

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 an effort to keep the practitioner abreast of recent developments in New York law, *The Survey* provides analysis and commentary on significant New York decisions. This installment of *The Survey* is highlighted by an examination of three recent Court of Appeals decisions that further delineate a criminal defendant's right to counsel. Read as an integrated whole, these decisions evince a liberal attitude on the part of the Court toward extending the defendant's right to counsel and suggest that the final step in the evolution of this important constitutional privilege is yet to come. In *People v. Cunningham*, the Court declared that a defendant's right to counsel attaches upon a request for an attorney and that this right cannot be waived in the absence of counsel. Similarly, in *People v. Samuels*, the Court held that this "indelible right" to counsel attaches upon the filing of a felony complaint.

* 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 (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.

Finally, *People v. Rogers* held that once the "indelible right" to counsel has attached, statements elicited from a defendant on an unrelated charge require suppression if made in the absence of an attorney.

The Survey also comments upon several lower court decisions of special significance to the practitioner. In *Laffey v. City of New York*, the Appellate Division, First Department, held that dismissal for failure to answer a calendar call constituted "neglect to prosecute," barring recommencement of the action under CPLR 205(a). In the rapidly changing area of professional advertising, the Appellate Division, Second Department, circumscribed the use of advertising of legal services by mail in *In re Koffler*. The *Koffler* Court chose not to penalize the defendant attorneys, but admonished the Bar that any future violations would result in the imposition of disciplinary sanctions.

It is hoped that these and other cases examined in *The Survey* will serve to further the goal of informing the practitioner of noteworthy trends in New York practice.

ARTICLE 2—LIMITATIONS OF TIME

CPLR 205(a): Prior dismissal for failure to answer calendar call held to be termination of action for neglect to prosecute

CPLR 205(a) generally provides that a timely commenced action may be recommenced within six months of the date of its dismissal, despite the expiration of the original statute of limitations.¹ This extension is unavailable, however, where the prior action is terminated for neglect to prosecute.² The phrase "neglect to prose-

¹ CPLR 205(a) (Supp. 1979-1980) provides:

(a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if he dies, and the cause of action survives, his executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action.

² CPLR 205(a) (Supp. 1979-1980); see, e.g., *Flans v. Federal Ins. Co.*, 43 N.Y.2d 881, 374 N.E.2d 365, 403 N.Y.S.2d 466 (1978), *rev'g*, 56 App. Div. 2d 615, 391 N.Y.S.2d 659 (2d Dep't 1977); *Jelinek v. City of New York*, 25 App. Div. 2d 425, 266 N.Y.S.2d 766 (1st Dep't 1966); *Hymowitz v. Soprinisky*, 24 App. Div. 2d 750, 263 N.Y.S.2d 822 (1st Dep't 1965); *Wright v. L.C. Defelice & Son, Inc.*, 22 App. Div. 2d 962, 256 N.Y.S.2d 63 (2d Dep't 1964),