

# The Survey of New York Practice Table of Contents

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# THE SURVEY OF NEW YORK PRACTICE

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### INTRODUCTION\*

In this third issue of Volume 57, *The Survey* analyzes several

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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

recent decisions of interest concerning New York law. In *Weiner v. McGraw-Hill, Inc.*, the Court of Appeals took a step toward alleviating the strict employment-at-will doctrine. The Court held that an employee hired for no specific duration can maintain a cause of action in breach of contract for wrongful discharge based upon representations concerning job security contained in an employer's personnel handbook. Significantly, this decision departed from numerous lower court holdings which have rejected this theory of liability. In the criminal area, a plurality of the Court of Appeals rejected an emergency exception to the sixth amendment right to counsel in *People v. Knapp*. In *Knapp*, the Court held that evidence obtained in a missing persons investigation must be suppressed if the police knew that the defendant was represented by counsel on a pending, unrelated charge. In *People v. Mirenda*, the Court held that the appointment of standby counsel to a defendant appearing pro se is merely discretionary and that there exists no constitutional right to standby counsel for pro se defendants.

Included among the appellate division cases is *Paladino v. Adelphi University*, in which the Second Department held that no cause of action existed for breach of contract and fraudulent misrepresentation asserted against a private school for failure to supply a quality education.

Also included in *The Survey* is a discussion of the meaning of

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Domestic Relations Law (McKinney) .....	DRL
Estates, Powers and Trusts Law (McKinney) .....	EPTL
General Municipal Law (McKinney) .....	GML
General Obligations Law (McKinney) .....	GOL
D. Siegel, <i>New York Practice</i> (1978) .....	SIEGEL
Weinstein, Korn & Miller, <i>New York Civil Practice</i> (1979) .....	WK&M
<i>The Biannual Survey of New York Practice</i> .....	<i>The Biannual Survey</i>
<i>The Quarterly Survey of New York Practice</i> .....	<i>The Quarterly Survey</i>
<i>The Survey of New York Practice</i> .....	<i>The Survey</i>

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.
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.

“public offering” as stated in the New York Real Estate Syndicate Act which requires the filing of detailed disclosure documents in real estate transactions. The author analyzes relevant case law and proposes a statutory scheme that would clarify the circumstances in which an offering would be deemed “private” within the meaning of the Act.

## CIVIL PRACTICE LAW AND RULES

### Article 2—Limitations of Time

*CPLR 203(b)(5): Filing of summons with county clerk is effected upon mailing of summons, not upon actual receipt by county clerk*

Section 203 of the CPLR sets forth the general method for computing the time period within which a claim must be interposed.<sup>1</sup> Subdivision (b)(5) of that section allows a plaintiff, by serving a summons on a designated county official, an additional 60 days after the expiration of the appropriate statutory period.<sup>2</sup> De-

<sup>1</sup> CPLR 203 (1972 & Supp. 1982-1983). Section 203(a) of the CPLR provides that a plaintiff must “interpose” his claim in order to toll the statute of limitations. *See* CPLR 203(a) (1972). Failure to do so within the prescribed statutory period suspends the plaintiff’s remedy. *Hulbert v. Clark*, 128 N.Y. 295, 297-98, 28 N.E. 638, 638 (1891). Although the plaintiff’s right is preserved, the practical effect of his neglect to interpose a timely claim is a permanent dismissal of the action. *See* SIEGEL § 34, at 35.

CPLR 203(b) provides six methods by which a plaintiff may interpose his claim. The most common way of interposing a claim is by serving a summons upon the defendant. CPLR 203(b)(1) (1972); *see id.*, commentary at 114. Alternatively, the statute permits a “publication of the summons against the defendant . . . pursuant to an order.” CPLR 203(b)(2) (1972). Orders granted for a provisional remedy or attachment, under certain conditions, also will satisfy the interposition requirement. *Id.* 203(b)(3),(4). Service upon an appropriate public official will allow the plaintiff an additional 60 days beyond the prescribed statutory period to serve the defendant. *Id.* 203(b)(5) (McKinney 1972 & Supp. 1982-1983); *see infra* note 2. Finally, subdivision 6 of section 203(b) sets forth the procedure to interpose a claim “in an action to be commenced in a court not of record.” CPLR 203(b)(6) (1972); *see* SIEGEL §§ 45-49, at 47-51; WK&M § 203.02, at 2-61 (1982 & Supp. 1982).

<sup>2</sup> CPLR 203(b)(5) (McKinney Supp. 1982-1983). Section 203(b)(5) provides in pertinent part:

A claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with him when: . . .

5. The summons is delivered to the sheriff of that county outside the city of New York or is filed with the clerk of that county within the city of New York in which the defendant resides, is employed or is doing business, . . . provided that:

(i) the summons is served upon the defendant within sixty days after the period of limitation would have expired but for this provision . . .

*Id.* Section 203(b)(5) was designed to aid a plaintiff who is experiencing difficulty effecting