TO DISCLOSE OR NOT TO DISCLOSE: WHEN RULE 1.6 CAN MAKE YOU SICK—ETHICS AND DUTIES DOWN ON THE FARM

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I. INTRODUCTION[1]

An attorney has represented Farmer McDonald in various matters for over twenty years. The original representation involved a dispute with a major record label over a song that Farmer McDonald believed was about his farming operation. McDonald believed this should entitle him to the royalties. A few weeks ago Farmer McDonald came to the lawyer's office to seek legal advice on a new business venture. Farmer McDonald told the lawyer that he has been selling produce that has been treated with a dangerous pesticide. Farmer McDonald says the insecticide is called "Buzz-Off" and it is imported illegally from Mexico. Buzz-Off is banned in the United States because it contains high levels of arsenic that can kill a person with a small dose. McDonald explains that Buzz-Off is extremely cheap and he adds water to the batch before spraying so it will be less toxic.

McDonald has been selling tomatoes treated with Buzz-Off at a roadside produce stand across the state line because he admits that he does not want his friends or family eating the contaminated produce. McDonald also mistakenly believes that if his produce stand is across the state line, the police cannot pursue him and charge him with a crime if someone gets sick or dies from his produce. After the lawyer corrects McDonald's understanding of jurisdiction, the two part ways.

If Farmer McDonald was your client, what course of action would you take? What ethical course of action are you bound to follow? What are the possible consequences of your failure to act? Do you have a duty to act against the client's interest and in the interest of society?

A lawyer's options are rather limited when it comes to breaking attorney-client confidentiality.[2] Most lay people believe that an attorney cannot disclose

1. A special thanks to John Dillard of Olsson, Frank, Weeda, Terman, Matz, Washington, DC, and Thomas Lawler of Lawler and Swanson, P.L.C., of Parkersburg, Iowa, for earlier comments on the Article and participating in the discussion of the Article and the survey results.

2. *See* Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 82 (1994).

anything communicated to their attorney.[3] In many ways, a lay person's analysis of the relationship of confidentiality between a client and their attorney would be correct. However, there are very specific exceptions to what appears to be the ironclad concept that an attorney cannot reveal client information.[4] Upon examination of the ABA rules for model conduct and a sampling of state rules for model attorney conduct, the concept of confidentiality is not as absolute as it may appear at first glance. The exceptions to confidentially allow an attorney to disclose client information when an attorney reasonably believes there is an imminent threat of death or substantial bodily harm to an individual.[5] In many hypotheticals that test the bounds of attorney-client confidentiality, the client has explicitly communicated to the attorney their intent to kill a third party.[6] However, the gray area, when the threat of harm is not as imminent or apparent, is not often discussed.

This Article examines what may happen when an attorney represents clients in the food industry who have questionable food handling practices that may lead to sickness or death of consumers. By applying the ABA model rules and state rules for attorney conduct, this Article seeks to provide information and resources that can assist attorneys when presented with such a challenging situation. Additionally, hypotheticals will spur thought on what course of action the individual reader may choose if presented with a similar ethical dilemma. This paper will begin with a brief definition of ethics and will then look at the adaptation of ABA rule 1.6 and the modern ABA rules. A sampling of state bar rules will be used to show the different ethical requirements lawyers are bound to in various states. Additionally, the Article will look at hypotheticals to create an opportunity for individuals to determine their course of action in certain situations. Finally, there will be a review of studies on attorney ethics to see how other attorneys may have acted during ethical dilemmas. The paper will close with some practical advice and resources for additional information on disclosure.

II. THE SCOPE OF ETHICS

A basic understanding of ethics will shed light on how an attorney may decide to disclose a client's information or not. At the most rudimentary level, ethics is defined as a theory, discipline, or system of moral principles that dictates what is right and wrong–good and bad.[7] Ethics deals with what people *ought* to

3. *See generally id.*

4. Levin, *supra* note 2, at 87.

5. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2015).

6. *See* Levin, *supra* note 2, at 129.

7. MERRIAM-WEBSTER, ETHICS, *available at* http://www.merriam-webster.com/dictionary/ethic (last visited Oct. 3, 2015).

do in certain situations.[8]

III. THE HISTORY OF ATTORNEY CLIENT PRIVILEGE

The history of privilege between an attorney and their client is believed to date back to the reign of Queen Elizabeth.[9] At the time, the rule appeared to be less of a formal rule and more of a consideration presented by attorneys to the court to prevent compulsory disclosure by legal counsel.[10] There are numerous cases from England in the 1700s where lawyers were forced to testify against their own clients in court.[11] At the close of the century, attorneys in England began to challenge testimony against their clients and enjoyed a very narrow privilege of confidentiality, usually limited to communication about current litigation and not including consultations.[12]

In America, the issue of attorney-client privilege does not appear in a case until the 1820's.[13] The Vermont court in *Dixon v. Parmelee*[14] recognizes the privilege, stating that it only applies to current litigation and the attorney must disclose other unrelated information.[15] The privilege was formally recognized by the United States Supreme Court in 1826 in *Chirac v. Reinicker*.[16] The Court recognized the privilege applied to the attorney and the client and neither will be compelled to release such information.[17]

IV. THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

A. Adaptation of Rule 1.6

Prior to 1983, the American Bar Association's bar codes required lawyers to maintain the confidentiality of client information.[18] The codes allowed attor-

8. ST. JAMES ETHICS CTR., WHAT IS ETHICS?, http://www.ethics.org.au/about/what-is-ethics (last visited Oct. 3, 2015).

9. Geoffrey C. Hazard, Jr., *An Historical Perspective on the Lawyer-Client Privilege*, 66 CALIF. L. REV. 1061, 1069 (1978).

10. *Id.* at 1069-70.

11. *Id.* at 1074-75.

12. *Id.* at 1080-81.

13. *Id.* at 1087.

14. Dixon v. Parmelee, 2 Vt. 185, 188 (1829).

15. Hazard, *supra* note 9, at 1088.

16. Chirac v. Reinicker, 24 U.S. 280, 294 (1826).

17. *Id.*

18. Levin, *supra* note 2, at 89-90; *see* CANONS OF PROF'L ETHICS, Canon 29, 37, 41 (1937).

neys to disclose the intention of a client to commit a crime.[19] However, lawyers could not reveal a client's intention to commit a non-criminal fraud, even though lawyers were required under the code to reveal a fraud or perjury that had already occurred in the course of the representation.[20]

In the late 1970s, the ABA created the Kutak Commission with the goal of drafting new proposed Model Rules of Professional Conduct.[21] The Commission produced a Discussion Draft that required the disclosure of client information to prevent substantial bodily harm to another.[22] The proposal for mandatory disclosure provoked so much outcry from the legal community that the Kutak Commission gave individual attorneys the discretion to disclose client information or not.[23] In the Commission's Proposed Final Draft, attorneys were permitted to disclose client confidences to prevent a client from committing a criminal or fraudulent act that was likely to result in substantial bodily harm or injury to the financial interest or property of another.[24] The ABA House of Delegates eventually adopted the proposed rule in the 1980's.[25]

B. Current ABA Rules

1. ABA Rule 1.6

According to ABA Rule 1.6 (a), "[a] lawyer shall not reveal information relating to the representation of a client . . ."[26] However, there are exceptions to this rule that allow attorneys to disclose otherwise privileged client information.[27]

Under Rule 1.6 (b),

> [a] lawyer may disclose information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in sub-

19. *Id.*

20. *Id.*

21. Levin, *supra* note 2, at 190; *see* ELAINE REICH, CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N CTR, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES v (1987).

22. Levin, *supra* note 2, at 90.

23. *Id.*; *see* MODEL RULES OF PROF'L CONDUCT R. 1.6 (Proposed Final Draft 1981); REICH, *supra* note 21, at 48 – 49.

24. REICH, *supra* note 21, at 49.

25. Levin, *supra* note 2, at 91.

26. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2013).

27. *See id.* R. 1.6(b).

> stantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; or (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.[28]

There are other exceptions to attorney-client confidentiality, but they are not applicable to this Article and will not be discussed.[29]

For the purposes of Rule 1.6, the ABA defines substantial bodily harm as an occurrence that would compromise an individual's physical integrity.[30] Such harm includes life-threatening or debilitating diseases.[31] Because foodborne pathogens have the ability to sicken or kill people,[32] for the purposes of this Article and the hypotheticals, foodborne pathogens will classified as an occurrence that may result in substantial bodily harm.

2. ABA Rule 4.1

According to Rule 4.1,

> In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.[33]

This rule prohibits a lawyer from lying on the behalf of their client or assisting in any criminal endeavor by their client.[34] The comments to Rule 4.1 clarify that the burden is on the other party to verify factual statements.[35] A lawyer is *required*, in extreme cases, to disclose client information if failing to do so would amount to assisting a client's crime or fraud.[36] In less severe circumstances, an attorney can simply withdraw from representation and possibly "disaffirm an

28. *Id.* R. 1.6(b)(1) – (3).

29. *See id.* R. 1.6.

30. *Id.* R. 1.6 cmt. 6.

31. *Id.*

32. *See Food Poisoning*, FOODSAFETY.GOV, http://www.foodsafety.gov/poisoning/ (last visited Oct. 3, 2015).

33. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2013).

34. *See id.*

35. *Id.*

36. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 3 (2015).

opinion" or "document" prepared during representation.[37]

V. STATE ADAPTATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

A. Virginia

Under Virginia State Bar Rule 1.6(a), "[a] lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client . . ."[38] The Virginia State Bar Rule is also somewhat more expansive than the ABA Rule[39] by protecting attorney-client privilege through "applicable law" and information that the client requested remain confidential, but also by protecting information that may be "embarrassing" or "detrimental" to the client.[40]

According to Virginia State Bar Rule 1.6(b), "[t]o the extent a lawyer reasonably believes necessary, the lawyer may reveal: . . . (3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation."[41]

In addition to the discretionary rule, the Virginia State Bar requires disclosure in certain situations under Rule 1.6 (c).[42] The rule states,

> [a] lawyer shall promptly reveal: (1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel.[43]

The requirement for compulsory disclosure is similar to what the Kutak

37. *Id.*
38. VA. RULES OF PROF'L CONDUCT R. 1.6(a) (2015).
39. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2015).
40. VA. RULES OF PROF'L CONDUCT R. 1.6(a) cmt. 5.
41. *Id.* R 1.6(b).
42. *Id.* R. 1.6(c)(1).
43. *Id.* R. 1.6(c)(1).

Commission initially proposed, but was not adopted by the ABA.[44]

Rule 4.1 also requires, "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of fact or law; or (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."[45] It is only in the comments that there is a reference to the exception to the obligation to disclose under Rule 1.6.[46] Virginia also chose to eliminate the "ABA Rule's references to a 'third person' in the belief that such language merely confused the Rule."[47] Also, the Virginia Bar "expand[ed] the coverage of the Rule to constructive misrepresentation – i.e., the knowing failure of a lawyer to correct a material misrepresentation by the client or by someone on behalf of the client."[48]

B. Michigan

Rule 1.6(b) of the State Bar of Michigan states,

> a lawyer shall not knowingly: (1) reveal a confidence or secret of a client; (2) use a confidence or secret of a client to the disadvantage of the client; or (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.[49]

Under Michigan's Rule 1.6(c), an attorney "may reveal: . . .(3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used; (4) the intention of a client to commit a crime and the information necessary to prevent the crime."[50] In following with the ABA Rules, Michigan has no requirement for compulsory disclosure as it applies to third party harm.[51]

Michigan's Rule 4.1 is a fairly simple adaptation that requires "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person."[52] "Knowingly" is defined as ac-

44. *Compare* REICH, *supra* note 21, *and* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 700 (1989), *with* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013).

45. VA. RULES PROF'L OF CONDUCT R. 4.1 (2009).

46. *Id.* R. 4.1, cmt. 3.

47. *Id.* R. 4.1 (referencing the Committee Commentary).

48. *Id.*

49. MICH. RULES OF PROF'L CONDUCT R. 1.6(b)(1) – (3) (2013).

50. *Id.* R.1.6(c)(3) – (4).

51. *Id.* R. 1.6.

52. *Id.* R. 4.1.

tual knowledge or constructive knowledge that can be inferred from the circumstances.[53]

C. New Mexico

Rule 16-106(A) from the State Bar of New Mexico provides that "a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation."[54]

However, under Rules 16-106(B-C), disclosure is allowed

> [t]o prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, a lawyer should reveal such information to the extent the lawyer reasonably believes necessary. . .(C) To prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another, a lawyer may reveal such information to the extent the lawyer reasonably believes necessary.[55]

Similar to the ABA Rules, New Mexico does not have a mandatory disclosure requirement for disclosure when there is a threat of third party harm.

Rule 16-401 requires not only that "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person" but also "[must not] fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 16-106."[56]

D. Washington State

Rule 1.6(a) of the Washington State Bar Association requires that "[a] lawyer shall not reveal information relating to the representation of a client . . ."[57]

Yet, Rule 1.6(b) provides an exception that:

> A lawyer to the extent the lawyer reasonably believes necessary: . . .(2) may reveal information relating to the representation of a client to prevent the client from committing a crime; (3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to re-

53. *Id.* R. 1.0.
54. N.M. RULES OF CONDUCT R. 16-106(A) (2015).
55. *Id.* R. 16-106(B) – (C).
56. *Id.* R. 16-401(a) – (b).
57. WASH. RULES OF PROF'L CONDUCT R. 1.6(a) (2014).

> sult or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services . . .[58]

Under the same rule, section 1.6(b)(1) requires mandatory disclosure "to the extent the lawyer reasonably believes necessary" if such disclosure "shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm."[59]

Rule 4.1 requires

> [i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.[60]

E. California

Under the California State Bar Rule 3-100(A), a lawyer "shall not reveal client secrets."[61] Client secrets are confidential information relating to the representation of a client.[62] Like the ABA and other state bar associations, there are exceptions to the California rule regarding the confidentiality of client information.[63]

Subsection B of the California State Bar Rule 3-100 allows a lawyer to "reveal confidential information relating to the representation of a client to the extent that the [lawyer] reasonably believes the disclosure is necessary to prevent a criminal act that the [lawyer] reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."[64] California does not require disclosure of confidential client information to prevent a criminal act.[65] The California State Bar does not have an equivalent to ABA Rule 4.1.[66] The State Bar decided that knowingly making misrepresentations is gross misconduct that is adequately

58. *Id.* R. 1.6(b)(2) – (3).
59. *Id.* R. 1.6(b)(1).
60. *Id.* R. 4.1(a)-(b).
61. CAL. RULES OF PROF'L CONDUCT R. 3-100(A) (2013).
62. *Id.* R. 3-100, cmt. 2.
63. *Id.* R. 3-100(B)-(C).
64. *Id.* R. 3-100(B).
65. *Id.* R. 3-100(B) – (C).
66. COMM'N FOR THE REVISION OF THE RULES OF PROF'L CONDUCT, STATE BAR OF CAL.,RULES AND CONCEPTS THAT WERE CONSIDERED BUT NOT RECOMMENDED FOR ADOPTION 1, 19 (2010).

addressed by other rules.[67] Additionally, the California Bar noted such a rule is unnecessary because "a lawyer's duty not to adopt or vouch for a client's or witness's falsehood is as old as the legal profession itself"[68] and extensive case law may create civil liability.[69]

F. Pennsylvania

The Pennsylvania Bar Rule 1.6(a) provides that a lawyer "shall not reveal information relating to representation of a client."[70] Section (c) of the rule allows disclosure of confidential information

> to the extent that the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another; or (3) to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used.[71]

Under the Pennsylvania Bar there is no mandatory disclosure requirement to prevent third party harm.[72]

Rule 4.1 requires

> [i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.[73]

G. Iowa

The Iowa State Bar Rule 32:1.6 forbids disclosure of client information with only limited exceptions including client permission.[74] One such exception holds that

67. *Id.*
68. *Id.*
69. *Id.*
70. 81.4 PA. CODE § 1.6(a) (2015).
71. 81.4 PA. CODE § 1.6(c).
72. *Id.*
73. 81.4 PA. CODE § 4.1(a) – (b).
74. IOWA R. OF PROF'L CONDUCT 32:1.6(a) (2013).

> [a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.[75]

Furthermore, Rule 32:1.6 also requires disclosure "to the extent the lawyer reasonably believes necessary to prevent certain death or substantial bodily harm."[76]

Rule 32:4.1 states:

> [i]n the course of representing a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 32:1.6.[77]

It is worth noting that all of the above states, with the exception of California, have the same wording of ABA Rule 4.1.[78]

Below is a chart with a condensed comparison of all the states referenced above:

State	Adaptation of ABA Rule 1.6	Adaptation of ABA Rule 4.1
Virginia	**shall not** reveal information that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental	**shall not** make a false statement of fact or law or fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client

75. *Id.* R. 32:1.6(b)(1) – (3).
76. *Id.* R. 32:1.6(c).
77. *Id.* R. 32:4.1(a) – (b).
78. *See id.*

	may reveal: information which establishes that client has perpetrated upon a third party a fraud related to the subject matter of the representation **shall** reveal intention of a client to commit a crime	
Michigan	**shall not** reveal a confidence or secret of a client; use confidence or secret to the disadvantage of the client; or use a confidence or secret of for the advantage of the lawyer or of a third person, unless the client consents **may reveal** confidences and secrets to rectify the consequences of a client's illegal or fraudulent act in which the lawyer's services have been used; the intention of a client to commit a crime	**shall not** make a false statement of material fact or law to a third person
New Mexico	**shall not** reveal information relating to representation of a client unless the client consents **may disclose** to prevent the client from committing a criminal or fraudulent act	**shall not** make a false statement of material fact or law to a third person and fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client
Washington State	**shall not** reveal information relating to the representation of a client **may reveal** information relating to prevent the cli-	**shall not** make a false statement of material fact or law to a third person; or fail to disclose when disclosure is

	ent from committing a crime; to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's crime or fraud in which the client has used the lawyer's services **shall** reveal information to prevent reasonably certain death or substantial bodily harm	necessary to avoid assisting a criminal or fraudulent act by a client
California	**shall** not reveal client secrets **may** reveal information to prevent a criminal act that is likely to result in death of, or substantial bodily harm to, an individual	California did not adopt a version or ABA Rule 1.4 and uses other rules and case law instead
Pennsylvania	**shall not** reveal information relating to representation of a client **may** reveal information to prevent reasonably certain death or substantial bodily harm; to prevent the client from committing a criminal act that is likely to result in substantial injury to the financial interests or property of another; or to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used	**shall not** make a false statement of material fact or law; or fail to disclose fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client

Iowa	**shall not** reveal client information **may** reveal information to prevent death or substantial bodily harm; to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services **shall** disclose information to prevent imminent death or substantial bodily harm	**shall not** make a false statement of fact or law; or fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client

VI. CORPORATIONS AS CLIENTS

Attorneys who are in-house counsel or privately represent corporate entities are expected to maintain a certain level of confidentiality when handling a company's information.[79] Under ABA Rule 1.13 (a), "[a] lawyer employed or re-

79. MODEL RULES OF PROF'L CONDUCT R. 1.13 (2013); *see* Vega v. Jones, Day, Reavis & Pogue, 121 Cal. App. 4th 282, 291(2004); Roberts v. Ball, 57 Cal. App. 3d 104, 111 (1976); *see also* Cicone v. URS Corp., 183 Cal. App. 3d 194, 208 (1986).

tained by an organization represents the organization acting through its duly authorized constituents."[80] The comments explain further that an organization is a legal entity that is treated as a client.[81] However, the organization is inanimate and can only act through "its officers, directors, employees, shareholders" and other equivalent positions.[82] Additionally, only legal advice given to authorized constituents is privileged and protected from disclosure; business recommendations are not entitled to the same protection.[83]

Since an organizational client has rights to confidentiality,[84] the ABA added similar exceptions to the confidentiality granted to non-organizational or individual clients.[85] Under Rule 1.13(b),

> [i]f a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.[86] Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.[87]

For in-house counsel specifically, there is a high risk of being fired if an attorney breaches confidentiality and exposes misconduct.[88] Attorneys who represent multiple corporate clients also risk losing several clients if they breach con-

80. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2013).

81. *See id.* R. 1.13 cmt. 1.

82. *Id.* R. 1.13(g).

83. ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE SETTING: HOW TO KEEP YOUR CONFIDENTIAL INFORMATION CONFIDENTIAL, PA. BAR ASS'N, https://www.pabar.org/public/committees/in-house/pubs/inhouseguide.asp (last visited Oct. 3, 2015).

84. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 2 (2013).

85. *Id.* R. 1.13.

86. *Id.* R. 1.13(b).

87. *Id.*

88. *See generally* LEAH C. LIVELY ET AL., AM. BAR ASS'N NAT'L. CONF. ON EQUAL EMP. OPPORTUNITY LAW, THE TABLES ARE TURNED: WHEN HUMAN RESOURCE PROFESSIONALS AND IN-HOUSE LAYWERS BRING CLAIMS AGAINST THEIR EMPLOYER (Apr. 2013), *available at* http://www.americanbar.org/content/dam/aba/events/labor_law/2013/04/nat-conf-equal-empl-opp-law/29alivelyetal.authcheckdam.pdf.

fidentiality.[89] Such risks are made even more complicated in the face of ethical obligations under the ABA rule and even more so for attorneys who practice in states that require mandatory disclosure.[90]

In-house counsel may also be liable for the criminal actions of fellow employees depending on the corporate structure of the particular company.[91] The higher up an attorney serving as in-house counsel progresses in the corporate structure, combined with any extra roles they may serve, makes that individual more liable for the actions of other individuals in the corporation.[92] Under the responsible corporate officer (RCO) doctrine, individual corporate officers can be found guilty of violating a variety of federal laws, such as the Federal Food, Drug and Cosmetic Act.[93] Responsibility can be imputed on a high-ranking individual in the absence of unlawful intent, negligence, knowledge of the violation, or direct participation in the wrongdoing.[94] To prove guilt under the RCO doctrine, the government must prove that the executive in question: (1) held a position of responsibility and authority in the corporation; (2) had the ability to prevent the violation; (3) failed to prevent the violation.[95]

VII. UNITED STATES V. PARK 421 U.S. 658 (1975)

A national food chain maintained several warehouses that had been exposed to rodent contamination.[96] The CEO, whom was later charged along with the corporation for violation of the Federal Food, Drug, and Cosmetic Act, was notified in writing by an FDA inspector of the unsanitary conditions.[97] Following a second inspection, the FDA found the same rodent contamination in food products.[98] After the corporation plead guilty, the CEO maintained a lack of personal responsibility for the violations.[99] The CEO believed that even though he was personally responsible for the corporation's employees, he was not culpable

89. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29, 31 (2013).

90. *See id.* R. 1.13; VA. RULES OF PROF'L CONDUCT R. 1.6(c) (2015); WASH. RULES OF PROF'L CONDUCT R. 1.6 (2013).

91. *See* Barbara DiTata, *Proof of Knowledge Under RCRA and Use of the Responsible Corporate Officer Doctrine*, 7 FORDHAM ENVTL. L. REV. 795, 806-07 (1996).

92. *See id.* at 807.

93. *Id.*

94. *See id.*

95. *Id.* at 808.

96. U.S. v. Park, 421 U.S. 658, 660 (1975).

97. *Id.* at 661.

98. *Id.* at 662.

99. *Id.* at 663.

because he had delegated responsibilities to various employees.[100] The CEO maintained that because he was assured by subordinates that the contaminations were being mitigated, no further follow-up or action was required.[101] The Supreme Court held that the CEO was indeed liable for the actions of the corporation because the CEO was in a position of power to rectify the violations.[102] The Court reasoned that a corporate agent, "through whose act, default, or omission the corporation committed a crime, was himself guilty individually of that crime."[103]

a. What would have been the best advice for in-house counsel to give the CEO after receiving the first letter? Would the answer change if the in-house counsel knew the CEO was in violation of the Federal Food, Drug, and Cosmetic Act?

b. If the attorney wishes to disclose client information, what information should be disclosed?

c. Who should the attorney disclose information to?

d. In what medium should the attorney disclose?

The *U.S. v. Park* case continues to be applicable law in the United States. The case has been followed in at least forty-two cases in state and federal courts.[104] The reasoning in *Park* was cited several times throughout 2013 and as recently as February of 2014 in the United States District Court for the Northern District of Indiana.[105]

VIII. PEANUT CORPORATION OF AMERICA

The following is a timeline[106] that shows the series of events that lead to one of the largest food recalls in US history[107]:

100. *Id.*

101. *Id.* at 663-64.

102. *Id.* at 673.

103. *Id.* at 670.

104. Source-checking the *Park* case reveals that the case has received positive treatment over 40 times. *See, e.g.*, U.S. v. Nivica, 887 F.2d 1110, 1125 (1989); *see also* U.S. v. Gel Spice Co., 773 F.2d 427, 435 (1985).

105. Stillwater of Crown Point Homeowner's Ass'n v. Stiglich, 999 F. Supp. 2d 1111, 1131-33 (N.D. Ind. 2014).

106. *See generally* Gretchen Goetz, *Peanut Corporation of America from Inception to Indictment: A Timeline*, FOOD SAFETY NEWS (Feb. 22, 2013), http://www.foodsafetynews.com/2013/02/peanut-corporation-of-america-from-inception-to-indictment-a-timeline/#.VL2-xUfF-nk.

107. *Id.*

The Peanut Corporation of America shut down in 2009 after a massive outbreak of Salmonella linked to its products left the company bankrupt. Evidence that company officials knowingly released contaminated product onto the marketplace first surfaced in February of 2009 following an investigation by the U.S. Food and Drug Administration. The United States Department of Justice has filed a criminal indictment against four former PCA officials, and revealed that another pled guilty to 29 counts of fraud. The offenses cited in this indictment stretch back far beyond the 2008-2009 outbreak, all the way back to 2003. What follows is a timeline of the history of PCA, from the company's beginnings through its end, and finally to the criminal charges brought against its top officials:

February 15, 2001: Stewart Parnell takes over as owner and president of the Peanut Corporation of America which includes a peanut production facility in Blakely, GA. The headquarters are established in Lynchburg, Virginia.

June 19, 2003: The Manager of Interim Operations at PCA's Blakely location sends a fax to Daniel Kilgore, the PCA Blakely Operations Manager, instructing him to substitute Chinese Extra Large peanuts for Blanched Jumbo Runners when shipping to a customer who had requested the latter, without notifying the customer. These instructions come 'per Stewart.'

September 2004 – September 2006: During this time period, Stewart Parnell and Daniel Kilgore order product to be shipped to customers before receiving results of microbiological testing that reveal the presence of Salmonella in the product on eight separate occasions. They do not inform customers who received the potentially contaminated product in any of these instances.

October 5, 2006: Stewart Parnell is notified by a customer that product received from PCA tested positive for Salmonella. That product is one of those that had tested positive for Salmonella during PCA's internal testing but had been shipped to the customer. Stewart Parnell responds to the customer in an email stating, 'I am dumbfounded by what you have found. It is the first time in my over 26 years in the business that I have ever seen any instance of this. We run Certificates of Analysis EVERY DAY with tests for Salmonella and have not found any instances of any, even traces, of a Salmonella problem.'

November 16, 2006: Michael Parnell, brother of Stewart Parnell and Vice President Sales, the food broker who negotiates sales for PCA, informs Stewart that the company could create a false certificate of analysis if need-

ed.

March 8, 2007: Stewart Parnell sends an email to a customer stating that 'We have run countless tests and show absolutely no evidence of Salmonella,' referring to a lot of product that he had been informed had tested positive for Salmonella in September 2006.

March 14, 2007: Stewart Parnell sends an email to a customer stating, 'Every peanut that we have shipped has only left our facility upon successful negative testing for Salmonella. . .We can find absolutely no evidence of instances of Salmonella.'

March 21, 2007: After being told that Salmonella testing results were not yet available for a lot of product and that shipment would have to be delayed in order to wait for the results, Parnell sends an email that reads: 'shit, just ship it. I cannot afford to lose another customer.'

April 12, 2007: A PCA official sends an email to the National Sales Manager regarding totes of peanut meal, saying, 'They need to air hose the top off though because they are covered in dust and rat crap.' The email was forwarded to Stewart Parnell, who replied, 'Clean em all up and ship them.'

March 2008: Mary Wilkerson is promoted to Quality Assurance Manager at PCA.

March 26, 2008: Daniel Kilgore sends email to Stewart and Michael Parnell regarding testing of peanut paste suggesting that PCA use a smaller sample size 'and hope they don't ever catch it.'

June 6, 2008: Stewart Parnell sends an email to PCA employees regarding retesting after a presumptive positive Salmonella test on a product. In it he states: 'I go thru this about once a week. . .I will hold my breath. . .again. . .'

September 2, 2008: Stewart Parnell authorizes Samuel Lightsey, who had taken over from Kilgore as Operations Manager in July of 2008, to ship product that had not tested within acceptable microbiological specifications because the customer didn't require a certificate of analysis.

September 6, 2008: The first victim of what will become a massive Salmonella outbreak linked to PCA products falls ill.

November 10, 2008: The Centers for Disease Control and Prevention detects an outbreak of Salmonella, identifying 13 cases in 12 states.

November 24, 2008: CDC identifies a second multistate cluster of Salmo-

nella infections, identifying 27 cases in 14 states.

February 2008 – December 2008: PCA ships 13 lots of peanut products accompanied by false certificates of analysis during this time, later investigations reveal.

February 2008 – January 2009: In later investigations, federal officials discover that peanut products known to be adulterated are introduced into commerce by PCA 20 times during this time period.

January 3-4, 2009: CDC pinpoints peanut butter as the likely source of the ongoing Salmonella outbreak.

January 9, 2009: Minnesota Department of Health isolates Salmonella from an opened container of King Nut peanut butter. The U.S. Food and Drug Administration (FDA) launches an investigation of PCA's Blakely, GA facility, where the nut butter was produced.

January 13, 2009: PCA announces a recall of some lots of peanut butter for potential Salmonella contamination.

January 16, 2009: PCA expands its recall to include all peanut butter produced on or after August 8, 2008 and all peanut paste produced on or after September 26, 2008.

January 18, 2009: PCA expands its recall a second time to include all peanut butter and peanut paste manufactured at its Blakely, GA processing plant on or after July 1, 2008.

January 21, 2009: FDA begins investigation of PCA facility in Plainview, TX

January 28, 2009: PCA expands its recall for a third time. All products produced at its Blakely plant since January 1, 2007 are now included.

February 2, 2009: FDA's investigation of PCA's Blakely, GA facility reveals that the plant shipped product before receiving positive test results for Salmonella 12 times between 2007 and 2009.

February 10, 2009: Stewart Parnell appears under subpoena before the House Energy and Commerce Subcommittee during a hearing on the PCA outbreak. He invokes his Fifth Amendment rights and refuses to testify.

February 12, 2009: Texas orders PCA Texas facility to halt production and

recall all product manufactured since January 1, 2007. PCA has now recalled over 3,600 products. Over 600 people are now known to have been sickened by Salmonella linked to PCA products.

February 14, 2009: PCA files for Chapter 7 bankruptcy and begins to liquidate its assets.

February 20, 2009: PCA issues a statement to customers telling them to cease distribution of products from PCA plants in Georgia and Texas.

April 2009: The Salmonella outbreak linked to PCA products ends. At least 714 people in 47 states have been sickened. Nine deaths are thought to be attributed to bacteria from PCA peanut products.

March 2010: Stewart Parnell hires Thomas J. Bondurant, Jr. as his defense attorney.

August 26, 2010: A federal judge awards victims of the PCA Salmonella outbreak $12 million in settlement money, to come out of the now-bankrupt PCA's insurance policy.

February 11, 2011: Family members of victims who died or were sickened in the PCA Salmonella outbreak call for criminal charges to be brought against former PCA officials during a press conference in Washington, D.C.

October 24, 2012: Grand Jury subpoenas a former PCA official, a female whose name is kept confidential.

February 11, 2013: Daniel Kilgore, Operations Manager at PCA plant in Blakely, GA from June 2002 through May 2008, pleads guilty to one count of conspiracy to commit fraud, one count of conspiracy to introduce adulterated and misbranded food into interstate commerce, eight counts of introducing adulterated food into interstate commerce with the intent to defraud, six counts of introducing misbranded food into interstate commerce with the intent to defraud, eight counts of interstate shipment fraud and five counts of wire fraud.

February 21, 2013: The Justice Department files a 76-count indictment of former PCA officials, including Stewart Parnell, Michael Parnell, Samuel Lightsey and Mary Wilkerson.[108]

a. What should an attorney, in-house counsel or otherwise, have done upon learning of such shipments and Stewart Parnell's intent to continue

108. *Id.*

shipping contaminated product?

b. If the attorney wishes to disclose client information, what information should be disclosed?

c. Who should the attorney disclose information to?

d. In what medium should the attorney disclose?

Currently, Samuel Lightsey reached a plea agreement for "cooperation against other defendants in exchange for sentencing consideration to keep his prison term at no more than six years."[109] The trial for Stewart Parnell, PCA's former chief executive officer; Michael Parnell PCA's former vice president and peanut broker and Mary Wilkerson, PCA's former manager of quality control is scheduled to begin on July 14, 2014.[110]

IX. YOU ARE ON THIN ICE, SKATE CAREFULLY

Unfortunately there is a considerable amount of ambiguity in the ABA Model Rules of Professional Conduct and at the level of individual state bars when it comes to the particulars of disclosure. Many questions such as who to disclose to, what information to disclose, how to disclose the information, all remain unanswered by the Model Rules.

The ABA uses the all-encompassing and incredibly vague term "reasonably believes necessary" in Rule 1.6 to allow the attorney to reveal information related to client representation.[111] The ABA defines reasonably as "the conduct of a reasonably prudent and competent lawyer."[112] For most, this definition offers little assistance in determining specific questions about disclosure such as who to disclose the information to and how much information to disclose. Rule 1.6 merely states the lawyer is to disclose client information to the extent the "lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm."[113] If presented with a situation where a lawyer believes it necessary to disclose, it is advisable to contact a state or ABA representative that is experienced with disclosure and obtain their advice on the matter.

109. Dan Flynn, *Plea Agreement Will Limit Lightsey's Prison Time to Six Years at Most*, FOOD SAFETY NEWS (May 8, 2014), http://www.foodsafetynews.com/2014/05/plea-agreement-will-limit-samuel-lightseys-prison-times-to-six-years/#VL2-30fF-n1.

110. *Id.*

111. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2013).

112. *Id.* R. 1.0(b) (2013).

113. *Id.* R. 1.6(b)(1) (2013).

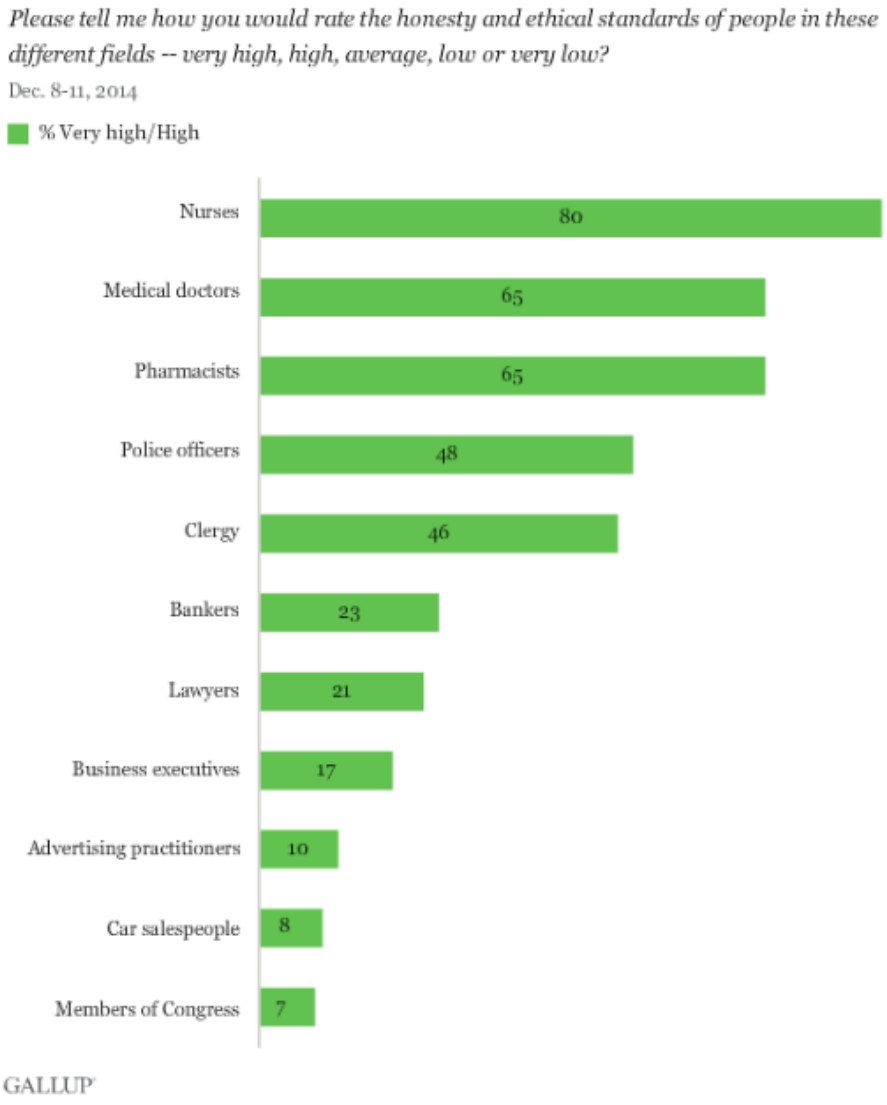
A. Current Ethical Rankings of Attorneys

Gallup conducted a poll in December of 2014 to ask individuals how ethical they believed members of various professions were. Lawyers were tied with television reporters at fifteen out of twenty-two.[114] The poll also showed the previous rankings of lawyers dating back to 1976.[115]

114. *Honesty/Ethics in Professions*, GALLUP, http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx (last visited Oct. 3, 2015).

115. *Id.*

B. Honesty/Ethics in Professions



Lawyers

	Very high	High	Ave-rage	Low	Very low	No opinion	Very high/ High
	%	%	%	%	%	%	%
2014 Dec 8-11	5	16	45	22	12	1	21
2013 Dec 5-8	3	17	45	23	12	1	20
2012 Nov 26-29	4	15	42	28	10	1	19
2011 Nov 28-Dec 1	3	16	43	27	10	1	19
2010 Nov 19-21	4	13	47	24	11	1	17
2009 Nov 20-22	3	10	45	28	12	1	13
2008 Nov 7-9	3	15	45	25	12	1	18
2007 Nov 30-Dec 2	2	13	49	25	10	1	15
2006 Dec 8-10	3	15	42	27	11	2	18
2005 Nov 17-20	3	15	46	25	10	1	18
2004 Nov 19-21	4	14	45	24	11	2	18
2003 Nov 14-16	3	13	47	25	11	1	16
2002 Nov 22-24	2	16	45	25	10	2	18
2001 Nov 26-27	4	14	50	23	8	1	18
2000 Nov 13-15	3	14	42	29	11	1	17
1999 Nov 4-7	1	12	45	28	13	1	13
1998 Oct 23-25	3	11	44	29	12	1	14
1997 Nov 6-9	3	12	41	31	10	3	15
1996 Dec 9-11	3	14	39	27	14	3	17
1995 Oct 19-22	4	12	36	29	17	2	16
1994 Sep 23-25	3	14	36	31	15	1	17
1993 July 19-21	3	13	41	28	13	2	16
1992 Jun 26-July 1	3	15	43	25	11	3	18
1991 May 16-19	4	18	44	21	10	5	22
1990 Feb 8-11	4	18	43	22	9	4	22
1988 Sep 23-26	3	15	45	23	10	4	18
1985 July 12-15	6	21	40	21	9	3	27
1983 May 20-23	5	19	43	18	9	6	24
1981 July 24-27	4	25	41	19	8	7	25
1977 July 22-25	5	21	44	19	8	4	26
1976 June 11-14	6	19	48	18	8	1	25

GALLUP

XI. HYPOTHETICALS

A. In-house counsel works for a global producer of candy. A recent batch of chocolate was accidentally mixed with peanuts. After separating the peanuts and the chocolate, the company sold the chocolate without warning that it may contain nuts or has come into contact with peanuts. This poses a serious health risk for those with extreme peanut allergies. The president of the company wants to know how to protect the company and avoid a recall.

- What should the attorney's course of action be? Withdraw, disclosure, or nothing?
- If the attorney wishes to disclose client information, what information should be disclosed?
- Who should the attorney disclose information to?
- In what medium should the attorney disclose?

B. A solo practitioner with a corporate practice is approached by potential corporate client that specializes in food processing and distribution. At the initial consultation the potential client reveals that in the past the company sold and distributed food that was known to be contaminated with E. Coli. It may have sickened people over a year ago and none of the product is currently in circulation.

- What should the attorney's course of action be? Withdraw, disclosure, or nothing?
- If the attorney wishes to disclose client information, what information should be disclosed?
- Who should the attorney disclose information to?
- In what medium should the attorney disclose?

C. Your client, Darry Barnes, is planning to distribute organic raw milk (milk that has not been pasteurized or homogenized.) Before it could be sold, the milk was accidentally left out in the hot sun and the milk spoiled. The farmer added a small amount of bleach to mask the smell and still plans to sell the milk as organic to customers.

What should the attorney's course of action be? Withdraw, disclosure, or nothing?

- If the attorney wishes to disclose client information, what information should be disclosed?
- Who should the attorney disclose information to?
- In what medium should the attorney disclose?

D. An attorney is retained to represent a father and son who want to create an LLC for their joint farming operation. The engagement letter contained no provision explaining the scope of the joint representation of the parties. A few days later, the son comes to the attorney alone and admits that the LLC was created to limit their criminal liability for contaminated produce the two were selling. The son wants to ease his guilty conscience by informing the media about the contaminated produce.

- What should the attorney's course of action be?
- If the attorney wishes to disclose client information, what information should be disclosed?
- Who should the attorney disclose information to?
- In what medium should the attorney disclose?

XII. EMPIRICAL RESEARCH

A. Yale Survey[116]

A survey, conducted in 1962, by the Yale Law Journal sought to compare attorney-client privilege with privilege in other professions.[117] The small study found that lawyers firmly believed that confidentiality and privilege encourage free discussion between attorneys and clients.[118] The survey also found that most clients do not fully understand the nuances of privilege; specifically one-third of lay people surveyed thought their attorney had an obligation to disclose confidential information in court.[119] Most of the clients surveyed answered that eliminating attorney-client privilege would discourage open and honest conversations between lawyers and clients.[120]

116. *See* Notes and Comments, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962) [hereinafter *Functional Overlap*].

117. Mitchell M. Simon, *Discreet Disclosures: Should Lawyers Who Disclose Confidential Information to Protect Third Parties Be Compelled to Testify Against Their Clients?* 49 S. TEX. L. REV. 307, 336 (2007); *Functional Overlap*, *supra* note 116, at 1226.

118. Simon, *supra* note 117, at 336.

119. *Id.*

120. *Id.*

B. Tompkins County Study

Over twenty-five years later, a study was conducted to see if the same basic findings of the Yale study held true, the results for the most part remained unchanged in that lay people still did not fully understand attorney-client privilege.[121] In this study, over forty-two percent of clients surveyed held the belief that confidentiality was absolute and there were no limitations.[122] The study also found that "'lawyers overwhelmingly do not tell clients of confidentiality rules.'"[123] Most attorneys told their clients "'only generally that all communications are confidential,' and only one quarter told their clients that any exceptions to the rule of attorney client confidentiality exist."[124]

C. New Jersey Study

The New Jersey Study, conducted in 1993, surveyed a sampling of lawyers who are licensed to practice in New Jersey.[125] The results of the survey showed that a discussion of disclosure is warranted because it is not just a hypothetical issue that lawyers face:

> Sixty-seven lawyers reported that since January 1985, they had encountered at least one occasion on which they reasonably believed that a client was going to commit a specific wrongful act that was likely to result in death or substantial bodily harm to an identifiable third party. Almost half of those lawyers had encountered the problem on more than one occasion. About 20% of the lawyers who had encountered the problem identified the anticipated act as homicide. Another 58% identified the act as assault or battery, including acts of domestic violence. Other anticipated wrongful acts included arson, kidnapping, driving while intoxicated and terrorism.[126]

The survey revealed lawyers are most likely to disclose confidential client information if they are reasonably certain that death or serious injury will be a result of inaction.[127] But this decision is not taken lightly and most prefer to not disclose client information if possible.[128]

121. Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 379 (1989).
122. *Id.* at 383.
123. *Id.*
124. *Id.* at 386.
125. Levin, *supra* note 2, at 107.
126. *Id.* at 111-12.
127. *Id.* at 130.
128. *Id.* at 128.

Disclosure is typically not the first option: most lawyers are likely to try to persuade clients to not take illegal actions.[129] Most of the time, clients do not go through with their planned crimes after speaking with their attorney.[130] The majority of lawyers surveyed believed that, absent their intervention, their client would have carried out their planned criminal act.[131] When there is a realistic chance of death or serious injury in addition to significant financial loss or damage to property, an attorney is most likely to act.[132]

Repercussions from a lawyer disclosing client information was not as disastrous to the relationship.[133] "The lawyers' responses suggest that they believe the ways in which they handle the problem of future client wrongdoing have relatively little adverse impact on the attorney-client relationship."[134] This claim is supported by the results of the survey showing that:

> More than 75% of the attorneys who believed their clients were going to cause substantial bodily injury to another reported that their handling of the situation had no apparent impact on their relationships with their clients. Less than 20% of the lawyers reported that their clients were less cooperative or that the relationship prematurely terminated. A small number of the lawyers responded that their relationships with their clients actually improved.[135]

Very rarely does the client seek alternative counsel or does counsel withdraw.[136] Most attorneys showed less willingness to take action in the face of financial harm to a third party.[137] Of the 190 attorneys who indicated that a client intended to inflict financial harm on a third party, only nine percent disclosed client information to prevent the harm.[138] The author indicated this particular result was higher than what was previously predicted.[139]

129. *Id.* at 116.
130. *Id.*
131. *Id.*
132. *See id.* at 130-32.
133. *See id.* at 138-39.
134. *Id.* at 138.
135. *Id.* at 130.
136. *Id.* at 136, 138-39.
137. *Id.* at 136-37.
138. *Id.* at 129-30.
139. *Id.* at 130.

D. New Hampshire Study[140]

The New Hampshire Study was conducted in April 2007 and it surveyed members of the New Hampshire bar.[141] The survey presented two hypotheticals and then asked if the lawyer would make a disclosure.[142] The first hypothetical "involved a divorce client who threatened to kill his wife upon recently learning she was having an affair."[143] The second "presented a case where a company had spilled toxic chemicals into the soil, endangering a town's water supply."[144]

Those surveyed were then asked if they would disclose client information to prevent the harm.[145] Participants were also asked if their answer would change if they would be "compelled to testify against their client."[146] Finally, the survey asked if participants had previously disclosed client information.[147] Those who conducted the survey received 189 anonymous responses back.[148]

The responses showed a clear contrast between what was seen as an eminent death and a threat of harm that may be perceived to be less immediate or likely to kill.[149] "Eighty-three percent of responding attorneys said they would disclose in the . . . [divorce case.]"[150] Yet, "only thirty-four percent indicated that they would disclose to protect the town's water supply."[151] In an assessment of the result, the researchers found:

> Despite the fact that a significant number of lawyers indicated they would disclose in either scenario, only thirteen respondents (seven percent) said they had disclosed confidential client information without the client's authorization to prevent harm or injury to someone besides the client. Also, somewhat surprisingly, previous disclosure was not associated with decisions to disclose in the divorce or environmental scenarios.[152]

140. Simon, *supra* note 117, at 339.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 340.
150. *Id.*
151. *Id.*at 339.
152. *Id.* at 341.

The New Hampshire Study shows a continuing trend in the legal community that lawyers are reluctant to disclose client information.[153] One-third would not disclose client information if they were forced to testify.[154] Mitchell Simon noted the results could support an argument against mandatory disclosure laws but there would need to be more research.[155]

XIII. POSSIBLE EFFECTS FROM THE DISCLOSURE OF CLIENT INFORMATION

The effects and effectiveness of disclosure, both mandatory and discretionary, have been called into question.[156] One fairly obvious benefit of disclosure is stopping third party harm.[157] Yet, it has been shown that the same effects can be replicated by the attorney attempting to persuade the client from not completing or attempting a criminal act.[158] Lawyers also claimed they disclosed information in an attempt to reduce potential liability for civil suits; the effectiveness of such an action was not released.[159] The possibility of improving overall reputations with the general public has also been noted as a possible benefit.[160] There is also the belief that disclosing criminal conduct will help preserve the legal profession's ability to self-regulate.[161]

The primary concern for disclosure of information is loss of the openness between attorneys and clients.[162] Many lawyers are also nervous about being forced into the role of "informants" and as a result, possibly losing business.[163] From an economic standpoint, it is highly inefficient and costly for a client to fire an attorney because of a disclosure and then hire a new lawyer to represent them.[164]

153. *Id.*
154. *Id.*
155. *Id.*
156. *See generally* Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091 (1985).
157. *Id.* at 1096.
158. Levin, *supra* note 2, at 116.
159. *Id.* at 131-32.
160. *See* Subin, *supra* note 156, at 1130-32.
161. *See generally id.*
162. *See id.* at 1166-67.
163. *See generally id.*
164. *Id.*

XIV. GENERAL RECOMMENDATIONS[165]

Below are a short list of recommendations that may act as a guide for an attorney with an unethical client.

- Know when an attorney–client relationship has been formed
  - ABA Rule 1.2 and local bar rules will help determine if there is a relationship or not
- Understand ABA rules
  - Rule 1.6: when disclosure is not allowed, mandatory, and discretionary
  - Rule 4.1: do not making knowingly false statements of fact or law
- Understand state bar rules
  - The ABA cannot disbar an attorney but the state bar can
  - Understand the state bar rules where you are licensed to practice because they may be slightly different then the ABA rules
- Advise against illegal action, if unsuccessful consider the threat of disclosure, if threat is unsuccessful then consider disclosure.
  - If decision to disclose is made, determine what information can still be kept confidential
- For in-house counsel: with particularly confidential matters, bring in outside counsel to make sure the confidentially is not questioned.
- Weigh potential personal consequences from disclosure
- If you are unsure about disclosing; contact a judge or a local bar ethics specialist for guidance.
  - ABA provides a service called ETHICSearch which according to the website, "is a free legal ethics research service for members of the American Bar Association provided through the ABA Center for Professional Responsibility. Non-ABA members can subscribe to the service annually."
    - ETHICSearch can be contacted by phone at 800-285-2221 (option 8) or e-mail at ethicsearch@americanbar.org

165. *See* CARRIE L. HUFF & DAVID A. DODDS, BLOOMBERG LAW REPORT, RISK & COMPLIANCE 4 (Vol. 1, No. 9 Dec. 2008), *available at* http://www.arnoldporter.com/resources/documents/A&PLLP_FederalRedFlag&RelatedIdentityTheftPreventionRules-IsYourOrganizationInCompliance_BloombergRiskComplianceLawReport_1208.pdf.

- For more information see the ETHICSearch website: http://www.americanbar.org/groups/professional_responsibility/services/ethicsearch.html

- The local state bar association may also have a contact to consult that is particularly knowledgeable about ethics issues.

XV. BIOGRAPHICAL INFORMATION

The American Agricultural Law Association (AALA) is an organization that focuses on the legal needs of the agricultural community.[166] Members include practicing lawyers from sole, small town and urban areas, student members, and other agricultural professionals. The AALA has an annual continuing legal educational meeting, and co-sponsors an agricultural law listserv with the National Agricultural Law Center[167] AALA members and agricultural law listserv members were provided with an electronic questionnaire prior to the conference and the CLE presentation on disclosure and Rule 1.6. The "ethics test", information about the back ground of the responders and hypotheticals follow.

XIV. RESPONSE FORM FOR ETHICS HYPOTHETICALS

The response from the survey is reported below. The respondents were informed that the replies would remain anonymous but the information from the answers may be used for a law review presentation, article, or other academic purposes. According to the Basic Health and Human Services Policy for Protection of Human Research Subjects,[168] this survey is exempt because the "information obtained is recorded in such a manner that human subjects can [not] be identified."[169]

166. See generally *About the AALA*, AALA, http://aglaw-assn.org/about/ (last visited Oct. 3, 2015).

167. *Id.*

168. 45 C.F.R. § 46.101(b)(2)(i) (2015).

169. *See id.*

A. Hypotheticals[170]

A. In-house counsel works for a global producer of candy. A recent batch of chocolate was accidentally mixed with peanuts. After separating the peanuts and the chocolate, the company sold the chocolate without warning that it may contain nuts or has come into contact with peanuts. This poses a serious health risk for those with extreme peanut allergies. The president of the company wants to know how to protect the company and avoid a recall.

How many years have you been a practicing attorney?
1 to 5 years
6 to 15 years
16 to 25 years
More than 25 years
What is your age?
Under 30 years old
30 to 45 years old
46 to 60 years old
Over 60 years old
What type of law practice do you work for?
Solo Practitioner
Small (2-5 Partners)
Medium (6-10 Partners)
Large (11-15 Partners)
"Big Law" (Greater Than 15 Partners)
Where are you licensed to practice in the United States?
North East
Mid Atlantic
South East
Mid-West
North West
South West
What is your primary area of practice?
Criminal Law
Family Law
Estate Planning
Contracts
Corporate
Agriculture
Food Law
LLC/Business Organization
Environmental Law

170. L. Leon Geyer, Professor, Virginia Tech & Stephen Guardipee, Research Assistant, Ethic Panel at American Agricultural Law Association Annual Education Symposium: To Disclose or Not to Disclose: When Rule 1.6 Can Make you Sick-Ethics and Duties Down on the Farm (Oct. 21, 2014).

A1. What should in-house counsel do?
Withdraw
Disclose information
Nothing
Other:_____

A2. If the attorney wishes to disclose client information, what information should be disclosed?
Company name
Brand of chocolate
All information related to the contaminated chocolate
Other:_____

A3. If the attorney choses to disclose, who should the attorney disclose client information to?
Someone else in the company
Police
FDA
Customers or Consumers
Media
Appropriate state authority
Other:_____

A4. In what medium should the attorney disclose?
In-Person
E-Mail
Phone
Anonymously
Other:_____

B. A solo practitioner with a corporate practice is approached by potential corporate client and at initial consultation reveals that in the past the client, a food processor and distributor, sold and distributed food that was known to be contaminated with E. Coli. It may have sickened people over a year ago and none of the product is currently in circulation.

B1. What should in-house counsel do?
Refuse Representation
Disclose information
Nothing
Other:_____

B2. If the attorney wishes to disclose client information, what information should be disclosed?
Company name
Type of produce
All information related to the contaminated produce
Other:_____

B3. If the attorney choses to disclose, who should the attorney disclose client information to?
Someone else in the company
Police
FDA
Customers or Consumers
Media
Appropriate state authority
Other:_____

B4. In what medium should the attorney disclose?
In-Person
E-Mail
Phone
Anonymously
Other:_____

C. Your client, Darry Barnes, is planning to distribute organic raw milk (milk that has not been pasteurized or homogenized.) Before it could be sold, the milk was accidentally left out in the hot sun and the milk spoiled. The farmer added a small amount of bleach to mask the smell and still plans to sell the milk as organic to customers.

C1. What should in-house counsel do?
Withdraw
Disclose information
Nothing
Other:_____

C2. If the attorney wishes to disclose client information, what information should be disclosed?
Farmer's Name
Type of contamination
All information related to the contaminated milk
Other:_____

C3. If the attorney choses to disclose, who should the attorney disclose client information to?
Police
FDA
Customers or Consumers
Media
Appropriate state authority
Other:_____

C4. In what medium should the attorney disclose?
In-Person
E-Mail
Phone
Anonymously
Other:_____

D. An attorney is retained to represent a father and son who want to create an LLC for their joint farming operation. The engagement letter contained no provision explaining the scope of the joint representation of the parties. A few days later, the son comes to the attorney alone and admits that the LLC was created to limit their criminal liability for contaminated produce the two were selling. The son wants to ease his guilty conscience by informing the media about the contaminated produce.

D1. What should in-house counsel do?
Withdraw
Disclose information
Explain the scope and purpose of the LLC
Nothing
Other:_____

D2. If the attorney wishes to disclose client information, what information should be disclosed?
LLC Name
Son's Name
Father's Name
Names of both Father and Son
Farmer's Name
Type of produce
All information related to the contaminated produce
Other:_____

D3. If the attorney choses to disclose, who should the attorney disclose client information to?
Father
Police
FDA
Customers or Consumers
Media
Appropriate state authority
Other:_____

D4. In what medium should the attorney disclose?
In-Person
E-Mail
Phone
Anonymously
Other:_____

XVII. RESULTS FROM ETHICS HYPOTHETICALS

Below are the results from the ethics hypotheticals.[171] The hypotheticals were presented in an electronic format over the internet. The survey was only available to those who were attending the conference or subscribed to Agricultural Law Listserv.

171. *Id.*

A. Section 1. General information about the respondents.

1. How many years have you been a practicing attorney?

1 to 5 years	**21**	(21%)
6 to 15 years	**23**	(23%)
16 to 25 years	**13**	(13%)
more than 25 years	**45**	(44%)

2. What is your age?

Under 30 years old	**11**	(11%)
30 to 45 years old	**32**	(31%)
46 to 60 years old	**27**	(26%)
Over 60 years old	**30**	(29%)

3. What type of law practice do you work for?

Solo Practitioner	**15**	(15%)
Small (2-5 Partners)	**26**	(25%)
Medium (6-10 Partners)	**7**	(7%)
Large (11-15 Partners)	**4**	(4%)
"Big Law" (Greater than 15 Partners)	**13**	(13%)
University	**14**	(14%)
Government	**17**	(17%)
Student	**3**	(3%)

4. Where are you licensed to practice in the United States?

North East	3	(3%)
Mid Atlantic	8	(8%)
South East	15	(15%)
Mid-West	53	(52%)
North West	2	(2%)
South West	20	(20%)

5. What is your primary area of practice?

Estate Planning	11	(11%)
Contracts	5	(5%)
Corporate	4	(4%)
Agriculture	37	(36%)
Food Law	3	(3%)
LLC/Business Organization	5	(5%)
Environmental Law	4	(4%)
other:	31	(30%)

Write-in Responses: Family/matrimonial, government, creditor rights, all above, ag & food, real property, water/property rights, higher education, constitutional, biotech licensing, federal grants/appropriations, tax, insurance, oil & gas.

B. Section 2. Responses to the Hypothetical.

A. In-house counsel works for a global producer of candy. A recent batch of chocolate was accidentally mixed with peanuts. After separating the peanuts and the chocolate, the company sold the chocolate without warning that it may contain nuts or has come into contact with peanuts. This poses a serious health risk for those with extreme peanut allergies. The president of the company wants to know how to protect the company and avoid a recall.

A1. What should in-house counsel do?

Withdraw	**6**	(6%)
Disclose information	**57**	(56%)
Nothing	**2**	(2%)
other:	**35**	(34%)

Write-in Responses: woodshed the president; convince the president to comply with FDA requirements by explaining that it is the best way to protect the company in the long term. It also avoids criminal action against the president and officers, advise of cost to company; advise engaging damage control PR firm, inform the manager to recall the product if necessary to reduce the risk of a con-consumer health problem, Demand full disclosure otherwise withdraw, Counsel the president regarding the extreme risks and liabilities, put insurance carrier on notice, and give best legal advice, seek expert advice, immediately notify the FDA.

A. In-house counsel works for a global producer of candy. A recent batch of chocolate was accidentally mixed with peanuts. After separating the peanuts and the chocolate, the company sold the chocolate without warning that it may contain nuts or has come into contact with peanuts. This poses a serious health risk for those with extreme peanut allergies. The president of the company wants to know how to protect the company and avoid a recall.

A2. If the attorney wishes to disclose client information, what information should be disclosed?

Company name	**0**	(0%)
Brand of chocolate	**8**	(8%)
All information related to the contaminated chocolate	**67**	(66%)
other:	**21**	(21%)

A. In-house counsel works for a global producer of candy. A recent batch of chocolate was accidentally mixed with peanuts. After separating the peanuts and the chocolate, the company sold the chocolate without warning that it may contain nuts or has come into contact with peanuts. This poses a serious health risk for those with extreme peanut allergies. The president of the company wants to know how to protect the company and avoid a recall.

A3. If the attorney choses to disclose, who should the attorney disclose client information to?

Someone else in the company	**12**	(12%)
Police	**0**	(0%)
FDA	**39**	(38%)
Customers or consumers	**9**	(9%)
Media	**0**	(0%)
Appropriate state authority	**21**	(21%)
other:	**16**	(16%)

Write-in Responses: Everybody, Assuming the president and board of directors have been notified, then may be disclosed to FDA, Board, NOT the police, advise the company to disclose to consumers, media and proper federal and state regulatory authority, no one, insurance carrier, Customers or consumers and the media.

A. In-house counsel works for a global producer of candy. A recent batch of chocolate was accidentally mixed with peanuts. After separating the peanuts and the chocolate, the company sold the chocolate without warning that it may contain nuts or has come into contact with peanuts. This poses a serious health risk for those with extreme peanut allergies. The president of the company wants to know how to protect the company and avoid a recall.

A4. In what medium should the attorney disclose?

In-person	**29**	(28%)
E-mail	**7**	(7%)
Phone	**20**	(20%)
Anonymously	**13**	(13%)
other:	**28**	(27%)

Write-in Responses: FDA Reportable Food Registry, all the above, company letter, Phone, followed by documentation, detailed description of the incident from which any risks to purchasers can be determined and evaluated, Start with most expeditious means of disclosure, media, client should disclose.

B. A solo practitioner with a corporate practice is approached by potential corporate client and at initial consultation reveals that in the past the client, a food processor and distributor, sold and distributed food that was known to be contaminated with E. Coli. It may have sickened people over a year ago and none of the product is currently in circulation.

B1. What should in-house counsel do?

Refuse Representation	26	(25%)
Disclose information	8	(8%)
Nothing	41	(40%)
other:	22	(22%)

Write-in Responses: Solo practitioner needs to decide if he/she wants to represent this company, get retainer, take case, advise of limits on representation, counsel them to disclose to FDA, white collar criminal defense attorney, and put insurance carrier on notice, inquire as to whether practices have changed, advise about potential liability, determine whether the client acted upon the advice of a former counsel who continues to follow the case, counsel the company to disclose the information.

B. A solo practitioner with a corporate practice is approached by potential corporate client and at initial consultation reveals that in the past the client, a food processor and distributor, sold and distributed food that was known to be contaminated with E. Coli. It may have sickened people over a year ago and none of the product is currently in circulation.

B2. If the attorney wishes to disclose client information, what information should be disclosed?

Company name	9	(9%)
Type of produce	9	(9%)
All information related to the contaminated produce	41	(40%)
other:	19	(19%)

Write-in Responses: None, very specific product information, only such information as may be necessary to prevent harm.

B. A solo practitioner with a corporate practice is approached by potential corporate client and at initial consultation reveals that in the past the client, a food processor and distributor, sold and distributed food that was known to be contaminated with E. Coli. It may have sickened people over a year ago and none of the product is currently in circulation.

B3. If the attorney choses to disclose, who should the attorney disclose client information to?

Someone else in the company	10	(10%)
Police	1	(1%)
FDA	29	(28%)
Customers or consumers	3	(3%)
Media	6	(6%)
Appropriate state authority	17	(17%)
other:	17	(17%)

Write-in Responses: Nobody, everybody, someone else in the company but if that fails to state authority and perhaps FDA, board, advise client to disclose.

B. A solo practitioner with a corporate practice is approached by potential corporate client and at initial consultation reveals that in the past the client, a food processor and distributor, sold and distributed food that was known to be contaminated with E. Coli. It may have sickened people over a year ago and none of the product is currently in circulation.

B4. In what medium should the attorney disclose?

In-person	17	(17%)
E-mail	9	(9%)
Phone	13	(13%)
Anonymously	12	(12%)
other:	26	(25%)

Write-in Responses: Don’t disclose, company letter, all, media.

C. Your client, Derry Barnes, is planning to distribute organic raw milk (milk that has not been pasteurized or homogenized.) Before it could be sold, the milk was accidentally left out in the hot sun and the milk spoiled. The farmer added a small amount of bleach to mask the smell and still plans to sell the milk as organic to customers.

C1. What should counsel do?

Withdraw	**33**	(32%)
Disclose information	**43**	(42%)
Nothing	**5**	(5%)
other:	**16**	(16%)

Write-in Responses: Convince client not to distribute. Tell him you will be forced to withdraw and make disclosure if proceeds to distribute.

C. Your client, Derry Barnes, is planning to distribute organic raw milk (milk that has not been pasteurized or homogenized.) Before it could be sold, the milk was accidentally left out in the hot sun and the milk spoiled. The farmer added a small amount of bleach to mask the smell and still plans to sell the milk as organic to customers.

C2. If the attorney wishes to disclose client information, what information should be disclosed?

Farmer's name	**5**	(5%)
Type of contamination	**9**	(9%)
All information related to the contaminated milk	**62**	(61%)
other:	**11**	(11%)

Write-in Responses: Consult local rules first and then decide extent of disclosure, nothing, disclose enough to prevent the immediate risk.

C. Your client, Derry Barnes, is planning to distribute organic raw milk (milk that has not been pasteurized or homogenized.) Before it could be sold, the milk was accidentally left out in the hot sun and the milk spoiled. The farmer added a small amount of bleach to mask the smell and still plans to sell the milk as organic to customers.

C3. If the attorney choses to disclose, who should the attorney disclose client information to?

Police	4	(4%)
FDA	27	(26%)
Customers or consumers	2	(2%)
Media	0	(0%)
Appropriate state authority	46	(45%)
other:	10	(10%)

Write-in Responses: Everyone, no one.

C. Your client, Derry Barnes, is planning to distribute organic raw milk (milk that has not been pasteurized or homogenized.) Before it could be sold, the milk was accidentally left out in the hot sun and the milk spoiled. The farmer added a small amount of bleach to mask the smell and still plans to sell the milk as organic to customers.

C4. In what medium should the attorney disclose?

In-person	16	(16%)
E-mail	10	(10%)
Phone	23	(23%)
Anonymously	19	(19%)
other:	17	(17%)

Write-in Respoonses: Letter, all, don't disclose.

D. An attorney is retained to represent a father and son who want to create an LLC for their joint farming operation. The engagement letter contained no provision explaining the scope of the joint representation of the parties. A few days later, the son comes to the attorney alone and admits that the LLC was created to limit their criminal liability for contaminated produce the two were selling. The son wants to ease his guilty conscience by informing the media about the contaminated produce.

D1. What should counsel do?

Withdraw	46	(45%)
Disclose information	10	(10%)
Explain the scope and purpose of the LLC	30	(29%)
Nothing	1	(1%)
other:	11	(11%)

Write-in Responses: Explain what LLC actually does, confirm with a letter, and withdraw in letter, refer son to another attorney, convince the son to cease sales, terminate joint representation, refer both to defense attorney, get son's permission to share disclosure with father, counsel both to stop selling. If unsuccessful, withdraw.

D. An attorney is retained to represent a father and son who want to create an LLC for their joint farming operation. The engagement letter contained no provision explaining the scope of the joint representation of the parties. A few days later, the son comes to the attorney alone and admits that the LLC was created to limit their criminal liability for contaminated produce the two were selling. The son wants to ease his guilty conscience by informing the media about the contaminated produce.

D2. If the attorney wishes to disclose client information, what information should be disclosed?

LLC name	**12**	(12%)
Son's name	**2**	(2%)
Father's name	**0**	(0%)
Names of both father and son	**2**	(2%)
Farmer's name	**1**	(1%)
Type of produce	**11**	(11%)
All information related to the contaminated produce	**50**	(49%)

Note: For question D2, 24% of respondants chose not to answer the question. This could potentially due to the absence of a write-in option.

D. An attorney is retained to represent a father and son who want to create an LLC for their joint farming operation. The engagement letter contained no provision explaining the scope of the joint representation of the parties. A few days later, the son comes to the attorney alone and admits that the LLC was created to limit their criminal liability for contaminated produce the two were selling. The son wants to ease his guilty conscience by informing the media about the contaminated produce.

D3. If the attorney choses to disclose, who should the attorney disclose client information to?

Father	4	(4%)
Police	4	(4%)
FDA	24	(24%)
Customers or consumers	2	(2%)
Media	1	(1%)
Appropriate state authority	36	(35%)
other:	8	(8%)

Write-in Responses: Nobody, the father appropriate state authority and perhaps FDA, everybody.

D. An attorney is retained to represent a father and son who want to create an LLC for their joint farming operation. The engagement letter contained no provision explaining the scope of the joint representation of the parties. A few days later, the son comes to the attorney alone and admits that the LLC was created to limit their criminal liability for contaminated produce the two were selling. The son wants to ease his guilty conscience by informing the media about the contaminated produce.

D4. In what medium should the attorney disclose?

In-person	18	(18%)
E-mail	6	(6%)
Phone	22	(22%)
Anonymously	15	(15%)
other:	17	(17%)

Write-in Responses: Phone, then a form of written confirmation, nothing, everything, state authority.