



**New York State Bar Association  
Committee on Professional Ethics**

**Opinion 1212 (01/04/2021)**

**Topic:** Public Defender's Obligation as to Closed Files and Transfer of Files upon De-Funding of Program

**Digest:** Absent the client's informed consent, a public defender may not deliver open or closed client files to the assigned counsel program. Rather, the public defender's office must facilitate the transfer of open client matters to the client or successor counsel appointed by the assigned counsel program and must maintain the files until this transfer can be accomplished. Closed client files from a defunded program must be maintained in the manner required of dissolving law firms.

**Rules:** 1.0(h), 1.0(p), 1.15(c)(4), 1.16(e), 7.2(b)(1)

**FACTS:**

1. The inquirer is an attorney with a not-for-profit public defender's office representing defendants in criminal matters as part of a county's assigned counsel program. The county has defunded the public defender's office and is moving to an alternate program to satisfy its obligation to provide counsel in accordance with New York County Law Article 18-B. Once the public defender's office has effectively withdrawn from representing its current clients, the county has requested that the public defender's office turn over open and closed client files to the assigned counsel program, which is administered by an employee of the county attorney's office. The closed files, which span more than 30 years, have all been converted for storage into electronic format.

**QUESTIONS:**

2. May a defunded public defender's office turn its open client files over to the county's assigned counsel program?

3. May a defunded public defender's office turn its closed client files over to the county's assigned counsel program?

**OPINION:**

4. County Law Article 18-B requires counties to provide criminal defense representation to qualified indigent persons. A county may fulfill its obligations under Article 18-B by appointing a public defender, by furnishing counsel through a private legal aid bureau or society designated by the county, or through a bar association plan in which the services of private counsel are rotated and coordinated by an administrator. *See* County Law § 722.

5. The inquiring attorney here is employed by a public defender's office, established under the authority of County Law Article 18-A, which had been funded by the county to provide the mandated representation. A public defender's office is a qualified legal services organization and, therefore, constitutes a law firm under the New York Rules of Professional Conduct ("Rules"). *See* Rule 1.0(h) and (p); Rule 7.2(b)(1). The assigned counsel program, however, is not a law firm, but rather is defined as an "Entity that sets forth protocols and policies for assigning attorneys to public defense clients and ensure that those attorneys provide quality representation." *See* N.Y.S. Office of Indigent Legal Services Standards for Establishing and Administering Assigned Counsel Programs – Black Letter Standards with Commentary (July 1, 2019) ("ILS Standards"), §1.4.c (published at <https://ils.ny.gov/files/ACP/ACP%20Standards%20with%20Commentary%70119.pdf>)

**Transfer of Open Client Files**

6. Lawyers in the public defender's office who are withdrawing from representing a current client (meaning a client with an "open" file) must comply with Rule 1.16(e) which requires them to "take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for

employment of other counsel, [and] delivering to the client all papers and property to which the client is entitled...”

7. In addition, the lawyers in the public defender’s office have a responsibility under Rule 1.6 and Rule 1.9(c) to maintain the client’s confidential information. As noted in Comment [2] to Rule 1.6, “A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source.” Rule 1.9(c) generally applies the duty of confidentiality to former clients. Accordingly, the public defender’s office may deliver files maintained in connection with an ongoing representation to the clients themselves, or to lawyers who have been appointed pursuant to Article 18-B as successor counsel in particular criminal cases. However, the public defender’s office may not deliver such client files to the assigned counsel program, which is neither a lawyer nor a law firm and which does not represent any of the public defender’s clients, absent the informed consent of the clients concerned. If delivery of the file to the client is not possible, and if the client’s informed consent to delivery of a client file to the assigned counsel program cannot be obtained, then the lawyers in the public defender’s office must take steps to preserve the client’s file until successor counsel is appointed.

8. We are mindful that administrative transfer of open client files to successor counsel may place a significant burden on an unfunded not-for-profit entity such as the public defender’s office. But as Comment [8A] to Rule 1.16 aptly notes, “... lawyers are ordinarily better suited than clients to foresee and provide for the burdens of representation.” Although responsibility for the cost of preserving the client files during the orderly transition of representation is an issue of law beyond the jurisdiction of the committee, the inquirer may wish to explore whether this expense may qualify as an obligation of the county under Articles 18-A or 18-B of the County Law.

## **Transfer of Closed Files**

9. Under the Rules, a lawyer has no ethical obligation to maintain the entire contents of closed client files indefinitely, but a lawyer may have an ethical obligation to maintain certain documents indefinitely, such as when the lawyer knows or has reason to know the client may need the documents in the future. *See* N.Y. State 1192 ¶ 12 (2020). Although a client’s right to some or all of what is broadly termed the “client file” is a question of law beyond our jurisdiction, we note that a lawyer may have the right to withhold some parts of a client file. *See Sage Realty v. Proskauer Rose*, 91 N.Y.2d 30 (1997) (holding that clients are generally entitled to all documents relating to representation, but a law firm is not required to disclose documents that might violate a duty of nondisclosure owed to third party, a duty imposed by law, or firm documents intended only for internal law office use). We also note that Rule 1.15(c)(4), obligates a lawyer to promptly deliver to the client the property of the client (including papers in the client file) that the client is “entitled to receive.”

9. In this instance, the lawyers in the public defender’s office have not culled through their closed files and undertaken the sometimes complicated case-by-case and page-by-page analysis that may be necessary to identify (i) the portions of each file to which the client is “entitled,” including important papers the client may need in the future, and (ii) the portions of the file the lawyer may withhold from the client. The public defender’s office has instead taken the reasonable step of converting all the documents in its closed files to an electronic format, a format that is acceptable, if not preferable in this day and age, as long as the evidentiary value of the documents that may be needed for an appeal or other proceeding is not unduly impaired by this method of storage. *See* N.Y. State 940 (2012) (opining that lawyer satisfies document retention requirements with electronic copies and may destroy original documents, with exceptions, including exception where copies may not be introduced into evidence or otherwise used in place of the originals if the need should arise); *see also*, N.Y. State 623 (1991) (requiring

lawyers to maintain documents of a former client that establish substantial personal or property rights “according to law and/or the reasonably foreseeable needs of the client” unless the former client takes possession of such documents or authorizes their destruction).

10. Whether the files are maintained as paper copies or stored in electronic format, attorneys in the public defender’s office have the same obligation as members of a law firm to maintain the closed files of former clients. In N.Y. State 1192 (2020), we noted:

The professional obligation to maintain closed files or to arrange for their disposition is not limited to those members of the firm who worked on the file when it was active. In N.Y. State 398 (1975), we held that, absent a special agreement to the contrary, the clients of a law partnership employ the firm as an entity and not a particular member of the firm. Consistent with that holding, the ethics committee of the Nassau County Bar Association determined that both partners of a two-member firm in dissolution were fully responsible to every client of the firm, and the lawyers’ separate agreement to the contrary could not diminish each lawyer’s responsibility to the clients of the firm. Nassau County 40-88 (1988).

11. By analogy, the inquirer’s obligation to maintain closed client files continues beyond the de-funding of the not-for profit entity in the same fashion as it would in the event of a law firm dissolution. Prior ethics opinions have addressed the breadth of the lawyer’s responsibility in situations analogous to that presented by the inquiring lawyer, such as retirement and dissolution. *See, e.g.*, N.Y. State 1192 (2020); N.Y. State 623 (1991); N.Y. State 460 (1977); N.Y. County 725 (1998).

12. As we stated most recently in N.Y. State 1192, a lawyer has no ethical responsibility to maintain closed client files indefinitely except for “original documents of intrinsic value such as wills, deeds or negotiable instruments as well as documents the lawyer knows or should know that the client or third party may need in the future.” To the extent the documents contained in the closed client files of the public defender’s office fall within these exceptions, we find no material difference in the scope of the inquirer’s obligations in this case.

## **CONCLUSION**

13. Absent the client's informed consent, lawyers in the public defender's office may not deliver open or closed client files to the assigned counsel program. Rather, the public defender's office must facilitate the transfer of open client files to the client or successor counsel appointed by the assigned counsel program and must maintain the files until this transfer can be accomplished. Closed client files must be maintained in the manner required of dissolving law firms.

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