

Committee Opinion
June 9, 1992

LEGAL ETHICS OPINION 1465

PERSONAL INTEREST AFFECTING
REPRESENTATION — PUBLIC
LAWYER: COMMONWEALTH'S
ATTORNEY PROSECUTING
DEFENDANTS CHARGED WITH
TRESPASSING ON PROPERTY OF
HOMEOWNERS ASSOCIATION OF
WHICH HE IS A MEMBER.

You have presented a hypothetical situation in which a full-time Commonwealth's Attorney lives in a subdivision surrounding a private lake. You indicate that the residents of the subdivision have formed a voluntary homeowners association, of which the Commonwealth's Attorney is a member. The homeowners association owns a parcel of land on the lake and plans to construct a recreational facility, specifically a dock, for use of members of the homeowners association without waterfront access from their property. The Commonwealth's Attorney will not be using the dock, since his property has its own lakefront access.

The use of the proposed recreational area to be built by the homeowners association would be limited to members and their guests. You state that it is likely that there will be trespassers and you indicate that it is the intention of the homeowners association to prosecute any trespassers. Finally, you state that as Commonwealth's Attorney, it would be the obligation of either the Attorney or his assistant to prosecute anyone charged with a crime in the county.

You indicate that it is likely that, in the future, the homeowners association will ask the Commonwealth's Attorney for advice concerning the proper procedures to follow both in posting the property and in seeking a warrant charging someone with trespassing. You state that this information, however, would be exactly the same kind of information the Commonwealth's Attorney provides to citizens everyday on various criminal laws, including trespassing, the procedures to be followed in obtaining a warrant, and the proper procedure for posting property.

You have asked the Committee to opine whether, under the facts of the inquiry, the Commonwealth's Attorney, by virtue of being either a member or elected officer of the homeowners association, is precluded from prosecuting persons charged with trespassing upon the property of the homeowners association.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-101(A) which provides that a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances; and DR:8-102(A)(1) which states that a public prosecutor or government lawyer in criminal litigation shall refrain from prosecuting a charge that the prosecutor or government lawyer knows is not supported by probable cause. Further guidance is available through Ethical Consideration 8-10(1)

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[EC:8-10] which exhorts that, because the prosecutor represents the sovereign, restraint should be used in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute.

The Committee is of the view that the attorney's position vis-a-vis the homeowners association, either as member or as elected officer, constitutes a personal interest affecting representation as articulated under DR:5-101(A). However, the Committee recognizes that the impact of such personal interests may be measured along a continuum, with the least significant interests representing only a *de minimis* conflict. Under the facts you have presented, the Committee opines that, since the anticipated trespassing would take place on common property owned by the association and not individually by the Commonwealth's Attorney, there would be no impropriety in the Commonwealth's Attorney prosecuting those charged with such trespassing.

The Committee cautions, however, that the attorney's membership on the homeowners association may potentially impact on the exercise of his prosecutorial discretion, as described by DR:8-102(A)(1).