

III. Model Principles of Records Management

Delaware State Bar Association

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Preamble. The Executive Committee of the Delaware State Bar Association approved the placement of these Model Principles of Records Management (the “Principles”) on the bar association’s website as a model framework of principles that lawyers can choose to apply in developing, maintaining, and implementing document retention and disposition policies. The Principles are not intended and should not be construed as establishing any minimum standards of professional care regarding document retention and disposition by lawyers. Lawyers are encouraged to exercise discretion, consistent with their legal and ethical obligations, in adopting policies suited to the nature and scope of their law practices, and to the interests and particular needs of their clients.

(a) Definitions. For purposes of the Principles,

(1) “Lawyer” means a lawyer who is representing clients, including a legal services organization representing clients or a lawyer on inactive or retired status. (These Principles are not suggested as appropriate for a lawyer representing a governmental entity in an office or department of that or another governmental entity, nor for a lawyer employed in the legal department of a corporation or other organization in which the corporation or other organization is the lawyer’s only client.)

(2) “Client” means a person or entity represented by a lawyer. Where the client has designated a representative other than the lawyer to act or to receive documents on the client’s behalf, or where the client has a guardian, such representative or guardian is considered a “client” of the lawyer for the purposes of the Principles.

(3) “Matter” means an engagement of a lawyer by a client for legal representation.

(4) “Document” means a writing, drawing, graph, chart, photograph, phono-record, tape, disc, or other form of data compilation relating to a matter.

(5) “Writing” or “written” means a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video-recording and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

(6) “Client documents” means documents, other than valuable client documents and lawyer documents, in a lawyer’s possession or control in connection with a matter, including (A) documents that were obtained from a client; (B) final versions of documents that were generated by or at the direction of a lawyer in the course of the matter, such as (i) copies of correspondence between a lawyer and client or copies of correspondence between a lawyer and third parties, (ii) copies of executed contracts, executed wills, executed deeds, corporate records, other papers constituting presumptive proof of title, birth and adoption records, passports, immigration records, and other similar documents, and (iii) copies of pleadings, briefs, applications and other documents prepared by a lawyer and filed with courts or other agencies on a client’s behalf.

(7) “Valuable client documents” means documents having intrinsic value, which are in a lawyer’s possession or control in connection with a matter, including but not limited to cash, securities, negotiable instruments, and collectors’ items such as original manuscripts. Original executed contracts, executed wills, executed deeds, other original papers constituting presumptive proof of title, original corporate records, original birth and adoption records, passports, original immigration records, and other similar unique original documents are also considered to be valuable client documents.

(8) "Lawyer documents" means documents, other than client documents and valuable client documents, in a lawyer's possession or control in connection with a matter, including (A) a lawyer's copies of client documents and valuable client documents; (B) internal administrative materials relating to a matter, such as memoranda concerning potential conflicts of interest, memoranda discussing which lawyers should be assigned to a matter, memoranda concerning the client's creditworthiness, memoranda concerning whether a lawyer must withdraw because of the client's misconduct, memoranda concerning a lawyer's possible malpractice liability to the client, and time and expense records relating to the representation; and (C) a lawyer's notes, drafts, working copies, internal memoranda, legal research, and factual research documents, including investigative reports, prepared by or for a lawyer for the use of a lawyer in the matter.

(b) Document retention and disposition policy or plan. A lawyer should take reasonable steps to safeguard documents. For this purpose, a lawyer should establish and administer a uniform document retention and disposition policy or plan, educate non-lawyer assistants as to its operation, and monitor compliance, all in a manner consistent with the lawyer's obligations under Rule 5.3 of the Delaware Lawyers' Rules of Professional Conduct. Furthermore, the participation of the client in the decision making process involving the retention and disposition of client documents is encouraged. For example, client participation may involve (1) a lawyer offering to make client documents available to a client at the conclusion of a matter and the client taking possession of the client documents, whether or not the lawyer in the lawyer's sole discretion retains copies of the client documents, or (2) a lawyer and a client reaching an agreement concerning the disposition of client documents after an appropriate retention period, at the conclusion of which retention period the client documents may be disposed of without further notice to the client.

(c) Duty to preserve records of fiduciary funds and other property. In the disposition of documents, a lawyer should ensure that complete records of fiduciary account funds and other property are kept by the lawyer and preserved for a period of five years after the completion of the events that they record, and that fiduciary books and records are preserved for a period of five years following the completion of that fiduciary obligation, as required by Rule 1.15(a) and Rule 1.15(d) of the Delaware Lawyers' Rules of Professional Conduct.

(d) Retention and disposition of valuable client documents. At or prior to the conclusion of a matter, a lawyer should promptly deliver to the client any valuable client documents in the lawyer's possession or control pursuant to Rule 1.15(b) of the Delaware Lawyers' Rules of Professional Conduct, unless it is otherwise agreed between the lawyer and client that such documents will remain in the lawyer's possession or control for safekeeping. If the originals of such documents are transferred to a client, a lawyer should retain copies to the extent necessary to comply with Rule 1.15(a) and Rule 1.15(d) of the Delaware Lawyers' Rules of Professional Conduct. If the lawyer has retained possession or control of the original valuable client documents for safekeeping, at the time of document disposition, the lawyer should make a reasonable search in order to locate the client. If the client or the beneficial owner of the valuable client documents (if other than the client) is located, the lawyer should promptly deliver such documents to such person. In the event that the lawyer, after a reasonable search, cannot locate the client or the beneficial owner of the valuable client documents, and if such documents have intrinsic value, the lawyer should follow the procedures described in Supreme Court Rule 73 for abandoned or unclaimed trust funds. If such valuable client documents are original executed contracts, executed wills, executed deeds, other original papers constituting presumptive proof of title, original corporate records, original birth and adoption records, passports, original immigration records, or other similar unique original documents, the lawyer should not destroy or discard the documents but should take reasonable steps to ensure their safekeeping in a manner consistent with any confidentiality applicable to the documents.

(e) Retention and disposition of client documents. A lawyer should retain client documents for a period of no less than five years subsequent to the conclusion of the matter, and should provide reasonable notice to the client prior to the disposition of client documents at the conclusion of such retention period, unless (1) the client has agreed in writing to a shorter or longer period of retention, or (2) the lawyer informed the client in writing during the course of the matter that the client should retain copies of client documents and copies of the client documents were provided therewith or thereafter to the client, or (3) the client is provided with the originals or copies of client documents at the conclusion of the matter and the lawyer informs the client in writing that the lawyer will not be retaining copies of the client documents or that the

client documents will be retained by the lawyer only for a specified period of time, or (4) the lawyer offers the originals or copies of the client documents to the client at the conclusion of a matter, the client declines to receive the client documents from the lawyer, and the lawyer informs the client in writing that the lawyer will not be retaining the client documents or that the client documents will be retained by the lawyer only for a specified period of time, or (5) the lawyer's primary contact with the client is through another lawyer of the client (including in the case of an entity its inside or outside counsel) and during the course of the lawyer's representation of the client, the lawyer has provided copies of the client documents to the other lawyer representing the client, or (6) the client documents are outdated or, in the sound discretion of the lawyer, are no longer of consequence to the interests of the client. In determining the length of time of retention of client documents, a lawyer should exercise discretion and consider such factors as the sophistication and circumstances of the client, the reasonable expectations of the client, the type of matter, any applicable statute of limitations, and the future consequences flowing from the matter. Moreover, a lawyer should exercise discretion particular to the type of matter rather than imposing a single retention period for all types of matters. In the absence of a retention period established between the lawyer and the client, it may be conclusively presumed by the lawyer that the client has consented to the lawyer's disposition of client documents, without further notice to the client, ten years after the conclusion of the matter. In disposing of documents, a lawyer should take appropriate measures to protect confidentiality, and should consider preserving an index or identification of tangible documents, including the manner of disposition. If the substance of a client document is retained by the lawyer in at least one retrievable form, the lawyer may dispose of any other form or forms of the client document at any time, unless the retention of a particular form of the client document is essential in order for it to be useful to the client.

(f) Retention and disposition of lawyer documents. Unless the lawyer and client have otherwise agreed, a lawyer may dispose of lawyer documents at any time, without obtaining the consent of or providing notice to the client, provided that copies of any documents required to be retained by the lawyer pursuant to Rule 1.15(a) and Rule 1.15(d) of the Delaware Lawyers' Rules of Professional Conduct, or by other law, are preserved by the lawyer.

(g) Reasonable notice prior to disposition of client documents. Except as provided in (e), a lawyer should provide a client with reasonable notice prior to the disposition of client documents. Reasonable notice may consist of written communication by first-class United States mail and by certified mail, return receipt requested, to the last client address contained in the lawyer's records or such other address as requested by a client, informing a client that client documents shall be disposed of upon the expiration of 90 days from the date of mailing or upon the lawyer's receipt of the client's written and signed consent to the disposition, whichever is sooner.

(h) Costs of storage, retrieval and delivery of documents. A lawyer may charge a client the reasonable costs associated with fulfilling the client's instructions regarding the storage, retrieval, and delivery of client documents and valuable client documents.

(i) Costs of copying documents. Upon the conclusion of a matter or upon the termination of the lawyer's representation in a matter, a lawyer may charge a client for the reasonable costs of copying documents requested by the client as follows: (1) correspondence between the lawyer and client previously provided to the client; (2) correspondence between the lawyer and a third party that either (a) has already been provided to the client or (b) if not previously provided to the client, constitutes routine administrative correspondence, such as correspondence with court reporters or other service providers; (3) copies of pleadings, briefs, applications and other documents prepared by the lawyer and filed with the courts or other agencies on the client's behalf which (a) have already been provided to the client or (b) if not previously provided to the client, constitute routine administrative court or agency papers, such as certificates of service, unless, under the circumstances of a particular matter, such administrative documents have an impact on the client's rights in the proceeding; and (4) copies of valuable client documents, if any, which were previously provided to the client. Upon the conclusion of a matter or upon the termination of the lawyer's representation in a matter, a lawyer should not charge a client for the costs of copying client documents retained by the lawyer, unless copies of the client documents previously were provided to the client.

(j) Protected documents. A lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another, e.g., if a court's protective order prohibits the copying of a document obtained during discovery from another party; or if the lawyer reasonably believes that the client would use the document to commit a crime; or if the document contains confidences of another client that the lawyer was required to protect. Under conditions of extreme necessity, a lawyer may properly refuse for a client's own benefit to disclose documents to the client unless a tribunal has required disclosure.

(k) Departing lawyers. A lawyer who leaves a law firm may leave with that law firm the documents of clients the lawyer represented while with the law firm, provided that the lawyer reasonably believes that the law firm has appropriate safeguarding arrangements.

(l) Inactive, retired, and deceased lawyers. Actions undertaken pursuant to the Principles by a lawyer on inactive or retired status should not be construed as constituting the unauthorized practice of law. A lawyer on inactive or retired status may enter into a written agreement with a lawyer or law firm that the lawyer or law firm will perform the inactive or retired lawyer's obligations with respect to documents within the scope of the agreement and delivered to the lawyer or law firm. The Principles should not be construed as varying the obligations of the estate of a deceased lawyer.

(m) Discovery. The Principles do not address the issue of whether any documents in the possession or control of a lawyer are or may be discoverable in civil litigation or criminal proceedings pursuant to applicable law or rules of court.

(n) Other law. To the extent that (1) applicable governmental statutes, regulations, court rules, or court orders may require that any valuable client documents, any client documents, or any lawyer documents be retained by the lawyer, or (2) such other law may impose on the lawyer obligations respecting property rights, the Principles should not be construed as varying such obligations or excusing the lawyer from compliance therewith. The Principles should not be construed as varying a lawyer's obligations pursuant to the Rules of the Delaware Supreme Court, including, without limitation, Rule 1.16(d), 3.4, and 8.1(b) of the Delaware Lawyers' Rules of Professional Conduct, and Rules 21 and 23 of the Delaware Lawyers' Rules of Disciplinary Procedure.