"BUT I KNOW ONE WHEN I SEE IT"[i]: A PRACTICAL FRAMEWORK FOR ANALYSIS AND ARGUMENT OF INFORMAL FIDUCIARY RELATIONSHIPS.

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For over a half-century, Texas courts, in certain situations, have found one party to a transaction to stand as an "informal fiduciary" in relation to the other.[ii] Once this relationship is found to exist, the door opens to a panoply of additional remedies and alternative causes of action not available without the existence of the relationship.[iii] However, the law surrounding how an informal fiduciary relationship, also called a "confidential relationship,"[iv] arises is scattered across Texas Supreme and appellate court opinions in a number of different areas of law.[v] Thus, the process of researching and assimilating the law surrounding confidential relationships is an onerous task for the practitioner faced with arguing the possible fiduciary status of an opposing party. Worse, the failure to have a feel for this law may cause the same practitioner to miss a valuable alternative or additional cause of action.

The Texas Supreme Court has admitted that no definition can be derived that is flexible enough to cover all fiduciary situations.[vi] After all, fiduciary relationships are creatures of equity, and in informal situations, the issue is invariably fact-bound, and thus "is not subject to hard and fast rules."[vii] However, upon reading a few "confidential relationship" cases, one is reminded of Justice Stewart's predicament in Jacobellis v. Ohio,[viii] where, upon giving up on deriving a workable definition for "pornography," he stated, "[b]ut I know it when I see it...."[ix] Even if an exact definition of "fiduciary" does not exist, some sort of methodological approach to fiduciary problems can still be achieved.

The intent of this comment, therefore, is not to create a definition for "fiduciary" or a

general rule for confidential relationships. Rather, this comment will set forth an analytical framework, derived from Texas case law, that can be used by the practitioner as a tool for analyzing a set of circumstances and framing arguments as to the existence (or non-existence) of a confidential relationship in a given case. In essence, this framework is designed to help the practitioner, and the court, not only to "see" the confidential relationship, but to analyze and argue its existence more effectively.

The comment begins in Part I with an explanation of the three fiduciary relationships existing in Texas law and the relationship between them. Part II outlines the structure of the confidential relationship argument and discusses the burden of proof. Finally, Part III sets forth the analytical framework, made up of "elements" derived from Texas case law, which will be used for meeting this burden of proof.

I. A Structural Overview of Texas' Fiduciary Law.

The first step in successfully arguing whether or not a fiduciary relaitonship exists is to understand the basic nature of this State's fiduciary law. This Part provides an overview of the fiduciary relationships recognized in Texas law, how they relate to each other, and how they are applied.

A. Three Types of "Fiduciary" Relationships in Texas.

Texas law recognizes three different "fiduciary" relationships: (1) the "formal" or "technical" fiduciary relationship;[x] (2) the "informal" fiduciary relationship, otherwise known as the "confidential relationship";[xi] and (3) the "special relationship."[xii] Although all are termed

"fiduciary," these relationships share significant differences. *Figure 1* below sets the three relationships side-by-side for comparison. Note that in each of these cases, the fiduciary duty imposed springs not from the underlying transaction between the parties, but from the relationship itself.[xiii]

(1) "Formal" (or "Technical)" Fiduciary Relationships.

Perhaps most basic to fiduciary law are the "formal" or "technical" fiduciary relationships.[xiv] This category includes relationships such as attorney-client, partner-partner, principle-agent, trustee-cestui que trust, and joint venturer-joint venturer,[xv] which all give rise to a fiduciary duty in Texas as a matter of law.[xvi] Hence, the mere status of the parties is its own proof that the fiduciary relationship exists.[xvii] In each of these relationships, the fiduciary owes to the other party the "utmost loyalty and good faith" and is generally required to place the interests of the other party above his own.[xviii] In order to show a breach of this duty, one only need further prove that the fiduciary's alleged dereliction was within the scope of the fiduciary relationship.[xix] The "formal" or "technical" fiduciary relationships will be discussed further in this comment only as necessary for comparison purposes.

(2) "Informal" Fiduciary (Confidential) Relationships.

In contrast to the formal fiduciary relationship, where the status of the parties is its own proof that the relationship exists, with the confidential relationship, the existence of the fiduciary relationship itself must be proven before a duty will arise.[xx] The status of the parties is but one element that will be considered in this determination.[xxi] Whether the relationship will be considered fiduciary is, more often than not, a question of fact.[xxii] However, the absence of a

confidential relationship is determined as a matter of law by the court.[xxiii]

Texas courts have stated in a number of different ways the general rule as to when a confidential relationship may exist.[xxiv] The most recent phrasing states that a confidential relationship can arise in "all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed, and the origin of the confidence is immaterial, and may be moral, social, domestic, or merely personal."[xxv] Once established, the fiduciary duty in a confidential relationship will be identical to that of a "formal" fiduciary relationship.[xxvi]

Once the fiduciary relationship is proven, then proof of a breach of that relationship, just as with the "formal" cases, entails the further showing that the dereliction alleged was within the scope of the now established fiduciary relationship.[xxvii] Obviously, the first stage of this process, the determination of the relationship to begin with, is by far the most difficult.

(3) "Special Relationships."

The "special relationship" is a term of art that is fairly new to the law of Texas.[xxviii] Although it is generally termed a "fiduciary" relationship, unlike the two other fiduciary relationships, the special relationship gives rise only to the tort duty of good faith and fair dealing.[xxix] The special relationship does not carry with it the full range of fiduciary rights and duties normally associated with the two other fiduciary relationships discussed above.[xxx] As the Texas Supreme Court has recently stated: "The duty of good faith and fair dealing merely requires the parties to deal fairly with one another and does not encompass the often more onerous burden that requires a party to place the interest of the other party before his own [as with the other fiduciary relationships]."[xxxi]

Justice Spears, concurring in English v. Fischer,[xxxii] stated that a "special relationship either arises from the element of trust necessary to accomplish the goals of the undertaking, or has been imposed by the courts because of an imbalance of bargaining power."[xxxiii] The first instance of which Justice Spears spoke is a reference to the fact that a "formal" or "informal" fiduciary relationship is also considered to be a "special" relationship.[xxxiv] The second instance in which such a relationship can arise, where there is an "imbalance of bargaining power" between the parties, has been imposed by Texas courts in only three classes of relationships: The insurer/ insured,[xxxv] the worker/worker's compensation carrier,[xxxvi] and the depositor/bank[xxxvii] relationships.[xxxviii] The court outlined its reasoning in Arnold v. National County Mutual Fire Insurance Company,[xxxix] stating:

> In the insurance context a special relationship arises out of the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining for settlement or resolution of claims[, and delay or deny claims with no more penalty than the interest on the amount owed. Further, an] insurance company has exclusive control over the evaluation, processing and denial of claims.[xl]

With the special relationship, as with the formal fiduciary relationship, the relationship exists as a matter of law, so the status of the parties again serves as its own proof that the relationship exists.[xli] Therefore, when the court determines that the duty of good faith and fair dealing should be imposed in a particular case, to the extent that the parties to that case represent a class, the duty will be imposed not just to the parties, but to that class.[xlii] Because of this broad effect inherent in finding a new special relationship, the Texas Supreme Court has been reluctant

to extend the imposition of the "special relationship" to new classes of relationships.[xliii] Moreover, the words quoted above from Arnold have become the standard for the disparity of bargaining power that must be present before the court will do so.[xliv]

B. Summary: The Relationship Between the "Relationships."

	Formal Fiduciary Relationships	**Confidential Relationships**	**Special Relationships**
Burden of proof on party alleging the relationship	None: the status of the parties is its own proof.[xlv]	Must prove the existence of a prior rela- tionship of trust.[xlvi]	None: the status of the parties is its own proof.[xlvii]
Application of relationship	Class[xlviii]	Case-by-case[xlix]	Class[l]
Duty imposed	Full fiduciary duty[li]	Full fiduciary duty[lii]	Duty of good faith and fair dealing only[liii]

Figure 1: The three types of "fiduciary" relationships in Texas and their characteristics.

As *Figure 1* indicates, in relation to each other, these fiduciary relationships differ in three ways. First, the burden upon the party alleging the fiduciary relationship may differ according to the type of relationship he is attempting to prove. On the one hand, both the formal fiduciary relationship and the special relationship exist as a matter of law, so the status of the parties is its own proof that the fiduciary relationship exists.[liv] On the other hand, the existence of a confidential relationship is a question of fact which must be proven by showing that a prior relationship of trust and confidence existed before the transaction or occurrence in dispute.[lv]

Second, the three types of relationships can differ

in their application. Both the formal fiduciary relationship and the special relationship are applied to "classes" of individual relationships.[lvi] For instance, the entire class of attorney-client relationships is generally considered to be of the formal fiduciary variety.[lvii] The special relationship in Texas is also applied on a "class" basis.[lviii] Alternatively, confidential relationships are found on a case-by-case basis and applied only to the facts before the court at the time.[lix]

Finally, the relationships differ in the extent of the duty imposed upon a finding that the relationship exists. In the case of both the formal fiduciary relationship and the confidential relationship, the duty imposed will be the full fiduciary duty, and the other party will enjoy all the concomitant rights.[lx] One of the duties imposed in these two relationships is the duty of good faith and fair dealing.[lxi] The special relationship, on the other hand, carries with it *only* the duty of good faith and fair dealing.[lxii]

C. Confidential Relationships, Revisited.

As noted above, the existence of a confidential relationship will usually be a question of fact.[lxiii] Thus, the practitioner is faced with weighing circumstances as with any factual argument. However, as will be discussed below, these arguments face obstacles that are unique to the law surrounding confidential relationships. The following two Parts draw their law from a number of areas.[lxiv] This law will be compiled and assimilated, and the common guidelines will be established. These guidelines can then be used for analyzing the circumstances surrounding a suspected confidential relationship, and in turn, arguing its existence or non-existence.

II. Outline of the "Confidential Relationship" Argument.

Nature of Trust in Alleged Fiduciary as to the
Transaction or Occurrence in Dispute:

Mere Subjective Trust: Summary Judgment Granted	Justifiable Trust: Fact Question for Jury

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Quantum of Evidence Presented
of a "Relationship Before."

Figure 2: The "Confidential Relationship" Argument.

Figure 2 is a basic diagram of the structure of a "confidential relationship" argument. In each case, there will be a transaction or occurrence that is in dispute. This is the reason that the parties are in a lawsuit to begin with. However, since one party is claiming to have relied upon the other as a fiduciary, or that the other should be bound to a fiduciary duty, two other concepts enter the picture. The first of these concepts is "justifiable trust."[lxv] The party alleging the fiduciary status in the other will have to show that he was justified in trusting the other party as a fiduciary.[lxvi] If the accuser cannot show that he was justified in trusting the other party as a fiduciary, no confidential relationship will be found.[lxvii] In the vernacular of confidential relationships, failing to establish a basis for justifiable trust means that the party proved only "mere subjective trust" in the alleged fiduciary.[lxviii] The line separating "mere subjective trust" and "justifiable trust" represents the burden of proof that must be met in order to create a fact question for the jury as to the existence of a confidential relationship.[lxix]

The second concept is that of the "relationship before" the transaction or occurrence in

dispute. For a party to successfully argue that the other should be considered an informal fiduciary in regard to the disputed transaction, "the evidence must show that the dealings between the parties continued for such a time that one party is justified in relying on the other to act in his best interest."[lxx] Put differently, proving the existence and character of the prior relationship between the parties is the *method* by which justifiable trust is established as to the transaction or occurrence in dispute.

A. Establishing the "Relationship Before."

Analytically, this fiduciary argument can be seen as involving two distinct yet inseparable temporal events; the "relationship before," and the "disputed transaction." These events are distinct because the party alleging the status will have to prove that there existed prior to, *and separate from*, the transaction or occurrence in dispute a relationship of trust and confidence.[lxxi] The party alleging the status will actually have to show that he was justified in trusting the other as a fiduciary *prior to* the disputed transaction.[lxxii] At the same time, these two events are inseparable because proof that a relationship of trust existed *prior to* the transaction in dispute will serve as proof that the party alleging the status was justified in trusting the other as a fiduciary at *the time of* the disputed transaction.[lxxiii]

As *Figure 2* indicates, the stronger the evidence of a relationship of trust prior to the disputed transaction, the stronger will be the argument that the other party should be considered a fiduciary, and the stronger should be the chance of so convincing the court. On the other hand, where there is no evidence alleged of any prior relationship between the parties, the party asserting the fiduciary argument will not survive a summary judgment motion or a motion for

judgment notwithstanding the verdict from the party arguing against the status.[lxxiv] Like-wise, a summary judgment may be granted if there is some evidence, but insufficient evidence, that a confidential relationship was created.[lxxv] Therefore, the practitioner should carefully analyze and assert, either in pleadings or affidavits, the particular facts surrounding the relationship of the parties prior to the transaction or occurrence in dispute. Mere general statements that the other party is or was a fiduciary may simply be an invitation to a summary judgment hearing.[lxxvi]

Whether or not an informal fiduciary relationship existed prior to the transaction in dispute will usually be a question of fact, "determined from the actualities of the relationship between the persons involved."[lxxvii] The challenge, then, for the practitioner who wishes to assert an "informal fiduciary" argument will be to gather and allege enough facts pertaining to the prior relationship to convince a court that an issue of fact exists, warranting ultimate submission to a jury. Chief Justice Calvert, in his dissent in Thigpen v. Locke,[lxxviii] referred to this as "creating a grey zone" that would require a jury to determine the answer.[lxxix] Somewhere below the threshold of that "grey zone" lies what Texas courts call "mere subjective trust."[lxxx]

B. Overcoming the "Mere Subjective Trust" Hurdle.

The conventional wisdom found in the law surrounding confidential relationships is that "mere subjective trust alone is not enough to transform an arm's-length dealing into a fiduciary relationship."[lxxxi] In addition, it is often stated that "[t]he fact that people have had prior dealings with each other and that one party subjectively trusts the other does not establish a confidential relationship."[lxxxii] These often-repeated lines reflect the general rule in Texas that when

considering an argument for the existence of a confidential relationship, Texas courts will emphasize "the distinction between factual proof of a confidential relationship and mere subjective assertions by one party."[lxxxiii]

The phrase "mere subjective trust" itself suggests two implied requirements for bringing forth a successful "fiduciary" argument. First is the obvious implied requirement that evidence of the prior relationship will be measured by objective criteria.[lxxxiv] Second is the somewhat less obvious implied requirement that the alleged informal fiduciary must have taken certain *actions* or made certain *assertions* over the course of the prior relationship that would have inspired justified trust in a reasonably prudent person.[lxxxv] Although neither of these requirements is mandatory, in the vast majority of cases, a party will not be able to "create a grey zone" without them.[lxxxvi]

As a practical matter, one should be prepared to show strong factual evidence of actions or assertions by the "informal fiduciary," continuing over a sufficient period of time, that would cause a reasonably prudent person to be justified in relying upon the "fiduciary" to "act in his best interest."[lxxxvii] This is the basic evidentiary burden; the threshold of the "grey zone" of which Chief Justice Calvert spoke.[lxxxviii]

The practitioner should never forget that in nearly all cases arguing the existence of a confidential relationship will be an uphill battle. In addition to the burden of proof set forth above, the practitioner may come up against any number of policy factors that weigh against his argument.[lxxxix] These policy considerations, which will differ from case to case, reflect the court's concerns about arbitrarily imposing fiduciary relationships.[xc] Now that the evidentiary burden for successfully asserting an informal fiduciary relationship has been set forth, what

finally remains is to create an analytical framework with which to ascertain and argue that a given set of circumstances will or will not meet this burden.

III. The Analytical Framework.

This analytical framework is a set of guidelines to be used in analyzing a particular set of circumstances and arguing to the court that a confidential relationship does or does not exist. It is essentially a tool for analyzing the "relationship before." This Part does not set forth a formula for determining which side of the argument will win, but simply outlines a process for approaching the problem in a rational and systematic manner. The framework developed below should be seen as a "totality of the circumstances" test that defines a method by which an individual can be argued to be a fiduciary in a given case.

Two goals in setting forth this framework are (1) that it should be easy to use, and (2) that it have as near to universal applicability as possible. Thus, the framework is drawn from many areas of Texas case law and set forth in "elements." The elements derived should not be considered in a vacuum, but must be taken in context with all the circumstances surrounding the relationship analyzed.[xci] Many times, in "confidential relationship" opinions, the courts will invariably cite a number of facts and never state which were decisive in their decisions.[xcii] So while it is impossible to predict how many elements must be present before the relationship will be considered "confidential," as a general rule, the more elements that are present, the stronger will be the argument.

Note also that there is no "bright line" separating these elements, and many of them are somewhat similar. Most of the decisions discussed will have more than one element present,

particularly in those cases where a confidential relationship was found. Nonetheless, the elements listed below are sufficiently distinct that each merits a separate discussion and analysis.

A. The Elements.

The elements that have historically been considered by Texas courts in analyzing the prior relationship are: (1) prior business dealings; (2) the transfer of confidential information; (3) the presence of a close, personal friendship; (4) the presence of a family relationship; (5) where one party is accustomed to guidance by the other; (6) where one party has superior knowledge or knows that the other relies upon him, or both; and (7) where there is evidence that one party was dominated by the other.

(1) Prior Business Dealings.

The presence of prior business dealings is one element commonly considered in evaluating a prior relationship.[xciii] And although it is conceivable that prior business dealings, standing alone, could be enough to instill in one party the objective trust necessary to establish a confidential relationship, the truth is, that with this evidence alone, little chance exists that the argument will succeed under Texas law.[xciv] This is not so much due to the fact that one could not develop some objective measure of justifiable trust over the course of a number of business deals, but because the Texas Supreme Court has basically refused to recognize a confidential relationship on this evidence alone.[xcv]

The Texas Supreme Court, in Gaines v. Hamman,[xcvi] held that a fact issue was raised as to the existence of a confidential relationship where a geologist and lease broker had, "for a number of years [actually four], been engaged in acquiring oil and gas leases which they were to

own jointly."[xcvii] The court later developed a more generalized version of this holding in Consolidated Gas & Equipment Company of America v. Thompson,[xcviii] wherein it stated that a confidential relationship could arise when "over a long period of time, the parties [have] worked together for the joint acquisition and development of property previous to the particular agreement sought to be enforced."[xcix]

As late as 1979, a confidential relationship was found under similar facts in Hedley v. duPont.[c] In Hedley, the plaintiff, again a geologist, had worked with the defendant investors for twenty years in the research and acquisition of oil leases.[ci] In a subsequent lawsuit, the plaintiff/geologist alleged that by the original agreement he was to use his geological expertise to evaluate prospective leases and the defendants were to acquire them and give him an interest.[cii] Further, the evidence showed that the plaintiff devoted his full time toward that end from the inception of the agreement and that he had in fact helped the defendants to acquire numerous properties.[ciii] The court found that these facts were sufficient to prove a confidential relationship.[civ]

These cases, however, are the exception.[cv] The courts in Texas have always been reluctant to find an informal fiduciary relationship in situations between businessmen or even non-businessmen who shared only a history of what might be called "arm's-length" business dealings.[cvi] One stark example of this reluctance is the recent case of Crim Truck & Tractor Co. v. Navistar International Transportation,[cvii] wherein the Texas Supreme Court declined to find that a confidential relationship existed between parties to a franchise agreement, even though the relationship had lasted in one form or another for over forty two years.[cviii]

Even in Gaines, where a confidential relationship was found, the court was careful to

point out that a confidential relationship would not be created solely by virtue of the fact that the parties were joint owners.[cix] Additionally, the court has recently reiterated its position that "[t]he fact that one businessman trusts another, and relies upon his promise to perform a contract," will not create a confidential relationship.[cx] Further, such a relationship will not be created merely because the relationship between the parties has been a cordial one of long duration."[cxi] As the court reasoned in Thigpen v. Locke,[cxii] "Businessmen generally do trust one another, and their dealings are frequently characterized by cordiality...."[cxiii]

These subsequent limitations to the primary rule stated above from Gaines are much more often quoted in Texas cases than the rule itself,[cxiv] and in reality, when all that can be shown between the parties is a history of business deals, without more, establishing an informal fiduciary relationship will be a practical impossibility.[cxv] This is but one element, however, and its importance increases as other elements are layered on top of it.

(2) Transfer of Confidential Information.

Another *possible* element to be considered, which closely relates to the "prior business dealings" element discussed above, is the exchange or transfer of confidential information, especially when the "fiduciary" has abused that information to make a profit for himself.[cxvi] Although historically the abuse of confidential information has sometimes been stated merely as a manner by which an already-established fiduciary relationship may be breached,[cxvii] a prior justified transfer of confidential information can also be an element used to *establish* the confidential relationship.[cxviii] The argument about to be proposed is not unsupported in Texas case law, although it has its genesis in the law of "trade secrets."[cxix]

For instance, in Furr's, Inc. v. United Specialty Advertising Company,[cxx] a trade secret

case, the court stated the rule that one who does not protect his trade secret through patent law or specifically in a contract "can still be protected if his disclosure is made in confidence so as to place the other party under a duty to keep his secret."[cxxi] The court further stated: "It is a well-settled rule that equity will grant relief when one breaches his *confidential relationship* in order to unfairly use a trade secret."[cxxii] In that case, the court held that because there actually was not a trade secret involved, no confidential relationship existed, thus clearly implying that the communication of a secret could create a confidential relationship.[cxxiii] Further, the Texas Supreme Court, in Hyde Corporation v. Huffines,[cxxiv] held that although a licensor/ licensee relationship is not automatically a confidential relationship, the fact that the plaintiff-inventor had disclosed trade secrets to the defendant during licensing negotiations made the relationship in that case confidential.[cxxv]

It could be argued that the court has recently impliedly accepted this element into Texas law on a broader scale, stating in Texas Bank & Trust Co. v. Moore[cxxvi] that an informal fiduciary relationship could be established in "all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed...."

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i.Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)(Stewart, J. concurring).

ii.See Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 513 (Tex. 1942).

iii.A non-exclusive list of the advantages that accrue to one proving a fiduciary relationship includes:

Shifting of Burden to Show Fairness: The imposition of a fiduciary relationship casts upon the fiduciary the burden of showing the fairness of the transaction in dispute. Texas Bank & Trust Co. v. Moore, 595 S.W.2d 502, 509 (Tex. 1980); Consolidated Bearing & Supply Co. v. First Nat'l Bank at Lubbock, 720 S.W.2d 647, 648 (Tex. App. -- Amarillo, no writ)(quoting Fitz-Gerald v.

Hull, 150 Tex. 39, 48, 237 S.W.2d 256, 261 (1951)); Tuttlebee v. Tuttlebee, 702 S.W.2d 253, 257 (Tex. App. -- Corpus Christi 1985, no writ); Miller v. Miller, 700 S.W.2d 941, 945 (Tex. App. -- Dallas 1985, writ ref'd n.r.e.).

Duty to Read Contract Before Signing: When a fiduciary relationship is imposed, the duty that the party signing a contract to read it first and know what it contains becomes the fiduciary's duty to fully disclose the facts. Thigpen v. Locke, 363 S.W.2d 247, 251-52 (Tex. 1962).

Relaxed Duty to Discover Fraud: The presence of a fiduciary relationship may cause the duty of the defrauded party to discover the fraud to be relaxed. See Andress v. Condos, 672 S.W.2d 627, 630 (Tex. App. -- Fort Worth 1984, writ ref'd n.r.e.)("Where there is a fiduciary relaitonship between the parties, ... diligence on the part of the defrauded party does not require as searching an inquiry into the conduct of the other party as where the parties were strangers or were dealing at arm's length. (quoting Eastman v. Biggers, 434 S.W.2d 439, 442 (Tex. Civ. App. -- Dallas 1968, no writ). Note, however, that the existence of the fiduciary relationship will not completely relieve the trusting party of the duty to discover fraud, but is only "an evidentiary matter bearing on the issue of whether fraud might have been discovered by the exercise of reasonable diligence." Id. at 630 (quoting Bush v. Stone, 500 S.W.2d 885, 891 (Tex. Civ. App. -- Corpus Christi 1973, writ ref'd n.r.e.)). Note also that the "discovery rule" is not imposed merely because a fiduciary relationship has been established. See id. at 630 (holding that the existence of a fiduciary relationship did not toll statute of limitations as a matter of law). But see Willis v. Maverick, 760 S.W.2d 642, 646 (Tex. 1988)(discovery rule will apply to an attorney/client relationship in the context of legal malpractice).

Removal From Statute of Frauds: The imposition of a fiduciary relationship can remove an oral or defectively written contract from the Statute of Frauds. Dodson v. Kung, 717 S.W.2d 385, 389 (Tex. App. -- Houston [14th Dist.] 1986, writ ref'd n.r.e.).

Vicarious Breach of Fiduciary Duty: "When a third party knowingly participates in the breach of a fiduciary duty, such third party becomes a joint tortfeasor and is liable as such [jointly and severally]." Horton v. Robinson, 776 S.W.2d 260, 265 (Tex. App. -- El Paso 1989, no writ)(quoting Kinzbach Tool Co., 160 S.W.2d at 514)); Chien v. Chen, 759 S.W.2d 484, 487 (Tex. App. -- Austin 1988, no writ).

Imposition of a Constructive Trust: Proof of a confidential relationship is one of the necessary conditions to the finding of

a constructive trust. See Rankin v. Naftalis, 557 S.W.2d 940, 944 (Tex. 1977).

iv.In this comment, the terms "informal fiduciary relationship" and "confidential relationship" will be treated as being synonymous. See Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 34 Tex. Sup. Ct. J. 647, 648 (June 12, 1991).

v.Although there is not a Key Number entitled "Fiduciaries" in West's Texas Digest, the subject does appear in the Descriptive-Word Index. See 54 **Tex. D. 2d** 358 (West 1984). The subjects included in that section range from "Accounting" to "Windstorm Damage." See id.

vi.See Crim Truck & Tractor Co., 34 Tex. Sup. Ct. J. at 648 n.2.

vii.Texas Bank & Trust Co. v. Moore, 595 S.W.2d 502, 508 (Tex. 1980).

viii.378 U.S. 184 (1964).

ix.Id. at 197 (Stewart, J. concurring).

x.See Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962).

xi.See Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 34 Tex. Sup. Ct. J. 647, 648 (June 12, 1991).

xii.See id.

xiii.See English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983)(Spears, J. concurring).

xiv.See Thigpen, 363 S.W.2d at 253.

xv.See id.

xvi.See Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 34 Tex. Sup. Ct. J. 647, 648 (June 12, 1991).

xvii.See id. "Mere status of the parties" simply refers to the labels that can be attached to the parties, i.e. attorney/client. Cf. Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988)("A fiduciary relationship exists between attorney and client.")

xviii.See Crim Truck & Tractor Co., 34 Tex. Sup. Ct. J. at 648.

xix.See Rankin v. Naftalis, 557 S.W.2d 940, 944 (Tex. 1977).

xx.See Crim Truck & Tractor Co., 34 Tex. Sup. Ct. J. at 648.

xxi.See infra, Part III.

xxii.See Crim Truck & Tractor Co., 34 Tex. Sup. Ct. J. at 648. But see Texas Bank & Trust Co. v. Moore, 595 S.W.2d 502, 507 (Tex. 1980)(confidential relationship found as a matter of law when evidence of the relationship was not refuted); Fisher v. Roper, 727 S.W.2d 78, 81 (Tex. App. -- San Antonio 1987, writ ref'd n.r.e.)(trial court found confidential relationship as a matter of law, court of appeals questioned the finding, but did not address the issue further because it was not properly preserved).

xxiii.See Thigpen v. Locke, 363 S.W.2d 247, 254 (Tex. 1962)(Calvert, C.J. dissenting); See also Gillum v. Republic Health Corp., 778 S.W.2d 558, 567 (Tex. App. -- Dallas 1989, no writ)("Even though the existence of a confidential relationship is a question of fact, ... [mere allegations of subjective trust are], as a matter of law, insufficient to create a legal duty.")

xxiv.See, e.g., Pope v. Darcey, 667 S.W.2d 270 (Tex. App. -- Houston [14th Dist.] 1984, writ ref'd n.r.e.)(An informal fiduciary relationship can arise where "one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an over-mastering dominance on the one side, or weakness, dependence, or justifiable trust on the other."). See also Tuck v. Miller, 483 S.W.2d 898, 905 (Tex. Civ. App. -- Austin 1972, writ ref'd n.r.e.)(citing Locke v. Thigpen, 353 S.W.2d 249, 255 (Tex. Civ. App. -- Houston 1961)(on motion for rehearing), rev'd

on other grounds, 363 S.W.2d 247 (Tex. 1962)(same rule stated). The Texas Supreme Court in Thigpen v. Locke recognized that fiduciary relationships "may arise informally from `moral, social, domestic, or purely personal relationships.'") Thigpen, 363 S.W.2d at 253 (quoting Fitz-Gerald v. Hull, 150 Tex. 39, 48, 237 S.W.2d 256, 261 (1951)). Most of the phrasings used in Texas will be treated infra at Part III.

xxv.Texas Bank & Trust Company v. Moore, 595 S.W.2d 502, 507 (Tex. 1980)(quoted in Crim Truck & Tractor Co., 34 Tex. Sup. Ct. J. at 648-49).

xxvi.See Crim Truck & Tractor Co., 34 Tex. Sup. Ct. J. at 648.

xxvii.See Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408, 416 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.); May v. Little, 473 S.W.2d 632, 636 (Tex. Civ. App. -- El Paso 1971, writ ref'd n.r.e.).

xxviii.See Crim Truck & Tractor Co., 34 Tex. Sup. Ct. J. at 648. The term itself likely had its birth in Justice Spears' often quoted concurring opinion in English v. Fischer. See 660 S.W.2d at 524 (Spears, J., concurring).

xxix.See Crim Truck & Tractor Co., 34 Tex. Sup. Ct. J. at 648. While both of the other fiduciary relationships also include "at the very minimum a duty of good faith and fair dealing, the converse is not true." Id.

xxx.See id.

xxxi.Id.

xxxii.660 S.W.2d 521 (Tex.1983).

xxxiii.Id. at 524 (Spears, J. concurring).

xxxiv.See Crim Truck & Tractor Co., 34 Tex. Sup. Ct. J. at 648 ("[A] fiduciary duty encompasses at the very minimum a duty of good faith and fair dealing.")

xxxv.See Aranda v. Insurance Co. of North America, 748 S.W.2d 210, 212 (Tex. 1988); Arnold v. National County Mutual Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987).

xxxvi.Aranda, 748 S.W.2d at 212-13.

xxxvii.Plaza Nat'l Bank v. Walker, 767 S.W.2d 276, 278 (Tex. App. -- Beaumont 1989, writ denied).

xxxviii.Some relationships come under a statutorily imposed duty of good faith and fair dealing. For instance, **Tex. Bus. & Com. Code Ann.** +s 1.203 (Tex. UCC)(Vernon 1968) imposes the duty upon all parties to a contract that comes under the Texas U.C.C. In this comment, only common law, court-created "special relationships" will be discussed.

xxxix.725 S.W.2d 165 (Tex. 1987).

xl.Id. at 167.

xli.Cf. Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987). Arnold established that in Texas, every insurer/insured relationship will carry with it the duty of good faith and fair dealing in the processing and settlement of claims. Id. See also Plaza Nat'l Bank, 767 S.W.2d at 278 ("We hold that [a special relationship] exists between a bank and its depositors.")

xlii.Cf Plaza Nat'l Bank, 767 S.W.2d at 278 (entire class of bank/depositor relationships are now "special relationships").

xliii.See, e.g., Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 34 Tex. Sup. Ct. J. 647, 650 (June 12, 1991)(Texas Supreme Court refused to declare the franchisor/franchisee relationship to be "special"); McClendon v. Ingersoll-Rand Co., 757 S.W.2d 816, 819 (Tex. 1988), rev'd on other grounds, 779 S.W.2d 69 (Tex. 1989), rev'd on other grounds, ___ U.S. ___, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990)(employer/employee relationship is not a "special relationship"). The Texas Supreme Court actually expressly withheld deciding whether a "special relationship" exists between an employee and employer. See McClendon, 779 S.W.2d at 70 n.1. See also English v. Fischer,

660 S.W.2d 521, 522 (Tex. 1983)("The novel concept [of an implied duty of good faith and fair dealing] advocated by the courts below would abolish our system of government according to settled rules of law and let each case be decided upon what might seem "fair and in good faith," by each fact finder.") The court was unwilling to take this step. Id.

xliv.See, e.g., Crim Truck & Tractor Co., 34 Tex. Sup. Ct. J. at 650 ("We find no evidence in this case that the franchisor exerted control over its franchisee's business comparable to that exerted by an insurer over it insured's claim.")

xlv.See id. at 648. This simply means that when two parties share this status, i.e. attorney and client, the relationship will be considered "fiduciary" as a matter of law. Id.

xlvi.Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408, 416 (Tex. App. -- Dallas, 1986, writ ref'd n.r.e.).

xlvii.Cf. Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987)(implicit in the court's holding was that the entire class of insurer/insured relationships would be considered "special relationships"). Thus, the mere status of two parties as "insurer/insured" will indicate that there is a "special relationship." See id.

xlviii.Cf. Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988)(court states implicitly that attorney/client relationships are, as a class, formal fiduciary relationships).

xlix.Id. ("The existence of [a confidential relationship] is to be determined from the actualities of the relationship between the persons involved.")

l.Cf. Arnold, 725 S.W.2d at 167 (entire class of insurer/insured relationships deemed "special").

li.See Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 34 Tex. Sup. Ct. J. 647, 648 (June 12, 1991).

lii.See id.

liii.Id.

liv.See supra notes 45 and 47.

lv.Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408, 416 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.).

lvi.See, e.g., Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988)("A fiduciary relationship exists between attorney and client."); Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987)(the entire class of insurer/insured relationships declared to be "special relationships"); Field Measurement Serv., Inc. v. Ives, 609 S.W.2d 615, 619 (Tex. Civ. App. -- Corpus Christi 1980, writ ref'd n.r.e.)("Inherent in an agency relationship is the fiduciary duty owed by the agent to his principal.")

lvii.See Willis, 760 S.W.2d at 645 (Tex. 1988)("A fiduciary relationship exists between attorney and client.")

lviii.Although, at this time the courts have only applied it to three classes. See Aranda v. Insurance Co. of North America, 748 S.W.2d 210, 212-13 (Tex. 1988)(the class of worker/worker's compensation carrier relationships); Arnold, 725 S.W.2d at 167 (the class of insured/insurer relationships); Plaza Nat'l Bank v. Walker, 767 S.W.2d 276, 278 Tex. App. -- Beaumont 1989, writ denied)(the class of depositor/ bank relationships).

lix.See supra note 49.

lx.See Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 34 Tex. Sup. Ct. J. 647, 648 (June 12, 1991).

lxi.See id.

lxii.Id.

lxiii.See id. at 649.

lxiv.See supra note 5.

lxv.See Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 34 Tex. Sup. Ct. J. 647, 649 (June 12, 1991)("[M]ere subjective trust alone is not enough to transform arm's length dealing into a fiduciary relationship." (quoting Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962))).

lxvi.See id.

lxvii.See, e.g., id. (no justifiable trust, therefore no confidential relationship).

lxviii.See id.

lxix.See Thigpen, 363 S.W.2d at 254 (Calvert, C.J., dissenting) (stating indirectly that the non-existence of a confidential relationship will be determined as a matter of law).

lxx.Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408, 416 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.). This general requirement of a prior fiduciary relationship has gone through a number of phrasings over its life. For instance, the Texas Supreme Court has phrased the requirement as such: "[A] fiduciary relationship could arise outside [the formal or technical relationships] when, over a long period of time, the parties [have] worked together for the joint acquisition and development of property previous to the particular agreement sought to be enforced." Consolidated Gas & Equip. Co. of America v. Thompson, 405 S.W.2d 333, 337 (Tex. 1966). Another court recently adopted the phrase as: "[A] fiduciary relationship may exist if the dealings between the parties have continued for such a long period of time that one party is justified in relying upon the other to act in his best interest," Walton Pond Joint Venture v. Hiawatha Savings & Loan Assoc., 1990 Tex. App. LEXIS 443, 31 (Tex. App. -- Houston [1st Dist.] Mar. 1, 1990, no writ)(not designated for publication). Still another court has phrased the requirement as simply that "there must have been a previous relationship which placed the parties in a position of confidence and trust." Linder v. Citizens State Bank of Malakoff, Texas, 528 S.W.2d 90, 94 (Tex. Civ. App. -- Tyler 1975, writ ref'd n.r.e.). In Gillum v. Republic Health Corp., the court stated simply that "something apart from the transaction itself is necessary." 778 S.W.2d at 567.

lxxi.Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408, 416 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.). The Texas Supreme Court first phrased this requirement in the context of constructive trusts. See, e.g., Consolidated Gas, 405 S.W.2d at 336 ("[F]or a constructive trust to arise there must be a fiduciary relationship before, and apart from, the agreement made the basis of the suit.") This requirement is, of course, not limited to constructive trusts alone but to any instance where an informal fiduciary relationship is alleged. See, e.g., Walton Pond Joint Venture, 1990 Tex. App. LEXIS at 30 (informal fiduciary argument asserted with claim for constructive fraud); Hamblet v. Coveney, 714 S.W.2d 126, 129 (Tex. App. -- Houston [1st Dist.] 1986, writ ref'd n.r.e.)("[T]he confidential relationship must exist apart from and prior to the transaction made the basis of the lawsuit." (quoting Rankin v. Naftalis, 557 S.W.2d 940, 944 (Tex. 1977)).

lxxii.See Hamblet v. Coveney, 714 S.W.2d 126, 129 (Tex. App. -- Houston [1st Dist.] 1986, writ ref'd n.r.e.); Kostelnik v. Roberts, 680 S.W.2d 532, 534 (Tex. App. -- Corpus Christi 1984, writ ref'd n.r.e.).

lxxiii.Cf. Hamblet v. Coveney, 714 S.W.2d 126, 129 (Tex. App. -- Houston [1st Dist.] 1986, writ ref'd n.r.e.)(implicit in the requirement of a relationship of trust prior to the transaction in dispute is the fact that this prior relationship will be used to show the same trust at the time of the transaction in dispute). See also Kostelnik v. Roberts, 680 S.W.2d 532, 534 (Tex. App. Corpus Christi 1984, writ ref'd n.r.e.)(supports same proposition).

lxxiv.See, e.g. Blue Bell, 715 S.W.2d at 416 (summary judgment evidence established lack of prior relationship); Linder, 528 S.W.2d at 94 (no prior relationship, motion for judgment notwithstanding the verdict granted and affirmed); Karnei v. Davis, 409 S.W.2d 439, 442 (Tex. Civ. App. -- Corpus Christi 1966, no writ)(no prior relationship at all, summary judgment granted and affirmed).

lxxv.For a detailed discussion on this point, see infra Subpart II.B.

lxxvi.See, e.g., Winston v. Lake Jackson Bank, 574 S.W.2d 628, 629 (Tex. Civ. App. -- Houston [1st Dist.] 1978, no writ)(general claims of "extensive prior dealings," with no specifics stated, held insufficient to defeat motion for summary judgment).

lxxvii.Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962). See also Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 34 Tex. Sup. Ct. J. 647, 649 (June 12, 1991)(citing MacDonald v. Follett, 142 Tex. 616, 623, 180 S.W.2d 334, 339 (1944))(the existence of a confidential relationship will be a question of fact); Schiller v. Elick, 150 Tex. 363, 367, 240 S.W.2d 997, 999 (1951)(same rule stated). But see Texas Bank & Trust Co. v. Moore, 595 S.W.2d 502, 507 (Tex. 1980)(Texas Supreme Court held that a confidential relationship existed as a matter of law where evidence of the relationship was undisputed); Fisher v. Roper, 727 S.W.2d 78 (Tex. App. -- San Antonio 1987, writ ref'd n.r.e.). (The trial court found a confidential relationship as a matter of law. The court of appeals questioned this finding by the trial court, but did not address it further because the error was not properly preserved.)

On the other hand, when no evidence or insufficient evidence exists of a prior relationship of trust, the confidential relationship will be held not to exist as a matter of law. See Thigpen, 363 S.W.2d at 254 (Calvert, C.J., dissenting).

lxxviii.363 S.W.2d 247 (Tex. 1962).

lxxix.Id. at 254 (Calvert, C.J., dissenting)("As in most fields of the law, we will have cases in which we can say that the evidence establishes conclusively that there was or was not a confidential relationship, but there will be others in which the evidence will leave the ultimate inference to be drawn in that grey zone in which the trier of facts has always functioned... Our difficulties begin, of course, when we are called upon to determine whether the evidence in a particular case creates a grey zone.")

lxxx.See, e.g., Crim Truck & Tractor Co., 34 Tex. Sup. Ct. J. at 649 ("[M]ere subjective trust alone is not enough to transform an arm's length dealing into a fiduciary relationship." (quoting Thigpen, 363 S.W.2d at 253)).

lxxxi.Thigpen, 363 S.W.2d at 253.

lxxxii.Consolidated Gas & Equip. Co. of America v. Thompson, 405 S.W.2d 333, 336 (Tex. 1966).

lxxxiii.Consolidated Bearing & Supply Co. v. Taylor, 720 S.W.2d 647, 649 (Tex. App. -- Amarillo 1986, no writ).

lxxxiv.Cf. Crim Truck & Tractor Co., 34 Tex. Sup. Ct. J. at 648 (the words "mere subjective trust alone is not enough" imply that some objective standard will be used).

lxxxv.Cf. id. ("acquired and abused, reposed and betrayed" implies triggering actions or assertions).

lxxxvi.For instance, when a party argues upon evidence of "domination" (discussed infra at Subpart III.A.(7)), it is logical that a more subjective standard should be allowed in order to establish the relationship, although objective evidence will strengthen the case. Likewise, when the parties are blood relatives or spouses, the mere fact of their status may to some extent brush aside the implied "requirement" of specific actions or assertions, although, again, the presence of specific actions or assertions will only make the case stronger.

However, these are definite exceptions to the general rule. In practice, subjective evidence will rarely be sufficient. Nor will mere status generally suffice outside of the recognized "technical" or "formal" fiduciary relationships such as attorney-client, partner-partner, principal-agent, etc., and those "special relationships" recognized by statute or Texas common law.

lxxxvii.Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408, 416 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.).

lxxxviii.See Thigpen v. Locke, 363 S.W.2d 247, 254 (Tex. 1962)(Calvert, C.J., dissenting).

lxxxix.The following is a non-exclusive list of the principles that a party faces when arguing for the existence of an informal fiduciary relationship:

Freedom of Contract: In Crim Truck & Tractor Co., the Texas Supreme Court weighed the plaintiff's "informal fiduciary" argument against the policy that "a party to a contract is free to pursue its own interests, even if it results in a breach of that contract, without incurring tort liability." 34 Tex. Sup. Ct. J. at 649 (citing Amoco Prod. Co. v. Alexander, 622 S.W.2d 563, 571 (Tex. 1981)). This "freedom of contract" theme weaves its way through many of the "informal fiduciary" cases. The Texas Supreme Court summed the theme up in Thigpen with another often-quoted phrase: "Businessmen generally do trust one another, and their dealings are frequently characterized by cordiality of the kind testified to here." 363 S.W.2d at 253.

Stability of Contracts: The principle that the stability of contracts should be preserved is evident as well in the "informal fiduciary cases" and will be protected. See, e.g., id. ("If we should permit respondents to set aside their conveyances on such slender evidence, the security of contracts and conveyances in this state would be seriously jeopardized.").

Due Diligence: The policy that "parties to a contract should read what they sign" has been found in cases where fraud is alleged. See, e.g., id. ("The party claiming fraud has a duty to use reasonable diligence in protecting his own affairs."). See also Hoover v. Cooke, 566 S.W.2d 19, 27 (Tex. Civ. App. -- Corpus Christi 1978, writ ref'd n.r.e.)("The fact that a party unilaterally has placed confidence in another is not sufficient to excuse the failure to adequately protect his own interests when the means to do so are readily at hand." (citing Lindsey v. Dougherty, 60 S.W.2d 300, 302 (Tex. Civ. App. -- Amarillo 1933, writ ref'd)). Of course, if the relationship had been found, the party who is relying on the fiduciary would be relieved of this duty. See Thigpen, 363 S.W.2d at 252. This just shows that the court will not dispense with this duty lightly.

Statute of Frauds: The same is true when the court is considering an argument that an "informal fiduciary relationship" exists such that an oral contract should be enforced even though it is within the Statute of Frauds. See, e.g., Consolidated Gas & Equip. Co. of America v. Thompson, 405 S.W.2d 333, 336 (Tex. 1966)("[T]he fact that one businessman trusts another, and relies upon his promise to carry out a contract, does not create a confidential relationship. To hold otherwise would render the Statute of Frauds meaningless.") On the other hand, a successful showing that the other party was a fiduciary would remove the contract from the Statute. See Tuck v. Miller, 483 S.W.2d 898, 903-04 (Tex. Civ. App. -- Austin 1972, writ ref'd n.r.e.).

Hesitancy to Impose Duty: "A fiduciary duty is an extraordinary one and will not lightly be created." Gillum v. Republic Health Corp., 778 S.W.2d 558, 567 (Tex. App. -- Dallas, no writ). Although more of a practical concern than a true "principle of law," the general hesitancy of a court to declare that a party is an informal fiduciary is always something that one should keep in mind, even if not battling against some other principle of law.

xc.See, e.g., Gillum, 778 S.W.2d at 567 ("A fiduciary duty is an extraordinary one and will not be lightly created.")

xci.See Thigpen, 363 S.W.2d at 253.

xcii.See infra notes 176 and 182 and accompanying text.

xciii.See, e.g., Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 34 Tex. Sup. Ct. J. 647, 647-48 (June 12, 1991); Thigpen, 363 S.W.2d at 249-50; Bush v. Stone, 500 S.W.2d 885, 887 (Tex. Civ. App. -- Corpus Christi 1973, writ ref'd n.r.e.); Barnett v. Matz, 483 S.W.2d 315, 318 (Tex. Civ. App. -- Austin 1972, no writ).

xciv.See, e.g., Crim Truck & Tractor Co., 34 Tex. Sup. Ct. J. at 647 (franchisor/franchisee relationship, without more, not sufficient to create informal fiduciary relationship); Thigpen, 363 S.W.2d at 253 (debtor/creditor relationship, without more, held insufficient); Thomson v. Norton, 604 S.W.2d 473, 476 (Tex. Civ. App. -- Dallas 1980, no writ)(lender/borrower relationship, without more, held insufficient even though alleged "fiduciary" was a bank officer who had arranged the land sale that was the basis for the disputed transaction, and had arranged financing).

xcv.This fact evidences a clash between the party's "informal fiduciary" argument and the principle of "freedom of contracts." See supra note 89 and accompanying text.

xcvi.163 Tex. 618, 358 S.W.2d 557 (1962).

xcvii.Id. at 622, 358 S.W.2d at 560 ("These leases would then be ... transferred to third parties and an override or other mineral interest retained and held jointly by the parties in equal portions, subject to Hamman's right to recoup his out-of-pocket expenses. Under the arrangement between the parties, Gaines would contribute the `geology' and Hamman would pay the expenses incident to the procuring of the leases and the turning of the deal.")

xcviii.405 S.W.2d 333 (Tex. 1966).

xcix.Id. at 337 (citing Gaines v. Hamman, 163 Tex. 618, 622 358 S.W.2d 557, 560 (1962)).

c.580 S.W.2d 662, 666 (Tex. Civ. App. -- Houston [14th Dist.] 1979, writ ref'd n.r.e.).

ci.Id.

cii.See id.

ciii.Id.

civ.Id.

cv.Note also that the rule set forth in Gaines v. Hamman may be bound to facts such as those in that line of cases: a geologist/ investor/lease-broker relationship, wherein the geologist has contributed confidential information and been subsequently exploited. See, e.g. 163 Tex. at 622, 358 S.W.2d at 560. The Texas Supreme Court implicitly noted the importance of this transfer of confidential information, stating that as to the transaction in dispute, a third party, largely on the strength of the geologist's geological reports, purchased the lease. See id. In Hedley v. duPont, the presence of confidential information was also a factor. See 580 S.W.2d at 665-66. The possible significance of the transfer of confidential information in creating an informal fiduciary relationship is discussed in the next subpart.

cvi.See, e.g., Thigpen v. Locke, 763 S.W.2d 247, 253 (Tex. 1962)("Businessmen generally do trust one another, and their dealings are frequently characterized by cordiality of the kind testified to here.")

cvii.35 Tex. Sup. Ct. J. 342 (Jan. 22, 1992)(on motion for rehearing).

cviii.Id. at 342-43.

cix.Gaines, at 624, 358 S.W.2d at 561.

cx.Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 35 Tex. Sup. Ct. J. 342, 344 (Jan. 22, 1992)(on motion for rehearing)(quoting Consolidated Gas & Equip. Co. of America v. Thompson, 405 S.W.2d 333, 336 (Tex. 1966)).

cxi.Id. (citing Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962)).

cxii.363 S.W.2d 247 (Tex. 1962).

cxiii.Id. at 253.

cxiv.See, e.g., Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 34 Tex. Sup. Ct. J. 647, 649 (June 12, 1991)(franchisor/ franchisee relationship of 43 years determined to be mere "arm's-length" dealing); Thigpen, 363 S.W.2d at 249, 253 (debtor/ creditor relationship of fifteen years determined to be mere "arm's-length dealing).

cxv.Justice Mauzy, dissenting in Crim Truck & Tractor Co., recognized this truism in Texas law as he engaged in the following rhetorical call and response:

> What sort of evidence ... might tend to establish a confidential relationship?
>
> -the fact that one businessman trusts another, and relies upon his promise to perform a contract? No, the court says today; one may trust another implicitly, and stake a lifetime of earnings on the other's promise, but that is still no evidence of a confidential relationship.
>
> -the fact that the relationship has been a cordial one, of long duration? No, says the court; businesses might interact on the best of terms for a century, but that would still not be any evidence of trust and confidence.

35 Tex. Sup. Ct. J. at 346 (Mauzy, J., dissenting.)

cxvi.See Furr's, Inc. v. United Specialty Advertising Co., 385 S.W.2d 456, 459 (Tex. Civ. App. -- El Paso 1964, writ ref'd n.r.e.), cert. denied, 382 U.S. 824 (1965).

cxvii.For instance, in both Gaines v. Hamman and Hedley v. duPont a confidential relationship was purportedly established between the respective geologists and lease brokers because the parties in each case had, "over a long period of time, worked together for the joint acquisition and development of property previous to the particular agreement sought to be enforced," hence, they came under the rule stated in Consolidated Gas & Equip. Co. of America v. Thompson, 405 S.W.2d 333, 337 (Tex. 1966). See Gaines at 622-24, 358 S.W.2d at 560-61; Hedley, 580 S.W.2d at 664. The parties in Gaines had worked together for four years, see Gaines at 620, 358 S.W.2d at 558, and the parties in Hedley had worked together for nearly twenty. See Hedley, 580 S.W.2d at 666. In each case,

the court apparently used the abuse of confidential information as a justification for imposing a constructive trust, and not as a reason for finding the informal fiduciary relationship to begin with. See Gaines at 622, 358 S.W.2d at 560; Hedley, 580 S.W.2d at 664-66. See also Omohundro v. Matthews, 161 Tex. 367, 368-72, 341 S.W.2d 401, 402-04 (1960)(lease broker/geologist case, geologist's technical studies and well log considered to be confidential information, same rule).

cxviii.See Furr's, Inc., 385 S.W.2d at 459.

cxix.To create the "transfer of confidential information" argument, the law of trade secrets has been chosen over the rules set forth in the Gaines v. Hamman line of cases for two reasons. See supra note 117. First, the rules are more refined and developed in the trade secret cases than in the Gaines line, as the "transfer of confidential information" is an intuitive central feature in trade secret litigation. Second, the rule from Gaines, that a confidential relationship may be formed when, "over a long period of time, the parties have worked together for the joint acquisition and development of property," Gaines at 622, 358 S.W.2d at 560, carries with it "joint venture" or "partnership" overtones that are not present in the rules from the law of trade secrets. Finally, in trade secret law, it is clear that a confidential relationship can be *created* by the transfer of confidential information. See Hyde Corp. v. Huffines, 158 Tex. 566, 586-87, 314 S.W.2d 763, 777 (1958).

cxx.385 S.W.2d 456 (Tex. Civ. App. -- El Paso 1964, writ ref'd n.r.e.), cert. denied, 382 U.S. 824 (1965).

cxxi.Id. at 459.

cxxii.Id. (emphasis added).

cxxiii.See id. at 458.

cxxiv.158 Tex. 566, 314 S.W.2d 763 (1958).

cxxv.See id. at 587, 314 S.W.2d at 777.

cxxvi.595 S.W.2d 502 (Tex. 1980).