

DISTRICT COURT OF THE STATE OF NEW YORK  
NASSAU COUNTY OF NEW YORK

-----X

THE PEOPLE OF THE STATE OF NEW YORK

**NOTICE OF MOTION**

Plaintiff,

against

DKT. NO. 867-9305

XXXX YYYYYY

Defendant.

-----X

**PLEASE TAKE NOTICE** that upon the annexed affirmation of Amy Hsu an associate at the Law Firm of Anthony J. Colleluori & Associates LLC, attorney for Defendant YYYYYY, a motion will be made at District Court of the State of New York, Nassau County, at 99 Main Street, Hempstead, New York in Courtroom Part X on November \_\_\_\_\_, 2007 for an order granting the following relief:

- I. an Order recusing the Hon. AAAA BBBBB of the District Court of Nassau County from deciding the instant motion to bar retrial of the defendant;

Granting such other and further relief as this court deems just and proper.

Dated:

Woodbury, New York

---

Amy Hsu, Esq.  
Attorney for Defendant

STATE OF NEW YORK  
NASSAU COUNTY : FIRST DISTRICT COURT

-----X

**AFFIRMATION**

Plaintiff,

against

DKT. NO. 867-9305

XXXX YYYYYY

Defendant.

-----X

Amy Hsu, an attorney duly licensed to practice in the courts of the State of New York,  
hereby affirms the following under the penalty of perjury:

1. That I am an Associate of the Law Offices of Anthony J. Colleluori and Associates LLC.
2. That I represent the defendant in the above captioned matter.
3. As such I am fully familiar with all the pleadings and proceedings hereto for had herein.
4. That I respectfully submit the within affirmation in support of defendant's Notice of Motion.

**I. RECUSAL**

**STATEMENT OF FACTS**

5. On or about September 9, 2006, Mr. YYYYYY was issued a Desk Appearance Ticket on a charge of Forcible Touching under NYS Penal Law Section 130.52.
6. Thereafter, on or about September 22, 2007, Mr. YYYYYY was arraigned and bail was set at \$500.

7. A trial in this case was commenced on or about August 1, 2007.
8. A motion in limine was argued before this Court to preclude the complainant's sister from testifying as an outcry witness. The defense argued that complainant did not make a prompt outcry because she made the complaint of the alleged touching almost two hours after its occurrence.
9. During the oral argument, the defense stated that computer records, subpoenaed to the court, showed the complainant had clocked out at 1:00 AM as opposed to 2:30 AM based on employers' time sheet records.
10. On or about August 4, 2007, the complainant was sworn in.
11. During the complainant's direct testimony, the People produced her "clocked-out" receipt, an electronically generated computer document which indicated that the complainant clocked out at around 2:30AM.
12. No prior notice of this receipt was ever provided to the defense despite demand and request as well as the ADA's assurance no electronically generated proof existed ( via their VDF form.)
13. As such, defense counsel immediately objected to the introduction of the receipt in evidence as it violated the discovery rules.
14. Thereafter, this Court declared a mistrial and indicated that it could not be fair in light of the evidence of the receipt that was revealed.

### ARGUMENT

15. Section 14 of the Judiciary Law provides for specific guidelines requiring judicial disqualification. Absent a legal disqualification (i.e. reason of interest or

- consanguinity) covered in the Judiciary law, the trial judge is the sole arbiter of recusal.
16. The defense recognizes that fact that there is no prohibition against the trial judge on a bench trial who declared a mistrial to decide a defense's motion to bar retrial of a defendant based on double jeopardy ground. Therefore, the defense is not asking this Court to disqualify itself as a matter of law.
17. Instead, the defense is requesting this Court to view the recusal with the notion of fundamental fairness and to recuse itself as to avoid the appearance of impropriety.
18. The decision of recusal under this circumstance is discretionary and is within the personal conscience of the Court. In making that determination, the Court should consider the overall situation.
19. In the motion to bar retrial of the defendant, several comments and legal argument were made regarding the conduct of this Court with respect to the declaration of mistrial. The defendant makes the argument that retrial is barred is due in part to the error of this Court.
20. Since in the motion the defendant makes several arguments about the errors committed by this Court, it would seemed that it would be difficult for the court to be impartial.
21. The court in People v. Zappacost, 77 A.D.2d 928 (2<sup>nd</sup> Dept. 1980) states that the judiciary must be "sensitive to the imperative that we avoid any situation which allows even a suspicion of partiality." It goes on to say that "courts must constantly be vigilant to avoid even the appearance of bias which may erode

public confidence in the judicial system as quickly as would damage caused by actual bias.” Zappacost, 431 A.D.2d at 930.

22. Given the situation in this case, recusal is advisable when objectivity cannot be guaranteed and reliability is questionable.

**WHEREFORE** your affirmant respectfully requests that this court grant recusal of itself for the purpose of deciding the defendant’s motion to dismiss his case based on Prosecutorial Misconduct and for all such other relief as to this Court is just and proper.

Dated:  
Woodbury, New York

---

Law Offices of  
Anthony J. Colleluori & Associates  
180 Froehlich Farm Boulevard  
Woodbury, New York 11797  
(516) 741-3400  
Email: [catlaw1@yahoo.com](mailto:catlaw1@yahoo.com)  
Website: [www.colleluorilaw.com](http://www.colleluorilaw.com)

By: Amy Hsu

TO: District Attorney’s Office  
Nassau County  
99 Main Street  
Hempstead, NY

CLERK OF THE COURT  
Nassau District Court  
99 Main Street  
Hempstead, NY