



U.S. OFFICE OF SPECIAL COUNSEL

Policy Statement on Personal Legal Representation at Interviews

The U.S. Office of Special Counsel (OSC) investigates complaints alleging, among other things, prohibited personnel practices and violations of the Hatch Act. OSC permits an individual to have a personal legal representative present during OSC interviews.

Personal Legal Representation of Witnesses and Subjects

OSC typically interviews witnesses and subjects during its investigations. "Witnesses" are employees who have or may have information about the matter under investigation. OSC designates as "subjects" those agency officials or employees who are responsible for the personnel action(s) or other prohibited activity at issue in the investigation. In some instances, subjects may face disciplinary action as a result of the investigation and, as such, request legal representation during interviews. Witnesses, however, seldom request such representation.

OSC will advise individuals whether they are potential subjects in the investigation. If persons are not so notified, they may consider themselves witnesses. OSC also may notify the agency liaison or point of contact which employees have been identified as potential subjects. If during an interview, OSC learns information that suggests a witness has now become a potential subject, OSC will inform the witness and give him or her the opportunity to reschedule the interview. The witness, however, should inform OSC at the earliest opportunity if the witness has reason to believe that OSC should reclassify the witness as a subject based on information known to the witness.

Designation of Personal Legal Representative Form Requirement

To ensure compliance with its policies and practices, OSC requires an individual requesting legal representation during an interview to complete a *Designation of Personal Legal Representative* form. This form must be completed before OSC will permit a representative to be present at an interview. Please note that the representative must also sign the form, indicating that he or she is serving as the individual's personal legal representative.

Personal Legal Representation by Agency Counsel

OSC recognizes that in some limited circumstances agencies may decide to allow agency counsel to provide personal legal representation to employees at interviews. OSC will permit agency counsel to attend interviews only if they represent the individual being interviewed in his or her personal capacity, and not the agency, for purposes of the matter under investigation. If agency counsel is not representing the individual being interviewed, he or she is not permitted to attend the interview. Situations occasionally arise in which it is not clear in what capacity agency counsel are serving or whose interests they are representing. To protect witnesses and subjects and to prevent

conflicts of interest from compromising the OSC investigation, the *Designation of Personal Legal Representative* form contains specific language addressing those situations where individuals request to be represented by agency counsel. OSC will require the agency attorney to sign this portion of the form before OSC will permit the agency attorney to be present during an interview. OSC recommends that agency counsel receive guidance and approval from their agency, including the Designated Agency Ethics Official, to ensure compliance with 18 U.S.C. § 205 and other ethics laws. Agency counsel should also ensure compliance with state bar rules of professional conduct. Agency liaisons and points of contact should not serve as the personal legal representatives of any witness or subject. Please also note that a claim of common law privilege, such as attorney-client privilege, does not prevent OSC from obtaining records and information with respect to the employee's agency. *See* 5 U.S.C. § 1212(b)(5)(C).

The Personal Legal Representative's Limited Role During the OSC Interview

An OSC investigative interview is not a deposition, unless so designated. During OSC interviews, personal legal representatives may not make evidentiary objections or otherwise interrupt, interfere with, or obstruct OSC's fact gathering process. After OSC has finished questioning an individual, a representative may request permission for the individual to clarify any part of his or her statement. OSC has the discretion to determine whether such requests will be granted or denied.

Legal representation during an OSC interview is a privilege that OSC extends voluntarily as a courtesy. OSC will take all necessary steps during the interview to avoid delay and disorderly, obstructionist, or contumacious conduct. If a representative engages in such conduct or refuses to comply with OSC's instructions, OSC may revoke the privilege and exclude the representative from further participation in the investigation.

More Information on Personal Legal Representation

OSC has developed an information sheet, *Your Role in an OSC Investigation*, to answer some of the questions most frequently asked by individuals who are interviewed in OSC investigations. It also explains employees' rights and responsibilities in connection with OSC investigations, including OSC's policies with respect to personal legal representation at interviews. OSC can provide a copy of *Your Role in an OSC Investigation* upon request to a witness, subject, or personal legal representative. Copies are also available on OSC's website at www.osc.gov.

Note: This policy statement supersedes all prior policy statements on personal legal representation at interviews. This statement is intended only to provide guidance to OSC staff on the circumstances under which individuals may have such representatives present, and the procedures for doing so. The statement is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against OSC or any other individual or entity.