

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 15-06**

QUESTION PRESENTED

Whether an attorney representing the adoptive parents is ethically obligated to disclose confidential information about the genetic parents to the adoptive parents?

OPINION

An attorney for adoptive parents is statutorily obligated by N.D.C.C. § 14-15-16 to conceal confidential information about the identity of the genetic parents from the adoptive parents unless the requirements of N.D.C.C. § 14-15-16 are first satisfied in obtaining authorized information disclosure. A lawyer for adoptive parents should explain the statutory procedures and limitations of N.D.C.C. § 14-15-16 to an adoptive parent client requesting confidential information disclosure and follow the procedures of N.D.C.C. § 14-15-16 to obtain authorization to disclose confidential information to the adoptive parent client. It is presumed for the purposes of the opinion that the child to be adopted is under the age of eighteen years.

APPLICABLE NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

Rule 1.19(b)(2), N.D.R. Prof. Conduct on Files, Paper, and Property Related to a Representation

Rule 1.4(a)(5), N.D.R. Prof. Conduct on Communication

FACTS PRESENTED

The attorney of record is now able to view all documents filed in an adoption, including restricted/confidential documents, through the Odyssey court filing system. In agency adoptions, the agency normally works with the birth parents and handles confidential information that the adoption agency does not want released to the adoptive parents. Since the attorney for the adoptive parents has access to the confidential information (either in digital or hard copy form), is the attorney under an ethical obligation to supply the adoptive parents with the confidential documents, particularly when the adoptive parent client requests that information?

DISCUSSION

The North Dakota Legislature has empowered the adoption agency with the discretion to disclose confidential adoption information. N.D.C.C. § 14-15-16(4) states "All papers; records; and identifying and nonidentifying information relating to an adopted individual, birth siblings, birth parents, or adoptive parents, whether part of the permanent record of the court or of a file in the department or in an agency are confidential and may be disclosed only in accordance with this section." N.D.C.C. § 14-15-16(5) states "Nonidentifying information, if known, concerning undisclosed genetic parents must be furnished at a reasonable fee to: a. The adoptive parents at the time of adoptive placement or upon their written request; b. An adopted adult upon written request; or c. A birth parent upon written request." N.D.C.C. § 14-15-16(7) states:

"Before the child reaches adulthood, at the discretion of the child-placing agency, with due regard for confidentiality, exchanges of identifying or nonidentifying information may take place between the genetic parents, adoptive parents, and adopted child.

- a. Disclosure of a party's identifying information may not occur unless the party consents to disclosure.
- b. If one parent objects, the identifying information disclosed by the agency may only relate to the consenting parent or parents."

N.D.C.C. § 14-15-16 does not authorize the attorney for any adoptive parent to disclose confidential information to the adoptive parent.

The North Dakota Rules of Professional Conduct do not permit an attorney to circumvent the requirements of N.D.C.C. § 14-15-16. The comment to Rule 1.4, N.D.R. Prof. Conduct on withholding or delaying transmission of information supports this interpretation in stating "When a lawyer reasonably believes the disclosure of certain information to a client would have a high probability of resulting in substantial harm to a client or others, the lawyer may withhold or delay the transmission of the information, but only to the extent reasonably necessary to avoid the harm." The right of birth parents to choose to remain anonymous is statutorily guaranteed, which right no attorney should violate without first obtaining a court order directing confidential information disclosure or obtaining the consent of each genetic parent through the adoption agency.

The specific requirements of N.D.C.C. § 14-15-16 override the more general rule on client file content disclosure. Cf. N.D.C.C. § 1-02-07; State ex rel Clayburgh v. American West Community Promotions Inc., 645 N.W.2d 196, 205; 2002 ND 98 (ND 2002) ("A regulation which exceeds the Commissioner's statutory authority or conflicts with the statute that it implements is void"). Although Rule 1.19(b)(2), N.D.R. Prof. Conduct defines all "pleadings, motions, memoranda, and other litigation materials which have been executed and served or filed" as part of "a client's files, papers (including items only electronically stored), or property", that rule does not automatically make confidential adoption information part of a client's file that must be disclosed to the adoptive parent client. The Odyssey court filing system has an option for filing documents as confidential and the attorney for the adoptive parents is legally obligated to respect that confidentiality.

Rule 1.4(a)(5), N.D.R. Prof. Conduct requires the attorney of adoptive parents to explain these legal limitations on confidential adoption information disclosure to the adoptive parent client when this information is requested by the client. That rule states a lawyer shall "consult with the client about any relevant information on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law." Although Rule 1.4(a)(4), N.D.R. § Conduct requires an attorney to "promptly comply with the client's reasonable requests for information", the statutory limitations of N.D.C.C. § 14-15-16 make such confidential information requests unreasonable.

CONCLUSION

An attorney of an adoptive parent who is asked to provide confidential information about genetic parents to his client must follow the procedures of N.D.C.C. § 14-15-16 on behalf of an adoptive parent client prior to such disclosure. The provisions

of that statute “supersede any other law regarding public hearings and records.” N.D.C.C. § 14-15-16(1). An attorney cannot violate the statutory right of a genetic parent to remain anonymous by disclosing confidential information already made available to that attorney on the electronic court filing system—only the adoptive agency is legally authorized to disclose such information pursuant to a court order or the provision of the consent of each genetic parent.

This opinion was drafted by Robin Gordon and was unanimously approved by the Ethics Committee on the 28th day of July, 2015.


Douglas A. Bahr
Ethics Committee Chairperson

This opinion is provided under Rule 1.2(B), North Dakota Rules for Lawyer Discipline, which states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.