

OPINION NO. 74-089

Syllabus:

A representative of the Attorney General's Office is the proper person to present complaints before hearings of the Ethics Commission, under present circumstances.

To: Barbara Rawson, Chairman, Ohio Ethics Commission, Columbus, Ohio
By: William J. Brown, Attorney General, October 25, 1974

I have before me your request for my opinion concerning who is the proper person to present complaints before the Ethics Commission.

The Ethics Commission was established by R.C. Chapter 102, Am. Sub. H.B. No. 55, effective December 19, 1973, and January 1, 1974. The processing of complaints is provided for by R.C. 102.06, which reads as follows:

"The ethics commission shall receive and may initiate, complaints against persons subject to Chapter 102. of the Revised Code concerning conduct alleged to be in violation of this Chapter. All complaints, including those by the commission or any of its members, shall be by affidavit made on personal knowledge, subject to the penalties of perjury.

"The ethics commission shall investigate complaints and charges presented to it and may request further information, including the specific amount of income from a source, from any person filing with the commission a statement required by Section 102.02 of the Revised Code, if the in-

formation sought is directly relevant to a complaint received by the commission pursuant to this Section. Such information is confidential. The person so requested shall furnish the information to the commission, unless within fifteen days from the date of the request the person files an action for declaratory judgment challenging the legitimacy of the request in the court of common pleas of the county of his residence, of his place of employment, or of Franklin County. The requested information need not be furnished to the commission during the pendency of the judicial proceedings. Proceedings of the commission in connection therewith, shall be kept confidential except as otherwise provided by this Section. If the commission finds that a complaint is not frivolous, and that the facts alleged in a complaint constitute a violation of Section 102.02, 102.03, or 102.04 of the Revised Code, it shall hold a hearing to determine whether there is a reasonable cause to believe that the facts alleged in the complaint are true.

If the commission does not so find, it shall dismiss the complaint. The person against whom the complaint is directed shall be given reasonable notice by certified mail of the date, time, and place of the hearing, a statement of the charges and the law directly involved, and shall be given the opportunity to be represented by counsel, to have counsel appointed for him if he is unable to afford counsel without undue hardship, to examine the evidence against him, to produce evidence and to call and subpoena witnesses in his defense, to confront his accusers, and to cross-examine witnesses. The commission shall have a stenographic record made of the hearing. The hearing shall be closed to the public.

"If upon the basis of such hearing, the commission finds based upon a preponderance of the evidence that the facts alleged in the complaint are true and constitute a violation of Section 102.02, 102.03, or 102.04 of the Revised Code, it shall report its findings to the appropriate law enforcement agency for proceedings in prosecution of violations of Chapter 102. of the Revised Code and to the appointing or employing authority of the accused.

"If the commission does not find based upon a preponderance of the evidence that the facts alleged in the complaints are true and constitute a violation of Section 102.02, 102.03, or 102.04 of the Revised Code, or if the commission has not scheduled a hearing within ninety days after the complaint is filed or has not finally disposed of the complaint within six months after it has been heard, it shall dismiss the complaint and, upon the request of the accused person, make public report of that finding, but in such case all evidence and the record of the hearing shall remain confidential unless the accused person also requests that the evidence and record be made public. Upon request by the accused person, the commission shall make the evidence and the record available for public inspection."

No mention is made of a prosecutor, investigator, or other person to present complaints before the Ethics Commission at its hearings. While R.C. 119.10 of the Administrative Procedure Act provides that the Attorney General has the duty to represent state agencies in certain hearings and in court, this Act does not apply to the Ethics Commission, which does not fit the definition of "agency" under R.C. 119.01(A). Therefore, my office is not expressly required to present cases at hearings of the Commission.

However, I feel that it would be sound policy for my staff to handle such presentations. Authority to do so is implied by R.C. 109.02, which provides that "[t]he attorney general is the chief law officer for the state and all its departments * * *." The Commission does have authority to appoint an attorney to perform this function: under R.C. 102.05, "the commission may appoint * * *such * * *professional * * *employees as are necessary to carry out the duties of the commission." However, unless the caseload warrants an attorney to do nothing but investigate and present complaints, it would be unwise for a staff member to handle such duties. The adjudicatory and prosecutorial functions of an agency should be handled by different persons, if the agency has both functions. Otherwise, the fairness of its hearings is threatened, because a person who handles prosecutions may well be unable to maintain an impartial, judicial attitude in similar cases. The federal Administrative Procedure Act was enacted, in part, to separate the adjudicatory and prosecutorial functions of federal agencies. Wong Yang Sung v. McGrath, 339 U.S. 33 (1949); and see U.S.C. Section 554(d). See also, Sorin v. Board of Education, 30 Ohio Misc. 108 (1974). Therefore, a staff member of the Ethics Commission should not present complaints unless he takes no part at all in the adjudicatory functions of the Commission.

The substance and appearance of strict fairness is especially important for an ethics commission. Having been charged with enforcement of laws dealing with conflicts of interest, its members should avoid even a suggestion of such conflicts in their own official activities.

Since the present caseload of the Commission does not justify a full-time prosecutor on the staff, it will be best for this office to present complaints to the Commission. Therefore, in specific answer to your question, it is my opinion and you are so advised that a representative of the Attorney General's Office is the proper person to present complaints before hearings of the Ethics Commission, under present circumstances.