as otherwise provided in section 1809 of the New York city civil court act, the uniform district court act, the uniform city court act and the uniform justice court act. If a party appears by attorney he may not act in person in the action except by consent of the court.

Id.; WK&M ¶ 321.01 (1985).

Courts generally have stated that the purpose of § 321 is to avoid confusion regarding the identity of the individual who has authority to act in an ongoing litigation. *See infra* note 28 and accompanying text.

Section 321(a) of the CPLR was adopted substantially unchanged from CPA 236. *See* FOURTH REP. 190; FINAL REP. 281; SIXTH REP. 119; CPLR 321, commentary at 411 (1972). Several older cases construing CPA 236 are treated in this survey to aid in an analysis of the corresponding CPLR section.

[2] *See* CPLR 320(a). A formal appearance is made when a party either "serve[s] an answer or a notice of appearance," or "mak[es] a motion which has the effect of extending the time to answer." *Id.*

[3] *See* CPLR 321(a); H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 66-67 (5th ed. 1976); *accord* Carlisle v. County of Nassau, 64 App. Div. 2d 15, 19, 408 N.Y.S.2d 114, 117 (2d Dep't 1978) (although party represented by counsel at trial may not act, he may help plan trial strategy). *Compare* Chase Manhattan Bank (N.A.) v. O'Flynn, N.Y.L.J., June 22, 1984, at 12, col. 5 (Sup. Ct. N.Y. County June 21, 1984) (despite contention that such was delay tactic, defendant who properly discharged his attorney could act on his own behalf) *with* Cann v. Cann, 204 Misc. 1069, 1071, 127 N.Y.S.2d 55, 58 (Sup. Ct. N.Y. County 1954) (once defendant represented by counsel, counsel can be served on defendant's behalf).

The rule against pro se representation by a party represented by counsel predates the codification of civil procedure in New York. *See* Webb v. Dill, 18 Abb. Pr. 264, 264 (Sup. Ct. 1st Dist. 1865). This principle is closely related to the premise permitting a party to retain only one attorney of record in a particular action. *Cf.* Dobbins v. County of Erie, 58 App.