

# Nebraska Judicial Ethics Opinion 05-1

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## ***Question Presented--***

*May a judge serve on a Court Appointed Special Advocate (CASA) board serving a county which is outside the judge's judicial district?*

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## **Conclusion**

The Code of Judicial Conduct would seem to prohibit a judge from serving on a CASA board because such service could create a perception that the judge's impartiality could be cast in doubt. In addition, although the question presented did not include any details about what duties are entailed in service on such a board, such service could further be prohibited by Code provisions prohibiting participation in direct fundraising and receiving financial benefits from advocacy groups.

## **Statement of Facts**

The 2000 Nebraska Legislature passed the Court Appointed Special Advocate Act (the Act). See Neb. Rev. Stat. §§ 43-3701 to 43-3716 (Reissue 2004). The Act provides for the creation of CASA programs to screen, train, and supervise CASA volunteers "to advocate for the best interests of children when appointed by a court." § 43-3706. The Act further provides for a "director" of any CASA program, who is to be responsible for administering the CASA program, "including recruitment, selection, training, supervision, and evaluation of staff and [CASA] volunteers." § 43-3707. The Act sets forth minimum qualifications for anyone wishing to serve as a CASA volunteer, sets forth the procedure for appointment of CASA volunteers by judges, and sets forth the duties of anyone appointed as a CASA volunteer for a particular case. See §§ 43-3709 through 43-3712.

In the present case, a juvenile court judge has indicated that he has been "asked if [he] would consider serving on [a] County CASA board." The judge indicated that the county is "not in [his] district." No further information was provided about what serving on the CASA board would entail, in the way of either duties or benefits. The Act makes no mention of such a board and, thus, provides no further guidance.

## **Applicable Code Sections**

Neb. Code of Jud. Cond., Canons 2 and 4

## **References in Addition to Nebraska Code of Judicial Conduct**

Neb. Rev. Stat. §§ 43-3701 to 43-3716 (Reissue 2004)

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 9.10 (2d ed. 1995)

S. Lubet, *When Good People Do Good Things: The Ethical Dimension of Judicial Involvement in Victim Assistance Programs*, 69 *Judicature* 199 (1986)

Nebraska Judicial Ethics Opinion 01-1

Nebraska Judicial Ethics Opinion 00-2

Nebraska Judicial Ethics Opinion 98-4

Nebraska Judicial Ethics Opinion 97-6

Nebraska Judicial Ethics Opinion 97-1

## Discussion

Canon 4 of the Nebraska Code of Judicial Conduct provides that a judge must conduct all of the judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge and so that they do not interfere with the proper performance of judicial duties. See Neb. Code Jud. Cond., Canon 4A(1) and (3). In Nebraska Judicial Ethics Opinion 97-6, this Committee discussed the propriety of a judge's serving even the most praiseworthy of nonjudicial organizations when the organization espouses or is dedicated to a particular legal philosophy or position. In that opinion, we quoted Jeffrey Shaman et al., *Judicial Conduct and Ethics* § 9.10 (2d ed. 1995), in cautioning that "a judge should not serve an organization that is likely to be engaged in proceedings that would ordinarily come before the judge."

Numerous prior opinions of this Committee have addressed the question of whether a judge may maintain membership or otherwise endorse particular advocacy groups. For example, in Nebraska Judicial Ethics Opinion 00-2, we discussed the impropriety of a judge's membership in a group such as the Association of Trial Lawyers of America (ATLA). ATLA "promotes justice and fairness for injured persons, safeguards victims' rights--particularly the right to trial by jury--and strengthens the civil justice system through education and disclosure of information critical to public health and safety." Similarly, in Nebraska Judicial Ethics Opinion 01-1, we discussed the need for exercising caution in even accepting a speaking engagement associated with an advocacy group such as Mothers Against Drunk Driving (MADD) and the need to not even impliedly endorse the group's policy positions. Similar considerations govern the instant question.

Although CASA is in some ways different from a typical advocacy group such as ATLA or MADD, CASA is in other ways similar. The most significant problem with a judge's membership or affiliation with any sort of advocacy group is the impact that such affiliation will have on the public perception of the judge's impartiality. "The public, or at least those segments of the public who tract specific special interest issues, may be justified in believing the judges who [affiliate themselves with] advocacy groups support the policy positions of the organization . . . [and the] [j]udge's perceptions of their own extrajudicial activities and . . . ability to set aside their personal beliefs, both real and apparent, are irrelevant." S. Lubet, *When Good People Do Good Things: The Ethical Dimension of Judicial Involvement in Victim Assistance Programs*, 69 *Judicature* 199 (1986). See Nebraska Judicial Ethics Opinion 97-6. Although CASA programs are, according to statute, specifically mandated to advocate for the best interests of the child involved in the proceeding, there is a similar danger of public perception that a judge affiliated with CASA may not act in a truly impartial manner in cases in which CASA volunteers make recommendations. This is true even if the particular CASA board on which the judge would serve is located outside his judicial district; board membership will nonetheless create a perception that the judge endorses and is partial to CASA and CASA volunteer recommendations.

We have previously recognized that, although CASA programs are not strictly advocates for either the prosecution or the defense in a particular case, nonetheless judges must avoid membership in or official involvement with victim witness, victim's assistance, or CASA programs. Nebraska Judicial Ethics Opinion 98-4. See, also, Nebraska Judicial Ethics Opinion 97-6. This is because victim advocacy groups (and groups such as CASA) remain advocates who are partisan, not neutral, in the judicial process. Nebraska Judicial Ethics Opinion 97-6. In any given case a CASA volunteer's recommendations will likely conflict with the position of the legal counsel for the natural parents or the minor themselves, who are also parties in the proceedings before the judge and whose constitutional rights the judge is sworn to protect. See Nebraska Judicial Ethics Opinion 97-1. When the judge is

asked to rule in such a case, his affiliation with CASA will cause a perception that the CASA volunteer's opinion might be afforded special weight because of the judge's affiliation. This reasonable doubt cast on the judge's capacity to act impartially or properly perform his judicial duties is why Canon 4 specifically prohibits such affiliation. See, also, Neb. Code of Judicial Cond., Canon 2 ("A judge shall not lend the prestige of judicial office to advance the private interests of . . . others . . . to convey that they are in a special position to influence the judge.").

In Nebraska Judicial Ethics Opinion 00-2, we noted:

The duty of judges to act in a professional manner in avoiding even the appearance of being potentially subject to outside influence is great. The linchpin of our judicial system is the principle that judges are and remain neutral and disinterested in all matters. A corollary to this principle is that judges be detached from all parties who may have an interest in matters sub judice. . . . As such, [affiliation with] organizations who promote and support matters which could reasonably call a judge's impartiality into question is prohibited.

Our opinion in this case is not intended to imply any improper motives or purposes to the judge's desire to serve CASA or to suggest that CASA or similar organizations have improper goals or purposes; it is simply to say that under the current Code provisions, a judge's affiliation with such an organization may raise a question as to the judge's impartiality. The Honorable Douglas F. Johnson, a Douglas County Juvenile Court judge and a member of this Committee, recently commented on judicial ethics prohibitions of juvenile court judges affiliating themselves with organizations such as CASA in an article reprinted in Nebraska Judicial News, Vol. 3 Dec. 2004. In so commenting, Judge Johnson further commented on recommended modifications to the Code which would allow juvenile court judges to be more proactive in working with community groups to meet the needs of children and families. Nonetheless, it is the opinion of this Committee that the proposed affiliation with CASA in this case is currently prohibited by the Code.

We further note that the Committee is without any significant detail concerning what membership on the CASA board would entail or require. In addition to the prohibitions noted above, such membership could also be prohibited by Code provisions constraining judicial involvement in fundraising for extra-judicial organizations, see Canon 4C(3)(b)(i) and Nebraska Judicial Ethics Opinion 02-3, or provisions constraining judicial receipt of financial benefits or funding for judicial training and education, see Canon 4D and Nebraska Judicial Ethics Opinion 04-1. Further, to the extent the CASA board might be considered to be an executive agency, a judge's participation on the board might well be further prohibited by the Nebraska Supreme Court's opinion in *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 527 N.W.2d 185 (1995) (prohibiting sitting judge from serving on commission or agency of executive branch as violation of Neb. Const. art. II §1). Inasmuch as the Committee has been provided with no guidance about what membership on a CASA board involves, and inasmuch as no mention of such a board is made in the Act, the Committee can only caution that further provisions of the Code or law might be implicated by such board membership.

## **Disclaimer**

*This opinion is advisory only and is based on the specific facts and question submitted by the person requesting the opinion pursuant to Appendix A of the Nebraska Code of Judicial*

*Conduct. Questions concerning ethical matters for judges should be directed to the Judicial Ethics Committee.*

APPROVED AND ADOPTED  
BY THE COMMITTEE ON JANUARY 20, 2005

*Judge John F. Irwin  
Judge Douglas F. Johnson  
Judge Stephen R. Illingworth  
Judge John F. Steinheider  
Judge Carlton E. Clark  
Judge John A. Colborn  
Judge Robert B. Ensz*