

NEW JERSEY DIVISION ON CIVIL RIGHTS

WITNESS INTERVIEW POLICY

When a complaint is filed with the New Jersey Division on Civil Rights (DCR) alleging a violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, or New Jersey Family Leave Act (FLA), N.J.S.A. 34-11:B-1 to -16, DCR is charged with conducting a neutral investigation to determine whether there is probable cause to support the allegations of the complaint. N.J.S.A. 10:5-14. Those investigations may require DCR to interview fact witnesses to obtain information necessary to ascertain “whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits.” Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev’d on other grounds, 120 N.J. 73 (1990), cert. denied, 498 U.S. 1073 (1991).

There is no right to have counsel present during investigative interviews, in part because the presence of a party’s attorney during an administrative investigation can have a chilling effect on the testimony of non-party fact witnesses. See, e.g. In re Comprehensive Investigation of the Sch. Dist., 276 N.J. Super. 354, 359 (App. Div. 1994); See In re Groban, 352 U.S. 330, 334 (1957).

Nonetheless, when DCR conducts an interview of an individual party to a complaint, the party being interviewed may be accompanied by counsel, subject to one exception: an attorney may not obstruct, guide, or in any way interfere with the investigative process, and DCR expressly retains the right to remove counsel from an interview if they engage in such behavior and to bar that counsel from attending future interviews.

If a party is a corporation, partnership or other business entity or organization, counsel may be present for an interview of persons within Respondent’s “litigation control group,” i.e., “current agents and employees responsible for, or significantly involved in, the determination of the organization’s legal position in the matter.” NJ Rules of Professional Conduct 1.13(a). Because an attorney representing a corporation, partnership or other business entity or organization does not represent all of the organization’s “directors, officers, employees, members, shareholders or other constituents,” DCR generally prohibits Respondent’s counsel from attending interviews of non-party witnesses regardless of whether that witness is a current or former employee of the Respondent. Ibid.

As a courtesy, DCR may also permit a non-party fact witness to have counsel present when being interviewed by DCR. An attorney, law firm or legal department representing an employer respondent cannot also represent a current or former employee who is not part of the employer’s litigation control group, as this would present a conflict of interest for DCR’s investigation. This conflict cannot be waived by the witness. The consideration at stake is the integrity of DCR’s investigation and the State’s compelling interest in having witnesses in DCR investigations speak freely and truthfully. That interest would be jeopardized by multiple representation. See Greer v. New Jersey Bureau of Securities, 291 N.J. Super. 365, 373 (App. Div. 1994) (upholding agency practice prohibiting multiple representations of witnesses by counsel during an administrative investigation.)