

Recusal is required whenever there is substantial doubt as to a jurist's ability to preside over a trial with impartiality. *Com. v. Darush*, 501 Pa. 15, 459 A.2d 727 (1983); *Com. v. Boyle*, 498 Pa. 486, 447 A.2d 250 (1982); *Com. v. Knighton*, 490 Pa. 16, 415 A.2d 9 (1980); *Com. v. Goodman*, 454 Pa. 358, 311 A.2d 652 (1973). The burden of proof rests upon the party seeking **recusal**. *In re Kirkander*, 326 Pa.Super. 380, 474 A.2d 290 (1984). The party who petitions for **recusal** must produce evidence which establishes bias, prejudice, or unfairness. *Rizzo v. Haines*, 520 Pa. 484, 555 A.2d 58, 90 A.L.R. 4th 1007 (1989).

In ruling upon a **recusal** motion, court must be sure to avoid even the appearance of impropriety. *Com. v. Bryant*, 328 Pa.Super. 1, 476 A.2d 422 (1984).

Recusal is a matter of individual discretion or conscience and only the **judge** being asked **recuse** himself may properly respond to the request. *Com. v. Jones*, 541 Pa. 361, 663 A.2d 142 (1995).

A trial **judge** should **recuse** himself when a reasonable question concerning his impartiality raised, even though actual prejudice is not found; however, a trial **judge's** determination regarding **recusal** will not be disturbed absent an abuse of discretion or bias. *Com. v. Edmister*, 535 Pa. 210, 634 A.2d 1078 (1993).

Recusal of a **judge** is unwarranted absent an allegation or showing of specific prejudgment or bias against the petitioner, and, for purposes of determining whether **recusal** is warranted, the United States Constitution Fourteenth Amendment due process provision is offended if the **judge** has a direct, personal, substantial, or pecuniary interest in the case. *Com. v. Jones*, 541 Pa. 361, 663 A.2d 142 (1995).

A party seeking **recusal** or disqualification of a **judge** is required to raise the objection at the earliest possible moment, or that party will suffer the consequence of being time barred. *In re Lokuta*, 11 A.3d 427 (Pa. 2011), petition for cert. filed, 80 U.S.L.W. 3028 (U.S. June 28, 2011).

Due process concerns extend to the actions of the judiciary; accordingly, litigants are guaranteed an absence of actual bias on the part of any **judge** adjudicating their case. For due process purposes, the concept of "judicial bias" encompasses matters in which an adjudicator has a direct, personal, substantial, or pecuniary interest in the outcome of the matter, and there is an impermissible risk of actual bias, so as to violate the Fourth Amendment's Due Process Clause, when a **judge** has had

significant, personal involvement in a critical decision regarding a litigant's case. Commonwealth v. Fears, 250 A.3d 1180 (Pa. 2021).

2021 WL 5937664

Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

Steven Patrick HARDY, Plaintiff,
v.
Arif SHAIKH, et al., Defendants.

CIVIL ACTION NO. 1:18-CV-01707

Signed 12/16/2021

II. Motion to Disqualify Judge

Under 28 U.S.C. § 455, a **judge** is required to **recuse** herself “in any proceeding in which [her] impartiality might reasonably be questioned, ... or [w]here [s]he has a personal bias or prejudice concerning a party.” *Culver v. Specter*, 1:11-CV-02205, 2013 WL 5488532, at *3 (M.D. Pa. Sept. 30, 2013); *citing* 28 U.S.C. § 455(a) and 28 U.S.C. § 455(b)(1). The test for **recusal** under § 455(a) is an objective test and requires **recusal** where a “reasonable person, with knowledge of all the facts, would conclude that the **judge’s** impartiality might reasonably be questioned.” *In re Kensington Int’l Ltd.*, 368 F.3d 289, 301 (3d Cir. 2004). “ ‘Extrajudicial bias’ refers to a bias that is not derived from the evidence or conduct of the parties that the **judge** observes in the course of proceedings.” *Johnson v. Trueblood*, 629 F.2d 287, 291 (3d Cir. 1980); *see also United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (“The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the **judge** learned from his participation in the case.”); *United States v. Gilboy*, 162 F. Supp. 384, 393–94 (M.D. Pa. 1958) (alleged bias must be personal and extrajudicial, not arising solely on the basis of court proceedings). Further, “a party’s displeasure with legal rulings does not form an adequate basis for **recusal**.” *Securacomm Consulting, Inc. v. Securacom Inc.*, 224 F.3d 273, 278 (3d Cir. 2000) (*citing In re TMI Litig.*, 193 F.3d 613, 728 (3d Cir. 1999)); *see also Jones v. Pittsburgh Nat’l Corp.*, 899 F.2d 1350, 1356 (3d Cir. 1990); *Waris v. Heartlean Home Healthcare Services, Inc.*, 365 F. App’x 402, 406–07 (3d Cir. 2010).

7. Should AIP be allowed to testify or address the Court?

Generally, it is in the AIP's best interest not to testify. First, the proceeding is not intended to be adversarial. The potential of subjecting an AIP to the psychological trauma of cross-examination, especially if that individual is at all compromised, is generally not in the best interests of the client. However, as in a criminal proceeding, the decision is ultimately the client's, not the lawyer's, and the lawyer is compelled by the Rules of Professional Responsibility, particularly Rule 1.14, to allow the client to testify if he/she insists upon it.

The recent case of *Estate of Rose Phillips*, 8 Fid. Rep. 3rd 327 (Phila. 2018) demonstrates the importance of knowing your client and knowing the weaknesses in the Petitioner's case. Incapacity should not just be viewed as a foregone conclusion. In *Phillips*, the AIP testified on her own behalf. The Court specifically noted in its findings that the AIP gave a "compelling recitation" in support of her wish not to have a guardian. The AIP and her counsel were able to demonstrate that there was adequate family support and that a plan was in place for the protection of the AIP. The Court also denied the petition because it found that the expert's testimony was lacking. The expert had not reviewed all of the necessary medical information and, according to the Court, lacked a sufficient understanding of the AIP's circumstances.

8. Is discovery needed? Does Counsel need an Order to obtain the client's medical or financial information? Is a protective Order required to protect the AIP's privacy?

Discovery is not allowed unless specifically authorized by the Court. However, it may be necessary for AIP's counsel to obtain medical records or bank statements which allow for the full review of his client's situation. Depending on the circumstances, these records may contain information about which the client has no knowledge. Generally, the Court will entertain a reasonable request **10/18/22, 2:39:24 PM** needed for the proper defense of the AIP. **Highlight** If necessary, counsel should make such a request to the Court. Where a simple request with an Order attached does not obtain results, a request for the issuance of a subpoena may be in order.

Counsel for the AIP also needs to be vigilant to protect AIP's privacy, especially from release of information on social media. Inappropriate attachments to the pleadings which disclose protected information may require a separate Court Order limiting the dissemination of that information and a caution to the party otherwise seeking to use it.

9. Is there a less restrictive alternative such as a power of attorney or support system?

In Re: Peery, 272 A. 2d 539 (Pa Super, 1999) (where the Court was satisfied that the AIP did not need a guardian, and stated that: "This Court need not look to whether Ms. Peery can manage her personal financial resources or meet essential requirements for health and safety on her own. Rather, the proper inquiry is whether Ms. Peery has in place a circle of support to assist her in making rational decisions concerning her personal finances and to meet essential requirements of health and safety. This Court will not disturb Ms. Peery's wishes as long as her decisions are rational and result in no perceivable harm to her").

7. **WHAT SHOULD COUNSEL'S INVESTIGATION LOOK LIKE?¹**

There are a number of steps that counsel can take, depending on what is appropriate under the circumstances. The essence of a thorough investigation should allow counsel to become familiar with all of the necessary facts, including those about which the AIP may not know, which assist in assessing the situation and assisting the client.

A. **Talk to the AIP.** Do it separately, without caretakers and family members present and, if possible, out of the residence. Make sure that there are no "monitors" which will allow your conversations to be overheard.

- a. What are the AIP's perceptions of his/her situation? Of family and those around him/her?
- b. Has there been a recent decline in the AIP's physical health or cognitive abilities that can be linked to a specific, treatable medical condition?
- c. Has there been a change in the AIP's living condition—i.e., a house that was always meticulous in the past is now messy, neglected? Mail is piling up, and bills are unpaid?
- d. Is AIP inappropriately dressed and/or lacking basic hygiene?
- e. Is AIP unusually quiet, withdrawn and not eating properly?

B. **Inspect the AIP's home.**

- a. What is the condition inside and outside the house? Any safety hazards?
- b. Is there food in the refrigerator? Past expiration dates?

¹ Special thanks to Diane M. Zabowski, Esquire, of Montgomery County whose insights and advocacy on behalf of AIP's have contributed to the protocol set forth in this section.

nicho	10/18/22 2:40:16 PM
Highlight	
a. What is the condition inside and outside the house? Any safety hazards?	
b. Is there food in the refrigerator? Past expiration dates?	

9. Is there a less restrictive alternative such as a power of attorney or support system?

In Re: Peery, 272 A. 2d 539 (Pa Super. 1999) (where the Court was satisfied that the AIP did not need a guardian, and stated that: "This Court need not look to whether Ms. Peery can manage her personal financial resources or meet essential requirements for health and safety on her own. Rather, the proper inquiry is whether Ms. Peery has in place a circle of support to assist her in making rational decisions concerning her personal finances and to meet essential requirements of health and safety. This Court will not disturb Ms. Peery's wishes as long as her decisions are rational and result in no perceivable harm to her").

7. WHAT SHOULD COUNSEL'S INVESTIGATION LOOK LIKE?¹

There are a number of steps that counsel can take, depending on what is appropriate under the circumstances. The essence of a thorough investigation should allow counsel to become familiar with all of the necessary facts, including those about which the AIP may not know, which assist in assessing the situation and assisting the client.

A. **Talk to the AIP.** Do it separately, without caretakers and family members present and, if possible, out of the residence. Make sure that there are no "monitors" which will allow your conversations to be overheard.

- a. What are the AIP's perceptions of his/her situation? Of family and those around him/her?
- b. Has there been a recent decline in the AIP's physical health or cognitive abilities that can be linked to a specific, treatable medical condition?
- c. Has there been a change in the AIP's living condition—i.e., a house that was always meticulous in the past is now messy, neglected? Mail is piling up, and bills are unpaid?
- d. Is AIP inappropriately dressed and/or lacking basic hygiene?
- e. Is AIP unusually quiet, withdrawn and not eating properly?

B. **Inspect the AIP's home.**

- a. What is the condition inside and outside the house? Any safety hazards?
- b. Is there food in the refrigerator? Past expiration dates?

¹ Special thanks to Diane M. Zabowski, Esquire, of Montgomery County whose insights and advocacy on behalf of AIP's have contributed to the protocol set forth in this section.

9. Is there a less restrictive alternative such as a power of attorney or support system?

In Re: Peery, 272 A. 2d 539 (Pa Super. 1999) (where the Court was satisfied that the AIP did not need a guardian, and stated that: "This Court need not look to whether Ms. Peery can manage her personal financial resources or meet essential requirements for health and safety on her own. Rather, the proper inquiry is whether Ms. Peery has in place a circle of support to assist her in making rational decisions concerning her personal finances and to meet essential requirements of health and safety. This Court will not disturb Ms. Peery's wishes as long as her decisions are rational and result in no perceivable harm to her").

7. **WHAT SHOULD COUNSEL'S INVESTIGATION LOOK LIKE?**¹

There are a number of steps that counsel can take, depending on what is appropriate under the circumstances. The essence of a thorough investigation should allow counsel to become familiar with all of the necessary facts, including those about which the AIP may not know, which assist in assessing the situation and assisting the client.

A. **Talk to the AIP.** Do it separately, without caretakers and family members present and, if possible, out of the residence. Make sure that there are no "monitors" which will allow your conversations to be overheard.

- a. What are the AIP's perceptions of his/her situation? Of family and those around him/her?
- b. Has there been a recent decline in the AIP's physical health or cognitive abilities that can be linked to a specific, treatable medical condition?
- c. Has there been a change in the AIP's living condition—i.e., a house that was always meticulous in the past is now messy, neglected? Mail is piling up, and bills are unpaid?
- d. Is AIP inappropriately dressed and/or lacking basic hygiene?
- e. Is AIP unusually quiet, withdrawn and not eating properly?

B. **Inspect the AIP's home.**

- a. What is the condition inside and outside the house? Any safety hazards?
- b. Is there food in the refrigerator? Past expiration dates?

¹ Special thanks to Diane M. Zabowski, Esquire, of Montgomery County whose insights and advocacy on behalf of AIP's have contributed to the protocol set forth in this section.

4. Criminal record. Try to obtain prior addresses so that you can check the county and local district court criminal records for each known past address.
 5. Civil Dockets. Check for prior litigation history and/or judgments.
- J. **Examine AIP's computer, email, phone records, and social media.** Consider requesting permission to hire a private forensic examiner or investigator if necessary.
- K. **Be alert to whether or not your client is still the victim of a scam artist who may have sensitive information about and/or may still be in direct contact with him/her.** Elder scamming is one of the most baffling and troubling developments with alleged incapacitated persons. It is baffling because a client may appear perfectly normal in all respects *except* for one very big blind spot when it comes to understanding that a scam artist has put him/her at tremendous risk. It is troubling because it is often very difficult to stop. The perpetrators are difficult to track down and may not even be in this country. It is also not unusual for highly educated, sophisticated clients, including those with doctorates, engineering degrees, or even financial backgrounds, to fall prey to scamming schemes. Counsel for the AIP should take note of possible access points for your client such as computers and smart phones. Scammers make contact with clients through emails, internet sites, and over the phone, often warning the elder client not to tell anyone or risk harm to his/her person or finances. For a recent, in-depth article on this phenomena, check out the following link for an article in *The Intelligencer*, a Bucks County newspaper, on March 8, 2019: <https://www.theintell.com/news/20190308/imposter-scams-bilking-consumers-of-millions>
8. **WHAT IF COUNSEL THINKS THE AIP'S WISHES ARE ILL-ADVISED AND AGAINST HIS/HER BEST INTERESTS?**

A. **"Best Interests" of the AIP v. What the AIP Wants**

In Re: Michael Sabatino, 2016 WL 6995384. This is an unreported, but nonetheless important, case that is very instructive on the dual issues of the AIP's ability to hire counsel and the court-appointed counsel's role under multiple provisions of the Code of Professional Ethics. The case was appealed to the Superior Court by an advocacy group ("AG") which had sought to interpose itself as AIP's counsel in place of court-appointed counsel. AG alleged that the Court denied AIP counsel of his own choosing and improperly appointed counsel

for him. The Superior Court disagreed, distinguishing *Rosengarten* because (1) AG had approached the AIP about representing him, not the other way around, (2) AG was still allowed to participate fully in the proceedings, (3) AG forcefully advocated against guardianship on AIP's behalf presenting witnesses and conducting direct and cross examination and (4) AG's disqualification as his counsel was at most harmless error because AG was allowed to participate as advocate for the AIP.

AG also alleged that court-appointed counsel failed to act as adversarial counsel as AIP had wished and asserted a violation of Rule 1.2 (*A lawyer shall abide by a client's decisions concerning the objectives of litigation*), Rule 1.6 (*Disclosure of client confidences*), and Rule 1.7 (*Undivided loyalty to a client*). The Superior Court disagreed, citing both 20 Pa. C.S. 5501 and Rule 1.14 (*Representing a person with diminished capacity*). The Court also noted that AIP's court-appointed counsel had reason, upon receiving the expert IME report, to believe that the AIP was at risk of substantial physical, financial or other harm and that it was appropriate to seek the appointment of a guardian. Court-appointed counsel also represented AIP's best interests by presenting him as a witness, by cross-examining the IME doctor and by presenting AIP's position to the Court. Also noting AG's advocacy, the Superior Court stated, "The desired balance between zealous advocacy and best interests was achieved throughout the proceedings."

B. When Should the Court Consider Appointing a Guardian *Ad Litem*?

20 Pa. C.S. §5511 (a) allows the Court to appoint counsel for the AIP; it does not specifically authorize the Court to appoint a guardian ad litem ("GAL"). However, 20 Pa. C.S. §751 (5) grants the Court authority on petition or on its own motion to appoint a GAL to "represent the interest, not already represented by a fiduciary of...a person not *sui juris*." Thus, a Court clearly can appoint a GAL in a guardianship action where the basic allegation is that the AIP is not "*sui juris*" or "of legal capacity."

Rule 1.14 also clearly establishes that the attorney representing an individual with diminished capacity (whether privately retained or court-appointed) can seek the appointment of a GAL. Explanatory Comment #7 states that "if a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian *ad litem*, conservator or guardian is necessary to protect the client's interests." The involvement of both counsel and a GAL may be important to protect the client's interest, especially where counsel is in conflict with a client who wants to take a course of action which is ill-advised. In that circumstance, the GAL can advocate that position which is in the client's

Rule 1.14

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Explanatory Comment to Rule 1.14

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the