CITY COURT : CITY OF RYE
WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK, 11-141

Plaintiff,

-against- DECISION AND ORDER

ROBERT SCHUBERT,

Defendants.

Appearances:
Janet DiFiore, District Attorney White Plains *(Valerie Livingston, Ass't Dist Att'y* of counsel) for plaintiff
Steven Gaines, Esq,, White Plains for Defendant

The Court, on its own motion, will consider whether I, the judge who would otherwise preside over this case, am disqualified from doing so.

Judiciary Law § 14 provides that,

A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree. . . .

Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal. *People v. Moreno*, 70 NY2d 403, 521 NYS2d 663 [1987].

Rules Governing Judicial Conduct, 22 NYCRR Section 100.2 provides that "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

1. (A) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment."

The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

The Rules Governing Judicial Conduct, 22 NYCRR Section 100.3(E) provides that:

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) (I) the judge has a personal bias or prejudice concerning a party or

(ii) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge knows that (I) the judge served as a lawyer in the matter in controversy, or (ii) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or (iii) the judge has been a material witness concerning it;

© the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding;

(d) the judge knows that the judge or the judge's spouse, or a person known by the judge to be [related within 6 degrees].

The Commentary to Rule 100.3(E) says:

[3E(1)] A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of

disqualification, even if the judge believes there is no real basis for disqualification.

[3.27][3F] A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification in the event a remittal is available under the Section.

To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

Accordingly, I will disclose on the record information what I believe the parties or their lawyers might consider relevant to the question of disqualification.

I have not been defendant's attorney in this or any other matter. I am not related to defendant, nor do I know of any relationship by blood or marriage to defendant. I have no personal knowledge of the facts underlying the charge before the Court. Neither I nor my family has an economic interest in the outcome of the case before this Court. I have had a history with the defendant and his family.

Defendant's son was a Boy Scout in the same Troop as my son. We attended Troop events together.

Defendant's son and my son attended the United States Naval Academy. Both are currently commissioned officers in the Navy. Defendant's son is a Naval Flight Officer; my son is a Naval Aviator. They are ultimately in a similar chain of command which at some level becomes identical.

Defendant and his wife were members of the Naval Academy Parent's Club of Long Island of which I was Membership Secretary, Vice President, President, and for the next month, Alumni Representative.

Defendant, his wife, my wife and I attended Navy football games at Annapolis and the Army-Navy game in Philadelphia and may have participated in the same tailgate parties.

We may have attended a party together to watch Navy beat Notre Dame (again).

Before taking the bench, defendant asked to retain me as his attorney in connection with his property. At defendant's request I visited his house twice and discussed his matter. Although, I declined to represent defendant, I recommended attorneys to him and discussed the procedures that would need to be followed in connection with those matters and how it might affect his life. I consistently told defendant that I was not his attorney and was not representing him.

Before taking the bench, I signed a letter supporting resolution of defendant's controversy. Before, the current Mayor was sworn in, I proposed that the City Council resolve the civil litigation brought by defendant by making an offer of settlement.

I spoke with defendant on several occasions and recommended he ask the questions he posed to me to his attorney.

Defendant visited me in Court twice. I consistently told him the Rye City Court had no case before it and would not have jurisdiction over his claims, and that he should consult his attorney. I drove him home after his last visit.

I was present at a recent American Legion meeting (to make a presentation and not as a member) at which defendant asked the American Legion to write in support of his claims.

In January, 2011, a third person allegedly threatened to shoot me, in substance very similar to the statement allegedly made by the defendant in this matter. Having been the subject of such a similar threat may cause others to perceive that I might project the threat against me onto the defendant in this case. Furthermore, since the District Attorneys' office is prosecuting both cases, some may perceive that I would curry favor in this matter so that the person who threatened me is diligently prosecuted. While others may so perceive, I do not feel that the circumstances would prevent me from being fair and impartial in this

matter.

I do not believe I am statutorily disqualified from hearing this case. However, given my history with the defendant, I can see why my impartiality might reasonably be questioned.

I consider the defendant to be a friend, although the degree of friendship may be the subject of debate. It is improper for a judge to preside over cases involving his close friends (*see, e.g., Matter of Murphy,* 82 NY2d 491, 495; *Matter of Fabrizio,* 65 NY2d 275). *Matter of Robert*, 89 NY2d 745, 658 NYS2d 221 [1997]. See also, Advisory Commission on Judicial Ethics, Opinion: 98-26 .

Accordingly, I will recuse myself from hearing further proceedings in this matter and assign the case to Judge Runes's calendar.

IT IS ORDERED, that I recuse myself in this case and it is further

ORDERED, that this case is transferred to the calendar of Judge Richard N. Runes.

Dated March 29, 2011

JOSEPH L. LATWIN, J.C.C.