

TAKEN IN CONTEXT:
AN EXAMINATION OF JUDICIAL DETERMINATIONS REGARDING
IMPLIED OBLIGATIONS OF CONFIDENTIALITY

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ABSTRACT

WOODROW HARTZOG: Taken in Context:
An Examination of Judicial Determinations Regarding
Implied Obligations of Confidentiality
(under the direction of Cathy Packer, Ph.D.)

This study explores how courts analyze claims of implied obligations of confidentiality. Individuals must regularly disclose information that, if misused, could subject them to harm, particularly on the Internet. Yet American courts lack a clear and consistent methodology for protecting self-disclosed information. Traditional privacy remedies often do not cover self-disclosed information. A more promising yet underdeveloped concept is the law of implied confidentiality. Implied confidentiality is a flexible and powerful concept, yet there is no widely adopted methodology to guide courts in determining which actions, language, or designs imply an obligation of confidentiality.

This dissertation utilizes Helen Nissenbaum's theory of privacy as contextual integrity as a framework for analyzing factors important to courts in disputes involving implied obligations of confidentiality. The theory of privacy as contextual integrity is the theory that privacy violations occur when the context in which information is disclosed is not respected. According to Nissenbaum, privacy and confidentiality are defined by the informational norms within a given context. Nissenbaum identified four factors relevant to informational norms: 1) context, 2) the nature of the information, 3) actors, and 4) terms of disclosure.

The 132 cases analyzed in this dissertation revealed that all four of Nissenbaum's factors were important to courts in analyzing implied obligations of confidentiality. Contextual integrity seems to be a good theory for analyzing both offline and online implied obligations of confidentiality, though the cases supported the collapse of Nissenbaum's four factors into two: context and terms.

This dissertation proposes a framework based on the case analysis to help courts ascertain the two most important considerations in implied obligations of confidentiality – party perception and party inequality. Courts presented with claims of an implied obligation of confidentiality should ask: 1) What was the context surrounding the disclosure? 2) What was the nature of the information? 3) Who were the actors and what was their relationship to each other? and 4) What were the internal and external terms of disclosure? This dissertation concludes that the concept of implied obligations of confidentiality is promising as an alternative to traditional privacy remedies, but in need of a unifying framework.

For my wife Jennifer,
with love, respect, and gratitude

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CHAPTER I

INTRODUCTION: PRIVACY, CONFIDENTIALITY, AND THE INTERNET

On October 3, 2005, Cynthia Moreno vented her frustrations online. As a self-described “nerdy girl” and student at the University of California at Berkeley, Moreno was happy to be free of high school classmates in Coalinga, California, who shot spit wads in her hair, taunted her for being chubby, and pulled chairs out from under her.¹ When she returned for a high school football game in the fall of 2005, she was reminded of her former misery and dislike for her hometown.

In an attempt to share her frustration with a close group of friends, she wrote “An ode to Coalinga” and posted it on the journal section of her personal profile on the social network site myspace.com.² She began the Ode with “the older I get, the more I realize how much I despise Coalinga” and then made a number of extremely derogatory comments about Coalinga and its residents.³ After six days, Moreno removed the Ode from her online journal.⁴

¹ John Ellis, *Coalinga grad loses MySpace rant lawsuit*, THE FRESNO BEE (Oct. 12, 2010, 2:07 pm), <http://www.fresnobee.com/2010/09/20/2085862/ex-student-loses-myspace-rant.html#storylink=mirelated>.

² *Moreno v. Hanford Sentinel*, 172 Cal. App. 4th 1125, 1128 (Cal. Ct. App. 2009).

³ *Id.* Moreno said that

I don’t care much for Coalinga, or the people that reside there or the friends I used to have while being there. In comparison to my college friends, they are nothing, were nothing, and remain nothing. In a nutshell, their histories and reputations are so denigrating and their focuses are set on such superficial and unimportant things that breaking out if it for an instant scares them....Who the hell wouldn’t want to get out of Coalinga to come to a school like CAL...and experience everything I have thus far?

Roger Campbell, the principal of Coalinga High School, read the Ode before it was removed and forwarded it to the local newspaper, the *Coalinga Record*, which published the Ode in the newspaper's letters-to-the-editor section with only a scant reference to the original context in which the Ode appeared.⁵ According to the California Court of Appeal: "The community reacted violently to the publication of the Ode. [Moreno and her family] received death threats and a shot was fired at the family home, forcing the family to move out of Coalinga."⁶ These losses required the Moreno family to close its 20-year-old family business.⁷ Moreno filed suit against Campbell alleging invasion of privacy and intentional infliction of emotional distress.

Moreno's claim for a right of privacy in self-disclosed information, like similar claims of many other Internet users, was unsuccessful. The California Court of Appeal found that because Moreno had disclosed the information online, she had no reasonable expectation of privacy in the Ode. The court stated: "Here, Cynthia publicized her opinions about Coalinga by posting the Ode on myspace.com, a hugely popular internet site. Cynthia's affirmative act made her article available to any person with a computer

That's right *****...envy me, because that's all you can do....literally, that is all you can do....talk nonsense ***** because you are nothing....So glad to be out of that damn town!

An Ode to Coalinga, THE COALINGA RECORD,
http://media.fresnobee.com/smedia/2010/09/15/11/OdeToCoalinga.source.prod_affiliate.8.pdf (last accessed January 30, 2011).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 1129.

⁷ *Id.*

and thus opened it to the public eye. Under these circumstances, no reasonable person would have had an expectation of privacy regarding the published material.”⁸

Moreno’s vague claim of “privacy” was relatively easy for the court to dismiss because the information had been self-disclosed to other people and thus was not private. Moreno’s disclosure was not uncommon; the most likely publisher of personal information in the Internet age is the person herself.⁹ The pervasiveness of electronically-mediated communication, such as social media, has transformed many Internet users into their own worst enemies. This problem with online disclosure is why the law of confidentiality and the context in which information is disclosed might be increasingly important to Internet users. Implied obligations of confidentiality can protect people revealing harmful information when explicit promises of confidentiality were not obtained.

Yet the concept of implied obligations of confidentiality has strengths and weaknesses that are not limited to its application to the Internet. Indeed, “offline” or general implied confidentiality is doctrinally unorganized, conceptually underdeveloped, and bereft of a unifying theory. In order to understand how implied obligations of confidentiality exist online, it is important to understand the more general tension between the disclosure and protection of information. Before the concept of implied confidentiality can be successfully applied online, its general application in offline disputes must be clear.

⁸ *Id.* at 1130.

⁹ Daniel Solove, *The Slow Demise of Defamation and Privacy Torts*, HUFFINGTON POST (Oct. 12, 2010, 11:14 am), http://www.huffingtonpost.com/daniel-j-solove/the-slow-demise-of-defama_b_758570.html; Lauren Gelman, *Privacy, Free Speech, and Blurry-Edged Social Networks*, 50 B.C. L. REV. 1315 (2009); James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1197 (2009).

It is a fact of modern life that individuals must disclose information that, if misused, could subject them to harm. Michael Harvey stated that “[i]n the course of a lifetime, an individual necessarily shares with others information that she would like to keep private.”¹⁰ Harvey gave as examples revealing one’s sexual orientation to a potential lover, seeking advice from a friend concerning an abortion, and asking parents for a loan for psychotherapy.¹¹ Support groups like alcoholics anonymous or dating services like match.com are social by design but also involve the disclosure of sensitive information. Harvey also noted that “sometimes individuals may find it necessary to reveal personal information to institutions. This information is thereafter [stored] in files or databases ranging from police reports indicating that the individual has been raped, to medical records reflecting her cosmetic surgery, to lists showing that she was a member of an AIDS patient therapy group.”¹² These disclosures are valuable to the individual, but once revealed, personal information is subject to misuse.

Professor Lior Strahilevitz also has discussed the misuse of personal information. He argued that “no one among us has guarded that embarrassing information with maximum diligence.... We all tell someone about our medical ailments. Virtually everyone feels the need to unburden himself by confessing embarrassing acts to another.”¹³ The sharing of intimate information with confidants is necessary for

¹⁰ G. Michael Harvey, Comment, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2385 (1992).

¹¹ *Id.*

¹² *Id.*

¹³ Lior Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 924 (2005).

emotional support and positively linked with strength of friendship.¹⁴ Some privacy theorists have suggested that intimate relationships would be impossible without an insistence on privacy.¹⁵ Strahilevitz summarized, “We are, in short, constantly disclosing embarrassing information about ourselves to third parties, yet we often harbor strong subjective expectations of privacy when doing so.”¹⁶

The rampant self-disclosure of personal information concomitant with an expectation of privacy is a problem because courts have struggled to determine whether and to what degree self-disclosed information is private.¹⁷ Strahilevitz stated, “Despite the centrality of this issue, the American courts lack a coherent, consistent methodology for determining whether an individual has a reasonable expectation of privacy in a particular fact that has been shared with one or more persons.”¹⁸

The number of privacy suits filed in the United States is declining sharply.¹⁹ However, it is unlikely this statistic reflects fewer perceived invasions of privacy.²⁰ Indeed, most evidence seems to suggest a rise in threats to privacy.²¹ The Federal Trade

¹⁴ Irwin Altman, et al., *Dialectic Conceptions in Social Psychology: An Application to Social Penetration and Privacy Regulation*, 14 ADVANCES IN EXPERIMENTAL PSYCHOLOGY 107 (1981). Altman’s “social penetration theory” posits, among other things, that the development of intimate relationships is dependent on the amount and degree of reciprocal self-disclosure.

¹⁵ Strahilevitz, *supra* note 13, at 923-24 (citations omitted).

¹⁶ *Id.* at 924.

¹⁷ *Id.* at 920-21.

¹⁸ *Id.*

¹⁹ Ed Finkel, *Libel-less*, ABA JOURNAL (Oct. 1, 2010, 2:50 a.m.), <http://www.abajournal.com/magazine/article/libel-less/>

²⁰ Daniel Solove, *The Slow Demise of Defamation and Privacy Torts*, HUFFINGTON POST (Oct. 12, 2010, 11:14 a.m.), http://www.huffingtonpost.com/daniel-j-solove/the-slow-demise-of-defama_b_758570.html; DANIEL SOLOVE, *THE FUTURE OF REPUTATION* (2007).

²¹ See, e.g., Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1466 (2000); DANIEL SOLOVE, *THE DIGITAL PERSON* 42 (2004); HELEN NISSENBAUM, *PRIVACY IN CONTEXT* (2009) (hereinafter

Commission and Congress have both made privacy an important agenda item.²² The media have reported countless recent privacy harms.²³ One reason the number of privacy suits might be declining is because the traditional legal remedies for violations of privacy have been largely ineffective in protecting privacy online.²⁴ The privacy torts, once thought to adequately address most privacy harms, have proven to be too inflexible or limited to adapt to changing notions of privacy.²⁵ Privacy protection legislation is a patchwork of statutes that can be easily circumvented by online user agreements that few read and even fewer fully understand.²⁶

referred to as “Context”); Helen Nissenbaum, *Protecting Privacy in the Information Age: The Problem of Privacy in Public*, 17 LAW & PHIL. 559 (1998); Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004) (hereinafter referred to as “Integrity”).

²² Katie Kaye, *Online Privacy: What to Expect in 2011*, CLICKZ (Jan. 3, 2011), <http://www.clickz.com/clickz/news/1934456/online-privacy-expect-2011>; Eliza Krigman, *Boucher Moving Forward On Privacy Legislation*, NATIONAL JOURNAL (Sept. 29, 2010, 11:09 AM), <http://techdailydose.nationaljournal.com/2010/09/boucher-moving-forward-on-priv.php>).

²³ Jeffery Rosen, *The Web Means the End of Forgetting*, THE NEW YORK TIMES MAGAZINE (July 21, 2010), http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=1&_r=1; see generally, POGO WAS RIGHT (January 8, 2011), <http://www.pogowasright.org/> (aggregating privacy stories from around the world); Kashmir Hill, THE NOT-SO-PRIVATE-PARTS (January 8, 2011), <http://blogs.forbes.com/kashmirhill/>.

²⁴ See, e.g., Solove, *supra* note 21, Nissenbaum, *supra* note 21; Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887 (2006); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000); Patricia Sanchez Abril, *A (My)Space of One’s Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 77 (2007); Strahilevitz, *supra* note 13.

²⁵ Neil Richards & Daniel Solove, *Prossers Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887 (2010); Solveig Singleton, *Privacy Versus the First Amendment: A Skeptical Approach*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 112-14 (2000) (discussing the hesitancy with which courts have applied tort of public disclosure); Volokh, *supra* note 24, at 1057-58 (explaining that parties who contract to maintain confidentiality have a reasonable expectation of privacy); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 311-20 (1983).

²⁶ Jonathan K. Sobel, et. al., *The Evolution of Data Protection as a Privacy Concern, and the Contract Law Dynamics Underlying It*, in SECURING PRIVACY IN THE INTERNET AGE 56 (Anupam Chander et al. eds. 2008).

Not all legal protections of personal information require a determination that an individual had a reasonable expectation of privacy. Confidentiality, or “the state of having the dissemination of certain information restricted,”²⁷ focuses not on the nature of the information as public or private, but rather the nature of the relationship or agreement between parties. Even if self-disclosed information is not “private,” it could be disclosed in confidence.

A number of scholars have looked to the law of confidentiality for more effective remedies for privacy harms than the much-maligned privacy torts.²⁸ Neil Richards and Daniel Solove argued, “Warren and Brandeis rejected confidentiality as too restrictive and narrow a basis for protecting privacy, but they did not envision just how flexibly the concept could be used.”²⁹ Susan Gilles observed that the privacy torts have “had a far from happy life.”³⁰ She noted that, given the bleak future of the privacy torts, “some have advocated that American courts take a second look at breach of confidence and assess its ability to protect privacy....”³¹

²⁷ BLACK'S LAW DICTIONARY, CONFIDENTIALITY (9th ed. 2009).

²⁸ See, e.g., McClurg, *supra* note 24; Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982); Harvey, *supra* note 10; Zimmerman, *supra* note 25; Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CAL. L. REV. 1133, 1174 (1992); Scott L. Fast, *Breach of Employee Confidentiality: Moving Toward a Common-Law Tort Remedy*, 142 U. PA. L. REV. 431 (1993); Pamela Samuelson, *Privacy As Intellectual Property?*, 52 STAN. L. REV. 1125 (2000); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193 (1998); Sharon Sandeen, *Relative Privacy: What Privacy Advocates Can Learn from Trade Secret Law*, 2006 MICH. ST. L. REV. 667, 697 (2006).

²⁹ Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 124, 173 (2007).

³⁰ Susan Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 7 (1995).

³¹ *Id.* (citing Zimmerman, *supra* note 25 (stating “More thought should also be given to increasing the use of legal sanctions for the violation of special confidential relationships, in order to give individuals greater control over the dissemination of personal information.”); Bezanson, *supra* note 28, at 1174 (stating “I suggest that the privacy tort may be formally interred, and that we look to the concept of breach of

From a doctrinal perspective, the law of confidentiality offers many benefits that are absent from the common law privacy torts and current privacy statutes. Under the law of confidentiality, courts can largely avoid the difficult question of whether information was private or offensive, and focus instead on whether a trust was breached. Additionally, the law of confidentiality is less constitutionally suspect than the disclosure tort, which has significant First Amendment limitations.³² The Supreme Court ruled in *Cohen v. Cowles Media* that the First Amendment does not bar an action for breach of a promise of confidentiality.³³

Although scholars have suggested that implied contracts of confidentiality or implied confidential relationships could serve as meaningful protections for harms related to the disclosure of sensitive information,³⁴ this area remains underdeveloped, particularly with respect to online communication. No scholarship has thoroughly analyzed the various factors relied upon by courts when analyzing implied agreements of confidentiality.

This void has seemingly resulted in an assumption that courts will know an implied obligation of confidentiality when they see it. This assumption is not helpful for those seeking to enforce obligations of confidentiality, particularly in a new environment such as the Internet. Consider Cynthia Moreno's self-disclosed online post intended for a small group of friends. The court seemingly failed to consider whether the information

confidence to provide legally enforceable protection from dissemination of identified types of personal information.”)).

³² See, e.g., Zimmerman, *supra* note 25; Singleton, *supra* note 25; Volokh, *supra* note 24; Gelman, *supra* note 9.

³³ 501 U.S. 663, 670 (1991).

³⁴ McClurg, *supra* note 24; Volokh, *supra* note 24; Richards & Solove, *supra* note 29, at 156-58, 180.

disclosed was subject to an implied obligation of confidentiality. Although Campbell never promised confidentiality to Moreno and Moreno did not utilize MySpace's privacy settings, a number of contextual factors hint at the confidential nature of the Ode, including the nature of the situation, the nature of the information in relation to the situation, the roles of the recipients of the information, and the implied terms regarding further dissemination under which the information was disclosed. According to Moreno's opening brief, "[E]ven when the ode was online, it did not identify Cynthia by her full name, and could only be read by those who wanted to view her journal; prior entries have produced little response, primarily from personal acquaintances."³⁵ A few days after the Ode was first published, Moreno reportedly took "prompt, affirmative steps to conceal the Ode, removing it from the online journal and extracting a promise from the *Record*'s editor that it would not be published."³⁶

Additionally, the MySpace terms of use prohibit "using or distributing any information obtained from the MySpace Services in order to harass, abuse, or harm another person or entity, or attempting to do the same."³⁷ Thus, by accessing the Ode subject to these terms, Campbell was potentially legally bound to confidence via an agreement with MySpace. Although the Ode might not ultimately be confidential, a potential claim for implied obligations of confidentiality was unexplored by Moreno and the court in this case.

³⁵ Appellant's Opening Brief at 13, *Moreno v. Hanford Sentinel*, 172 Cal. App. 4th 1125, 2008 WL 2959318.

³⁶ *Id.* at 18. According to the plaintiffs, the Ode was no longer online when Campbell disclosed it to the local newspaper. Appellants Reply Brief at 8, *Moreno v. Hanford Sentinel*, 172 Cal. App. 4th 1125, 2008 WL 5011945.

³⁷ *Terms of Use*, MYSPACE, <http://www.myspace.com/index.cfm?fuseaction=misc.terms#ixzz12AolEv1N> (last visited Oct. 12, 2010).

Other courts have found contextual factors relevant to privacy-related disputes. The United States District Court for the District of New Jersey found it significant that an online community claiming privacy in its content restricted access using privacy settings. The court found that “[t]his group is entirely private, and can only be joined by invitation,” and the fact that full access to the community was granted only upon accepting an invitation created a reasonable expectation of privacy for invited users.³⁸ Such reasonable expectations that information will not be disseminated lie at the heart of confidentiality law.

Obligations of confidentiality don’t have to be explicit. They can be implicit parts of confidential relationships or created through implied agreements of confidentiality. These obligations can be inferred from customs, norms, and other indicia of confidentiality beyond explicit confidentiality agreements. Yet no research has examined which contexts, if any, are important to courts when inferring obligations of confidentiality online or offline. Given the uncertainty surrounding privacy in the digital era, understanding how implied obligations of confidentiality are formed is more important than ever.

The primary purpose of this dissertation is to examine implied confidentiality disputes to determine precisely what courts consider important in the creation of implied obligations of confidentiality. This research examines court cases to determine the role that factors such as context, actors, nature of the information, and terms of disclosure play in creating judicially-recognized obligations of confidentiality. This dissertation examines both online and offline cases in order to fully analyze factors important in

³⁸ Pitettrylo v. Hillstone Restaurant Group, 2008 WL 6085437 at *6 (D.N.J.).

implied confidentiality. By clarifying and organizing the body of case law, the concept of implied obligations confidentiality can be consistently applied in numerous contexts, including where it is most needed – the Internet

A second purpose of this research is to contribute to the existing scholarship on Helen Nissenbaum's theory of privacy as contextual integrity. The theory of privacy as contextual integrity is the theory that privacy violations occur when the context in which information is disclosed is not respected when one person shares another's personal information. This application of Nissenbaum's theory both helps illuminate the way courts have dealt with questions of context in deciding online privacy and breach of confidentiality disputes and explores the usefulness of the theory for the study of implied obligations of confidentiality. This dissertation demonstrates which context-relative informational norms are significant enough to rise to the level of a legal obligation of confidentiality. It helps validate Nissenbaum's theory in this area by demonstrating courts' implicit, if inconsistent, consideration of context-relative informational norms.

This is an important research topic because many individuals routinely disclose personal information online with the belief that it will remain confidential and expecting they will have some legal recourse should their information be disseminated further. However, the traditional privacy remedies are largely ineffective for people whose personal information has been self-disclosed. In some contexts, such as on the Internet, explicit confidentiality agreements that protect the disclosers of information are rare. Individuals need a clarification of their rights, and courts need help navigating these largely unorganized legal waters.

It should be emphasized that although the Internet has brought this legal issue to the forefront, disputes regarding claims of implied obligations of confidentiality have challenged courts since the advent of the American common law. Thus, the topic of this dissertation is important not just for Internet-related law, but for all disputes involving implied obligations of confidentiality.

THE LAW OF CONFIDENTIALITY

The law of confidentiality could be an effective remedy for people who disclose personal information in confidence but then feel their privacy has been violated. Confidentiality has been explored well in the scholarly literature as both a normative and legal concept. Although implied confidentiality has been touched upon by some scholars,³⁹ it has yet to be well-conceptualized by legal scholars.

Harvey stated, “When one person shares information with another, and the confidant agrees not to divulge this information to third parties, an expectation of confidentiality arises.”⁴⁰ *Black’s Law Dictionary* defines confidentiality as “the state of having the dissemination of certain information restricted.”⁴¹ Ethicist Sissela Bok defined confidentiality as “the boundaries surrounding shared secrets and the process of guarding these boundaries. While confidentiality protects much that is not in fact secret, personal secrets lie at its core.”⁴²

Bok theorized that there were four moral rationales for confidentiality: 1) the need for individual autonomy over personal information; 2) the need people have for private

³⁹ See, e.g., McClurg, *supra* note 24.

⁴⁰ Harvey, *supra* note 10, at 2395.

⁴¹ BLACK’S LAW DICTIONARY, CONFIDENTIALITY (9th ed. 2009).

⁴² SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 119-21 (1983).

relationships and loyalties with friends, family, and organizations; 3) when a promise of silence is made, an obligation may exist for contractual reasons; and 4) professional confidentiality of doctors, attorneys, priests, and other professionals premised on the value to society in protecting the privacy of these relationships.⁴³ These justifications are reflected in confidentiality law through the recognition of confidentiality agreements and confidential relationships.

Obligations of confidentiality are found in multiple areas of the law including contracts for confidentiality,⁴⁴ the still-developing tort of breach of confidentiality,⁴⁵ evidentiary privileges regarding confidentiality,⁴⁶ procedural protections like protective orders to prevent the disclosure of embarrassing personal information in court records,⁴⁷ and statutes explicitly creating confidential relationships.⁴⁸ This dissertation will focus on implied agreements for confidentiality for specific disclosures and implied confidential relationships. In general, courts will impose an obligation of confidentiality when an individual or other entity voluntarily assumes, promises, or agrees to confidentiality with respect to designated information or enters into a confidential or fiduciary relationship.⁴⁹

⁴³ *Id.*

⁴⁴ *See, e.g.,* McClurg, *supra* note 24.

⁴⁵ *See, e.g.,* Vickery, *supra* note 28.

⁴⁶ *See, e.g.,* Richards & Solove, *infra* note 29.

⁴⁷ *See, e.g.,* FED. R. CIV. P. 26(c) (authorizing protective orders “to protect a party or person from annoyance, embarrassment [or] oppression”).

⁴⁸ *See, e.g.,* Fair Credit Reporting Act 15 U.S.C. 1681 *et. seq.*; Gramm-Leach Bliley Act 15 U.S.C. § 6801 *et. seq.*; Health Insurance Portability and Accountability Act 42 U.S.C. § 1301 *et. seq.*; Video Privacy Protection Act 18 U.S.C. § 2710(b)(2)(B) (2008).

⁴⁹ Gilles, *supra* note 30, at 15. Daniel Solove and Neil Richards succinctly summarized the law of confidentiality:

Confidentiality rules involve instances where one party has a legal duty not to disclose certain information it has acquired from another party. These rules include: (1) the breach

Confidentiality agreements are binding agreements that prohibit the disclosure of information. In an influential article on promises of confidentiality and privacy, Susan Gilles found that “[e]xpress written contracts, binding the signer to hold information confidential, have long been used in the commercial area, particularly by employers to prevent employees from revealing business secrets.”⁵⁰ She found that a “plaintiff who wishes to sue in contract for a breach of confidence must prove a contract exists—that there was an offer, acceptance and consideration. Where the court is faced with a written agreement of confidentiality, typically in the employment scenario, these elements rarely prove a problem for the plaintiff.”⁵¹

Of course, confidentiality agreements are not limited to commercial or employment contexts. These contracts are relied upon to protect anonymity, arbitration proceedings,⁵² settlement agreements, and trade secrets.⁵³ Additionally the contracts are used to protect sensitive information such as health information, sexual preference,

of confidentiality tort, which imposes liability for disclosing another person's confidential information if in breach of a duty of confidentiality; (2) the breach of an express or implied contract of confidentiality; (3) statutory provisions restricting the disclosure of confidential information; (4) protective orders preventing the disclosure of confidential information obtained during discovery; and (5) trade secret law restricting the disclosure of confidential information maintained by businesses. There are also other confidentiality rules not involving civil liability, such as criminal prohibitions on divulging certain kinds of confidential information, evidentiary privileges restricting testimony about confidential data, and statutory protections that limit the release of confidential information by certain companies or government agencies.

Daniel J. Solove & Neil H. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1669 (2009).

⁵⁰ *Id.*

⁵¹ *Id.* at 16 (citing JOHN E. MURRAY, MURRAY ON CONTRACTS, §§ 17, 18, 72 (2d rev. ed. 1974); RUDOLPH CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 14.04 (Louis Altman ed., 4th ed. 1994)); see also *Snepp v. United States*, 444 U.S. 507 (1980).

⁵² See, e.g., Amy Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211 (2006).

⁵³ See, e.g., Pamela Samuelson, *Privacy As Intellectual Property?*, 52 STAN. L. REV. 1125 (2000).

intimate feelings, and other similar pieces of personal information.⁵⁴ Even quasi-contractual promises of confidentiality can be effective. In the case of *Cohen v. Cowles Media*, the Minnesota Supreme Court affirmed that the use of the equitable doctrine of promissory estoppel could be utilized when individuals justifiably rely on a promise to their detriment.⁵⁵

Online user agreements often contain confidentiality clauses. Employee intranets,⁵⁶ online health and financial information sites,⁵⁷ and even social network sites obligate users to duties of confidentiality.⁵⁸ Duties of confidentiality may also extend to websites that promise to protect users' personal information. These promises can often be found in a website's privacy policy.⁵⁹

⁵⁴ See, e.g., *Hammonds v. Aetna Casualty & Sur. Co.*, 243 F. Supp. 793 (N.D. Ohio 1965); see also Neil Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 124 (2007).

⁵⁵ 478 N.W.2d 387 (Minn. 1992), *on remand from* 501 U.S. 663 (1991). Promissory estoppel is an equitable doctrine designed to enforce promises that are detrimentally relied upon even though the formal elements of a contract might not be present. See, e.g., Woodrow Hartzog, *Promises and Privacy: Promissory Estoppel and Confidential Disclosure in Online Communities*, 82 TEMP. L. REV. 891 (2009).

⁵⁶ See, e.g., *Terms and Conditions*, LINMARK GROUP LIMITED EMPLOYEE INTRANET, http://intranet.linmark.com/web/terms_and_conditions.html (last accessed August 11, 2010) (stating that "[t]he distributing, printing, capturing and sharing of any information from the Intranet with individual(s) other than authorized Intranet user(s) is straightly prohibited without prior management approval").

⁵⁷ See, e.g., *Terms of Use*, HOME BUYERS MARKETING INC: LOAN OFFICER, <http://www.hbmnet.com/TermsOfUse.asp?nogreet=1> (last visited Aug. 11, 2010) (stating that "[y]ou will only have the right to use the HBM Confidential Information as provided for in this Agreement or as approved by HBM in writing and you agree not to provide any person with your password or access to this Website or use any HBM Confidential Information for any other purpose").

⁵⁸ See, e.g., *Privacy Policy*, CARING BRIDGE, <http://www.caringbridge.org/privacy> (stating "Every member of a caring community, including the Author, family and all Visitors, is responsible for maintaining the confidentiality of the web site address ("URL") of a CaringBridge Site in accordance with the Author wishes.").

⁵⁹ *Saffold v. Plain Dealer Publ'n Co.*, CV 10 723512, Cuyahoga County Court of Common Pleas (filed April 7, 2010); *McVicker v. King*, No. 09-cv-436 (W.D. Pa. Mar. 3, 2010); *Sedersten v. Taylor*, 2009 U.S. Dist LEXIS 114525 (Case No. 09-3031-CV-S-GAF) (W.D. Mo. Dec. 9, 2009).

Obligations of confidentiality also can arise from implied agreements and can be an implicit part of a fiduciary relationship. Implied agreements can arise “in fact” and “in law.” Andrew McClurg stated, “Implied contracts that arise in law are also called ‘quasi-contracts.’ Implied contracts arising in fact are based on the apparent intention of the parties, whereas quasi-contracts are imposed by law without regard to the intentions of the parties to create or not create a contract.”⁶⁰ In other words, implied confidentiality agreements “in fact” arise when individuals *actually* objectively agree to confidentiality, but the understanding is implied in lieu of an explicit agreement. Implied confidentiality agreements in law are actually not “agreements” between the parties at all, but rather an imposition of confidentiality by the state in order to do justice as a matter of public policy.⁶¹

This dissertation examines the role of context in both implied-in-fact and implied-in-law agreements, though that distinction is blurry at times. Because implied-in-fact contracts draw heavily from context, these agreements are a greater focus of analysis than implied-in-law agreements, which draw from a legal sense of fairness. Like McClurg’s research, this dissertation analyzes confidential agreements that are “founded upon a meeting of minds, which, although not embodied in an express contract, [are] inferred, as a fact, from conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding.”⁶² Of course, a plaintiff wishing to recover under a breach of implied contract of confidentiality theory must still prove the essential elements of a

⁶⁰ McClurg, *supra* note 24, at 916.

⁶¹ *Id.*

⁶² *Id.* at 917 (quoting *Balt. & Ohio Ry. Co. v. United States*, 261 U.S. 592, 597 (1923)).

contract – offer, acceptance, and consideration.⁶³ Gilles found that where courts are faced with written agreements of confidentiality, the elements of contract formation rarely prove a problem for the plaintiff.⁶⁴ However, confidentiality agreements need not be in writing to be enforceable.

Alan Garfield noted that “even when parties do not explicitly contract for a promise of silence, courts will sometimes imply such a promise, especially when there is a pre-existing contractual relationship.”⁶⁵ Garfield found that “this type of implication most often occurs when a party reveals personal information to a professional, particularly if the ethical code of the profession mandates that the professional respect the client’s privacy.”⁶⁶ Garfield noted courts are willing to infer a promise of confidentiality as a component of the contractual relationship involving professionals such as doctors, psychologists, and bankers.⁶⁷ Garfield warned that “[o]utside of these special relationships, it is far from clear that a court would be willing to imply a promise of confidentiality.”⁶⁸

Gilles found that “American courts have also reacted favorably to claims that an existing contract contains an implied guarantee of confidentiality. Here there is no doubt that a contract exists between the parties, but the contract lacks any express term

⁶³ Gilles, *supra* note 30, at 16 (citing JOHN E. MURRAY, MURRAY ON CONTRACTS §§ 17, 18, 72 (2d rev. ed. 1974)).

⁶⁴ *Id.*

⁶⁵ Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 281 (1998).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

requiring parties to keep the information secret.”⁶⁹ Here the nature of the relationship between the parties becomes important. Gilles found that “[i]n numerous cases, courts have held that doctors’ and psychiatrists’ contracts with their patients contain an implied term requiring that information disclosed by the patient be kept confidential. Some courts have also implied such a pledge of confidentiality into a bank’s contract with its depositor.”⁷⁰

However, courts will infer terms of confidentiality only when such terms are apparent from contextual factors such as other “terms of the agreement, the parties’ conduct, the course of dealing or usage and from consideration of justice.”⁷¹ Courts are reluctant to infer confidentiality from oral contracts and informal settings, which often lack expectations of confidentiality. Gilles noted that “it appears that the further we move from the commercial setting, the more difficult it becomes for a breach of confidence plaintiff to convince a court that an oral promise of confidentiality constitutes an enforceable contract.”⁷²

In addition to agreements for confidentiality, an obligation of confidentiality may be created by entering into a special kind of confidential relationship known as a “fiduciary relationship.” The law of equity has traditionally designated certain relations as “fiduciary.”⁷³ Gilles wrote that “[w]here such a relation exists, a fiduciary is under a duty ‘to act for the benefit of the other party to the relation as to matters within the scope

⁶⁹ Gilles, *supra* note 30, at 18.

⁷⁰ *Id.* at 17-18.

⁷¹ *Id.* at 18.

⁷² *Id.* at 19.

⁷³ *Id.* at 39.

of the relation.’ This duty, often characterized as the ‘duty of loyalty,’ includes an obligation not to reveal information.”⁷⁴

According to Roy Ryden Anderson:

The essence of a confidential relationship is fiduciary obligation.... Fiduciary obligation is the highest order of duty imposed by law. In the relationship with the principal, the beneficiary of the relationship, the fiduciary must exercise utmost good faith and candor, must disclose all relevant information, and must not profit from the relationship without the knowledge and permission of the principal. The fiduciary must make every effort to avoid having his own interests in conflict with those of the principal, and, when conflict is unavoidable, the fiduciary must place the interests of the principal above his own. These principles are both basic and uncompromising.⁷⁵

Like confidentiality agreements, the existence of a confidential relationship is a question of fact.⁷⁶ Anderson found that “confidential relationships have been labeled ‘fact-based’ fiduciary relationships to distinguish them from formal [fiduciary relationships].”⁷⁷ Although professional relationships such as doctor/patient and attorney/client relationships are the most common types of confidential relationships, courts have found many kinds of relationships to be fiduciary, including friendships, business relationships, and familial relationships.⁷⁸

Gilles wrote that “[e]quity has never bound itself by any hard and fast definition of the phrase ‘confidential relation’ and has not listed all the necessary elements of such a relation, but has reserved discretion to apply the doctrine whenever it believes that a

⁷⁴ *Id.* at 39-40 (citations omitted).

⁷⁵ Roy Ryden Anderson, *The Wolf at the Campfire: Understanding Confidential Relationships*, 53 SMU L. Rev. 315, 317 (2000).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

suitable occasion has arisen.”⁷⁹ Gillis did identify some factors that courts consider in determining whether a confidential relation exists: “length of time of the reliance, a disparity in the positions of the parties, and a close relationship between the parties. It is ‘great intimacy, disclosure of secrets, entrusting of power, and superiority of position’ that evidence a confidential relation.”⁸⁰

The Supreme Court of Texas held that “[a]n information relationship may give rise to a fiduciary duty where one person trusts in and relies on another, whether the relation is a moral, social, domestic, or purely personal one.”⁸¹ However, these duties are not imposed lightly, and not every relationship involving trust and confidence is a fiduciary one.⁸² Anderson identified three limitations on establishing a fact-based fiduciary relationship:

First, the alleged relationship must be found to have existed prior to the transaction at issue. Second, the reliance by the aggrieved party that the other would act toward him as a fiduciary must not have been subjective. Third, the alleged confidential relationship may not be established solely by private agreement, but must arise *sui generis* from the nature of the relationship.⁸³

Thus, while confidential obligations *can* be created by contract, fiduciary relationships require more than a contract. This is another instance where context informs confidentiality law. Additionally, confidentiality agreements and fiduciary relationships

⁷⁹ Gilles, *supra* note 30, at 41.

⁸⁰ *Id.* (quoting GEORGE G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 482 at 281 (2d ed. 1981).

⁸¹ Schlumberger Tec. Corp. v. Swanson, 959 S.W.2d 171, 176-77 (Tex. 1997).

⁸² *Id.*; see also ETHAN J. LEIB, FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP--AND WHAT THE LAW HAS TO DO WITH IT (2011).

⁸³ Anderson, *supra* note 75, at 324.

can be simultaneously present. In *Snepp v. United States*,⁸⁴ the federal government successfully sued an ex-employee who published a book about his CIA experience for both breach of contract and breach of fiduciary duty.⁸⁵

Breach of these confidential relationships sometimes gives rise to liability under the breach of confidentiality tort. This tort, while very developed in England, is limited in the United States.⁸⁶ Garfield found that “[c]ourts impose liability under the tort when a person discloses information that he received in confidence.”⁸⁷ The tort isn’t limited to professional relationships. According to Garfield, liability can also occur “in an informal setting if the party receiving the information either explicitly or implicitly agrees to keep the information confidential.”⁸⁸ Thus, implicit confidentiality agreements have contractual and tortious implications.

Conceptually, confidentiality seems to be a more accurate reflection of modern notions of privacy than the maligned “secrecy paradigm,” which holds that only secret or unknown information can be deemed “private.”⁸⁹ Humans are social beings who routinely disclose information – even very sensitive information – to trusted individuals.

⁸⁴ 444 U.S. 507 (1980).

⁸⁵ *Id.* at 508. The Supreme Court found that Snepp had “violated his trust” by publishing his book, and the Court imposed a constructive trust on his profits. *Id.* at 516.

⁸⁶ Harvey, *supra* note 10; Gilles, *supra* note 30; Richards & Solove, *supra* note 29, at 156-58, 180; PAUL STANLEY, *THE LAW OF CONFIDENTIALITY: A RESTATEMENT* (2008).

⁸⁷ Garfield, *supra* note 65, at 341.

⁸⁸ *Id.* (citing *Balboa Ins. Co. v. Trans Global Equities*, 267 Cal. Rptr. 787, 797 (Cal. Ct. App. 1990) (stating that a duty of confidence arises when information is “offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others” (quoting *Farris v. Enberg*, 158 Cal. Rptr. 704, 711 (Cal. Ct. App. 1979))); *Tele-Count Eng’rs, Inc. v. Pacific Tel. & Tel. Co.*, 214 Cal. Rptr. 276 (Cal. Ct. App. 1985)(same)).

⁸⁹ *See, e.g.*, CHARLES FRIED, *AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE* (1970); Richards & Solove, *supra* note 29, at 156-58, 180.

Whereas a conception of privacy as secrecy only considers the nature of the information, confidentiality looks to the relationship between the parties and the context of disclosure. This emphasis on context underlies the theoretical framework for this dissertation: confidentiality as contextual integrity.

CONTEXTUAL INTEGRITY: A CONCEPTUAL FRAMEWORK

Generally, courts look to context when analyzing implied obligations of confidentiality. Yet implied confidentiality is doctrinally unorganized, conceptually underdeveloped, and bereft of a unifying theory. This dissertation adopts the emerging theory of privacy as contextual integrity as a framework for analyzing courts' treatment of online and offline implied obligations of confidentiality. Because confidentiality is generally considered a type of privacy,⁹⁰ this framework for privacy analysis is well-suited for analyzing questions about the context surrounding promises of confidentiality.

In short, the theory of privacy as contextual integrity is the theory that privacy violations occur when “context-relative informational norms”⁹¹ are not respected when sharing information. According to its creator, Helen Nissenbaum, the framework of contextual integrity provides that “finely calibrated systems of social norms, or rules, govern the flow of personal information in distinct social contexts (e.g., education, health care, and politics).”⁹² Nissenbaum stated that these norms “define and sustain essential activities and key relationships and interests, protect people and groups against harm, and balance the distribution of power.”⁹³ Nissenbaum stated that context-relative

⁹⁰ See Daniel Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477 (2006).

⁹¹ Nissenbaum, Context, *supra* note 21, at 3.at 129.

⁹² *Id.* at 3.

⁹³ *Id.*

informational norms are simultaneously reflections of expectations of privacy in certain contexts and normative prohibitions on the further dissemination of that information.

Developed as a model of informational privacy, contextual integrity is defined by Nissenbaum as “compatibility with presiding norms of information appropriateness and distribution.”⁹⁴ Specifically, Nissenbaum posited:

[W]hether a particular action is determined a violation of privacy is a function of several variables, including the nature of the situation, or context; the nature of the information in relation to that context; the roles of agents receiving information; their relationships to information subjects; on what terms the information is shared by the subject; and the terms of further dissemination.⁹⁵

Nissenbaum has also referred to these variables simply as 1) contexts; 2) actors; 3) attributes; and 4) transmission principles.⁹⁶ Nissenbaum posited that context-relative informational norms are characterized by these variables, which “prescribe, for a given context, the types of information, the parties who are the subjects of the information as well as those who are sending and receiving it, and the principles under which this information is transmitted.”⁹⁷

Nissenbaum defined context as “structured social settings with characteristics that have evolved over time...and are subject to a host of causes and contingences of purpose, place, culture, historical accident, and more.”⁹⁸ Regarding actors, Nissenbaum posited that three roles must be examined: “senders of information, recipients of information, and

⁹⁴ Nissenbaum, Integrity, *supra* note 21, at 155.

⁹⁵ *Id.*

⁹⁶ *Id.* at 140.

⁹⁷ *Id.* at 141.

⁹⁸ *Id.* at 130.

information subjects.”⁹⁹ The third variable, attributes of information types, which will be referred to as “the nature of the information,” was defined by Nissenbaum as “the nature of the information in question: not only who it was about, and to whom and from whom it was shared, but what it was about...the ‘kind and degree of knowledge.’”¹⁰⁰ The final variable, transmission principles, which will be referred to as the “terms of disclosure,” are constraints on the flow of information from party to party in a context. According to Nissenbaum, the terms of disclosure in informational norms express the conditions under which such transfers ought (or ought not) to occur.¹⁰¹ These four variables guide the analysis in this dissertation regarding when and how courts consider implied obligations of confidentiality.

Technology has made it easy for individuals to violate context-relative informational norms. The Internet has removed most meaningful barriers to the collection, storage, and dissemination of information. Nissenbaum stated, “Information technologies alarm us when they flout these informational norms—when, in the words of the framework, they violate contextual integrity.”¹⁰²

Data-brokerage is a prime example of a potential violation of contextual integrity online. Social media and Web 2.0 websites encourage the disclosure of information within a particular context: Facebook users share information with their “friends;” Google users search for information by entering terms into a search engine; Match.com users create profiles to share with potential intimates. Yet this information, once shared

⁹⁹ *Id.* at 141.

¹⁰⁰ *Id.* at 143.

¹⁰¹ *Id.* at 145.

¹⁰² *Id.*

for its original purpose, is stored by websites and later sold to third parties such as commercial data brokers, marketers and other businesses, law enforcement agencies, and the federal government.¹⁰³ Once this information is transferred to third parties, it exists in a different context – as part of a digital dossier or other aggregated chunk of data – and can be used for purposes far removed from the purpose for which the information originally was disclosed. Thus, the integrity of the original context, for example, disclosure to Facebook friends who know the user, has been violated because that information was shared with strangers.

The central tenet of contextual integrity provides that “there are no arenas in life not governed by norms of information flow.... Almost everything – things that we do, events that occur, transactions that take place – happens in a context not only of place but of politics, convention, and cultural expectation.”¹⁰⁴ Because Nissenbaum’s theory applies to norms of information flow, it is well suited to frame this research, which analyzes when courts should infer obligations that restrict the flow of information by looking at context.

Nissenbaum originally offered her theory of privacy as contextual integrity to determine how privacy was *breached*. Her theory is used in this dissertation to frame the *creation* (or lack thereof) of the privacy-related obligations of confidentiality by identifying the context-relative information norms considered by courts. Nissenbaum posits “two types of information norms: norms of appropriateness, and norms of flow or

¹⁰³ Chris Hoofnagle, *Big Brother's Little Helpers: How Choicepoint and Other Commercial Data Brokers Collect, Process, and Package Your Data for Law Enforcement*, 29 N.C. J. INT'L L. & COM. REG. 595 (2004).

¹⁰⁴ Nissenbaum, *Context*, *supra* note 21, at 129-48.

distribution. Contextual integrity is maintained when both types of norms are upheld, and it is violated when either of the norms is violated.”¹⁰⁵

Nissenbaum has applied contextual integrity to a number of controversial privacy questions, including:

Whether it is morally wrong for Google Maps’ Street view to include images of identifiable individuals (or their possessions) without permission, whether the FBI should be allowed to coerce librarians to divulge a library’s lending logs, whether Internet service providers are entitled to track customers’ clickstreams and sell them at will, whether one may post a tagged group photograph of others on one’s Facebook page, whether insurance companies violate client privacy when they generate massive databases pooled from information about their clients, [and] whether the police should be permitted to erect covert license plate recognition systems at public intersections....¹⁰⁶

Regarding social media and the self-disclosure of information, Nissenbaum asked, “[W]hy, if information is already ‘out there’ in some sense, is it problematic when it is ‘out there’ in another place?”¹⁰⁷ According to Nissenbaum, the answer is that “another place” is a different context, and that point is critical to an individual’s expectations of privacy. Nissenbaum rejected the idea that social network sites like Facebook were devoid of entrenched norms.¹⁰⁸ Nissenbaum stated, “Although of course the medium of social networking sites, generally, and design characteristics (configurations) of specific sites shape the nature of interactions to some degree, these interactions are also governed

¹⁰⁵ *Id.* at 138.

¹⁰⁶ Nissenbaum, Context, *supra* note 21, at 10.

¹⁰⁷ *Id.* at 62. Also inherently problematic with the self-disclosure of information online is what Nissenbaum and other scholars have dubbed “the privacy paradox”: “people appear to want and value privacy, yet simultaneously appear not to value or want it.” *Id.* at 104. According to Nissenbaum, privacy skeptics tend to believe that “[w]hat people do counts more than what they say, and what they do expresses quite the opposite of what is indicated by the polls. In almost all situations in which people must choose between privacy and just about any other good, they choose the good.” *Id.* at 105.

¹⁰⁸ *Id.* at 223.

by norms of respective social contexts and acquire significance from their occurrences within them.”¹⁰⁹

According to Nissenbaum, “The contexts these sites serve are as variable as the available sites themselves, of which there are at least 350 [in 2010], and some of the variation is likely to correlate with the particular demographic that specific sites have historically served.”¹¹⁰ The same can be said for all online activity. The norms of a closed social network site like the Online Intergroup of Alcoholics Anonymous are likely to differ than those on Facebook. This dissertation asks whether courts have recognized any such distinction.

Contextual integrity – informational norms that restrict the flow of information in certain contexts – can serve as the basis for implied obligations of confidentiality. If all users of an online community realize the norm of the group is to maintain confidentiality, even if that it is never explicitly stated, then individuals might be expected to rely on this norm when disclosing intimacies. This reliance can be the basis for courts to find an obligation of confidentiality.¹¹¹ Thus context might serve courts better in privacy-related disputes than the current analysis engaged in by judges ascertaining reasonable expectations of privacy in information.

Given the ineffectiveness of traditional privacy remedies and the exponential growth of self-disclosed information on the Internet, the law of confidentiality has never been more relevant. Yet explicit agreements for confidentiality online are rare. Websites

¹⁰⁹ *Id.* at 224.

¹¹⁰ *Id.* at 224.

¹¹¹ *See, e.g.,* Hartzog, *supra* note 55.

largely claim to dictate the terms of user privacy in their terms-of-use agreements and privacy policies. These terms cannot be negotiated and are drafted to favor websites.

Additionally, Internet users are limited by website design – they can only interact in ways the software code allows. But obligations of confidentiality are not created only by explicit agreements and relationships. By examining how, if at all, courts consider the context, actors, nature of the information, and terms of disclosure, this dissertation determines to what extent implied obligations of confidentiality could be a legitimate concept in protecting user privacy in the Internet age.

A contextual approach to implied obligations of confidentiality has gained gradual support from scholars. While the privacy literature is rich with eulogies for the traditional privacy remedies because they are ineffective in an online environment, fewer suggest confidentiality law as an answer. Furthermore, no literature has squarely examined what factors are important to courts that are called upon to recognize an obligation of confidentiality.

LITERATURE REVIEW

The question of when confidentiality should be implied has not been well-developed by scholars. While courts and scholars have developed general rules for such a finding, such as “whenever a reasonable person would conclude an agreement of confidentiality was implied” or “whenever a fiduciary relationship exists,” there is little analysis beyond these guiding principles. However, the broader concepts related to the law of confidentiality have been well-addressed, and the literature on these subjects is relevant for implied confidentiality. Confidentiality is a hybrid legal concept that often utilizes contractual obligations and fiduciary responsibilities to protect an individual’s

privacy. Thus, the scholarly writing about implied obligations of confidentiality exists within the larger body of literature about privacy, contracts, fiduciary relationships, and technology.

The notion that traditional legal remedies for the protection of privacy are ineffective in the Internet age seems to dominate privacy law literature. Privacy scholars have suggested modifying the privacy torts,¹¹² passing new legislation, altering existing statutes,¹¹³ turning to confidentiality law,¹¹⁴ or simply giving up on the concept of privacy and embracing our new transparent society.¹¹⁵ Of those privacy law scholars who have offered confidentiality law as a viable remedy for privacy harms, few have progressed past that initial suggestion. This is particularly true for the application of confidentiality law to online disputes.

The same can be said for contract scholars. While confidentiality agreements are well-covered in the contract law literature with respect to their enforceability and interpretation, few contract scholars have examined the creation of implied confidentiality agreements online. Nevertheless, contract theories, particularly the

¹¹² See, e.g., Patricia Sanchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J. LAW & TECH. 1 (2007); Sarah Ludington, *Reining in the Data Traders: A Tort for the Misuse of Personal Information*, 66 MD. L. REV. 140 (2006); Joseph Elford, *Trafficking in Stolen Information: A "Hierarchy of Rights" Approach to the Private Facts Tort*, 105 YALE L. J. 727 (1995).

¹¹³ See, e.g., Jacqueline D. Lipton, *"We the Paparazzi": Developing a Privacy Paradigm for Digital Video*, 95 IOWA L. REV. 919 (2010).

¹¹⁴ See, e.g., Richards & Solove, *supra* note 29; Gilles, *supra* note 30, at 15; McClurg, *supra* note 24; Steven Bibas, *A Contractual Approach to Data Privacy*, 17 HARV. J.L. & PUB. POL'Y 591, 609 (1994); Vickery, *supra* note 28; Fast, *supra* note 28; Harvey, *supra* note 10; Jay Weiser, *Measure of Damages for Violation of Property Rules: Breach of Confidentiality*, U. CHI. L. SCH. ROUNDTABLE 75 (2002).

¹¹⁵ See, e.g., DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN FREEDOM AND PRIVACY?* (1998).

empirical view of contract¹¹⁶ and the relational theory of contract,¹¹⁷ are well-suited for a contextual analysis of implied obligations. The theme throughout the privacy, contract law, and fiduciary relationship literature is that privacy law and, specifically, the law of confidentiality must respond to the threats wrought by technology.

Privacy and Confidentiality in the Pre-Digital Age. The scholarly literature reveals that most privacy laws are largely a reaction to problems caused by new technologies. However, most scholars have noticeably neglected to include confidentiality law in their analysis how of technology has challenged application of privacy laws. The scholarly literature on privacy is important because it helps frame the analysis of Nissenbaum's four variables that shape informational norms: context, actors, nature of the information, and the terms of disclosure.

While confidentiality itself is lacking a unifying theory, the concept of confidentiality is part of a number of conceptualizations of privacy. Privacy has been the subject of great theoretical debate in the scholarly literature. Prior to mass adoption of computers and Internet use, most privacy literature focused heavily on the theoretical aspects and conceptualizations of privacy. These conceptualizations of privacy, often contoured by the threat to privacy posed by the mass media, included the right to be let alone and control over personal information. Of these conceptualizations, control over information is the most relevant regarding confidentiality law.

¹¹⁶ See, e.g., Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

¹¹⁷ IAN MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980).

In 1890, Samuel Warren and Louis Brandeis wrote “The Right to Privacy,”¹¹⁸ which is the seminal American scholarly piece on privacy. It is, according to some scholars, the most influential law review article ever written.¹¹⁹ In “The Right to Privacy,” the young attorneys Warren and Brandeis helped structure the conceptual landscape of privacy; gave birth to the four privacy torts; and shaped the development of statutory, constitutional, and other privacy protections.¹²⁰ Warren and Brandeis’s conceptualization of privacy was the memorable and evocative “right to be let alone.”¹²¹

The scholars also arguably stunted the growth of confidentiality law in the United States. Warren and Brandeis explicitly deemed contracts inadequate to protect individuals from the new privacy violations wrought by the technology of the late 1800s such as the handheld camera. Although the scholars recognized the utility of contracts, they asserted that because “modern devices afford abundant opportunities for the perpetration of [privacy harms] without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation.”¹²²

Professors Richards and Solove observed that “Warren and Brandeis pointed American common law in a new direction, toward a more general protection of ‘inviolable

¹¹⁸ 14 HARV. L. REV. 193 (1890).

¹¹⁹ Harry Klaven, Jr., *Privacy in Tort Law, -Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 327 (1966) (calling *The Right to Privacy* “the most influential article of all.”); see also, e.g., Bezanson, *supra* note 28; Zimmerman, *supra* note 28; Solove & Richards, *supra* note 29.

¹²⁰ Richards & Solove, *supra* note 29, at 125.

¹²¹ 14 HARV. L. REV. 193, 205 (1890).

¹²² *Id.* They went on to state “for instance, the state of photographic art was such that one’s picture could seldom be taken without consciously ‘sitting’ for the purpose, the law of contract or trust might afford the prudent man sufficient safeguards against the improper circulation of his portrait; but since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to.” *Id.* at 211.

personality’ against invasions by strangers.”¹²³ Richards and Solove also observed that Dean William Prosser “cemented this change of direction in his 1960 article ‘Privacy’ and in the *Second Restatement of Torts*, for which he served as a reporter.”¹²⁴ The professors said that “Prosser not only established American privacy law as four related torts, but also minimized the importance of confidentiality as a concept in American law.”¹²⁵

Although “the right to be let alone” became the most commonly accepted concept of privacy, a number of pre-Internet scholars conceptualized it differently. Professor Charles Fried theorized that privacy was “control over knowledge about oneself.”¹²⁶ Fried’s thesis was that “privacy is not just one possible means among other to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust.”¹²⁷ He argued that “[p]rivacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable.”¹²⁸

This conceptualization is much more aligned with the intrinsic nature of confidentiality than the right to be let alone. That is to say, confidentiality, defined here as “the state of having the dissemination of certain information restricted,”¹²⁹ is more

¹²³ Richards & Solove, *supra* note 29, at 125.

¹²⁴ *Id.*; see also Solove & Richards, *supra* note 25.

¹²⁵ *Id.*

¹²⁶ Charles Fried, *Privacy*, 77 YALE L. J. 475, 483 (1968); see also CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 142 (1970).

¹²⁷ *Id.* at 477.

¹²⁸ *Id.*

¹²⁹ BLACK’S LAW DICTIONARY, CONFIDENTIALITY (9th ed. 2009)

effective at furthering respect, love, friendship, and trust than a “right to be let alone,” which focuses on secrecy, solitude, and inviolate personality. Indeed, a confidentiality agreement could be seen a legal and normative manifestation of “control over knowledge about oneself.”

Several scholars in disciplines other than law have embraced the concept of privacy as control over information. Alan Westin helped popularize the concept of privacy as control in his book *Privacy and Freedom*.¹³⁰ As a general premise, “Westin’s theory of privacy speaks of ways in which people protect themselves by temporarily limiting access to themselves by others.”¹³¹ More specifically, according to Westin:

Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others. Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small group intimacy or, when among large groups, in a condition of anonymity or reserve.¹³²

Westin’s theory focuses on the need for privacy to help individuals emotionally adjust to life within a society. “He describes privacy both as a dynamic process (i.e., we regulate privacy so it is sufficient for serving momentary needs and role requirements) and as a non-monotonic function (i.e., people can have too little, sufficient, or too much privacy).”¹³³ Psychologist Irwin Altman also developed one of the most prominent and widely accepted theories regarding privacy as control. In Altman’s book *The*

¹³⁰ ALAN WESTIN, *PRIVACY AND FREEDOM* (1967).

¹³¹ Stephen Margulis, *On the Status and Contribution of Westin's and Altman's Theories of Privacy*, 59(2) JOUR. OF SOCIAL ISSUES 411, 412 (2003)

¹³² Westin, *supra* note 130, at 7.

¹³³ Margulis, *supra* note 131, at 412.

Environment and Social Behavior,¹³⁴ he posits that privacy is the “the selective control of access to the self.”¹³⁵

Although privacy scholarship before the Internet continually wrestled with the challenges presented by technology, the privacy literature was not focused on technology. Media defendants were the focus of most of the discussion surrounding the disclosure, false light, and intrusion torts.¹³⁶ Advertisers were the most likely infringers of the right to publicity.¹³⁷ Thus, threats to privacy were not as pervasive because publication was slower and less widespread and mostly done by journalists and corporations. Predictably, the literature was sparse when compared to the literature produced after the digital revolution. The Internet age brought about a dramatic change in the quantity and nature of privacy scholarship.

Privacy in the Internet Age. Digital communication and the Internet are the reasons confidentiality law has an increased significance in the privacy law literature. Generally, scholars have found that traditional privacy law remedies are ineffective on the Internet. However, online confidentiality has been analyzed differently by scholars. This difference between scholarly accounts of privacy and confidentiality in the Internet age underscores the need to further develop a legal conceptualization of confidentiality.

Professor Neil Richards stated that “[o]ne of the most interesting developments in the legal literature on privacy over the past decade has been the emergence of what I

¹³⁴ IRWIN ALTMAN, *THE ENVIRONMENT AND SOCIAL BEHAVIOR* (1975).

¹³⁵ *Id.*

¹³⁶ Vickery, *supra* note 28.

¹³⁷ Nancy S. Kim, ‘*Wrap Contracts and Privacy*, Association for the Advancement of Artificial Intelligence Press Technical Report SS-10-05, 2010, at 1, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1580111 (last visited July 2, 2010).

would like to refer to as the ‘Information Privacy Law Project.’ This term refers to a collective effort by a group of scholars to identify a law of ‘information privacy’ and to establish information privacy law as a valid field of scholarly inquiry.”¹³⁸ Richards found that, generally, “Information Privacy Law Project” scholars “base their work either expressly or implicitly upon a binary distinction between ‘decisional privacy’ and ‘information privacy,’ ... approach the problems of privacy from a technological or intellectual property background, and have been interested in the technical aspects of information regulation in addition to its jurisprudential implications.”¹³⁹

Solove is one of the most prominent scholars in the Information Privacy Law Project.¹⁴⁰ He has had a significant impact on the conceptualization of privacy and its relationship with technology. Solove rejected the conceptualization of privacy as a unitary concept with a uniform value that is unvarying across different situations.¹⁴¹ Following philosopher John Dewey’s view that philosophical inquiry should begin as a response to dealing with life’s problems and difficulties, Solove argued that “the focal point should be on privacy *problems*” not on the fruitless search for what privacy “is.”¹⁴² Solove argued that privacy should be determined on the basis of its importance to society,

¹³⁸ Neil Richards, *The Information Privacy Law Project*, 94 GEO. L. J. 1087, 1089 (2006).

¹³⁹ *Id.*

¹⁴⁰ See, e.g., DANIEL SOLOVE, UNDERSTANDING PRIVACY (2008) (hereinafter “UNDERSTANDING”); Solove, *supra* note 21; Daniel Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087 (2002); Daniel Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L. J. 967 (2003); Solove, *supra* note 90; Richards & Solove, *supra* note 29, at 125; Daniel Solove, “*I’ve Got Nothing to Hide*” and Other Misunderstandings of Privacy, 44 SAN DIEGO L. REV. 745 (2007); Daniel Solove, *Data Mining and the Security-Liberty Debate*, 74 U. CHI. L. REV. 343 (2008); Solove & Richards, *supra* note 49; Solove & Richards, *supra* note 25.

¹⁴¹ SOLOVE, UNDERSTANDING, *supra* note 140, at 8.

¹⁴² *Id.*

not in terms of individual rights.¹⁴³ He stated: “When we protect privacy, we protect against disruptions to certain activities. A privacy invasion interferes with the integrity of certain activities and even destroys or inhibits some activities. Instead of attempting to locate the common denominator of these activities, we should conceptualize privacy by focusing on the specific types of disruption.”¹⁴⁴

To further this focus on specific types of disruption, Solove proposed a taxonomy of privacy – “a framework for understanding privacy in a pluralistic and contextual manner.”¹⁴⁵ His taxonomy was grounded in the different kinds of privacy-infringing activities that can be sorted into four principal groups: (1) information collection, (2) information processing, (3) information dissemination, and (4) invasion.¹⁴⁶ Solove stated that the taxonomy was “an attempt to identify and understand the different kinds of socially recognized privacy violations.”¹⁴⁷

Solove identified breach of confidentiality as one of the recognized privacy violations resulting from information dissemination. In discussing the breach of confidentiality tort and its relationship to the disclosure tort, Solove argued that “disclosure and breach of confidentiality cause different kinds of injuries. Both involve revealing a person’s secrets, but breaches of confidentiality also violate trust in a specific

¹⁴³ *Id.* at 10.

¹⁴⁴ *Id.* at 9.

¹⁴⁵ *Id.* at 10; *see also* Solove, Taxonomy, *supra* note 90.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

relationship. The harm resulting from a breach of confidentiality, then, is not simply that information has been disclosed, but that the victim has been betrayed.”¹⁴⁸

Regarding confidentiality in the digital age, Solove’s dominant concern was the creation of “digital dossiers” – digital collections of detailed data about an individual.¹⁴⁹ Solove stated that “[d]igital technology enables the preservation of the minutia of our everyday comings and goings, of our likes and dislikes, of who we are and what we own,...an electronic collage that covers much of a person’s life – a life captured in records, a digital person composed in the collective computer networks of the world.”¹⁵⁰

Solove’s solution was to develop structural legal protections for the confidentiality of these dossiers.¹⁵¹ He argued, “If we look at privacy more as an aspect of social and legal structure, then we begin to see that certain types of privacy harms are systemic and structural in nature, and we need to protect them differently.”¹⁵² He proposed an architectural approach to analyzing privacy problems, particularly privacy problems inherent in information systems.¹⁵³ He proposed: “For problems that are architectural, the solutions should also be architectural. Privacy must be protected by reforming the architecture, which involves restructuring our relationships with businesses and the government. In other words, the law should *regulate the relationships*.”¹⁵⁴ Thus, instead of passing a law saying that certain information cannot be shared by businesses,

¹⁴⁸ *Id.* at 138.

¹⁴⁹ Solove, *supra* note 21, at 1.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 91.

¹⁵² *Id.* at 97.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 100.

Solove argued that businesses collecting personal information should uniformly owe a heightened duty not to harm the individuals from whom they collect personal information.

Regarding obligations of confidentiality concerning digital dossiers, Solove proposed “that the law should hold that companies collecting and using our personal information stand in a fiduciary relationship with us.”¹⁵⁵ Solove stated that “[f]iduciaries have a duty to disclose personal interests that could affect their professional judgment as well as duty of confidentiality.”¹⁵⁶ Solove asserted that the concept of a fiduciary has not been extended far enough to cover important relationships built upon trust. Although fiduciary relationships are recognized by courts, they have been very limited in scope.¹⁵⁷

To determine if someone is a fiduciary, a close examination of the relationship between parties is required. Solove observed that courts typically examine a number of factors when ascertaining fiduciary obligations, including “[t]he degree of kinship of the parties; the disparity in age, health, and mental condition; education and business experience between the parties; and the extent to which the allegedly subservient party entrusted the handling of...business affairs to the other and reposed faith and confidence in [that person or entity].”¹⁵⁸ Solove found that most of these factors deal with the granting of trust and disparities in power and knowledge, which favor a finding of

¹⁵⁵ Solove, *supra* note 21, at 103.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* Solove found that “[e]xamples of fiduciary relationships include those between stockbrokers and clients, lawyers and clients, physicians and patients, parents and children, corporate officers and shareholders, and insurance companies and their customers.” *Id.* (citing *Hammonds v. Aetna Casualty & Surety Co.*, 243 F. Supp. 793 (D.Ohio 1965); *McCormick v. England*, 494 S.E. 2d 431 (S.C. Ct. App. 1997)).

¹⁵⁸ *Id.* (quoting *Pottinger v. Pottinger*, 605 N.E.2d 1130, 1137 (Ill. App. 1992)).

fiduciary relationships between Internet users and the collectors and users of Internet users' data.¹⁵⁹ Regarding an architectural approach to information privacy online, Solove stated:

If our relationships with the collectors and users of our personal data are redefined as fiduciary ones, then this would be the start of a significant shift in the way the law understands their obligations to us. The law would require them to treat us in a different way – at a minimum, with more care and respect. By redefining relationships, the law would make a significant change to the architecture of the information economy.¹⁶⁰

Other legal scholars have written extensively on the effect of information technology on privacy.¹⁶¹ Joel Ridenberg was one of the first to suggest an architectural approach to privacy law.¹⁶² Lawrence Lessig adeptly addressed the possibilities and challenges technology poses to promises and preferences of confidentiality for online information in his seminal book on technology and law, *Code and Other Laws of Cyberspace*.¹⁶³ Regarding privacy, Lessig found that “[software] code has already upset a traditional balance. It has already changed the control that individuals have over facts about their private lives. The question now is: Could code re-create something of that traditional balance? I argue that it can.”¹⁶⁴

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 104.

¹⁶¹ See, e.g., Froomkin, *supra* note 21; Kang, *supra* note 28.

¹⁶² Joel R. Reidenberg, *Privacy Protection and the Interdependence of Law, Technology and Self-Regulation*, in CASHIERS DU CENTRE DE RECHERCHES INFORMATIQUES ET DROIT: VARIATIONS SUR LE DROIT DE LA SOCIÉTÉ DE L'INFORMATION 129 (2001) (“[T]he *Lex Informatica* or “code” approach regulates through the technical rules embedded in network architecture.”); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998); Joel R. Reidenberg, *Rules of the Road for Global Electronic Highways: Merging Trade and Technical Paradigms*, 6 HARV. J.L. & TECH. 287, 296 (1993).

¹⁶³ LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

¹⁶⁴ *Id.* at 142.

Like Solove, Lessig was concerned about the collection and use of self-disclosed information on the Internet.¹⁶⁵ In Lessig's view, the ubiquitous collection of self-disclosed information had a number of negative consequences. First, he held that the aggregation of information robbed users of the benefit of innocence through de-contextualization of data. Lessig argued that "[a]t any given time there are innocent facts about you that may appear, in a particular context or to a particular set, guilty."¹⁶⁶ As an example, he points to a photo of an older man out to eat with a beautiful young woman who was not his wife. While it might appear that this man was having an affair, this woman was, in fact, his daughter. Removing context from this picture could make the man appear to be an adulterer.

Lessig explicitly rejected the argument advanced by some scholars, such as David Brin, that mutual accountability through complete transparency was a better option than protecting privacy.¹⁶⁷ Brin's thesis was that if everyone knew everyone else's secrets, privacy would not be necessary.¹⁶⁸ Lessig countered: "Brin assumed that this counterspying would be useful to hold others 'accountable.' But according to whose norms? 'Accountable' is a benign term only so long as we have confidence in the community doing the accounting."¹⁶⁹ According to Lessig: "When we live in multiple communities, accountability becomes a way for one community to impose its view of propriety on another. And because we do not live in a single community; we do not live

¹⁶⁵ *Id.* at 151.

¹⁶⁶ *Id.* at 152.

¹⁶⁷ *Id.* at 153.

¹⁶⁸ DAVID BRIN, *TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM* (1998).

¹⁶⁹ Lessig, *supra* note 163, at 153.

by a single set of values; and perfect accountability can only undermine this mix of values.”¹⁷⁰

Lessig proposed that code could help prevent privacy harms on the Web. First, code could be used to make personal information harder to find via search engines.¹⁷¹ Additionally, code could be used to control the collection and use of personal information by giving Internet users the right to choose how their data will be used.¹⁷² According to Lessig, “[T]he standard way we have pushed individuals to choose is through text—through privacy statements that report a site’s privacy practices and then give the consumer the right to opt in or out of those practices.”¹⁷³ Lessig noted that most people do not have “the time or patience to read through cumbersome documents describing obscure rules for controlling data.”¹⁷⁴

Lessig argued that “[w]hat is needed is a way for the machine to negotiate our privacy concerns for us, a way to delegate the negotiating process to a smart agent – an electronic butler – who, like the butler, knows well what we like and what we do not like.” Ultimately, Lessig envisioned a kind of quasi-property right in personal information, which individuals could use as a negotiating chip when interacting with websites. While the “privacy as property” approach has its critics,¹⁷⁵ it is a popular

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 159.

¹⁷² *Id.*

¹⁷³ *Id.* at 160.

¹⁷⁴ *Id.*

¹⁷⁵ *See, e.g.,* Samuelson, *supra* note 53.

approach considered by scholars when addressing the privacy problems wrought by technology.

In sum, privacy and confidentiality in the digital age are largely defined by technology. Although digital communication can erode an individual's privacy, it can also help protect an individual's personal information. In any event, the development of privacy law has trailed the development of technology, leading scholars to question the effectiveness of many privacy laws.

The Failure of Traditional Privacy Remedies. The traditional remedy for harms resulting from the publication of private information is the tort of public disclosure of embarrassing private facts, also known as “the disclosure tort.” Scholars have noted the ineffectiveness of this tort online. Some scholars have offered confidentiality law as a replacement. The flaws in the disclosure tort, including a difficulty in deciding when expectations of privacy are reasonable and First Amendment concerns, frame the benefits of confidentiality law online.

The disclosure tort was extensively criticized before the Internet.¹⁷⁶ From its inception, the tort was troubled, and its faults became magnified over time.¹⁷⁷ Joseph Elford noted in 1995 that “[t]he private facts tort is a mess. It has disappointed those who hope it would enhance individual privacy while it has exceeded all estimations of its chilling effect on speech.”¹⁷⁸

¹⁷⁶ See, e.g., Harry Klaven, Jr., *Privacy in Tort Law, -Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 327 (1966); see also, e.g., Bezanson, *supra* note 28; Zimmerman, *supra* note 25.

¹⁷⁷ See, e.g., Gilles, *supra* note 30, at 8 (stating “Despite the efforts of Warren, Brandeis and Prosser, this tort has had a far from happy life.”); Solove & Richards, *supra* note 25.

¹⁷⁸ Elford, *supra* note 112.

Several scholars claim the disclosure tort was rendered ineffective in 1989 in the case *Florida Star v. B.J.F.*¹⁷⁹ In this case, the U.S. Supreme Court declared that defendants cannot be punished for publishing matters of public significance without the claimant proving that punishment is necessary to advance a state interest of the highest order.¹⁸⁰ Andrew McClurg argued that this declaration almost guarantees defeat for plaintiffs pursuing claims based on the disclosure tort.¹⁸¹ McClurg actually found that “[f]or the most part, the privacy torts as defined in the Second Restatement have functioned inadequately and fared poorly in the courts.”¹⁸² Eugene Volokh criticized the tort’s distinction between speech on matters of public significance and speech on matters of private concern as “theoretically unsound; it is precedentially largely unsupported; [and] in the few circumstances in which it has been endorsed, it has proven unworkable....”¹⁸³

However, the increased threat to privacy resulting from the technological destruction of any meaningful barriers to surveillance and publishing has rendered the disclosure tort nearly inert. Patricia Sanchez Abril hypothesized that the problem with the disclosure tort’s online application was its focus on secrecy.¹⁸⁴ She stated that “[a]ttempts to apply traditional public disclosure jurisprudence to online social networking demonstrate the incoherence of this jurisprudence” because the disclosure tort

¹⁷⁹ 491 U.S. 524 (1999).

¹⁸⁰ *Florida Star*, 491 U.S. at 533.

¹⁸¹ McClurg, *supra* note 24, at 899.

¹⁸² *Id.* at 908.

¹⁸³ Volokh, *supra* note 24, at 1089.

¹⁸⁴ Abril, *supra* note 112.

is centered around keeping information from people and social networking is centered around the disclosure of information¹⁸⁵ Abril argued that the *Restatement (Second) of Torts* was an outdated guide and that “[i]n the absence of clear and relevant guidance, courts have resorted to intellectual shortcuts in their use of concepts of space, subject matter, secrecy, and seclusion as necessary benchmarks for privacy protection.”¹⁸⁶ According to Abril, “What were once mere indicators of privacy have become, in some instances, the extent of judicial inquiry.... Despite judicial attempts to find a universal conceptual hook on which to hang the public disclosure tort, there is simply no such common denominator in legal privacy analysis.”¹⁸⁷

Scholars largely agreed that a significant flaw of the disclosure tort is the amount of speculation it requires from judges. According to Abril, the tort’s “analysis calls for highly normative and subjective determinations, including the elusive boundaries of concepts like privacy, public concern, and offensiveness. This analysis forces judges to rely on their perception of social norms, rather than more traditional legal methods.”¹⁸⁸ Abril argued that this onus transforms judges into “‘armchair sociologists [attempting] to assess cultural expectations of privacy,’ an expansive and complex role.”¹⁸⁹

The tort also calls upon judges to determine what information is “private” and what information is public or at least “of public concern.” Other scholars commenting on the tort have noted the practical and constitutional difficulty in defining the term “public”

¹⁸⁵ *Id.* at 3.

¹⁸⁶ *Id.* at 4.

¹⁸⁷ *Id.* at 4-5.

¹⁸⁸ *Id.* at 10.

¹⁸⁹ *Id.* at 10 (citing Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U. L. REV. 1, 8 n. 12 (1983)).

in order to determine whether information is worthy of privacy protections.¹⁹⁰ Dianne Zimmerman noted that “to distinguish private facts from ‘public’ information about an individual, courts often look either to the location of the action or to the nature of the subject matter. Courts using the ‘location’ analysis commonly state that information individuals reveal about themselves in public places is by definition not private.”¹⁹¹ Courts using the subject-matter analysis “rule that the subject matter is private even though the locus is not.”¹⁹² Zimmerman found that both approaches are practically unfeasible and threaten freedom of speech.

Perhaps the most significant failure of the privacy tort’s application to the Internet is that the tort typically fails to protect self-disclosed information. Unlike Warren and Brandies, who worried about tabloids publishing their private moments, the most likely publisher of personal information in the Internet age is the person herself.¹⁹³ In light of the mass adoption of social media and pervasiveness of electronically-mediated communication, Internet users have become their own worst enemy.

Online self-disclosure lies at the heart of the problem addressed by this dissertation. The rampant self-disclosure of personal information concomitant with an expectation of privacy is a problem because courts have struggled to determine whether and to what degree self-disclosed information is private.¹⁹⁴ Professor Lior Strahilevitz

¹⁹⁰ Zimmerman, *supra* note 25; Singleton, *supra* note 25; Volokh, *supra* note 24.

¹⁹¹ Zimmerman, *supra* note 25, at 347.

¹⁹² *Id.* at 349.

¹⁹³ Daniel Solove, Huffington Post: The Slow Demise of Defamation and Privacy Torts, http://www.huffingtonpost.com/daniel-j-solove/the-slow-demise-of-defama_b_758570.html (October 12, 2010, 11:14 a.m.); Gelman, *supra* note 9; Grimmelmann, *supra* note 9, at 1197.

¹⁹⁴ Strahilevitz, *supra* note 13, at 920-921.

stated, “Despite the centrality of this issue, the American courts lack a coherent, consistent methodology for determining whether an individual has a reasonable expectation of privacy in a particular fact that has been shared with one or more persons.”¹⁹⁵

Solove argued that part of the problem with protecting self-disclosed information is that courts hold that information must be a secret to be protected, and that self-disclosed information cannot be a secret since it was voluntarily disclosed to others. He calls this approach to privacy the “secrecy paradigm.” Solove described the secrecy paradigm as an understanding of privacy based on concealment preventing others from invading one’s hidden world.¹⁹⁶ Under this conception, disclosed information is no longer concealed and, thus, no longer private. Sharon Sandeen noted that this “vision of privacy makes it difficult for individuals to protect personal information once it has been shared with others.”¹⁹⁷ Solove argued that the secrecy paradigm “fails to recognize that individuals want to keep things private from some people but not others.”¹⁹⁸

Disclosing information to some, but not all, can be very difficult in modern society. Solove asserted that not all private activities are pure secrets “in the sense that they occur in isolation and in hidden corners. When we talk in a restaurant, we do not expect to be listened to. A person may buy condoms or hemorrhoid medication in a store open to the public, but certainly expects these purchases to be private activities.”¹⁹⁹

¹⁹⁵ *Id.*

¹⁹⁶ Solove, *supra* note 21, at 42.

¹⁹⁷ Sandeen, *supra* note 28, at 694.

¹⁹⁸ Solove, *supra* note 21, at 44.

¹⁹⁹ *Id.*

Solove held that contrary to the notion that information in public records cannot be private, “there is a considerable loss of privacy by plucking inaccessible facts buried in some obscure [public] document and broadcasting them to the world on the evening news. Privacy can be infringed even if no secrets are revealed and even if nobody is watching us.”²⁰⁰ In other words, context is important when considering whether information is public or private. Solove and other scholars ponder whether secrecy is even possible in a networked world. Solove posited that life in the Information Age “often involves exchanging information with third parties, such as phone companies, Internet service providers, cable companies, merchants, and so on. Thus, clinging to the notion of privacy as total secrecy would mean the practical extinction of privacy in today’s world.”²⁰¹

Nissenbaum asserted that the labeling of information as exclusively public or private (what she refers to as the public/private dichotomy) fails to consider the context in which the information exists.²⁰² Nissenbaum rationalized an individual’s desire to have “privacy in public” by explaining that information revealed in one context, such as being viewed on the street by another pedestrian, might not be seen as an invasion of privacy. However, a photo of the same person on the same street appearing on Google Maps might be perceived as an invasion of privacy. According to Nissenbaum, the relegation of information into public and private spheres is rife with challenges as “[i]nterpretations

²⁰⁰ *Id.*

²⁰¹ Solove, *Conceptualizing*, *supra* note 140, at 1152.

²⁰² *See* Nissenbaum, *Context*, *supra* note 21; Nissenbaum, *Integrity*, *supra* note 21.

of what counts as a private space may vary across times, societies, and cultures.”²⁰³

Nissenbaum observed that the common rebuttals to claims of privacy in public are that

when people move about and do things in public arenas, they have implicitly yielded any expectation of privacy. Much as they might prefer that others neither see, nor take note, expecting others not to see, notice, or make use of information so gained would be unreasonably restrictive of others' freedoms. One cannot reasonably insist that people avert their eyes, not look out their windows, or not notice what others have placed in their supermarket trolleys. And if we cannot stop them from looking, we cannot stop them remembering and telling others. In 2001, Tampa police, defending their use of video cameras to scan faces one-by-one as they entered the Super Bowl stadium, stated, “the courts have ruled that there is no expectation of privacy in a public setting.”²⁰⁴

In essence, information that falls within the private half of the public/private dichotomy warrants privacy consideration; “for all the rest, anything goes.”²⁰⁵

Nissenbaum’s theory of contextual integrity rejects the secrecy paradigm altogether. According to the theory, “[T]here are no arenas of life not governed by norms of information flow, no information or spheres of life for which ‘anything goes.’”²⁰⁶ Thus, the idea that information can objectively be public or categorically undeserving of privacy protection is countered by the fact that “[a]lmost everything—things that we do, events that occur, transactions that take place—happens in a context not only of place but of politics, convention, and cultural expectation.”²⁰⁷ According to Nissenbaum, the

²⁰³ Nissenbaum, Integrity, *supra* note 21, at 132.

²⁰⁴ *Id.* at 135-36.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 136.

²⁰⁷ *Id.* at 137.

integrity of these contexts is maintained when norms of appropriateness and distribution are maintained, and this maintenance of contextual norms is the hallmark of privacy.²⁰⁸

Other legal scholars have rejected the secrecy paradigm, too. Strahilevitz proposed a form of relative privacy using social network analysis as a tool “for resolving disputes where parties to a communication disagree about whether the recipient was entitled to share it with others.”²⁰⁹ Instead of a dichotomous public/private distinction, Strahilevitz asserted:

[P]rivacy tort law should not focus on the abstract, circular, and highly indeterminate question of whether a plaintiff reasonably expected that information about himself would remain “private” after he shared it with one or more persons. Instead, the law should focus on the more objective and satisfying question of what extent of dissemination the plaintiff should have expected to follow his disclosure of that information to others.²¹⁰

This social network approach allows for a more nuanced analysis of disclosure of information that might have privacy implications.

Other scholars have urged courts to borrow concepts from other areas of the law, such as trade secrets, to determine whether information was public or private.²¹¹ Sharon Sandeen maintained that trade secret law had enough similarities to privacy law to offer significant improvements in privacy analysis. She stated:

In the case of trade secrets, the law is designed to facilitate limited disclosures, preferring the small-scale dissemination and use of trade secret information over an environment of ultra-secrecy. A similar line should be drawn for personal information. Individuals should not be

²⁰⁸ *Id.*

²⁰⁹ Nissenbaum, Integrity, *supra* note 21, at 137.

²¹⁰ *Id.* at 921.

²¹¹ See Samuelson, *supra* note 53; Sandeen, *supra* note 28, at 694.

required to choose between the life of a hermit and the life of a person with little or no control over the use of their personal information.²¹²

Sandeen drew attention to the concept of “relative secrecy” used to determine whether a trade secret will receive legal protection. Under the doctrine of relative secrecy, “legal protection for trade secrets does not necessarily cease when information is disclosed to another. Rather, information can be protected as a trade secret even if it is known by multiple individuals or companies.”²¹³ Only when information is “generally known or readily ascertainable” will it be stripped of protection as public information.²¹⁴ The term “generally known” means “well known” or “commonly known to the trade in which the putative trade secret owner is engaged.”²¹⁵ Sandeen noted that “trade secret owners are not required to exercise all possible efforts to protect the secrecy of their information, but instead only those efforts that are ‘reasonable under the circumstances.’”²¹⁶

The literature reveals that the ever-increasing amount of self-disclosed information on the Internet renders traditional privacy remedies inert online. The secrecy paradigm, which holds that information is uniformly either public or private, has proven largely unworkable online. Although Internet users routinely disclose information online in traditionally “public” ways, users still feel their expectation of privacy in this information is threatened and routinely violated. This conflict has led a number of

²¹² *Id.* at 697-98.

²¹³ *Id.* at 697.

²¹⁴ ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 1.01[1].

²¹⁵ *Id.* at § 1.07[1].

²¹⁶ Sandeen, *supra* note 28, at 697.

scholars to propose that the law of confidentiality can serve as an effective remedy for online privacy harms.

A Turn to Confidentiality Law. Michael Harvey succinctly summarized the common scholarly perception of traditional privacy remedies: “[I]ndividuals whose privacy has been invaded by public disclosure of personal information have no viable remedy in American Jurisprudence.”²¹⁷ However, Harvey did not jettison hope. He stated: “Lovers of privacy should not concede defeat at this juncture, however. For the law has thus far overlooked the other party who is essential to the public disclosure of personal information but for whom constitutional protection is tenuous in comparison to that of publishers – that is, the source of the information.”²¹⁸

According to Harvey, the most common culpable party in privacy disputes is not the media, but rather an intimate who betrayed a confidence by revealing personal information.²¹⁹ Harvey argued that “[t]he existence of this as yet ignored link in the chain of public disclosure of personal information opens up the possibility of attaching liability at the source of the information leak under a breach of confidence theory.”²²⁰ Harvey proposed “interring the private-facts tort and adopting a new approach to overcoming the tension between privacy interests and the First Amendment: a legally enforceable duty of confidentiality” that prevents the unauthorized disclosure of personal information that was promised to be held in confidence.²²¹

²¹⁷ Harvey, *supra* note 10, at 2391.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 2392.

²²¹ *Id.*

Numerous scholars have joined Harvey in calling for an expansion of breach of confidentiality law – particularly the tort of breach of confidentiality. The seminal article on the tort was actually a student note written by Alan Vickery. Vickery found that “[t]hough still in rudimentary form, a breach of confidence tort appears to be emerging from the case law to provide a basis of recovery where existing law is deficient.”²²² Vickery proposed that “the basis for imposing liability should be disclosure of information revealed in the course of a nonpersonal relationship of a sort customarily understood to carry an obligation of confidentiality.”²²³ Scott Fast urged courts to build upon the tort of breach of confidentiality to protect employee privacy.²²⁴

This overlooked link in the publication chain – the trustee of disclosed information – is particularly relevant online. The Internet is simply a technology used to connect people. Where connections exist, relationships can develop, including contractual relationships and relationships of trust and confidence. All connections online are opportunities for confidentiality.

Steven Bibas recognized that the trustee of disclosed information could play a crucial role in solving the problems of surveillance and data misuse.²²⁵ Bibas proposed a contractual approach to data privacy that “could give individuals the power to choose privacy or not without requiring privacy for everybody or nobody.”²²⁶ According to Bibas, “[A] contractual solution would be superior to approaches dictated by legislators,

²²² Vickery, *supra* note 28.

²²³ *Id.*

²²⁴ Fast, *supra* note 28.

²²⁵ Bibas, *supra* note 114.

²²⁶ *Id.* at 592.

bureaucrats, or judges because it would be more sensitive to individual preferences.”²²⁷

Like Harvey, Bibas recognized that the institutions most likely to violate an individual’s privacy, such as credit bureaus and other private-sector data banks, were in contractual relationships with the individuals they threatened.²²⁸ In theory, contracting parties are free to specify conditions of confidentiality.

While Susan Gilles noted the scholarly attention paid to confidentiality as an alternative to traditional privacy remedies, she remained skeptical because contracts for confidentiality, fiduciary relationships, and the tort of breach of confidentiality had very limited scopes.²²⁹ Gilles argued that the damages for breach of contract were too limited to be meaningful and that courts were unlikely to find the necessary intent to create contracts in many informal situations, such as the disclosure of a secret between friends.²³⁰ She did note that the doctrine of promissory estoppel, an equitable doctrine that “operates to enforce a promise even though the formal requisites of contract are absent,” was an attractive alternative to a contract theory of recovery.²³¹

Gilles also found that the fiduciary theory of recovery for breach of confidentiality was incomplete because it was “limited to those plaintiffs whose confidences have been revealed by trustees, agents, guardians, doctors, clergy, and lawyers. While not unimportant, this remedy is, therefore, far from a universal cure.”²³²

²²⁷ *Id.*

²²⁸ *Id.* at 605.

²²⁹ Gilles, *supra* note 30.

²³⁰ *Id.* at 23.

²³¹ *Id.* at 33, 39; *see also* Hartzog, *supra* note 55.

²³² Gilles, *supra* note 30, at 46.

According to Gilles, this limited scope did not include many of the people who needed a remedy for breach of confidentiality, including friends, family, and even those participating in professional endeavors like a journalist's sources.²³³ Additionally, Gilles found that the wide array of duties owed by a fiduciary might be over-burdensome for most relationships.²³⁴ Gilles stated, "At the center of a fiduciary or confidential relationship is a duty on one party to be selfless and act in the interest of another....Do we seriously think...a friend is prohibited from putting herself in a position where her own and her friend's interests will conflict? Obviously not."²³⁵ Gilles argued, "If the only duty we wish to impose is the duty to keep secrets, it seems unsound to call a relationship a fiduciary one. It seems cleaner to admit the objective, to deter the revelation of confidences, and to fashion a remedy to achieve the goal."²³⁶

Gilles recognized that the tort for breach of confidentiality had a broader scope than contractual and fiduciary approaches to breach of confidence and also allowed for the recovery of emotional damages that are unrecoverable under contract and fiduciary causes of action.²³⁷ However, ultimately, Gilles argued that the breach of confidentiality tort was constitutionally suspect under the First Amendment because it allowed for the recovery of punitive damages.²³⁸ Andrew McClurg agreed with Gilles and argued that

²³³ *Id.* at 45-46.

²³⁴ *Id.* at 48.

²³⁵ *Id.* at 47.

²³⁶ *Id.* at 48.

²³⁷ Gilles, *supra* note 30, at 60.

²³⁸ *Id.* at 65-74. Gilles noted that punitive damages were one of the main causes of "chilling effects" sought to be alleviated by First Amendment doctrine.

implied contracts of confidentiality were the appropriate remedy for breaches of confidence.²³⁹

The argument that the breach of confidence tort might be unconstitutional was rebutted by Solove and Richards, who argued that the First Amendment should not apply to civil liability “when government power merely serves as a backstop to private ordering[,]” as when the government enforces contracts.²⁴⁰ Regarding the breach of confidentiality tort, Solove and Richards argued that the tort is not constitutionally suspect because it is similar to contracts for confidentiality or promissory estoppel, which have survived First Amendment scrutiny. They posited:

The breach of confidentiality tort is a private cause of action that has both tort-like and contract-like elements. Duties of confidentiality can be created by express contracts or implied as a matter of law from the circumstances of a relationship. In many instances, the breach of confidentiality tort remedies a harm akin to those protected by contract law or promissory estoppel. One party voluntarily assumes a duty, either through an express or implied contract or promise. Breach of confidentiality differs from other torts such as defamation and public disclosure of private facts because the duty of confidentiality is understood as arising from a consensual relationship. Beyond a formalistic distinction between tort and contract, why should such different First Amendment consequences follow from the CEO's breach of confidentiality tort and implied contract actions? For the purposes of the First Amendment, the nature of the information involved is the same regardless of whether contract or tort liability is involved. Moreover, the basic theory upon which liability is premised is also largely the same – an express or implied assumption of a duty of confidentiality.²⁴¹

In a separate article, Richards and Solove also argued that the law of confidentiality has a longer and more developed history than the right to privacy Warren and Brandies wrote about. Richards and Solove held that “Warren and Brandeis did not

²³⁹ McClurg, *supra* note 24, at 906 n.126.

²⁴⁰ Solove & Richards, *supra* note 49, 1655.

²⁴¹ *Id.* at 1670.

invent the right to privacy from a negligible body of precedent but instead charted a new path for American privacy law.”²⁴² According to Richards and Solove, when torts scholar William Prosser embraced Warren and Brandeis’s conception of privacy as a general protection of “inviolate personality,” he drastically minimized the importance of confidentiality as a concept in American law.²⁴³ Richards and Solove observed that “[b]y contrast, English law developed a flexible and powerful law of confidentiality from *Prince Albert v. Strange*, the very same case underpinning Warren and Brandeis’s conception of privacy.”²⁴⁴

Almost all of the literature on confidentiality law noted the failure of traditional privacy remedies and the advantages of focusing on relationships between people rather than the content of disclosed information. Additionally, the literature reveals that some of the most effective ways to create an obligation of confidentiality are through express and implied agreements. Scholars agreed that confidentiality law was much less problematic under the First Amendment than the disclosure tort and often overlooked by those seeking a redress for privacy harms. While the review below covers these scholars’ claims, few scholars have advanced implied obligations of confidentiality past the introductory stage.

Implied Obligations of Confidentiality. Scholars typically agree that implied obligations of confidentiality can exist and are desirable in many circumstances, but have not sufficiently articulated these circumstances. Scholars have argued that the cumbersome nature of explicit confidentiality agreements and the limited nature of

²⁴² Richards & Solove, *supra* note 29, at 125.

²⁴³ *Id.*; see also Richards & Solove, *supra* note 25.

²⁴⁴ Richards & Solove, *supra* note 29, at 125.

explicit confidential relationships compels the need for a nuanced framework for implied obligations of confidentiality. Although he ultimately argued for greater judicial scrutiny of confidentiality agreements, Alan Garfield recognized:

Although parties can use contracts to protect privacy interests, they are often not so used. Contracting is particularly unlikely when one shares information with an intimate relation—a spouse, friend, doctor, or psychologist—because the relationship itself suggests that a contract is both unnecessary and inappropriate. When parties deal at arms length—contracts with lending institutions, brokers, or blood banks—a confidentiality provision is more likely, but not certain. Even in arms-length transactions, such as a library or video selections, individuals may not perceive the need to bargain for a promise of silence.²⁴⁵

Garfield noted that the “basic elements of contract formation – offer, acceptance, and consideration – are unlikely to pose any problems for contracts of silence prepared in formal settings.”²⁴⁶ According to Garfield, the more difficult contracts of silence were the ones created informally, particularly oral contracts. Garfield found “[a]n informal contract of silence may be found to exist after one party casually shared information with another, and later claims that the other party understood that he or she gave the information in exchange for a promise not to disclose it.”²⁴⁷ Garfield held that “[t]he potential limitations on the formation of [agreements to protect privacy interests] are worth identifying because scholars concerned with protecting privacy interests have occasionally looked to contract law as a possible source of protection.”²⁴⁸

²⁴⁵ Garfield, *supra* note 65, at 272-73.

²⁴⁶ *Id.* at 277.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 278 (citing Susan Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFFALO L. REV. 1 (1995)).

Implied obligations of confidentiality often arise from informal agreements that don't explicitly provide for confidentiality. Rather, confidentiality can be inferred from other terms and contexts. Garfield argued that a number of problems arise when trying to use informal contracts of confidentiality to protect privacy interests. Particularly, he found that "[e]ven when parties manifest assent to an agreement...a court can still deny enforcement if it believes that reasonable people would not have intended the agreement to be legally binding."²⁴⁹ According to Garfield, "Reasonable people anticipate that commercial deals will be enforceable, but that casual arrangements between friends and family will not."²⁵⁰ As an example, Garfield stated that "even if a friend extracts from another a promise to keep information about an AIDS test confidential, a court still might not enforce the agreement if it concludes that reasonable people would not have intended the agreement to be binding."²⁵¹

In formulating his proposal for the breach of confidentiality tort, Vickery also examined implied contract as a basis of recovery "because confidential and contractual obligations are often present in the same relationship."²⁵² Vickery noted that "[t]he doctrine of implied-in-fact contract means that promises are inferred from the conduct of the parties and common usages, practices, and understandings at the time of

²⁴⁹ *Id.* at 283.

²⁵⁰ Garfield, *supra* note 65 (stating that "[o]f course, one has to distinguish between a social engagement between friends, which is unlikely to be enforceable, and a commercial transaction between friends, such as a loan of money, which will be enforceable. A commitment of nondisclosure one friend makes to another would seem to fall somewhere between these two extremes."). *Id.* at n. 98.

²⁵¹ *Id.*; see also *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203 (Minn. 1990), *rev'd on other grounds*, 501 U.S. 663 (1991) (stating that "a moral obligation alone will not support a contract").

²⁵² Vickery, *supra* note 28, at 1444.

contracting.”²⁵³ Vickery found that courts looked to “licensing statutes, professional codes of ethics, and other sources of public policy for evidence of a pervasive understanding of confidentiality with respect to the particular relationship involved. Based on this understanding, these courts have found an implied promise at the time of contracting not to divulge information to third parties.”²⁵⁴ However, Vickery asserted that “contract law, like tortious invasion of privacy, is inadequate, theoretically and practically, to protect confidence” because contract formation can be problematic and the damages available for breach of contract are limited.²⁵⁵

Like other scholars, Vickery acknowledged that implied obligations of confidentiality could exist, but failed to explore under what circumstances implications could bind a trustee of information. Strahilevitz more deeply explored the question of context and looked to the design of support communities to find implied expectations of confidentiality. According to Strahilevitz, groups like Alcoholics Anonymous “share deeply held social norms barring the disclosure of information about attendees outside of the group setting.”²⁵⁶ These groups are designed to promote a sort of mutually assured security because all of the members have disclosed intimate information. This assurance could give rise to a reasonable expectation of confidentiality in the information disclosed within the community. Strahilevitz stated that “certain groups can be designed to trigger reciprocal nondisclosure, and people making germane disclosures within these settings

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 1442-47.

²⁵⁶ Strahilevitz, *supra* note 13, at 969-70.

generally ought to expect that the information disclosed will not circulate outside this group.”²⁵⁷

Eugene Volokh asserted that contracts, particularly implied obligations of confidentiality, were perhaps the only constitutional imposition of civil liability for speech.²⁵⁸ Volokh noted that implied contracts for confidentiality arise where “people reasonably expect – because of custom, course of dealing with the other party, or all the other factors that are relevant to finding an implied contract – that part of what their contracting partner is promising is confidentiality.”²⁵⁹ Volokh stated, “I tentatively think that a legislature may indeed enact a law stating that certain legislatively identified transactions should be interpreted as implicitly containing a promise of confidentiality, unless such a promise is explicitly and prominently disclaimed by the offeror, and the contract together with the disclaimer is accepted by the offeree.”²⁶⁰ According to Volokh: “The great free speech advantage of the contract model is that it does not endorse any right to ‘stop people from speaking about me.’ Rather, it endorses a right to ‘stop people from violating their promises to me.’”²⁶¹

Andre McClurg furthered this argument and noted that implied contracts of confidentiality might be effective for people in intimate relationships sharing information online.²⁶² McClurg stated the maxim that “[p]romises can be made orally or in writing,

²⁵⁷ *Id.*

²⁵⁸ Volokh, *supra* note 24, at 1057.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1060.

²⁶¹ *Id.* at 1061.

²⁶² McClurg, *supra* note 24, at 912.

or can be inferred from conduct” and argued that “[n]o difference in legal effect between express and implied contracts exists. The only distinction lies in how assent to the contract is manifested.”²⁶³ McClurg recognized:

The central features of an implicit promise of confidentiality, shared by all [intimate, fiduciary, and otherwise confidential] relationships, include: (1) confidentiality is reasonably expected as a matter of custom and general understanding; (2) people part with private information in reliance on this expectation (in many cases, detrimentally changing their position in doing so); and (3) trust in the confidentiality of private information is necessary to make the relationship function properly.²⁶⁴

McClurg’s central argument was that agreements of confidentiality arise in fact in intimate relationships because it is commonly understood in these relationships that certain information is to be kept between intimates.²⁶⁵ McClurg argued that “consideration for the contract exists in the mutuality of the confidential agreement as well as in the broader emotional, physical, and other benefits each partner to an intimate relationship confers upon the other.”²⁶⁶ McClurg proposed that mutual assent to the confidential agreement “arises as a matter of custom and common understanding from the decision to participate in an intimate relationship. It can be inferred from the course of dealing between the parties and the overall context of an intimate relationship, including the manner in which the private information is conveyed between intimate partners.”²⁶⁷

Here, McClurg engaged in one of the few attempts to identify specific contexts that could give rise to implied obligations of confidentiality: “The fact that private

²⁶³ *Id.*

²⁶⁴ *Id.* at 913.

²⁶⁵ *Id.* at 917.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

information is shared...between intimate partners outside the presence of others, often within homes behind closed doors and drawn curtains, lends support to the assumption that the tacit understanding of the parties is: 'I'm sharing this with you because I expect you to keep it in confidence.'"²⁶⁸ Ultimately, McClurg proposed the use of explicit confidentiality agreements between intimates because of the "difficulty in identifying the terms of an implied confidentiality contract between intimate partners...."²⁶⁹

There have been numerous calls in the literature for an increased role for implied obligations of confidentiality. Yet no literature has addressed the next logical question: *When* should courts recognize an implied obligation of confidentiality? Some clues can be drawn from contract theorists who rely heavily on context to shape the obligations of the parties.

The Empirical and Relational Approach to Contracts. While a sharp focus on context and custom instead of rigid doctrine might be novel in privacy law, it has long been espoused by a number of contract theorists. For example, Stuart Macaulay, also known as the founder of the "Wisconsin School" of contract theory,²⁷⁰ has developed an empirical view of contracts focused on the premise that customs, not rules of law, dictate the expectations of contracting parties. This approach is relevant when ascertaining whether an implied contract of confidentiality exists between parties.

Macaulay published the results of his interviews with businessmen in his seminal article "Non-contractual Relations in Business: A Preliminary Study," and found that the

²⁶⁸ McClurg, *supra* note 24, at 917.

²⁶⁹ *Id.* at 929.

²⁷⁰ PETER LIZNER, A CONTRACTS ANTHOLOGY 45 (2d ed. 1995).

actual rules of contract law had little impact on working businessmen.²⁷¹ Instead, he found that, notwithstanding serious risks, businessmen often prefer to rely on one's word, a handshake, or common honesty and decency.²⁷²

This focus on custom, norms, and context was echoed by Ian Macneil in his "relational theory of contracts."²⁷³ Macneil rejected the view that contracts were rationally bargained for exchanges that took place in a perfect market. Instead, he found that contracts must be "contextual with a vengeance."²⁷⁴ According to Macneil, courts must take relational norms into consideration when interpreting what the parties to a contract agreed to.²⁷⁵ Both Macaulay's and Macneil's theories have relevance for analysis of implied obligations of confidentiality; both increase the focus on context such as custom and norms. Although the privacy literature regarding an empirically-based contextual approach to confidentiality is sparse, these contract theorists support the application of Nissenbaum's theory to confidential agreements.

Conclusions – A Dearth of Analysis. Although confidentiality, privacy, implied contracts, and online communication have all been well explored as separate areas in the literature, very few articles have analyzed the convergence of these topics. This dissertation seeks to fill that void.

²⁷¹ Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

²⁷² *Id.*

²⁷³ IAN MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980).

²⁷⁴ Jay Feinmann, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737 (2000).

²⁷⁵ *Id.* Macneil asserted that the context of contractual relations could be broken down according to ten contract norms such as role integrity, reciprocity, and implementation of planning. *Id.*

Generally, scholarly writing on confidentiality and privacy has almost always sought to address the challenges wrought to privacy by new technologies. However, conceptions of privacy remain as fractious as the patchwork of privacy laws that have developed since the publication of Warren and Brandeis's famous article. A number of scholars have argued that the law of confidentiality is more concrete, consistent, and easier to use in disputes involving the harmful dissemination of personal information. These scholars advocate the use of implied contracts of confidentiality for those disclosing information, yet no consensus has emerged regarding when and how these contracts might be formed online. Most notably absent from the literature is an analysis of Nissenbaum's context-relative informational norms in implied obligations of confidentiality. Courts are left to speculate as to whether a party was implicitly bound to confidence or whether an implied expectation of confidentiality was reasonable in any given circumstance. This dissertation helps remedy this dearth of analysis by systematically investigating judicial consideration of context-relative informational norms in order to determine how implied obligations of confidentiality might be formed.

RESEARCH QUESTIONS

This dissertation examines implied confidentiality disputes to determine precisely what courts consider important in the creation of implied obligations of confidentiality. This dissertation examines how courts have considered the four different aspects of contextual integrity in implied confidentiality disputes: 1) the context; 2) the actors; 3) the nature of the information; and 4) the terms of disclosure. This dissertation suggests a decision-making framework for courts to use when deciding whether an implied obligation of confidentiality exists. This dissertation also further develops Nissenbaum's

theory of contextual integrity by applying it to implied obligations of confidentiality. To accomplish these goals, this dissertation addresses the following research questions:

* What factors have courts considered important in analyzing alleged implied obligations of confidentiality? Specifically:

- How have courts considered the context in which information was disclosed?
- How have courts considered the roles played by the senders, recipients, and subjects of disclosed information?
- How have courts considered the nature of the information disclosed?
- How have courts considered the terms of disclosure?
- What other factors do courts consider important?

* Are these variables considered differently in online and offline cases? If so, how?

* How does this analysis contribute to Nissenbaum's theory of privacy as contextual integrity?

* How can these factors best form a decision-making framework for courts to use in analyzing implied obligations of confidentiality?

METHODOLOGY

This dissertation reviews 132 cases involving implied obligations of confidentiality to determine how courts consider context-relative informational norms in these disputes. Cases for analysis were identified by searching the online version of the Westlaw reporting service. Searches were limited to cases that expressly addressed some aspect of implied obligations of confidentiality. Cases involving both online and offline disputes were analyzed. Implied confidentiality cases were identified by using multiple

search strings.²⁷⁶ There were no date restrictions on the search in order to analyze the entire history of cases addressing implied obligations of confidentiality.²⁷⁷

LIMITATIONS

This dissertation has several limitations. First, judicial opinions are sparse regarding privacy disputes for two major reasons: 1) The damages available for privacy harms tend to be small, and lawsuits are expensive. Few attorneys will take privacy claims because there is such a slim chance of meaningful recovery. 2) The “privacy paradox” involved in litigation is that lawsuits actually give more attention to information the plaintiff is claiming was private. In this way, litigation is counterproductive to an individual’s privacy. Another limitation to this dissertation is that if a judge fails to consider context-relative informational norms, it is unclear whether the judge

²⁷⁶ The following searches were conducted in the ALLCASES database with no date restriction: “(imply implied) /3 confid!,” “infer! /3 confidential,” “(confiden! private privacy) /s impl! /p (website “web site” internet online e-mail),” “(contract! agree! term!) /s imply implied implication unspoken nonverbal) /p website “web site” internet web online) & private privacy confid!),” “(“implied confidentiality” “implication of confidentiality”),” “implied non-disclosure” “implication of non-disclosure”),” “confidentiality was implied” “confidential agreement was implied” “confidential relationship was implied”),” “(“implied confidential” “implication of confidential”),” “(“implied confidentiality” “implication of confidentiality”),” (“implied obligation of confidentiality” “implied duty of confidentiality” “implied obligation of secrecy” “implied duty of secrecy” “implied secrecy”),” “(implied in fact” “implied-in-fact”) /p (confid!),” “(“implied in fact” “implied-in-fact”) /p (online website “web site” internet).” The aforementioned searches yielded a universe of over 1000 court rulings involving implied obligations of confidentiality. The cases then were read to determine which cases did not actually discuss implied obligations of confidentiality. Cases that involved the relevant search terms but dealt with unrelated issues were excluded from the sample. For example, cases that dealt with implied waivers of express confidentiality agreements were discarded, since this dissertation is only focusing on the formation, not waiver, of implied confidentiality. Cases that included the term “confidence” and “confidential” in the broader sense instead of as a restriction on dissemination of information, such as “the state’s implied confidence in its decision was apparent,” were also discarded. Additionally, cases that contained the search terms but were devoid of any discussion on the merits of implied confidentiality were also discarded. For example, cases where a claim for breach of implied confidentiality was summarily dismissed based on a procedural deficiency were discarded. Cases that simply provided a list of previously documented elements that are required to prove a claim but no substantive analysis, such as the existence of a trade secret or a privacy interest in government-held information, were also discarded as redundant.

²⁷⁷ The earliest case found using the language of implied confidentiality was in 1861. *Keene v. Wheatly*, 4 Phila. 157, 14 F. Cas. 180 (E.D. Pa. 1861).

affirmatively rejected these norms as unimportant to the decision or whether the parties simply failed to incorporate them into the dispute.

CHAPTER OUTLINE

Chapter One of the dissertation introduced the problem with expectations of privacy in self-disclosed information and the law surrounding privacy in a digital age and implied confidentiality. This chapter has reviewed the literature on these topics and addressed how the dissertation will contribute to that literature. This chapter listed research questions, methodology, and limitations. Finally, this chapter outlined the remainder of the dissertation.

Chapter Two of the dissertation focuses on courts' consideration of context such as the characteristics of the social settings in which information is disclosed in implied confidentiality disputes. This chapter analyzes in what contexts implied obligations of confidentiality have been formed or denied and identifies trends in the cases.

Chapter Three of the dissertation focuses on the courts' consideration of the actors in implied obligations of confidentiality. Specifically, chapter three examines the significance attributed by courts to the nature of the disclosers of information, recipients of information, and the people who are the subjects of the information. This chapter identifies the trends and patterns in the cases.

Chapter Four of the dissertation focuses on the courts' consideration of the nature of information in implied obligations of confidentiality. Specifically, chapter four analyzes whether some kinds of information are more likely to be implied as confidential when they are disclosed than others. This chapter identifies the trends in the cases.

Chapter five of the dissertation focuses on courts' consideration of transmission principles, that is, the express and implied terms and conditions under which transfers of information ought (or ought not) to occur. This chapter will analyze how specific and explicit these terms must be to give rise to an obligation of confidentiality. This chapter will also attempt to identify any trends and compare offline and online cases.

Chapter Six summarizes the findings and discusses the results. It analyzes how the findings develop Nissenbaum's theory of privacy as contextual integrity. It also develops a decision-making framework for judicial analysis of online and offline implied obligations of confidentiality based on an analysis of the factors considered important by courts.

CHAPTER II

THE ROLE OF CONTEXT IN IMPLIED OBLIGATIONS OF CONFIDENTIALITY

The central component of Nissenbaum's theory of contextual integrity is the importance of context-relative informational norms. According to Nissenbaum, privacy and confidentiality cannot be adequately analyzed without looking at the informational norms within a given context.¹ Thus, it is important to define "context." The word context is defined as "circumstances in which an event occurs; a setting."² Because this definition is so broad, it is only minimally helpful when analyzing implied obligations of confidentiality. Nissenbaum defined contexts within her framework as "structured social settings characterized by canonical activities, roles, relationships, power structures, norms (or rules), and internal values."³ However, this definition is also too broad for the purposes of this dissertation because it overlaps with other aspects of Nissenbaum's theory.

A more specific definition is required to separate the term "context" from the other three factors in Nissenbaum's framework for contextual integrity: 1) nature of the information, 2) actors, and 3) terms of disclosure. Thus, for the purposes of this dissertation, context is defined as 1) the relationship between the actors to a disclosure or

¹ HELEN NISSENBAUM, *PRIVACY IN CONTEXT* 129 (2010).

² "Context," *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE*, <http://education.yahoo.com/reference/dictionary/entry/context> (last accessed March 12, 2011 11:47 am).

³ NISSENBAUM, *SUPRA* NOTE 1, AT 132.

2) any external circumstance affecting the actors to a disclosure, the nature of the information disclosed, or the terms of disclosure. By focusing on relationships and external circumstances instead of the intrinsic aspects of the actors, disclosed information, and terms of disclosure, the term “context” is different than the other three factors.

The cases revealed that courts routinely and explicitly rely on context when analyzing implied obligations of confidentiality. For example, in *Taylor Energy v. U.S. Dept. of the Interior*, an assignee of an oil and gas lease brought an action under the Administrative Procedure Act seeking judicial review of the decision by the Minerals Management Service (MMS) to release financial information in a trust agreement between the assignee and MMS.⁴ The assignee claimed that the trust agreement was confidential and contained valuable trade secrets. At dispute was whether a disclosure of information abrogated the secrecy of the confidential information. The U.S. District Court for the District of Columbia stated, “Plaintiff correctly argues that ‘[n]ot all disclosures are created equal; context matters as to whether a limited disclosure places that information in the public domain.’”⁵

Of the 132 cases analyzed in this dissertation, 88 explicitly considered context relevant in analyzing claims of implied confidentiality. This analysis of context occurred in many different types of disputes, including breach of contract;⁶ the breach of confidentiality tort;⁷ fraud;⁸ negligence;⁹ breach of trade secret;¹⁰ patent infringement;¹¹

⁴ *Taylor Energy Co. v. U.S. Dept. of the Interior*, 2010 WL 3429470 (D.D.C.).

⁵ *Id.* at *8.

⁶ *See, e.g.,* *Givens v. Mullikin ex. Rel. Estate of McElwaney*, 75 S.W.3d 383 (Tenn. 2002).

⁷ *See, e.g.,* *Humphers v. First Interstate Bank Oregon*, 696 P.2d 527, 534 (Or. 1985).

failure to properly disclose information under FOIA;¹² and waiver of testimonial, evidentiary, and *Miranda* privileges.¹³ Most of these cases involved offline instead of online disputes. Although an overwhelming majority of the cases were not related to the Internet, the courts' logic and analysis of implied obligations of confidentiality could be applied to online disputes.

The importance of context in implied obligations of confidentiality is firmly entrenched in the doctrine. As early as 1861, courts in the United States recognized that context, such as the custom of an industry, community, or group, could play an important role in creating an implied obligation of confidentiality. In *Keene v. Wheatley*,¹⁴ a playwright brought suit to enjoin the public performance of a play she claimed improperly used her dialogue. The substance and language of the play were allegedly obtained by a performer in one of the plaintiff's plays.¹⁵ The Circuit Court for the Eastern District of Pennsylvania found that the plaintiff

was entitled, in her competition with professional rivals, to the co-operation and support of every person employed by her within the walls of her theatre. The implied confidential restriction which ought to have prevented the disclosure of the words of her new play by performers of her own theatrical company was of the greatest importance to her in this competition.¹⁶

⁸ See, e.g., *Scott v. Kemp*, 316 A.2d 883 (Pa. 1974).

⁹ See, e.g., *Thomas v. State Emp. Grp. Benefits Prgm*, 934 So.2d 753 (La. Ct. App. 2006).

¹⁰ See, e.g., *RTE Corp. v. Coatings, Inc.*, 267 N.W.2d 226 (Wis. 1978).

¹¹ See, e.g., *Diodem, LLC v. Lumenis Inc.*, 2005 WL 6220720 (C.D. Cal.).

¹² See, e.g., *Council on American-Islamic Relations, Cal. v. FBI*, 2010 WL 4024806 (S.D. Cal.).

¹³ See, e.g., *WBAI-FM v. Proskin*, 42 A.D.2d 5 (N.Y. App. Div. 1973).

¹⁴ 4 Phila. 157, 14 F. Cas. 180 (E.D. Pa. 1861).

¹⁵ *Id.* at 188.

¹⁶ *Id.*

The purpose of this chapter is to examine what contextual factors are significant to courts that analyze implied obligations of confidentiality. The cases revealed that courts look to business and industry custom, the presence and nature of negotiations, the nature of the relationship between the parties, the purpose of the disclosure, whether and how the information was solicited, the timing of the disclosure, the presence and nature of an accompanying transaction, and public policy when determining whether an implied obligation of confidentiality exists. While no one factor seemed to dominate the analysis, it is clear that courts considered developed relationships, the ability to negotiate, unequal bargaining power, and entrenched normative expectations of confidentiality as key components of implied obligations of confidentiality.

Courts seemed to look for evidence of two factors more than anything else: mutual agreement between the parties and one party being more vulnerable to harm or coercion than the other. The courts' search for mutuality is reflected in the courts' attempts to locate and support the shared goals and expectations of the parties. Some factors, such as custom and negotiation, were seen as evidence of a knowing and voluntary acceptance of implied obligations of confidentiality. For example, if confidentiality was a widely accepted custom between inventors and investors in certain industries, then courts were likely to find that the parties in a dispute understood and relied upon implied confidentiality.

Other factors, such as the purpose of the disclosure, were seen as supporting an implied obligation of confidentiality when the mutual goals of the parties could not be fulfilled without such an obligation. For example, physicians could not properly diagnose a patient without full disclosure of the patient's medical history. Given the sensitive

nature of a person's medical history, implied confidentiality was seen as necessary for the physician-patient relationship to properly function.

Courts also consistently looked to whether one party in a relationship was more vulnerable to harm or coercion than the other. Contexts that left the disclosing party vulnerable to harm were seen as evidence of an assumption of confidentiality by the less vulnerable party as well as justification for building implied confidentiality into certain relationships. Courts recognized that vulnerable parties were more likely to need, but be unable to request, confidentiality than parties on equal footing. Thus, it was reasonable and likely that the recipient of information knew or should have known confidentiality was implied in their relationships with vulnerable parties.

Figure 1 demonstrates the numbers of cases that addressed each contextual factor:

Figure 1: Contextual Factors Considered by Courts

<u>Contextual Factor</u>	<u>Number of Cases</u>
Relationship between the parties	44
Custom	23
Negotiation	22
Timing of the disclosure	15
Purpose of the disclosure	12
Solicitation	8
Public policy	5

Of course, all of these categories required fact-specific inquiries by the courts, which resulted in varying outcomes for the parties to the case. Often courts considered

several of these factors in the same case. Yet virtually none of the courts articulated a specific framework or theory for why these factors were important. The courts often simply stated the general rule that context was important when analyzing the facts of the case and provided no further explanation of their logic. This chapter will clarify the judicial reasoning in cases involving implied obligations of confidentiality by identifying and analyzing the contextual factors –and sub-factors—important to courts. This analysis will reveal the truly important factors and underlying justifications for finding implied confidentiality and help develop a decision-making framework for implied obligations of confidentiality.

RELATIONSHIP BETWEEN THE PARTIES

The nature of the relationship between the parties is one of the most important contextual factors used to analyze a claim for implied confidentiality.¹⁷ Courts in the 44 cases that considered this factor often found it paramount in its analysis. To some extent, this factor overlaps with the custom between the parties. However, this factor also involves other aspects of the relationship between the parties. Courts consistently found that long, developed relationships were likely to give rise to an implied obligation of confidentiality because a developed relationship likely involves trust and custom.¹⁸ The nature of particular kinds of relationships, such as doctor-patient and inventor-potential investor,¹⁹ also received the benefit of an inference of confidentiality. Additionally,

¹⁷ See, e.g., *Roth v. U.S. Dept. of Justice*, 656 F. Supp. 2d 153, 165 (D.D.C. 2009) (finding that “[c]ircumstances that may indicate implied confidentiality include...the informant’s relationship with the agency....”) (citing *U.S. Dept. of Justice v. Landano*, 508 U.S. 165, 179 (1993)).

¹⁸ See, e.g., *Meyer v. Christie*, 2007 WL 3120695 at *4 (D. Kan.) (finding that a bank’s privacy policy promising confidentiality resulted in a binding contract where, among other things, the plaintiff “has a long-term banking business and banking relationship with [one of the defendants].”).

¹⁹ *Diodem, LLC v. Lumenis, Inc.*, 2005 WL 6220720 at *10 (C.D. Cal.).

courts were more amenable to claims of implied confidentiality where the party requesting or relying on confidentiality did not have equal bargaining power with the recipient of the information.²⁰ The reason these factors seemed important to courts is that implied expectations of confidentiality were more plausible in developed relationships, unequal bargaining power could inhibit the ability of vulnerable parties to explicitly request confidentiality, and relationships formed in pursuit of a common goal required confidentiality to be effective.

History Between the Parties. While some relationships, such as joint ventures²¹ and physician-patient relationships,²² were confidential as a matter of law, others became confidential or fiduciary in nature as a matter of fact due to the history between the parties. The case of *Paul v. Aviva Life and Annuity*²³ involved a class-action lawsuit brought by individual business owners and the closely held corporations they operated against their insurance company. The plaintiffs claimed that the defendant insurance company, Aviva, failed to disclose the risks of the insurance policy it sold to the plaintiffs, in violation of the defendant's fiduciary duty.

At issue was whether the insurer-insured relationship was fiduciary. Because the U.S. District Court for the Northern District of Texas found that the fiduciary nature of the relationship cannot be implied-in-law, it considered whether the fiduciary relationship could be implied-in-fact. The court found that “[a]n implied-in-fact fiduciary

²⁰ See, e.g., *L-3 Comm. Corp., v. OSI Sys., Inc.*, 2008 WL 2595176 at *5 (2d Cir.).

²¹ See, e.g., *Fail-Safe LLC v. A.O. Smith Corp.*, 2010 WL 3503427 (E.D. Wis.).

²² See, e.g., *Crippen v. Charter Southland Hosp., Inc.*, 534 So. 2d 286 (Ala. 1988); *Anderson v. Strong Mem'l Hosp.*, 775, 531 N.Y.S.2d 735, 739 (N.Y. Gen. Term 1988).

²³ 2010 WL 5105925 (N.D. Tex.).

relationship...may be created ‘where one places trust and confidence in another, thereby placing the latter party in a position of influence and superiority over the former.’”²⁴ In finding that there was no confidential fiduciary relationship between an insurer and an insured, the court held, “There are no allegations of a longstanding relationship between the parties, nor that [the defendant] was in a position of significant dominance and superiority.”²⁵

The case of *Hogan v. DC Comics*²⁶ involved comic book artists who alleged that they pitched an idea in confidence to the famous comic book company, DC. Here, the U.S. District Court for the Northern District of New York found that an alleged conversation constituted a prior relationship with DC Comics and possibly created a confidential relationship.²⁷ In *Champion v. Frazier*,²⁸ the Missouri Court of Appeals noted that case precedent supported an implied-in-fact contract based on the developed nature of the relationship between the parties.²⁹ These cases indicate that developed relationships are more likely to involve implied obligations of confidentiality than newer, less developed ones in both contractual and fiduciary relationships.

Of course, a mere allegation of a developed relationship is typically not enough to support a successful claim of implied confidentiality.³⁰ The claim must be supported by

²⁴ *Id.* at *9.

²⁵ *Id.* at *10.

²⁶ 1997 WL 570871 at *6 (N.D.N.Y.).

²⁷ *Id.*

²⁸ 977 S.W.2d 61 (Mo. Ct. App. 1998).

²⁹ *Id.* (citing *Hudson v. DeLonjay*, 732 S.W. 2d 922, 926 (Mo. App. E.D. 1987)).

³⁰ *Davies v. Kransa*, 535 P.2d 1161, 1167 (Cal. 1975) (stating that “[i]n the present case, plaintiff alleges in her amended complaint the existence of a confidential relationship, but her conclusionary allegations, unsupported by factual averments, are insufficient to give rise to a triable issue.”).

evidence. Recall *Massachusetts Institute of Tech. v. Harman International.*, which dealt with whether a patent for an automobile navigation system using spoken word directions had been used publicly or only exposed to a small group of study participants in confidence. The plaintiff, MIT, claimed that an implied confidentiality agreement existed between its researchers and trial participants because “all field trial participants were trusted friends, supporters or colleagues...and . . . they understood the implied duty not to disclose information regarding the...project.”³¹ While the U.S. District Court for the District of Massachusetts did not discount the possibility that such close relationships would give rise to an implied obligation of confidentiality, it rejected the plaintiffs’ claim because, among other things, they provided no evidence to support a finding of confidentiality.³²

In *Fischer v. Viacom*,³³ the U.S. District Court for the District of Maryland did not find an implied confidential relationship where, among other things, there were no prior dealings between the parties, who appeared to be “complete strangers.”³⁴ In *Markogianis v. Burger King*,³⁵ the U.S. District Court for the Southern District of New York held that the “level of activity between the parties, who were complete strangers to one another, does not give rise to any fiduciary or confidential relationship. Plaintiff had no prior dealings with [defendant].”³⁶ The court here also focused on the fact that the relationship

³¹ 584 F. Supp. 2d 297, 304 (D. Mass. 2008).

³² *Id.*

³³ 115 F. Supp. 2d 535 (D. Md. 2000).

³⁴ *Id.* at 544.

³⁵ 1997 WL 167113 (S.D.N.Y.).

³⁶ *Id.* at *4.

was not only new, but it was not very involved or developed.³⁷ The courts' analysis reveals that strangers are less likely to be subject to implied confidentiality obligations than parties who are familiar with each other.

Specific Relationships with Heightened Probability of Implied

Confidentiality. Several courts specified that certain kinds of relationships, such as joint ventures, principal-agent,³⁸ physician-patient,³⁹ accountant/attorney-client,⁴⁰ employer-employee,⁴¹ and those involving trusted advisors, were likely to involve an implied obligation of confidentiality.⁴² Nearly all these specific relationships have at least two

³⁷ *Id.*

³⁸ *See, e.g.* McAfee, Inc. v. Agilysys, Inc., 316 S.W.3d 820 (Tex. Ct. App. 2010). The court of appeals of Texas elaborated on the nature of fiduciary and confidential relationships, stating:

There are two types of fiduciary relationships: formal fiduciary relationships that arise as a matter of law, such as partnerships and principal-agent relationships, and informal fiduciary relationships or “confidential relationships” that may arise from moral, social, domestic, or personal relationships. A fiduciary relationship is an extraordinary one and will not be created lightly. The mere fact that one party to a relationship subjectively trusts the other does not indicate the existence of a fiduciary relationship. A person is justified in believing another to be his fiduciary “only where he or she is accustomed to being guided by the judgment and advice of the other party, and there exists a long association in a business relationship, as well as a personal friendship.”

Id. at 829 (citations omitted).

³⁹ *See, e.g.*, Crippen v. Charter Southland Hosp., Inc., 534 So. 2d 286 (Ala. 1988) (finding a duty of confidentiality in the doctor-patient relationship); Anderson v. Strong Mem'l Hosp., 531 N.Y.S.2d 735, 739 (N.Y. Gen. Term 1988) (finding that “the physician-patient relationship itself gives rise to an implied covenant of confidence and trust when breached.”); Givens v. Mullikin *ex rel* Estate of McElwaney, 75 S.W. 3d 383, 407 (Tenn. 2002).

⁴⁰ *See, e.g.*, Wagenheim v. Alexander Grant & Co., 19 Ohio App. 3d 7, 12-13 (Ohio Ct. App. 1983).

⁴¹ *See, e.g.*, SI Handling Systems, Inc. v. Heisley, 658 F. Supp. 362 (E.D. Pa. 1986) (citing established precedent that “in some circumstances, an agreement not to disclose a former employer’s trade secrets may be *implied* from the confidential nature of the employment relationship.”) (emphasis in original); Sweetzel, Inc. v. Hawk Hill Cookies, Inc., 1995 WL 550585 at *12 (E.D. Pa. 1995).

⁴² *See, e.g.*, Omnitceh Intern., Inc., v. Clorox Co., 11 F.3d 1316 (5th Cir. 1994) (recognizing a fiduciary relationship between business partners, attorneys and their clients, the insured and their insurers, and majority shareholders and minority shareholders).

elements in common: vulnerable parties and the disclosure of information in furtherance of a common goal.

In *Faris v. Enberg*,⁴³ the California Court of Appeals found that among the factors from which a confidential relationship can be inferred is “proof of a particular relationship such as partners, joint adventurers, principal and agent or buyer and seller under certain circumstances.”⁴⁴ In *Fail-Safe v. A.O. Smith*,⁴⁵ the U.S. District Court for the Eastern District of Wisconsin observed that a joint business venture between the parties “by its very nature implied that disclosures made in the context of such an arrangement were confidential.”⁴⁶ According to the court, a joint venture is established under Wisconsin law by “(1) contribution of money or services by each of the parties; (2) joint proprietorship and mutual control over the subject matter of the venture; (3) an agreement to share profits; and (4) an express or implied contract establishing the relationship.”⁴⁷

The joint venture relationship is similar to relationships involving fiduciary duties, and the requirements for its formation provide insight into the impetus behind obligations of confidentiality. Joint ventures require some form of commitment of resources and leave both parties vulnerable to harm if the relationship fails. This commitment of resources heightens the importance of the relationship and separates it from other relationships with fewer consequences if confidentiality is breached. Both

⁴³ 97 Cal. App. 3d 309, 323 (Cal. Ct. App. 1979).

⁴⁴ *Id.*

⁴⁵ 2010 WL 3503427 (E.D. Wis.).

⁴⁶ *Id.* at * 22 (finding no evidence that a joint venture relationship existed between the parties).

⁴⁷ *Id.*

parties in a joint venture also are seeking a common goal – to generate profits. Thus, there is an implied understanding in joint ventures that certain disclosures are meant to further the profit goal, with the inverse implication that disclosures should not be used for other, potentially harmful, purposes.

Both parties to a joint venture have the capacity to modify their relationship. The mutual ability to affect the relationship is the result of placing trust and confidence in the other party. Finally, both parties to a joint venture have some form of agreement regarding the boundaries of the relationship. Other aspects of a joint venture, such as vulnerability, a common goal between the parties, and mutual control and agreement in confidential relationships are also factors considered by courts in analyzing implied obligations of confidentiality and will be addressed below as part of the relationship between the parties and later in this dissertation as wholly separate factors.

Relationships in which one party is vulnerable to harm due to the other's access to sensitive information seemed to be a significant factor for many courts deciding whether an implied obligation of confidentiality existed, particularly in specific relationships in business, employment, and medical settings. In the trade secret dispute in *Ecolaire v. Crissman*,⁴⁸ the U.S. District Court for the Eastern District of Pennsylvania noted that an employee's position as vice president "gave him access to numerous pre-existing trade secrets."⁴⁹ According to the court, the nature of his relationship with his employer as a trusted executive also gave him an implied duty of non-disclosure.⁵⁰

⁴⁸ 542 F. Supp. 196 (E.D. Pa. 1982).

⁴⁹ *Id.* at 207.

⁵⁰ *Id.*

Disclosures made in pursuit of a common goal and recognition by the parties of that pursuit also seemed to be a significant factor for courts.⁵¹ In *Carpenter Foundation v. Oakes*,⁵² a corporation founded for the purpose of preserving items about Mary Baker Eddy, the founder of Christian Science, sought to enjoin the publishing of sensitive correspondence that contained frank discussions of religion and recollections of students by the founder of the corporation. The corporation insisted that the disclosure of these sensitive materials to the defendant, a former employee seeking to publish the materials, was made within a relationship of “agency, trust and confidence” and that the documents were disclosed with “the express and implied understanding and condition that documents would be circulated among only those ‘qualified’ students of Christian Science.”⁵³

The Court of Appeal for California agreed with the plaintiff, stating, “[W]e have no difficulty in finding a fiduciary relationship established not only by reason of the agency created in the operation of the [non-profit’s satellite branch], but also by virtue of the long, intimate, personal friendship” between the president of the corporation and the defendant, a former employee.⁵⁴ The court then acknowledged that the common goal of the parties was critical for the formation of this fiduciary obligation. The court said:

“The transmission of the papers involved more than a mere gratuitous token of friendship

⁵¹ See, e.g., *Cloud v. Standard Packing Corp.*, 376 F.2d 384, 389 (7th Cir. 1967) (stating that “[w]here the facts show that a disclosure is made in order to further a particular relationship, a relationship of confidence may be implied...”); *RTE Corp. v. Coatings, Inc.*, 84 Wis. 2d 105, 199-20 (Wis. 1978) (stating that “a relationship of confidence may be implied when a disclosure is made solely for the purpose of advancing or implementing an existing special relationship.”).

⁵² 26 Cal. App. 3d 784 (Cal. Ct. App. 1972).

⁵³ *Id.* at 789.

⁵⁴ *Id.* at 798.

between acquaintances. Its purpose was clear. It was the necessary step to effect the goal, repeatedly discussed by the parties,” of spreading the views of the founder of Christian Science to a limited number of pupils.⁵⁵ Note that disclosure in pursuit of a common goal or in furtherance of a relationship is also an important factor separately considered by the courts.⁵⁶

Not all financial relationships were seen as fiduciary. The insurer-insured⁵⁷ and debtor-creditor⁵⁸ relationships were explicitly rejected as fiduciary or even confidential by some courts. The Ninth Circuit held in *Star Patrol*, a dispute over the development of the Mighty Morphin’ Power Rangers television series and distribution of related products, that “the arms-length business relationship between [the parties] is insufficient to impose fiduciary-like duties that arise from a confidential relationship.”⁵⁹ The court then helpfully recognized that although fiduciary relationships involve obligations of confidentiality, implied confidentiality can be established many other ways, including simple proof that “an idea was offered and received in confidence, and later disclosed without permission.”⁶⁰

⁵⁵ *Id.*

⁵⁶ See Chapter II, note 132 and accompanying text.

⁵⁷ *Paul v. Aviva Life and Annuity Co.*, 2010 WL 5105925 at *10 (N.D. Tex.).

⁵⁸ *Velasquez-Campuzano v. Marfa Nat. Bank*, 896 F. Supp. 1415, 1426 (W.D. Tex. 1995) (stating that “[i]n Texas, the relationship between a bank and its customers is generally not fiduciary in nature.”); *Graney Dev. Corp. v. Taksen*, 92 Misc. 2d 764, 768 (N.Y. Gen. Term 1978) (observing that a bank was under no obligation of confidentiality because “the relationship between the bank and the plaintiff was solely that of creditor and debtor.”); *Norkin v. Hoey*, 181 A.D. 2d 248, 255 (N.Y. Ct. App. 1992) (stating “whatever expectations of confidentiality may inhere in the traditional relationship between bank and depositor, such expectations are wholly lacking in the context of the debtor-creditor loan relationship”).

⁵⁹ 1997 WL 683327 at *2 (9th Cir.).

⁶⁰ *Id.*

A similar logic was employed by the Supreme Court of California in *Davies v. Kransa*,⁶¹ which recognized a confidential relationship might involve a “trusted friend or advisor,” but here the defendant was merely a “prospective purchaser or exploiter.”⁶² The court then, as in *Star Patrol*, emphasized that an obligation of confidentiality might exist in this dispute, but the facts “are insufficient to impose upon him the fiduciary-like duties that arise from a confidential relationship.”⁶³ Thus, relationships involving vulnerable parties and parties who share common goals should be analyzed for implied confidentiality, even if the relationship does not rise to the level of fiduciaries.

Familial relationships, standing alone, were also not seen as inherently fiduciary by most courts.⁶⁴ In *Norris v. Norris*, the Ohio Court of Appeals found that “proof of the marital relationship in no sense established the fiduciary relationship essential to the establishment of a trust between the parties. But the marital status, in and of itself, implied a confidential relationship which is to be considered along with all other circumstances” when determining whether a relationship is fiduciary.⁶⁵ However, at least one court found that marriage could, by itself, support a finding of an implied obligation of confidentiality.⁶⁶

⁶¹ 535 P.2d 1161, 1167 (Cal. 1975).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Scott v. Kemp*, 316 A.2d 883, 885-86 (Pa. 1974) (stating that “[t]he bare fact that [defendant] and [plaintiff] were brother and sister does not, without more, place them in a relationship of confidentiality.”).

⁶⁵ 57 N.E.2d 254, 261 (Ohio Ct. App. 1943).

⁶⁶ *See Lakin v. Lakin*, 1999 WL 1320464 at *19 (Conn. Super. Ct.) (recognizing that “giving the nature of the marital relationship, Connecticut implies a confidential or fiduciary relationship between the parties.”).

The physician-patient relationship appeared to be the paradigmatic confidential relationship.⁶⁷ The nature of this relationship was best summarized by the Supreme Court of Tennessee in *Givens v. Mullikin ex rel. Estate of McElwaney*⁶⁸ as follows:

Any time a doctor undertakes the treatment of a patient, and the consensual relationship of physician and patient is established, two jural obligations (of significance here) are simultaneously assumed by the doctor. Doctor and patient enter into a simple contract, the patient hoping that he will be cured and the doctor optimistically assuming that he will be compensated. As an implied condition of that contract, this Court is of the opinion that the doctor warrants that any confidential information gained through the relationship will not be released without the patient's permission.... Consequently, when a doctor breaches his duty of secrecy, he is in violation of part of his obligations under the contract.⁶⁹

The confidential physician-patient relationship is thus contractual and fiduciary. In *Doe v. Roe*,⁷⁰ the former patient of a psychiatrist brought a lawsuit after the psychiatrist published a book that revealed extremely specific and sensitive details of the patient's treatment. The Supreme Court of New York County found that physicians owed their patients the highest fiduciary duty of confidentiality. The court entered into a lengthy analysis of the reasons behind this duty. According to the court, physicians were under a general duty not to disclose information revealed by the patient because a patient should be able to freely disclose her symptoms to her doctor in order to receive treatment

⁶⁷ See, e.g., *Pierce v. Caday*, 422 S.E.2d 371, 374 (Va. 1992) (finding that “[u]pon receipt of [a patient’s confidential] information, the physician impliedly promises not to violate the confidence.”); *Doe v. Roe*, 400 N.Y.S.2d 668 (N.Y. Gen. Term 1977); *Ghayoumi v. McMillan*, 2006 WL 1994556 (Tenn. Ct. App.); *Givens v. Mullikin ex rel Estate of McElwaney*, 75 S.W. 3d 383, 407 (Tenn. 2002) (recognizing that an implied contract of confidentiality can exist when a patient compensates a physician in return for medical treatment).

⁶⁸ 75 S.W. 3d 383 (Tenn. 2002).

⁶⁹ *Id.* at 407.

⁷⁰ 400 N.Y.S. 668 (N.Y. Gen. Term 1977).

“‘without fear that those facts may become public property.’”⁷¹ In agreeing with a long line of established precedent, the court held:

I too find that a physician, who enters into an agreement with a patient to provide medical attention, impliedly covenants to keep in confidence all disclosures made by the patient concerning the patient's physical or mental condition as well as all matters discovered by the physician in the course of examination or treatment. This is particularly and necessarily true of the psychiatric relationship, for in the dynamics of psychotherapy “[t]he patient is called upon to discuss in a candid and frank manner personal material of the most intimate and disturbing nature....He is expected to bring up all manner of socially unacceptable instincts and urges, immature wishes, perverse sexual thoughts – in short, the unspeakable, the unthinkable, the repressed. To speak of such things to another human requires an atmosphere of unusual trust, confidence and tolerance. ... Patients will be helped only if they can form a trusting relationship with the psychiatrist.”⁷²

Again, the court finds vulnerable parties and the disclosure of information in furtherance of a common goal, in this case psychiatric treatment, as significant aspects of implied confidentiality.

It is important to note that the lack of a developed relationship was not seen by courts as a bar to implied confidentiality. In *Zippertubing v. Teleflex*,⁷³ the Third Circuit observed in a dispute over wrongfully obtained customer information that although the parties had no prior relationship, an implied obligation of confidentiality existed based on other circumstances surrounding a transaction such as implied terms of confidentiality and prior awareness of both parties’ business goals and the reason for disclosing valuable

⁷¹ *Id.* at 207, 209 (citing *Hague v. Williams*, 181 A.2d 345, 349 (1962)) (finding that “[t]he unauthorized revelation of medical secrets or any confidential information given in the course of treatment, is tortious conduct which may be the basis for an action in damages.”).

⁷² *Id.* at 210 (citing Marvin S. Heller, *Some Comments to Lawyers on the Practice of Psychiatry*, 30 TEMP. L. REV. 401, 405-06 (1957)).

⁷³ 757 F.2d 1401 (1985).

customer information.⁷⁴ Finally, courts recognized that a contract could create confidentiality obligations within a relationship even if the law did not inherently recognize certain relationships as confidential, such as the insurer-insured relationship.⁷⁵

Unequal Bargaining Power. Courts often were willing to find an implied obligation of confidentiality in relationships involving unequal bargaining power.⁷⁶ In *Fischer*,⁷⁷ the case in which a creator of comic characters sued a producer of television programs for breach of implied contract and breach of duty of confidentiality for producing a program allegedly based on the creator's ideas, the U.S. District Court for the District of Maryland noted the general rule that "an implied duty of confidentiality exists in circumstances where the parties deal on unequal terms, the transaction is more than an arm's length deal, and one party trusts and relies on the other."⁷⁸ This rule would seem to indicate that reliance on implied confidentiality in a developed relationship with unequal bargaining power is reasonable.

Unequal bargaining power was seen as a critical component in fiduciary relationships. In *Paul*, the case involving a lawsuit alleging the defendant failed to disclose the risks of the insurance policy it sold to the plaintiffs in violation of their

⁷⁴ *Id.* at 1408.

⁷⁵ *See, e.g.,* Thomas v. State Emp. Group Benefits Program, 934 So. 2d 753, 756-57 (La. Ct. App. 2006) (finding no implied condition of confidentiality can be read into an insurer's contract with its insured "by virtue of its intrinsic nature or longstanding custom or tradition." The court continued, "A contractual duty on the part of an insurer to maintain the confidentiality of its insured's medical records *might* arise independently of any duty under general tort law, if the insurer expressly assumes such an obligation under the terms of the insurance contract.").

⁷⁶ *See, e.g.,* Paul v. Aviva Life and Annuity Co., 2010 WL 5105925 at *9 (N.D. Tex.)(citing Martin v. State Farm Mut. Auto. Ins. Co., 808 N.E.2d 47, 52 (Ill. Ct. App. 2004)).

⁷⁷ 115 F. Supp. 2d 535 (D. Md. 2000).

⁷⁸ *Id.* at 543; *see also* Hogan v. D.C. Comics, 1997 WL 570871 at *5 (N.D.N.Y.) (citing case law stating "[a] confidential or fiduciary relationship exists between parties 'where the parties do not deal on equal terms and one trusts and relies on the other.'" (citations omitted)).

fiduciary duty, the court observed that “‘significant dominance and superiority [are] necessary to establish a fiduciary relationship.’”⁷⁹ Here, the U.S. District Court for the Northern District of Texas found that the relationship between an insurer and the insured did not involve one party in a position of significant dominance or superiority over another. As a result, the relationship between the parties was not a fiduciary one.⁸⁰

The U.S. District Court for the Eastern District of Pennsylvania recognized in *Harold ex rel. Harold v. McGann*⁸¹ that a confidential relationship exists “to the extent that the parties do not deal with each other on equal terms.”⁸² The court found that a “special confidence can result from ‘an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other’” and that a confidential relationship exists when a party is required to act for the benefit of another and prohibited from taking a benefit due to that party for himself.⁸³ For example, in *In re Clark’s Estate*,⁸⁴ a dispute involving an alleged abuse of a confidential relationship between Alice Clark and a beneficiary of her will, John Smith, the Supreme Court of Pennsylvania found that the Clark’s “weakened mental condition and dependence on Smith in her financial dealings, coupled with Smith’s assumption of control over Mrs. Clark’s business

⁷⁹ Paul v. Aviva Life and Annuity Co., 2010 WL 5105925 at *9 (N.D. Tex.) (citing Martin v. State Farm Mut. Auto. Ins. Co., 808 N.E.2d 47, 52 (Ill. App. 2004)).

⁸⁰ *Id.*

⁸¹ 406 F. Supp. 2d 562 (E.D. Pa. 2009) (citations omitted).

⁸² *Id.* at 571.

⁸³ *Id.*

⁸⁴ 359 A.2d 777 (Pa. 1976).

affairs, fully warranted the chancellor's finding that Smith and Clark stood in a confidential relationship.”⁸⁵

CUSTOM

One of the most important aspects of an implied obligation of confidentiality is that the discloser and recipient of information knew or should have known that the information was disclosed in confidence. For this reason, courts considered custom a very significant factor in analyzing implied obligations of confidentiality. If confidentiality was a regular and accepted practice in a given context, courts often found a discloser’s reliance on that custom reasonable. This reliance was reasonable because the common knowledge of a custom made it likely that the recipient of the information was aware of an expectation of confidentiality before the information was disclosed, or, in any event, the recipient should have known to keep the information confidential.

Courts found two types of customs important: party customs and industry customs. Courts were likely to find an implied obligation of confidentiality for parties if they offered or required confidences in previous, similar contexts. Industry customs of confidentiality, most commonly found in intellectual property disputes, were important to courts if confidentiality was a commonly accepted practice in any given industry, though not necessarily the custom of the parties currently requesting or being charged with an obligation of confidentiality.

In both types of contextual factors, courts seemed to assume that if confidentiality was a known custom, then the discloser and recipient of information likely knew or should have known about this custom. If the parties knew or should have known of the

⁸⁵ *Id.* at 635.

custom, it is more likely that expectations and promises of confidentiality were implied. Additionally, an industry's or recipient's custom of confidentiality demonstrates that the practice is reasonable and plausible, thus increasing the likelihood of implied confidentiality.

Party Custom. Some courts looked to whether the discloser of information or the recipient of information had a custom of requesting or maintaining the confidentiality of similar disclosures or of maintaining confidentiality when dealing with the same party.⁸⁶ As will be discussed later, courts considered the history between the parties important. Thus, a custom of confidentiality between the parties would be a significant factor in finding an implied obligation of confidentiality in a particular disclosure. If the recipient of information customarily kept similar disclosures confidential for other parties, then that too was a factor to be considered by the courts.

Courts also considered the absence of a recipient's custom of confidentiality. For example, in denying a claim for an implied confidentiality agreement between MIT researchers and participants in a research study, the U.S. District Court for the District of Massachusetts held that the researchers "failed to support the notion that there is a 'recognized culture that would preclude, or at least inhibit, most of the participants in the field tests from disclosing information...to others.'"⁸⁷ This case dealt with whether a patented automobile navigation system using spoken word directions had been used publicly or only exposed to a small group of study participants in confidence. The court

⁸⁶ See, e.g., *Moore v. Marty Gilman, Inc.*, 965 F. Supp. 203, 214 (D. Mass. 1997) (citing *Burten v. Milton Bradley Co.*, 592 F. Supp. 1021, 1027 (D.R.I. 1984) (noting that in previous cases, a business's adherence to an industry custom of confidentiality was a key point in determining whether an implied confidential relationship exists).

⁸⁷ *Mass. Inst. of Tech. v. Harman Int'l. Indus.*, 584 F. Supp. 2d 297, 304 (D. Mass. 2008).

focused on the particular steps taken (or not taken) by MIT researchers to ensure the confidentiality of the patent rather than on a generally accepted industry practice of confidentiality adhered to by academic researchers. According to the courts, MIT provided little proof that it customarily required confidentiality of its research trial participants.⁸⁸

Industry Custom. Courts consistently considered industry custom a significant factor in analyzing claims for implied obligations for confidentiality.⁸⁹ In *Metrano v. Fox Broadcasting*,⁹⁰ the plaintiff, a screenwriter who pitched a television show about people with extraordinary medical conditions who can perform incredible human feats, brought a suit against a broadcasting producer for breach of confidence for using the screenwriter's ideas that were disclosed in a pitch meeting without his authorization. The U.S. District Court for the Central District of California recognized that, if proven, the television industry's practice of implied confidentiality in all pitch meetings supported a plaintiff's claim for breach of confidence.⁹¹

In *Moore v. Marty Gilman*,⁹² the U.S. District Court for the District of Massachusetts detailed the importance of customs in implied confidential relationships

⁸⁸ *Id.* at 304-05.

⁸⁹ See *Bergin v. Century 21 Real Estate Corp.*, 2000 WL 223833 at *2, *4 (S.D.N.Y.); *Vantage Point v. Parker Bros.*, 529 F. Supp. 1204, 1217-18 (1981) (*Markogianis v. Burger King Co.*, 1997 WL 167113 (S.D.N.Y.) (noting that "[i]ndustry custom can create an implied-in-fact contract between the parties...."); *Prescott v. Morton Int'l, Inc.*, 769 F. Supp. 404, 410 (D. Mass. 1990) (holding that a genuine issue of material fact exists "as to whether the parties' conduct would lead a reasonable person in the industry to infer that Morton promised not to use the information in the design plans without authorization.").

⁹⁰ 2000 WL 979664 (C.D. Cal.).

⁹¹ *Id.* at *7-8. Here the plaintiff, an actor who pitched an idea for a television show, alleged that the "defendant implicitly understood that it should maintain confidentiality of [the show idea] because that was 'the case with all pitch meetings in the television industry.'" *Id.* at *7.

⁹² 965 F. Supp. 203 (1997).

that are necessary to protect a trade secret. The court found evidence in a previous case that established the existence of an industry-wide custom of confidentiality recognized by reputable game and toy companies “to maintain the secrecy of ideas submitted by outside inventors.”⁹³ This fact, among others, led the court to recognize that industry custom could create an implied obligation of confidentiality in the pitched ideas if that custom is demonstrated by evidence.⁹⁴ However, in the current dispute, the court held that “there was no evidence of an industry custom or practice that would give rise to a shared expectation that defendants would not use any ideas that plaintiffs might gratuitously disclose to them.”⁹⁵

The cases did not reveal exactly how much evidence was required to demonstrate a custom strong enough to support an implied obligation of confidentiality. One court suggested that the evidence must reflect a near uniform, not just anecdotal, adherence to custom. In *Flotec v. Southern Research*,⁹⁶ the U. S. District Court for the Southern District of Indiana found in a trade secret dispute:

The evidence showed a widespread but not uniform practice in the machine shop industry of keeping a customer’s information confidential. The evidence does not support, however, a uniform custom of keeping such information confidential when it concerns components of a product already on the market and where the customer does not ask for any promise of confidentiality.⁹⁷

The court found that there was strong evidence of a custom of confidentiality and that “[t]he witnesses who described the supposed custom all had experience with explicit

⁹³ *Id.* at 214 (citing *Burten v. Milton Bradley Co.*, 592 F. Supp. 1021, 1027 (D.R.I. 1984)).

⁹⁴ *Id.*

⁹⁵ *Id.* at 216.

⁹⁶ 16 F. Supp. 2d 992 (S.D. Ind. 1998).

⁹⁷ *Id.* at 1007.

confidentiality agreements in the industry” and all viewed the practice as beneficial to their business.⁹⁸ However, the court found that this custom was not sufficient as the sole means of finding an implied obligation of the parties.⁹⁹ Another court clarified that the mere allegation of industry custom was not sufficient to support a claim of implied confidentiality, particularly if that custom was contradicted by other evidence.¹⁰⁰

However, even a uniform adherence to custom might not be enough for courts to infer an obligation of confidentiality in a dispute. The court in *Flotec* found that industry custom, standing alone, did not justify an obligation of confidentiality. The court questioned “whether it was reasonable for [the plaintiff] to rely on this asserted custom as *the sole means* to protect the confidentiality if [sic] information it claims is a secret and vital to its business success.”¹⁰¹ Ultimately, the court found that it needed more to find implied confidentiality in this dispute, holding, “To the extent that Flotec was relying on a supposed custom of the machine shop industry to protect the confidentiality of the drawings it gave to SRI, Flotec did not take reasonable steps to protect the confidentiality of the information on those drawings.”¹⁰² Thus, according to the court, custom can be *a* factor, but not *the* factor, in determining whether confidentiality was implied when information was disclosed.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Keane v. Fox Television Stations, Inc.*, 297 F. Supp. 2d 921, 940 (S.D. Tex. 2004) (stating that “[i]n the 12(b)(6) context the court would ordinarily presume the truth of Keane’s assertion regarding industry custom. However, the court is ‘not required to accept as true conclusory allegations [that] are contradicted by documents referred to in the complaint.’”) (citations omitted).

¹⁰¹ *Flotec*, 16 F. Supp. 2d at 1007 (emphasis in original).

¹⁰² *Id.*

Courts emphasized that the custom of merely exchanging valuable or sensitive information was not, by itself, enough to establish an obligation of confidentiality. A custom of confidentiality should be firmly established to be legally binding. In *Fischer v. Viacom*,¹⁰³ the U. S. District Court for the District of Maryland found that the “commonplace give-and-take between those who ‘pitch’ ideas and those who listen and consider” was not enough of a custom to give rise to a duty of confidentiality.¹⁰⁴

Industry customs of confidentiality seemed most significant in disputes involving implied contracts, as opposed to confidential relationships formed by fiduciary obligations or statutes. A number of implied contract disputes looked to custom, even if the contract was unrelated to confidentiality. In *Hogan v. DC Comics*,¹⁰⁵ the U.S. District Court for the Northern District of New York found, “Whether an implied contract exists depends upon the general practices of the industry.”¹⁰⁶ However, industry custom seemed less significant for the broader category of confidential relationships.¹⁰⁷ For example, in a claim for the tort of breach of confidential relationship, the Supreme Court of Oregon

¹⁰³ 115 F. Supp. 2d 535 (D. Md. 2000).

¹⁰⁴ *Id.* at 544.

¹⁰⁵ 1997 WL 570871 (N.D.N.Y.).

¹⁰⁶ *Id.* at *5.

¹⁰⁷ See *supra* Chapter One, note 89 and accompanying text; see also *Star Patrol Enter. v. Saban Entm’t, Inc.*, 1997 WL 683327 (9th Cir.). In *Star Patrol* the court noted the difference between a claim for “breach of confidence” and “breach of confidential relationship and fiduciary duty” when the plaintiff inadvertently mislabeled its cause of action, claiming “breach of confidential relationship” instead of “breach of confidence.” The court stated:

An action for breach of confidential relationship would necessarily fail because the arms-length business relationship between Star Patrol and the defendants is insufficient to impose fiduciary-like duties that arise from a confidential relationship. However, to establish a breach of confidence claim, the plaintiff must only allege that an idea was offered and received in confidence, and later disclosed without permission.

Id. at *2.

held: “It requires more than custom to impose legal restraints on ‘the right to speak, write, or print freely on any subject whatever.’ ...[A] legal duty not to speak, unless voluntarily assumed in entering the relationship, will not be imposed by courts or jurors in the name of custom or reasonable expectation.”¹⁰⁸

As a refresher, implied-in-fact contracts for confidentiality cover only the agreed-upon disclosures, whereas confidential relationships often impose a heightened fiduciary-like duty of care, which includes a duty not to disclose any information gained within the scope of the relationship that would harm the discloser.¹⁰⁹ In any event, it is clear that courts have explicitly recognized that customs can serve as evidence of an implied agreement of confidentiality.¹¹⁰ According to the U.S. Court of Appeals of the Ninth Circuit, the cause of action for an implied-in-fact contract of confidentiality can be maintained under any circumstance where it can be concluded that the recipient of

¹⁰⁸ *Humphers v. First Interstate Bank Oregon*, 696 P.2d 527, 534 (Or. 1985).

¹⁰⁹ Roy Ryden Anderson, *The Wolf at the Campfire: Understanding Confidential Relationships*, 53 SMU L. REV. 315, 317 (2000). Confidential relationships are often referred to as “nonconsensual” because while entering into the relationship such as a doctor/patient relationship might be voluntary, the duty of confidentiality is often imposed not solely because of an agreement between the parties, but through some other law or policy; *see also* *Biddle v. Warren Gen. Hosp.*, 1998 WL 156997 at *12 (Ohio Ct. App.) (finding that in confidential relationships between physicians and patients “there is no indication that patients bargain for confidentiality; rather, it is assumed.”). This distinction between confidential contracts and confidential relationships can be muddled at times, and the phrase “confidential relationship” is often used to describe a relationship that is confidential, but does not include other traditional fiduciary duties. “Confidential relationship” has also been haphazardly used by many to describe a relationship involving any obligation of confidentiality, regardless of the scope or source of the obligation.

¹¹⁰ *Star Patrol Enter. v. Saban Entm’t, Inc.*, 1999 WL 683327 (9th Cir) (finding that “[p]roper and competent proof of an industry custom and usage which created an obligation on the part of the defendants might form part of the [circumstances that can demonstrate voluntary acceptance of confidentiality.]” *Id.* at *1; *Markogianis v. Burger King Corp.*, 1997 WL 167113 at *5 (S.D.N.Y.) (holding that “[i]ndustry custom can create an implied-in-fact contract between the parties, resulting in a requisite legal relationship needed to support a misappropriation claim.”).

information voluntarily accepted the disclosure knowing the conditions on which it was tendered.¹¹¹

NEGOTIATION

The 22 cases in which negotiation was considered offered varying judicial opinions on how negotiations should impact an inference of confidentiality. Some courts opined that a lack of negotiation reflected an absence of the “meeting of the minds” necessary for true agreement between the parties.¹¹² Other courts looked to whether the parties were negotiating at “arm’s-length,” defined as “[o]f or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship.”¹¹³ For courts, “arms-length negotiations” tended to serve as evidence of ample opportunity to explicitly request confidentiality, with the implication that the failure to exploit that opportunity meant that an implied obligation of confidentiality was unlikely.¹¹⁴

¹¹¹ *Star Patrol Enter. v. Saban Entm’t, Inc.*, 1999 WL 683327 at *1 (9th Cir.).

¹¹² *Meyer v. Christie*, 2007 WL 3120695 at *5 (D. Kan.) (finding that “the terms of the manual were not bargained for by the parties....No ‘meeting of the minds’ occurred.”).

¹¹³ ARM’S-LENGTH, BLACK’S LAW DICTIONARY (9th ed. 2009).

¹¹⁴ *See, e.g., Fischer v. Viacom Int’l, Inc.*, 115 F. Supp. 2d 535, 544 (D. Md. 2000) (finding that “[r]ather than establishing a relationship of trust and confidentiality....[plaintiff] merely contacted [defendant] and asked to keep ‘the details of the series on file’” with no explicit promise of confidentiality). The court found it important to describe the fact that “[t]hese alleged facts describe the parties acting at arm’s length, with no prior dealings, no promise of confidentiality, and no employment or personal relationship that could give rise to a duty of trust.” *id.*; *see also Vantage Point, Inc. v. Parker Brothers, Inc.*, 529 F. Supp. 1204, 1218 (E.D.N.Y. 1981) (finding that the creation of a confidential relationship would be “unduly burdensome and unwarranted in policy where the sole contract between the parties has been the arms-length submission of an idea.”); *Star Patrol Enter., Inc. v. Saban Entm’t, Inc.*, 1997 WL 683327 at *2 (9th Cir.) (stating that “[a]n action for breach of confidential relationship would fail because the arms-length business relationship between Star Patrol and the defendants is insufficient to impose fiduciary-like duties that arise from a confidential relationship.”); *Ranger Enter., Inc. v. Leen & Assoc., Inc.*, 1998 WL 668380 at *6 (9th Cir.).

Failed negotiations for confidentiality were also relevant to courts because they indicated that an implied obligation of confidentiality was unlikely.¹¹⁵ For example, in *Young Design v. Teletronics*,¹¹⁶ the plaintiff, a data communications equipment manufacturer in a trade secret case, claimed that it shared secret information about a new wireless product within an implied confidential relationship. However, the U.S. District Court for the Eastern District of Virginia highlighted a number of factors that cut against this assertion, including the fact that the plaintiffs “did not require [the defendant] to sign non-disclosure agreement of any kind” and the fact that there was no evidence the plaintiff “probed...for any explicit commitment to keep the technology confidential” after the defendant refused to sign a non-disclosure agreement during a business meeting.¹¹⁷ This failed negotiation – the evidence that no confidentially agreement was reached—seemed relevant to the court in dispelling the claim for implied confidentiality.

In *Fail-Safe v. A.O. Smith*,¹¹⁸ the manufacturer of devices used to prevent pool suction entrapments brought a suit against the manufacturers of motors for the pumps, claiming, among other things, misappropriation of trade secrets. At dispute was whether the plaintiff took appropriate measures to guard the secrecy of its proprietary information. The plaintiff claimed it revealed its proprietary information in implied confidence because it explicitly agreed to keep the defendant’s information confidential. The U.S.

¹¹⁵ See, e.g., *L-3 Comm. Corp., v. OSI Sys., Inc.*, 2008 WL 2595176 at *5 (2d Cir.) (finding that no obligation of confidentiality existed in an intellectual property dispute where the plaintiff could have, but failed to, insist upon “explicit contract terms providing that L-3 would act in a fiduciary capacity.”); *Omintech Intern., Inc. v. Colorox Co.*, 11 F.3d 1316, 1331 (5th Cir. 1994) (finding that no confidential relationship existed in a trade-secret dispute where, among other things, the parties “had only an arms-length business relationship” and “the parties vigorously negotiated the instruments already executed.”).

¹¹⁶ 2001 WL 35804500 (E.D. Va.).

¹¹⁷ *Id.* at *5.

¹¹⁸ 2010 WL 3503427 (E.D. Wis.).

District Court for the Eastern District of Wisconsin found that the fact that the plaintiff “willingly agreed to a confidentiality agreement that protected [the defendant’s] proprietary information, but did nothing to protect [its own] information provided an obvious signal to [the defendant] that [the plaintiff] ‘knew how to ask that information be considered confidential if it really thought the company’s crown jewels were at risk.’”¹¹⁹ According to the court, this “signal,” i.e., the lack of a request for confidentiality despite the opportunity to do so, defeated the plaintiff’s claim of implied confidentiality because the defendant was likely unaware of any confidentiality obligation.

However, other courts found that the presence of negotiation within an arms-length transaction had no effect on or actually increased the likelihood of an implied obligation of confidentiality.¹²⁰ This is particularly true for disputes involving confidential relationships imposed by law, as opposed to those imposed by contract.¹²¹

Negotiations often occurred within the context of a financial transaction. Ten courts found that the presence and nature of an accompanying transaction were relevant in analyzing implied obligations of confidentiality.¹²² While the courts did not explain why the existence of a transaction was significant, they seemed to reason that if the

¹¹⁹ *Id.* at *21.

¹²⁰ *See, e.g.,* Smith v. Dravo, 203 F.2d 369, 377 (7th Cir. 1953) (finding that “[t]he implied limitation on the use to be made of the information had its roots in the ‘arms-length’ transaction.”); Knapp Schenk & Co. Ins. Agency, Inc. v. Lancer Management Co., Inc., 2004 WL 57086 (D. Mass); Davies v. Kransa, 535 P.2d 1161, 1167 (Cal. 1975) (noting that although no fiduciary-like confidential relationship existed in an arms-length transaction between businessmen, “[t]he circumstances of that transaction may impose upon defendant a duty to refrain from unauthorized disclosure of the idea.”); Formex Mfg., Inc., v. Sullivan Flotation Sys., 1992 WL 131161 (Fed. Cir.).

¹²¹ *See, e.g.,* Biddle v. Warren General Hosp., 1998 WL 156997 at *12 (Ohio Ct. App.) (finding that in confidential relationships between physicians and patients “there is no indication that patients bargain for confidentiality; rather, it is assumed.”).

¹²² *See, e.g.,* Roth v. U.S. Dept. of Justice, 656 F. Supp. 2d 153, 165 (D.D.C. 2009) (finding that “[c]ircumstances that may indicate implied confidentiality include whether the informant was paid....”).

parties were otherwise entering into a transaction with legal obligations, then an implied obligation is more likely in that context than when there is no underlying transaction between the parties.¹²³ The existence of a transaction indicates an apparent *quid pro quo* or reciprocity critical for both implied contracts and voluntary confidential relationships.¹²⁴

Because there were no cases directly on point, it is unclear whether situations involving consumers and standard-form contracts of adhesion would result in a greater likelihood of implied confidentiality due to an inability to negotiate terms. According to many courts that addressed the issue, failure to take advantage of an opportunity to request confidentiality as part of a negotiation between parties reflected a lack of desire to keep information confidential. Because parties to standard-form contracts had no opportunity to negotiate, their failure to request confidentiality should not be held against them under the logic employed by these courts.

For example, Internet users bound by a website's terms-of-use agreement have no meaningful opportunity to negotiate for confidentiality. Thus, a lack of negotiation for confidentiality cannot be held against them. In these instances, a court would likely need to give greater weight to other contextual factors that might reflect the intention of the parties regarding confidentiality. Thus, in disputes involving standard-form contracts, the

¹²³ See, e.g., *Givens v. Mullikin ex rel Estate of McElwaney*, 75 S.W.3d, 407-08 (Tenn. 2002) (finding that “[a]n implied covenant of confidentiality can arise from the original contract...”); *Ghayoumi v. McMillan*, 2006 WL 1994556 (Tenn. Ct. App.); *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793, 801 (N.D. Ohio 1965); *MacDonald v. Clinger*, 84 A.D.2d 482, 484-46 (N.Y. Ct. App. 1982); *Doe v. Roe*, 93 Misc. 2d 201 (N.Y. Gen. Term. 1977); *Thomas v State Emp. Group Benefits Program*, 934 So. 2d 753, 757 (La. Ct. App. 2006).

¹²⁴ Note that this reciprocity is also the motivation behind attributing significance to the timing of the disclosure of information. See *infra* note 125 and accompanying text.

absence of any meaningful opportunity to negotiate could shift more weight on to other factors courts consider in analyzing implied obligations of confidentiality.

TIMING OF THE DISCLOSURE

The timing of the disclosure of information was significant for courts, as they were loathe to imply confidentiality when disclosures occurred before a promise of confidentiality was made or before a substantive relationship was formed.¹²⁵ The U.S. District Court for the Western District of Texas stated in *Keane v. Fox Television Stations*,¹²⁶ a dispute over the alleged confidential disclosure of the idea for the popular “American Idol” television show, that “[t]he ‘idea man who blurts out his idea without having first made his bargain’—whether in a so-called sales packet, Internet postings, or discussions with family members and callow undergraduate students – ‘has no one but himself to blame for the loss of bargaining power.’”¹²⁷ The Fifth Circuit in *Smith v. Snap-On Tools*, the dispute over the alleged confidential disclosure of a novel ratchet made by

¹²⁵ See, e.g., *Vantage Point v. Parker Brothers*, 529 F. Supp. 1204 (E.D.N.Y. 1981) (stating that “the mere voluntary act of submitting an idea to one with whom the plaintiff has had no prior dealings will not make the disclosure one in confidence, even if stated to be so. A person may not ‘by his gratuitous and unilateral act...impose upon another a confidential relationship.’”) (citations omitted); *Klekas v. EMI Films, Inc.*, 150 Cal. App. 3d 1102 (Cal. Ct. App. 1984); *Enberg v. Syndicast Serv., Inc.*, 97 Cal. App. 3d 309, 323-24 (Cal. Ct. App. 1979); *Keane v. Fox Television Stations, Inc.* 297 F. Supp. 2d 921 (S.D. Tex. 2004); *Learning Curve Toys, LLC v. Playwood Toys, Inc.*, 1998 WL 46894 (N.D. Ill.) (referencing testimony that supported the fact that the parties “arrived at a confidentiality agreement prior to sharing information with each other”); *Kleck v. Bausch & Lomb, Inc.*, 145 F. Supp. 2d 819, 824 (W.D. Tex. 2000); but cf, *Landsberg v. Scrabble Crossword Game Players*, 736 F.2d 485, 490 (9th Cir. 1984) (finding that a disclosure might have been made in confidence even if the disclosure preceded any conduct on the recipient’s part indicating the existence of an implied-in-fact contract).

¹²⁶ 297 F. Supp. 2d 921, 942 (S.D. Tex. 2004).

¹²⁷ *Id.* (quoting *Kleck v. Bausch & Lomb, Inc.*, 145 F. Supp. 2d 819, 824 (W.D. Tex. 2000)); see also *Metrano v. Fox Broad. Co.*, 2000 WL 979664 at *7 (C.D. Cal. 2000) (finding that “[n]othing in the pleadings suggests that plaintiff communicated to defendant the requirement of confidentiality before the presentation”); *RTE Corp. v. Coatings, Inc.*, 84 Wis. 2d 105, 119 (Wis. 1978) (finding that “[t]he contract clause came too late to protect the confidentiality of the drawing, which had been disclosed at an earlier time”); *Holloman v. O. Mustad & Sons (USA), Inc.*, 196 F. Supp. 2d 450, 460 (E.D. Tex. 2002) (finding that no confidentiality obligation existed where the plaintiff admitted to revealing a trade secret to others for testing purposes without first entering into non-disclosure agreements with those people); *Hoeltke v. C.M. Kemp Mfg. Co.*, 80 F.2d 912, 923 (4th Cir. 1935).

combining parts of two existing tools, said that “[r]eliance on confidentiality, however, must exist at the time the disclosure is made. An attempt to establish a special relationship long after an initial disclosure comes too late.”¹²⁸

By focusing on timing, the courts seem to be trying to ensure that the recipient of the information had the opportunity to either decline confidentiality or refrain from entering into a relationship with confidentiality obligations. Courts will not imply confidentiality unilaterally. A promise of confidentiality or decision to enter into a confidential relationship must be voluntary by both parties.¹²⁹ In *Klekas v. EMI Films*,¹³⁰ a dispute concerning the alleged confidential disclosure of a screenplay and novel that purportedly became the famous movie “The Deer Hunter,” the California Court of Appeal held that to establish an implied-in-fact contract of confidentiality, “the plaintiff must show, [among other things], that under all circumstances attending disclosure it can be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered (i.e. the offeree must have the opportunity to reject the attempted disclosure if the conditions were unacceptable)...”¹³¹

PURPOSE OF THE DISCLOSURE

Courts regularly looked to the purpose of the disclosure of information to determine if an implied obligation of confidentiality existed.¹³² Courts considered

¹²⁸ 833 F.2d 578, 581 (5th Cir. 1988).

¹²⁹ See, e.g., *Innospan Corp. v. Intuit, Inc.*, 2011 WL 856265 at *6 (N.D. Cal.) (stating that “[i]t is trickery to send an unsolicited business plan to someone the sender thinks is a potential business investor and then to foist confidentiality duties on that recipient without his agreement in advance”).

¹³⁰ 150 Cal. App. 3d 1102 (Cal. Ct. App. 1984)

¹³¹ *Id.* at 1114; see also *Star Patrol Enter. v. Saban Entm’t, Inc.*, 1997 WL 683327 at *1 (9th Cir.).

¹³² See, e.g., *Carpenter Found. v. Oakes*, 26 Cal. App. 3d 784, 798 (Cal. Ct. App. 1972) (finding that a fiduciary confidential relationship existed where, among other things, the purpose of the disclosure of

disclosures made in order to promote a common goal or further develop the relationship as evidence of an implied obligation of confidentiality. Courts seemed to recognize that if confidentiality is necessary to encourage disclosure or if it is necessary for any given disclosure to be effective, then an inference of confidentiality is more reasonable than it is in relationships where confidentiality seems unnecessary.

The case of *Sentinel Products v. Mobil Chemical*¹³³ involved a patent and trade secret dispute whereby valuable information was disclosed by a product developer to potential buyers allegedly in confidence. The U.S. District Court for the District of Massachusetts held that ““where the facts demonstrate that a disclosure was made in order to promote a specific relationship, e.g. disclosure to a prospective purchaser to enable him to appraise the value of the secret, the parties will be bound to receive the information in confidence.””¹³⁴ Looking at the facts on record, the court found that “[t]he jury could reasonably conclude that a confidential relationship should ‘be implied where disclosures have been made in business relationships between...purchasers and suppliers...or prospective licensees and licensors.’”¹³⁵

It seems that the court recognized that the developer’s need for confidentiality would have been obvious to a buyer before the disclosure, and, as a result, the court was

sensitive information was clearly to advance a relationship in which the recipient was to inform a restricted group of students); *Zippertubing Co. v. Teleflex Inc.*, 757 F.2d 1401, 1408 (3d Cir. 1985) (finding that an implied duty of confidentiality existed where, among other things, the only purpose of a disclosure of confidential information was to facilitate a business relationship and procurement of services); *RTE Corp. v. Coatings, Inc.*, 84 Wis. 2d 105, 119-20 (Wis. 1978) (stating, “[I]t is true that a relationship of confidence may be implied when a disclosure is made solely for the purpose of advancing or implementing an existing special relationship.”); *Omitech Intern., Inc., v. Clorox Co.*, 11 F.3d 1316, 1331 (5th Cir. 1994); *Cloud v. Standard Packaging Corp.*, 376 F.2d 384, 388-89 (7th Cir. 1967).

¹³³ 2001 WL 92272 (D. Mass).

¹³⁴ *Id.* at * 12 (quoting *Burten v. Milton Bradley Co.*, 763 F.2d 461, 493 (1st Cir. 1985)).

¹³⁵ *Id.*

willing to find an implied obligation of confidentiality in the relationship. The U.S. District Court of Massachusetts continued this rationale in *Knapp Schenk v. Lancer Management*,¹³⁶ finding that where secret data were explicitly disclosed for the purpose of evaluating intellectual property in contemplation of acquiring it, “a jury could reasonably find that an implied confidential relationship arose.”¹³⁷ This case involved rigorous negotiations surrounding the acquisition of all rights associated with the “Splash Fuel Oil Dealers Program,” which provides insurance service packages for oil heat dealers.¹³⁸

Courts similarly looked to the purpose of disclosure when patients sought treatment from physicians. According to these courts, the disclosure of sensitive information was necessary to receive medical treatment.¹³⁹ Thus, an obligation of confidentiality can be implied in law because patients have little choice as to whether to withhold sensitive information.¹⁴⁰ Additionally, in order to effectively satisfy their duty of responsible medical treatment, physicians must have access to a patient’s confidential

¹³⁶ 2004 WL 57086 (D. Mass).

¹³⁷ *Id.* at *12.

¹³⁸ *Id.*

¹³⁹ See, e.g., *MacDonald v. Clinger*, 84 A.D.2d 482 (N.Y. Ct. App. 1982); *Doe v. Roe*, 93 Misc. 2d 201, 210-11 (N.Y. Gen. Term 1977) (finding that in the dynamics of psychotherapy “[t]he patient is called upon to discuss in a candid and frank manner personal material of the most intimate and disturbing nature....He is expected to bring up all manner of socially unacceptable instincts and urges, immature wishes, perverse sexual thoughts – in short, the unspeakable, the unthinkable, the repressed.”).

¹⁴⁰ See, e.g., *Pierce v. Caday*, 422 S.E.2d 371, 374 (Va. 1992) (finding that a “thorough, accurate medical history furnished by the patient is an indispensable component of medical treatment. In other words, receipt of that confidential information is ‘an inseparable part of the health care,’ it is vital to the proper discharge of the general duty imposed on practitioners.”) (citations omitted); *State v. Martin*, 274 N.W.2d 893, 895 (S.D. 1979) (finding that confidentiality may be inferred from a psychiatric social worker-client relationship if, among other things, “[c]onfidentiality must be essential to the full and satisfactory maintenance of the relation between the parties”).

information, such as her medical history.¹⁴¹ Thus, the need for a patient to disclose information within these relationships justifies and compels the implied obligation of confidentiality.

SOLICITATION

Eight courts analyzing a claim for implied confidentiality considered whether and how information was solicited although no court considered this factor as solely determinative.¹⁴² Instead, it was seen as one of many factors relevant in their analysis.¹⁴³ The Fifth Circuit in *Smith v. Snap-On Tools*,¹⁴⁴ a dispute over the alleged confidential disclosure of a novel ratchet made from parts of two existing tools, held that “[w]hen a manufacturer has actively solicited disclosure from an inventor, then made use of the disclosed material, the manufacturer may be liable for use or disclosure of the secret in the absence of any expressed understanding as to confidentiality.”¹⁴⁵

¹⁴¹ *Pierce*, 422 S.E.2d at 374.

¹⁴² *See, e.g.*, *Moore v. Marty Gilman*, 965 F. Supp. 203, 215 (D. Mass. 1997) (finding in a claim for breach of implied confidentiality that “[d]efendants did not solicit plaintiffs or do anything to foster the impression that it was their regular practice to seek out and buy ideas of others”); *Meyer v. Christie*, 2007 WL 3120695 at *4 (D. Kan.); *Jackson v. LSI Industries, Inc.*, 2005 WL 1383180 at *3 (M.D. Ala.) (finding in a claim for breach of implied contract for confidentiality and a promise to pay for an idea that “[i]f Defendant is requesting that the Plaintiff disclose his idea, most Courts will find that such requests or solicitation implies a promise to pay for the idea, if the Defendant uses it.”); *Enberg v. Syndicast Serv., Inc.*, 97 Cal. App. 3d 309, 323-24 (Cal. Ct. App. 1979) (stating that “[w]e do not believe that the unsolicited submission of an idea to a potential employee or potential business partner...presents a triable issue of fact for confidentiality.”).

¹⁴³ *See, e.g.*, *DPT Lab., LTD. v. Bath & Body Works, Inc.*, 1999 WL 33289709 (W.D. Tex.) (finding that “confidentiality may be implied when the recipient actively solicits the disclosure.”); *Phillips v. Frey*, 20 F.3d 623, 632 (5th Cir. 1994); *Smith v. Dravo Corp.*, 203 F.2d 369, 376 (7th Cir. 1953); *Research, Analysis & Dev., Inc., v. United States*, 8 Cl. Ct. 54, 56 (Cl. Ct. 1985) (finding that although unsolicited data was disclosed, an implied-in-fact contract of confidentiality was formed on other factors such as preexisting laws governing confidential disclosure to the government).

¹⁴⁴ 833 F.2d 578 (5th Cir. 1987).

¹⁴⁵ *Id.* at 580.

Courts seemed to deduce that solicited information was more likely more sensitive than unsolicited disclosures and, as a result, this information was more likely to be seen as being implicitly disclosed in confidence. Or, perhaps courts felt more comfortable placing the onus of rebutting an inference of confidentiality on those who solicit information. Those who solicit information as part of a transaction have the power to shape their offer and, as a result, are in better position to explicitly dispel any notion of confidentiality. The absence of solicitation was also seen as a significant factor by courts. Courts typically found that unsolicited disclosures did not support a finding of implied confidentiality.¹⁴⁶ This is because unsolicited information often resulted in a disclosure of information before confidentiality was agreed upon.

PUBLIC POLICY

Six courts explicitly considered public policy when analyzing implied confidentiality disputes. Public policy was less important in disputes involving implied-in-fact agreements for confidentiality than it was in what courts referred to as implied-in-law agreements and fiduciary relationships. Public policy was invoked when the dynamics of a particular relationship were such that justice demanded it, not when there was a mutual agreement of confidentiality between the parties.¹⁴⁷ For example, the attorney-client relationship requires confidentiality in order for the relationship to be

¹⁴⁶ See, e.g., *Smith*, 833 F.2d at 580 (finding that there is no implied confidential relationship where plaintiff “disclosed the invention of his own initiative...[and] without discussing pecuniary recompense for his suggestion”); *Moore v. Marty Gilman*, 965 F. Supp. 203, 215 (D. Mass. 1997); *Rogers v. Desa Int’l, Inc.*, 183 F. Supp. 2d 955, 957 (E.D. Mich. 2002) (emphasizing the unsolicited nature of the disclosed information in rejecting a claim for implied confidentiality).

¹⁴⁷ *Metrano v. Fox Broad. Co., Inc.*, 2000 WL 979664 (C.D. Cal.) (holding that “[a]n action for breach of confidence ‘is not based upon apparent intentions of the involved parties; it is an obligation created by law for reasons of justice’ and ‘where in fact the parties made no promise.’”) (citations omitted). The court further specified that “a breach of confidence claim is not limited to circumstances where a fiduciary relationship exists between the parties.”) *Id.*

effective. An attorney cannot offer effective legal representation if his client will hold back information for fear that it is not safe with his attorney. Thus, the law supports this confidentiality in order to further the public benefit gained by effective counsel. Implied-in-fact confidentiality agreements and public policy were not seen as mutually exclusive, though. Rather, they were both seen as factors that supported the imposition of implied confidentiality.

The courts' consideration of public policy was most apparent in cases involving the physician-patient relationship and other relationships involving a high degree of trust that society has an interest in maintaining.¹⁴⁸ The Supreme Court of Tennessee in *Alsip v. Johnson City Medical Center*,¹⁴⁹ a case involving a spouse's request for the communications between her husband, a deceased patient, and doctor after a surgery mishap, held that the covenant of confidentiality between physicians and patients "arises not only from the implied understanding of the agreement between the patient and the doctor, but also from a policy concern that such private and potentially embarrassing information should be protected from public view."¹⁵⁰

In order to determine if an implied confidential evidentiary privilege exists, the Supreme Court of South Dakota in *South Dakota v. Martin* laid out a four-part test, of which the final two parts were that the relationship should be, in the opinion of the relevant community, one that should be fostered and that the benefit of confidentiality

¹⁴⁸ See, e.g., *Doe v. Roe*, 93 Misc. 2d 201, 214 (N.Y. Gen. Term. 1977); *MacDonald v. Clinger*, 84 A.D.2d 482, 484 (N.Y. Ct. App. 1982); *Ghayoumi v. McMillan*, 2006 WL 1994556 (Tenn. Ct. App.).

¹⁴⁹ 197 S.W.3d 722 (Tenn. 2006).

¹⁵⁰ *Id.* at 726 (citing *Givens v. Mullikin*, 75 S.W.3d 383, 407 (Tenn. 2002)).

outweighs the benefit gained by transparency.¹⁵¹ Here, the court used a balancing test for public policy, weighing the societal benefit of confidentiality against the public's and litigant's need for information. The dispute in this case centered around whether a telephone communication between a criminal defendant and psychiatric social worker in which the defendant told the social worker, "I just killed somebody," was privileged.¹⁵²

Public policy could also serve to invalidate an implied covenant of confidentiality in limited circumstances, as with all other contract terms.¹⁵³ In *Alsip*, the court said that:

For example,...the covenant [of confidentiality] is voided when a doctor determines that a patient's illness presents a foreseeable risk to third parties; in such circumstances, the doctor has a duty to break the patient's confidence and risks no civil liability when he does so. State law also requires doctors to report "any wound or other injury inflicted by means of a knife, pistol, gun, or other deadly weapon, or by other means of violence" to police, in clear violation of the covenant of confidentiality, in order to promote vital societal interests in public safety, law enforcement, and crime deterrence. Public policy as reflected in state law also vitiates the covenant of confidentiality by requiring doctors to report suspected child abuse, sexual assault, and instances of venereal disease in minors who are thirteen and under. Thus, the covenant of confidentiality is not absolute and can be voided when its enforcement would compromise the needs of society.¹⁵⁴

Thus, a public policy in favor of confidentiality is a significant factor for courts in analyzing implied obligations of confidentiality, but only to the extent that it is not outweighed by countervailing public interests such as public safety, law enforcement, and crime deterrence. The court found that the defendant's statement was not privileged

¹⁵¹ *South Dakota v. Martin*, 274 N.W.2d 893, 895 (S.D. 1978).

¹⁵² *Id.*

¹⁵³ *See, e.g., Doe v. Roe*, 93 Misc. 2d 201, 214 (N.Y. Gen. Term. 1977) (stating that "[i]t is not disputed that under our public policy the right of confidentiality is less than absolute....In no case, however, has the curiosity or education of the medical profession superseded the duty of confidentiality."); *Alsip v. Johnson City Medical Ctr.*, 197 S.W.3d 722, 726 (Tenn. 2006)(citing *Planters Gin Co. v. Federal Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn.2002)).

¹⁵⁴ *Id.* (citations omitted).

because there was “nothing in the record which would indicate that the conversation was made in confidence or with the expectation of confidentiality.”¹⁵⁵

CONCLUSION

The cases revealed that courts look to the contexts of party and industry custom, the presence and nature of negotiations, the nature of the relationship between the parties, the purpose of the disclosure, whether and how the information was solicited, the timing of the disclosure, the presence and nature of an accompanying transaction, and public policy when determining if an implied obligation of confidentiality exists.

While no one factor seemed to dominate the analysis, courts considered developed relationships, the ability to negotiate, unequal bargaining power, and entrenched normative expectations of confidentiality key components of implied obligations of confidentiality. Courts seemed to look for two main factors in their analysis: mutual agreement between the parties and one party being more vulnerable to harm or coercion than the other. The courts’ search for mutuality is reflected in the courts’ attempts to locate and support the shared goals and expectations of the parties. The courts’ emphasis on vulnerability is seen in their attempts to protect those who need to disclose information but are limited in their ability to obtain an explicit confidentiality agreement.

According to courts, if confidentiality was a regular and accepted practice in a given context, a discloser’s reliance on that custom is reasonable. Courts also looked to see whether the parties negotiated for confidentiality. Some courts viewed a lack of negotiation as evidence that no confidentiality agreement was reached. Other courts

¹⁵⁵ *Id.* at 896.

viewed an individual's failure to request confidentiality when presented with the opportunity to do so as evidence that no agreement was reached. Some courts looked to see if negotiation for confidentiality was even possible, like with a website's terms-of-use agreement. In these instances, other contextual factors became more important to the court since a true negotiation of terms did not occur.

The nature of the relationship between the parties was important for courts looking for evidence of a mutual agreement of confidentiality or unequal bargaining power. Courts consistently found that longer, developed relationships were evidence of an implied obligation of confidentiality. The nature of specific of relationships, such as the relationship between a doctor and her patient, also received an inference of confidentiality. Courts were more amenable to claims for implied confidentiality where the party requesting or relying on confidentiality did not have equal bargaining power with the recipient of the information. The reason these factors seemed important to courts is that implied expectations of confidentiality were more plausible in developed relationships and unequal bargaining power could inhibit the ability of vulnerable parties to negotiate for confidentiality.

Courts considered the disclosure of information made in order to promote a common goal or to further develop the relationship as evidence of an implied claim of confidentiality. Courts seemed to recognize that if confidentiality is necessary to encourage disclosure, or if it is necessary for any given disclosure to be effective, then an inference of confidentiality is more reasonable there than in relationships where confidentiality seems unnecessary. Courts also seemed to deduce that solicited information was more evocative of a bargain or transaction and, as a result, solicited

information was more likely to be seen as being implicitly disclosed in confidence in exchange for the information.

The timing of the disclosure of information was significant; courts were loathe to imply confidentiality when disclosures occurred before a promise of confidentiality was secured or before a substantive relationship was formed. Finally, courts looked to public policy both to support and defeat claims of implied confidentiality.

Ultimately, courts seemed to be trying to ascertain two things: 1) what was the true agreement of the parties and 2) does the relationship, by its nature, require an implied obligation of confidentiality? Using these two frames, courts were able to parse the factors that could help them answer these questions. Each factor considered by courts could and should be part of any decision-making framework.

CHAPTER III

HOW THE NATURE OF THE INFORMATION DISCLOSED AFFECTS IMPLIED OBLIGATIONS OF CONFIDENTIALITY

Recall Nissenbaum's theory of contextual integrity: Privacy and confidentiality cannot be adequately analyzed without looking at the informational norms within a given context.¹ Nissenbaum identified four factors relevant to informational norms: 1) context, 2) the nature of the information, 3) actors, and 4) terms of disclosure. This chapter will focus on the courts' consideration of the nature of the information in analyzing implied obligations of confidentiality.

While all obligations of confidentiality involve the disclosure of information, not all information is the same. Some information is very sensitive, such as intimate thoughts and health-related information. Other information is mundane and uninteresting, such as an individual's daily routine. Some information is completely public, like the price of goods and services. Other information is proprietary, secret, or both, such as a company's trade secrets. The purpose of this chapter is to analyze how the nature of information, which can vary greatly, affected the judicial analysis of implied obligations of confidentiality.

Within her framework, Nissenbaum sometimes referred to the nature of information as the "attributes of the information" or "information types."² According to

¹ HELEN NISSENBAUM, *PRIVACY IN CONTEXT* 129 (2010).

² *Id.* at 143.

Nissenbaum, the nature of the information concerns what the information was about, or, as James Rachels has put it, “the kind and degree of knowledge.”³ Nissenbaum stated, “Informational norms render certain attributes appropriate or inappropriate in certain contexts under certain conditions.”⁴ As an example, she observed that physicians can ask about the intimate details of their patients’ bodies, but employers generally cannot do the same of their employees.⁵

The concept of “the nature of the information” is expansive. It seems virtually impossible to create an exhaustive taxonomy for the category.⁶ Nissenbaum noted this problem herself when she stated that the concept of the nature of the information “recognizes an indefinite array of possibilities.”⁷ Thus, the goal of this chapter is simply to identify which attributes had a noticeable impact on the courts’ decisions. The cases revealed that courts regularly and often explicitly relied on the nature of the information when analyzing implied obligations of confidentiality. For example, in *Resnick v. Resnick*, a business dispute between brothers, the U.S. District Court for the Southern

³ *Id.* (quoting James Rachels, *Why Privacy is Important*, 4(4) PHIL. & PUBLIC AFFAIRS 323, 371 (1975)).

⁴ *Id.*

⁵ *Id.*

⁶ Indeed, Nissenbaum did not even define the “nature of the information,” stating:

Those who may be expecting a precise definition of information type or attribute will be disappointed, for I rely throughout on an intuitive sense, assuming that it is as adequate for the explication of contextual integrity as for many important practices and policies successfully managed in society with nothing more. One need look no further than the endless forms we complete, the menus we select from, the shopping lists we compile, the genres of music we listen to...and the terms we submit to search engines to grasp how at ease we are with information types and attributes.... In general, attribute schemes will have co-evolved with contexts and not be readily accessible to fixed and finite representations.

Id. at 144.

⁷ *Id.*

District of New York excluded loan application information from a potential implied obligation of confidentiality between a bank and its depositors.⁸ Here, a banking and trust company claimed it was under an implied obligation of confidentiality not to disclose its banking relationship with one of the other parties to the lawsuit. The court suggested that while some information was implicitly confidential, it was not clear that the bank was under an implied obligation to keep a lending relationship confidential.⁹

Of the 132 cases analyzed in this dissertation, 44 explicitly considered the nature of the information relevant in analyzing a claim of implied confidentiality. The remaining cases did not expressly mention the nature of the information, though it may have been a factor in the decisions. This analysis of the nature of the information occurred in many different types of disputes, including suits involving banking relationships,¹⁰ implied covenants of confidentiality in medical-care contracts,¹¹ trade secret misappropriation,¹² patent ownership and infringement,¹³ requests for information under the Freedom of

⁸ 1990 WL 164968 (S.D.N.Y.).

⁹ *Id.* at *7.

¹⁰ *Resnick v. Resnick*, 1990 WL 164968 (S.D.N.Y.); *Twiss v. New Jersey*, 591 A.2d 913 (N.J. 1991); *Graney Dev. Corp. v. Tasken*, 92 Misc. 2d 764 (N.Y. Gen. Term. 1978); *McGuire v. Shubert*, 722 A.2d 1087 (Penn. 1998).

¹¹ *Alsip v. Johnson City Medical Center*, 197 S.W.3d 722 (Tenn. 2006); *MacDonald v. Clinger*, 84 A.2d 482 (N.J. Sup. Ct. Ch. Div.1982); *Doe v. Roe*, 93 Misc. 2d 201 (N.Y. Gen. Term. 1977).

¹² *Rogers v. Desa Int'l, Inc.*, 183 F. Supp. 2d 955 (E.D. Mich. 2002); *Daily Int'l Sales Corp. v. Eastman Whipstock, Inc.*, 662 S.W.2d 60 (Tex. Ct. App. 1983).

¹³ *FMC Corp. v. Guthery*, 2009 WL 485280 (D.N.J.); *Google, Inc. v. Traffic Info., LLC*, 2010 WL 743878 (D. Or.); *Diodem, LLC v. Lumenis, Inc.*, 2005 WL 6220720 (C.D. Cal.).

Information Act,¹⁴ and general contract and business-related disputes.¹⁵ Only one case involved an online dispute.¹⁶

The nature of the information was considered by courts according to type. This chapter identifies the different types of information that have been significant to courts analyzing implied obligations of confidentiality. The cases revealed that, consistent with the courts' consideration of context, courts tended to find implied obligations of confidentiality in situations involving information that, if disclosed, could harm a vulnerable party. This was revealed in courts' holdings that sensitive, secret, and proprietary information all could harm the discloser of information if confidence was breached by the recipient. Courts also seemed to protect information that intrinsically could be expected to remain confidential, which is another trait of sensitive and proprietary information.

Courts were most likely to find an implied obligation of confidentiality where confidentiality was instrumental to the disclosure; that is, it was unlikely that the information would have been disclosed without an obligation of confidentiality. Courts also found that some kinds of information, like secrets, sensitive health information, and valuable proprietary information, likely evoke a heightened sense of confidentiality in the recipients of information. Courts seemed to recognize that an inference of confidentiality

¹⁴ *Wildearth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243 (D. Colo. 2010); *Council on American-Islamic Relations, Cal. v. FBI*, 2010 WL 4024806 (S.D. Cal.); *Roth v. U.S. Dept. of Justice*, 656 F. Supp. 2d 153, 165 (D.D.C. 2009).

¹⁵ *Smith v. Dravo Corp.*, 203 F.2d 369 (7th Cir. 1953); *Faris v. Enberg*, 97 Cal. App. 3d 309 (Cal. Ct. App. 1979).

¹⁶ *Google, Inc. v. Traffic Info., LLC*, 2010 WL 743878 (D. Or.).

was much more reasonable when the disclosed information intrinsically evoked a heightened sense of *gravitas* in the recipient.

Figure 1 demonstrates the numbers of cases that addressed each type of information:

Figure 1: The Type of Information Considered by Courts

<u>Type of information</u>	<u>Number of Cases</u>
Secret information	20
Highly personal information	16
Proprietary or useful information	15
Information exposing discloser or subject to physical harm	8
Information that is likely to be shared	5

None of the courts articulated a specific framework or theory for why the nature of the disclosed information was important. The courts often simply drew attention to the nature of the information and did not detail their analysis. Thus, the picture of what information attributes courts consider important is largely drawn from inferences. This chapter is an attempt to analyze these inferences, which will hopefully clarify the courts' reasoning. By identifying the many ways in which the type of the information disclosed was important in judicial decision-making, the important factors and underlying justifications for finding implied obligations of confidentiality can become clear.

SECRET INFORMATION

Courts placed great significance on whether the information disclosed was a secret. For the purposes of this analysis, a secret is defined as “[s]omething kept hidden

from others or known only to oneself or to a few.”¹⁷ Many of the cases in which secrecy was a relevant factor in a claim for implied confidentiality were disputes involving trade secrets. Part of the reason courts considered secrets important in these disputes is that information must be generally unknown or the owner must have attempted to protect the information in order for it to be eligible for trade secret protection.¹⁸ In determining whether information was adequately protected, courts often were asked to determine if an agreement of implied confidentiality was reasonable in a given context.¹⁹ This is particularly true when dealing with ideas that were pitched to potential investors or businesses.²⁰ While secret information contributed to finding an implied obligation of confidentiality, publicly known information decreased the likelihood of such an obligation.²¹

For example, the case of *Keane v. Fox Television Stations*²² involved a dispute over a television producer’s alleged confidential disclosure of the idea for the popular

¹⁷ *Secret*, AMERICAN HERITAGE DICTIONARY (May 10, 2011), <http://education.yahoo.com/reference/dictionary/entry/secret>. It is important to differentiate the concept of secrecy from the larger concept of privacy, which includes secrets as well as other concepts such as control over information, blackmail, and the right to make decisions about one’s body and family. In distinguishing between secrets and private information, the Supreme Court of Oregon stated in *Humphers v. First Interstate Bank of Oregon*, “Secrecy involves intentional concealment. ‘But privacy need not hide; and secrecy hides far more than what is private.’” 696 P.2d 527 (Or. 1985) (quoting SISSELA BOK, SECRETS 11 (1983)); see also DANIEL SOLOVE & PAUL SCHWARTZ, INFORMATION PRIVACY LAW 1 (2009).

¹⁸ See, e.g., *Keane v. Fox Television Stations, Inc.*, 297 F. Supp. 2d 921 (S.D. Tex.2004) (“The critical threshold requirement for pursuing [a claim for misappropriation of a trade secret or misappropriation of an idea] is secrecy/confidentiality.”).

¹⁹ See, e.g., *Universal Reinsurance Co. LTD., v. St. Paul Fire and Marine Ins. Co.*, 1999 WL 771357 at *10 (S.D.N.Y.); *Diodem, LLC v. Lumenis Inc.*, 2005 WL 6220720 at *10 (C.D. Cal.) (analyzing how secret information was for purposes of an implied obligation of confidentiality in the context of a patent dispute); *Williams v. Coffee County Bank*, 308 S.E.2d 430 (Ga. Ct. App. 1983).

²⁰ *Torah Soft LTD. v. Drosnin*, 2001 WL 1425381 (S.D.N.Y) (finding no implied confidentiality where an idea was disclosed in a letter to others besides the alleged confidant.).

²¹ See, e.g., *Keane*, 297 F. Supp. 2d at 941.

²² 297 F. Supp. 2d 921 (S.D. Tex. 2004).

“American Idol” television show to a television network. Here, the U.S. District Court for the Western District of Texas said the fact that the producer had advertised his idea for a show over the Internet before disclosing it to the television station “completely eviscerates his ability to characterize that concept as a trade secret **or** as an idea that was conveyed in confidence to a select group.”²³

Another case that reflects the importance the courts assign to information being at least relatively secret for a valid claim of implied confidentiality is *Star Patrol Enterprises v. Saban Entertainment*.²⁴ This case involved a breach of confidentiality claim based on an implied-in-fact contract, which was allegedly formed when an entertainment company pitched an idea for the Mighty Morphin’ Power Rangers television show to television producers. The Ninth Circuit found that the entertainment company successfully alleged the elements of breach of confidentiality because it alleged that the idea for the television production had not been made public.²⁵

If information was easily discoverable, courts were unlikely to find an implied obligation of confidentiality. A good example of this is the case of *Flotec v. Southern Research*.²⁶ This case involved a trade secret dispute between a manufacturer of an oxygen regulator (Flotec) and a competitor (SRI), which was given access to some of the disputed information by Flotec allegedly in implied confidence. However, the information was not completely a secret. The information had been in the open market for several years, and Flotec’s product was susceptible to reverse engineering.

²³ *Id.* at 941 (emphasis added).

²⁴ 1997 WL 683327 (9th Cir.).

²⁵ *Id.* at *2.

²⁶ 16 F. Supp. 2d 992 (S.D. Ind. 1998).

The U.S. District Court for the Southern District of Indiana was asked to determine if the disclosure of the trade secret was made with an implied obligation of confidentiality. The court found no implied confidentiality and stated that the defendant “knew that the Flotec components shown in the drawings had been on the market for a couple of years and were readily susceptible to reverse engineering by any skilled company interested in trying to compete.”²⁷ The court found that, among other reasons, because the information was freely available, Flotec should have known that the information was a not secret and the disclosure was not made in confidence.²⁸

However, one court found that the fact that information was public did not prevent a finding of implied confidentiality. In *Smith v. Dravo Corp.*,²⁹ Dravo Corp. approached the designer of a proprietary shipping container ostensibly about purchasing the design. Based on some preliminary negotiations, the designer sent Dravo detailed information concerning its business. However, Dravo ultimately rejected the purchase and designed its own container that was allegedly similar to the designer’s container. Although the designer passed away before the lawsuit, his estate representatives brought a claim for breach of confidentiality and sought to enjoin Dravo’s use of the container. Dravo claimed that the container design could have been easily obtained through public inspection, as the containers were in public use. The court responded:

It is unquestionably lawful for a person to gain possession, through proper means, of his competitor's product and, through inspection and analysis, create a duplicate, unless, of course, the item is patented. But the mere fact that such lawful acquisition is available does not mean that he may,

²⁷ *Id.* at 1007.

²⁸ *Id.* at 1006-07.

²⁹ 203 F.2d 369 (7th Cir. 1953).

through a breach of confidence, gain the information in usable form and escape the efforts of inspection and analysis.³⁰

Thus, a lack of secrecy was not a bar to an implied obligation of confidentiality for this court. While no court articulated exactly how secret information must be in order to contribute to the creation of an implied obligation of confidentiality, most courts agreed that the information should at least not be widely known or “public” information.³¹ However, if a recipient entered into a confidential relationship because it was easier to obtain or use information when delivered by the discloser, it appears that an implied obligation of confidentiality can still exist even if the information is publically available. In other words, if the confidentiality agreement provided the defendant some kind of advantage that it would not have had otherwise, it is still enforceable.

HIGHLY PERSONAL INFORMATION

In sixteen cases, courts considered highly personal information an important factor in the creation of an implied obligation of confidentiality. Highly personal information seemed to be most significant to courts when dealing with health-related information.³² However, the courts’ logic seemingly could include any personal

³⁰ *Id.* at 375.

³¹ *See, e.g.,* Universal Reinsurance Co. LTD. v. St. Paul Fire and Marine Ins. Co., 1999 WL 771357 at *10 (S.D.N.Y.) (“[P]laintiffs must show the existence of an implied-in-fact confidentiality agreement. As discussed above, plaintiffs’ information in this case is not the type that warrants confidentiality protection. They have failed to refute defendant’s evidence that all of the plaintiffs’ information is publicly available and that the program was not novel.”); *Williams v. Coffee Cnty. Bank*, 308 S.E.2d 430, 432 (Ga. Ct. App. 1983) (“It would be anomalous indeed to permit appellant to recover for appellees’ breach of an implied duty of confidentiality when the only information disclosed was a matter of public record and undisputedly was not confidential.”); *Daily Int’l Sales Corp. v. Eastman Whipstock, Inc.*, 662 S.W.2d 60, 63 (Tex. Ct. App. 1983) (noting that one factor courts could consider in determining if an implied obligation of confidentiality exists is the “degree to which the information has been placed in the public domain or rendered readily accessible through publication or marketing efforts.”).

³² *See, e.g.,* *Alsip v. Johnson City Medical Center*, 197 S.W.3d 722 (Tenn. 2006) (recognizing an implied covenant of confidentiality in medical-care contracts between physicians and their patients due to the intimate nature of the information shared within the relationship); *MacDonald v. Clinger*, 84 A.D.2d 482, 484-46 (N.Y. Ct. App. 1982); *Crippen v. Charter Southland Hosp., Inc.*, 534 So. 2d 286 (Ala. 1988).

information such as intimate thoughts or conversations, embarrassing personal facts, or even financial information.

An example of the courts' focus on health-related information is the case of *Overstreet v. TRW Commercial Steering Division*.³³ This worker's compensation case involved an employer's request to question a physician treating one of its employees outside of the presence of the employee and his counsel. The employee, Billy Overstreet, had complained of hearing loss and claimed it was caused by his employment by the defendant, TRW, as a painter, a tow motor operator on the shipping dock, and an assembly line worker. Overstreet saw a physician who concluded that his hearing loss was caused, in part, by his employment with TRW.

However, TRW denied Overstreet's claim for worker compensation and Overstreet brought suit seeking worker's compensation benefits. TRW requested permission to interview Overstreet's physician out of the presence of Overstreet and his counsel because TRW asserted that Overstreet's injury was not due to his employment with TRW. The Supreme Court of Tennessee then analyzed whether Overstreet's physician was bound by an implied obligation of confidentiality to refrain from disclosing information relating to his examination of Overstreet.

The court noted in this case that obligations of confidentiality between a patient and physician can be implied based not only an implied understanding between the patient and doctor, "but also from a policy concern that such private and potentially embarrassing information should be protected from public view."³⁴ The court stated,

³³ 256 S.W.3d 626 (Tenn. 2008).

³⁴ *Id.* at 633-34. These two different grounds for implied confidentiality are understood as confidentiality implied "in fact" and "in law." *Id.*

“This confidentiality in care-giving exists because ‘[t]o the physician we bare our bodies...in confidence that what is seen and heard will remain unknown to others.’”³⁵

This statement reflects an awareness that highly personal information is likely to be disclosed with an implied obligation of confidentiality.

In the case of *Doe v. Roe*,³⁶ the court seemed to give great weight to the sensitive nature of the health-related information when determining an implied obligation of confidentiality existed. Here, a former patient of a psychiatrist brought a claim for breach of confidentiality against the psychiatrist after the psychiatrist published a book that revealed information about the patient during treatment. The Supreme Court of New York County, New York found:

[A] physician, who enters into an agreement with a patient to provide medical attention, impliedly covenants to keep in confidence all disclosures made by the patient concerning the patient's physical or mental condition as well as all matters discovered by the physician in the course of examination or treatment. This is particularly and necessarily true of the psychiatric relationship, for in the dynamics of psychotherapy “[t]he patient is called upon to discuss in a candid and frank manner personal material of the most intimate and disturbing nature.... He is expected to bring up all manner of socially unacceptable instincts and urges, immature wishes, perverse sexual thoughts – in short, the unspeakable, the unthinkable, the repressed.”³⁷

One judge found that the health information received by pharmacists also made implied obligations of confidentiality likely. The case of *Suarez v. Pierard*³⁸ involved, among other claims, a claim of breach of implied contract of confidentiality brought by a

³⁵ *Id.* at 644 (citing *Alsip v. Johnson City Medical Center*, 197 S.W.3d 722, 726 (Tenn. 2006)).

³⁶ 93 Misc. 2d 201 (N.Y. Gen. Term. 1977).

³⁷ *Id.* at 210 (citing Marvin S. Heller, *Some Comments to Lawyers on the Practice of Psychiatry*, 30 TEMP. L. REV. 401, 405-406 (1957)).

³⁸ 663 N.E.2d 1039 (Ill. Ct. App. 1996).

pharmacy customer against a pharmacist after the pharmacist disclosed the customer's responses to questions about her mental health treatment and condition to third parties. The majority of the court found that the customer failed to adequately plead an implied-in-fact contractual duty of confidentiality. However, in a concurrence, one judge observed that "[pharmacists] maintain extensive patient records and counsel patients on drug interactions. In doing so, they can literally reconstruct a patient's medical history. Surely the public has a right to expect that pharmacists will keep the health conditions and treatments of their clients in confidence."³⁹ Although the judge reiterated that the facts of the current dispute did not support a claim for breach of an implied contract of confidentiality, this concurrence further demonstrates that sensitive information can be relevant to the creation of an implied obligation of confidentiality.

Personal financial information also was considered sensitive by courts in implied confidentiality disputes.⁴⁰ In the case of *McGuire v. Shubert*,⁴¹ the Supreme Court of Pennsylvania addressed the issue of whether a bank's duty of confidentiality to a customer can be implied. The court observed, "Based on common law principles of contract and agency, a number of jurisdictions have held that a bank has an implied contractual duty, as a matter of law, to keep financial information concerning a depositor confidential."⁴² The court's rationale was partly that "[i]t is inconceivable that a bank

³⁹ *Id.* at 1044 (Breslin, J., concurring).

⁴⁰ *See, e.g.,* *Twiss v. Dept. of Treasury, Office of Financial Mgmt.*, 591 A.2d 913, 919-20 (N.J. 1991) (recognizing that New Jersey has recognized an implied obligation of confidentiality in bank records); *Const. Defense Fund v. Humphrey*, 1992 WL 164734 (E.D. Pa.) ("The general view... is that a bank has an implied contractual duty of confidentiality and can be held liable to its customer for disclosing information on the customer's accounts without the customer's consent or other justification.").

⁴¹ 722 A.2d 1087 (Penn. 1998).

⁴² *Id.* at 1090.

would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts.”⁴³ This focus on “intimate” information demonstrates that some courts look to the sensitivity of financial information in determining whether there is an implied obligation of confidentiality.⁴⁴

It appears that when considering obligations of confidentiality that were implied-in-fact, courts looked at whether the sensitive nature of the information would serve as a signal to the recipient that the information was disclosed in confidence.⁴⁵ This is because implied-in-fact obligations are based on the understanding between the parties. Here social norms can play a large role in determining whether an implied obligation of confidentiality was reasonable or likely. Courts seemed to reason that sensitive information was more likely than non-sensitive information to have been disclosed according to an implicit promise of confidentiality. The rationale for this logic is that the recipient would or should have realized that sensitive information is routinely disclosed in confidence, thus an express promise of confidentiality need not be made. Instead, as a matter of course, it is reasonable to expect and rely on implied confidentiality when disclosing sensitive information.

⁴³ *Id.* at 1091.

⁴⁴ *Cf. Sharma v. Skaarup Ship Mgmt. Corp.*, 699 F. Supp. 440 (S.D.N.Y. 1988) (recognizing that while New York recognizes an implied duty of confidentiality between a bank and its depositors, it does not recognize such a duty between a bank and its borrowers because one who defaults on his debts to a merchant cannot expect that his default will be kept a complete secret); *Resnick v. Resnick*, 1990 WL 164968 (S.D.N.Y.) (recognizing that no implied obligation of confidentiality exists for a bank regarding the status of a borrower's loan, but it is unclear whether banks are under an implied obligation of confidentiality concerning other pieces of information regarding their lending relationship with a borrower); *Graney Dev. Corp. v. Taksen*, 92 Misc. 2d 764, 768 (N.Y. Gen. Term. 1978) (finding that information about the status of a borrower's loan “was not information that the borrower would normally expect would be kept confidential. One who defaults on his debts owed to a merchant cannot expect that his default will be kept a secret.”).

⁴⁵ *See, e.g., Wildearth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243 (D. Colo. 2010) (“[T]he texts of the emails undermine any implication that the documents were meant to be protected by a [confidential] privilege.”).

In situations where confidentiality was implied in the absence of an understanding between the parties regarding confidentiality, courts seemed to value the potential for harm if sensitive information were disclosed. The focus in these cases was not the agreement of the parties, but rather furthering some policy through implied confidentiality. In the case of health-related information, courts seemed to try to protect vulnerable parties who disclosed information. This concern for vulnerability is consistent with the courts' consideration of context in Chapter Two.

PROPRIETARY OR USEFUL INFORMATION

In fifteen cases, courts considered the proprietary and useful nature of information when determining whether implied obligations of confidentiality existed. Proprietary information was information individuals and business considered to be their property. Useful information was any information that had a utility for individuals and organizations and was typically commercial in nature. Much like with sensitive information, the disclosure of proprietary information can serve as a signal to recipients of the information that the disclosure is expected to be confidential. Specifically, in commercial settings, courts seemed to hold that proprietary and useful information was likely to be disclosed via an implied obligation of confidentiality.

A contrasting case is *Densy v. Wilder*,⁴⁶ which involved a dispute over an idea for a film. Here, the plaintiff, Victor Densy, pitched an idea for a film based on the life of famed cave explorer Floyd Collins to the secretary of Billy Wilder, a writer, producer, and director for the Paramount Pictures Corporation. Densy telephoned Wilder's secretary to request to speak to Wilder. Wilder's secretary insisted that Densy disclose

⁴⁶ 46 Cal. 2d 715 (Cal. 1956).

the story idea to her, and he did. He claimed that the secretary promised to pay Densy if Wilder used the idea. Densy never heard back from Wilder, but years later Paramount released a film that closely resembled the synopsis and historical facts that Densy disclosed to Wilder's secretary. Densy claimed that Wilder and Paramount violated their breach of implied contract to either pay Densy or keep the idea he pitched confidential.

The Supreme Court of California held that “[t]he law will not imply a promise to pay for an idea from the mere fact that the idea has been conveyed, is valuable, and has been used for profit; this is true even though the conveyance has been made with the hope or expectation that some obligation will ensue.”⁴⁷ The language of the court reflected its decision that the mere fact that information was valuable could not, standing alone, justify an implied obligation of confidentiality. Regardless, it is clear that some courts found the useful or proprietary nature of information significant in analyzing implied obligations of confidentiality.⁴⁸

⁴⁷ *Id.* at 739.

⁴⁸ *See, e.g.,* Sentinel Prod. Corp. v. Mobil Chem. Co., 2001 WL 92272 (D. Mass.) (finding that an implied confidential relationship could exist where one business received information about a product from a potential seller with knowledge that the product was eligible for patent protection and reason to know that the seller was disclosing a trade secret); Research, Analysis, & Dev., Inc. v. United States, 8 Cl. Ct. 54 (Cl. Ct. 1985) (referencing the propriety nature of plaintiff's information in finding that an implied-in-fact contract existed prohibiting the Air Force from disclosing the plaintiff's proposal regarding aerospace research and development); Prescott v. Morton Int'l, Inc., 769 F. Supp. 404 (D. Mass. 1990) (finding that a genuine issue of material fact existed as to whether an implied-in-fact contract of confidentiality existed where the discloser of information made the proprietary nature of the information clear to the recipients); Kleck v. Bausch & Lomb, Inc., 145 F. Supp. 2d 819, 824 (W.D. Tex. 2000) (“[T]he great weight of authority requires that an idea be novel before it will be protected under a breach of confidence or other quasi-contractual theory.”); Lehman v. Dow Jones & Co., Inc., 783 F.2d 285, 300 (2d Cir. 1986) (finding that “New York law implied a requirement that ‘when one submits an idea to another, no promise to pay for its use may be implied, and no asserted agreement enforced, if the elements of novelty and originality are absent’”).

For example, in the patent dispute *Hoeltke v. C.M. Kemp*,⁴⁹ the Fourth Circuit was asked to determine if an implied confidentiality agreement existed between an inventor and potential purchaser. The court stated:

It is argued that there was no confidential relationship existing between complainant and defendant with respect to the disclosure of complainant's invention; but this contention is groundless. Complainant offered to disclose his invention to defendant with a view of selling it to defendant, and so stated in his letter. Defendant was interested in the proposition and invited the disclosure, otherwise it would not have seen complainant's specification and drawings until the patent was granted. While there was no express agreement that defendant was to hold the information so disclosed as a confidential matter and to make no use of it unless it should purchase the invention, we think that in equity and good conscience such an agreement was implied; and having obtained the disclosure under such circumstances, defendant ought not be heard to say that there was no obligation to respect the confidence thus reposed in it.⁵⁰

The court here focused on, among other things, the signaling effect of the valuable and proprietary nature of the disclosed information in order to find an implied obligation of confidentiality. The court seemed to reason that because the information was valuable, it should be obvious that the inventor would not disclose it to the potential purchaser without restrictions on its use. Thus, it was reasonable to find an implied obligation of confidentiality.

INFORMATION EXPOSING DISCLOSER OR SUBJECT TO PHYSICAL HARM

Some information is kept confidential because revealing it could subject the discloser or subject of the information to physical harm from a third party. For example, the identity of police informants and related pieces of information often are kept confidential because if they were to be made public, criminals implicated by the

⁴⁹ 80 F.2d 912 (4th Cir. 1935).

⁵⁰ *Id.* at 923.

informant might seek to harm him. Courts considered this factor significant in eight cases in which the courts were called upon to determine if an implied obligation of confidentiality existed between the discloser and recipient of information. All of these cases involved disputes under the Freedom of Information Act (FOIA). In these cases, requests were filed for the identities and other information concerning confidential government informants. The agencies responded to the requests by invoking a FOIA exemption to disclosing the information. The agencies claimed an implied obligation of confidentiality between the government and their confidential sources.

For example, in *Council on American-Islamic Relations v. Federal Bureau of Investigation*,⁵¹ the Council on American-Islamic Relations requested documents regarding government surveillance of Muslim groups. In response, the FBI invoked FOIA Exemption 7(D), which allows an agency to withhold records or information compiled for law enforcement purposes that could reasonably be expected to disclose the identity of a confidential source.⁵² According to the U.S. District Court for the Southern District of California, “Exemption 7(D) applies if the agency establishes that a source has provided information under either an express or implied promise of confidentiality.”⁵³ According to the court, the FBI was attempting to protect “the names and identifying information of telecommunications companies, internet[sic] service providers, and financial institutions which have provided information to the FBI in furtherance of the FBI’s criminal and national security investigations.”⁵⁴

⁵¹ 2010 WL 4024806 (S.D. Cal).

⁵² 5 U.S.C. § 552(b)(7)(D).

⁵³ 2010 WL 4024806 at *14 (citations omitted).

⁵⁴ 2010 WL 4024806 at *15.

The U.S. District Court for the Southern District of California extensively referenced the leading precedent on implied confidentiality for government sources in law enforcement investigations, *U.S. Department of Justice v. Landano*.⁵⁵ The court stated:

The Supreme Court in *Landano* rejected the argument that “an assurance of confidentiality can be inferred whenever an individual source communicates with the FBI because of the risk of reprisal or other negative attention inherent in criminal investigations.” Instead, the agency must explain why, in the particular case, there was an implied assurance of confidentiality, although it may rely on factors such as “the nature of the crime investigated and the witness' relation to it.” In the present case, the FBI has carried its burden with regard to any individual informants because it is reasonable to infer that an informant in a terrorism case would assume confidentiality based on the “nature of the crime investigated.”⁵⁶

The court ultimately concluded that the implied claim of confidentiality was supported because disclosure of the requested information would likely cause substantial harm to the sources who disclosed information to the FBI.⁵⁷ The court seemed to reason that the threat of harm to the discloser of information was so great that it was reasonable to infer that disclosure would not have occurred without an obligation of confidentiality. Thus, even if a promise of confidentiality was not explicit, it was implied.

Several other courts adopted this logic. In *Roth v. U.S. Department of Justice*,⁵⁸ an inmate on death row in Texas sought information from the Department of Justice (DOJ) under FOIA relating to the FBI’s use of confidential sources in its investigation of the inmate. The inmate claimed that this information could corroborate his claim that he

⁵⁵ 508 U.S. 165 (1993).

⁵⁶ Council on American-Islamic Relations v. FBI, 2010 WL 4024806 at *15 (S.D. Cal.) (citations omitted).

⁵⁷ *Id.* at *16.

⁵⁸ 656 F. Supp. 2d 153 (D.D.C. 2009).

did not commit the four murders he was convicted of. The DOJ claimed Exemption 7(D), which permits the withholding or redacting of information where disclosure “could reasonably be expected to disclose the identity of a confidential source.”⁵⁹ Under this exemption, the court must determine “whether the sources named or providing withheld material were in fact confidential.”⁶⁰

Of course, confidentiality for sources can be explicitly provided, or an assurance of confidentiality can be reasonably inferred from the circumstances.⁶¹ The court found that “[c]ircumstances that may indicate implied confidentiality include whether the informant was paid, the informant’s relationship with the agency, the character of the crime at issue, and the source’s relationship to the crime.”⁶² Here, the court looked to the character of the crime at issue to determine the nature of the information. This analysis was done in order to ascertain the degree of vulnerability and likelihood of harm if the information is disclosed.⁶³ After reviewing the documents, the court found that the information withheld under 7(D) had been obtained via an express or implied assurance of confidentiality.

⁵⁹ 5 U.S.C. § 552(b)(7)(D) (2009).

⁶⁰ *Roth*, 656 F. Supp. 2d at 164.

⁶¹ *Id.* (citing *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165 (1993)).

⁶² *Id.*

⁶³ *See, e.g.,* *Richardson v. U.S. Dep’t. of Justice*, 730 F.Supp.2d 225, 237-38 (D.D.C. 2010) (“The nature of the crime investigated and informant’s relation to it are the most important factors in determining whether implied confidentiality exists.”); *Coleman v. FBI*, 13 F. Supp. 2d 75, 82 (D.D.C. 1998) (finding that plaintiff’s conviction for “numerous violent crimes” including murder, rape, and kidnapping, as well as “the relation of the witness thereto is precisely the type that the implied confidentiality exemption expressed in *Landano* is designed to encompass”); *Skinner v. U.S. Dep’t. of Justice*, 2010 WL 3832602 (D.D.C.) (recognizing that an implied grant of confidentiality for confidential sources has been recognized with respect to the cocaine trade, gang-related murder, methamphetamine trafficking operations, and other violent acts committed in retaliation for witnesses’ cooperation with law enforcement).

The U.S. District Court for the District of Columbia found in another FOIA dispute, *Richardson v. U.S. Department of Justice*,⁶⁴ with facts similar to *Roth*, that “[i]n determining whether the source provided information under an implied assurance of confidentiality, the Court considers ‘whether the violence and risk of retaliation that attend this type of crime warrant an implied grant of confidentiality for such a source.’”⁶⁵

In *Rugerio v. U.S. Dept. of Justice*,⁶⁶ another FOIA case seeking information about the government’s use of confidential sources, the U.S. District Court for the Eastern District of Michigan found that the evidence “established that implied assurances of confidentiality existed here because the information given by the DEA’s informants related to crimes that inherently involve violence and risk of retaliation.”⁶⁷ The court cited an affidavit in support of its finding that “[d]ue to the type of information which is provided by the sources and the fact that the individuals are associates of the plaintiff, it is highly unlikely that the source would have provided information to the DEA other than under circumstances of implied confidentiality.”⁶⁸

Thus, the logic of these courts seems to be that if information makes a discloser vulnerable to physical harm, then it is likely that confidentiality was implied because it is likely that the government sources would not have disclosed the information otherwise. This logic is consistent with the logic employed by judges who looked for evidence of the necessity of confidentiality in the disclosure of information. That is, if confidentiality was

⁶⁴ 2010 WL 3191796 (D.D.C.).

⁶⁵ *Id.* at *9 (citing *Mays v. Drug Enforcement Admin.*, 234 F.3d 1324 (D.C. Cir. 2000)).

⁶⁶ 234 F. Supp. 2d 697 (E.D. Mich. 2002).

⁶⁷ *Id.* at 704.

⁶⁸ *Id.* (emphasis and citations omitted).

necessary to keep a particular disclosure from physically harming the discloser, but no explicit promise of confidentiality was made, courts were likely to support an implied obligation of confidentiality. Under this logic, confidentiality would be less likely to be recognized by the courts in contexts where confidentiality was not important to the discloser or unnecessary to protect the discloser of information. For example, without confidentiality, an eyewitness to a crime might not disclose information to the government. However, an eyewitness to an embarrassing celebrity slip-up might still agree to be interviewed because celebrities are less likely than violent criminals to retaliate against eyewitnesses.

INFORMATION THAT IS LIKELY TO BE SHARED

Some courts called upon to determine if an implied obligation of confidentiality existed simply asked if the disclosed information was inherently the kind of information that would be shared with others. This kind of information was less likely to be subject to an implied obligation of confidentiality than information that is traditionally kept confidential. Whereas the other types of information contributed to the creation of an obligation of information, this type actually detracted from implied obligations of confidentiality. This type of information was not a neutral or “catch-all” category. Rather, some courts expressly discussed how information that is likely to be shared eroded the likelihood of an implied obligation of confidentiality.

A good example of this analysis is the case of *Google v. Traffic Information*,⁶⁹ which involved a patent dispute over two pieces of traffic-management software. This action was triggered when a software company called Traffic told the cell-phone

⁶⁹ 2010 WL 743878 (D. Or.).

company T-Mobile via an e-mail marked “confidential” and “for settlement purposes only” that Google’s patents infringed upon a Traffic patent. T-Mobile then disclosed the contents of that e-mail to Google, which, in anticipation of a suit against it by Traffic, sued Traffic for patent infringement. In the course of litigation, Traffic asserted that T-Mobile was bound by an implied confidentiality agreement not to disclose the e-mail that sparked Google’s lawsuit. However, the U.S. District Court for the District of Oregon disagreed. The court stated:

I do not find this argument persuasive because the record in this case contains no evidence even of an implied confidentiality agreement between T-Mobile and Traffic. There is nothing inherently confidential about a statement accusing a third party's product of patent infringement. Traffic should reasonably have anticipated – and perhaps even intended – that its claim of infringement by Google's product would be communicated to Google – how better for T-Mobile to refute Traffic's infringement claim than by seeking Google's help in explaining [its traffic software]?⁷⁰

The court focused on the fact that the content of the information should have signaled to the discloser that it was likely to be shared with other parties. As a result, the court found no implied obligation of confidentiality. Again, this logic is consistent with the logic of courts that look to the need for confidentiality for disclosure to occur.⁷¹ Here, it appears that the nature of the information was such that the disclosure was likely to occur without a promise of confidentiality. Confidentiality was largely irrelevant and thus unlikely to be implied.

It is also worth noting that this is only one of seven cases analyzed in this dissertation that dealt with an exclusively online disclosure of information.

⁷⁰ *Id.* at *3.

⁷¹ This same logic can also be applied to the sensitivity of information factor. *See, e.g., Doe v. Roe*, 93 Misc. 2d 201, 210 (NY. Gen. Term. 1977) (finding that confidentiality is a necessity in the physician-patient relationship because such intimate information is revealed within it).

Unfortunately, the court did not devote any analysis to the significance of the medium in this case. The court merely concluded there was no evidence of implied confidentiality in the e-mail because there was no confidentiality agreement between the parties. Instead, the e-mail was “unilaterally” labeled confidential, which is not enough, by itself, to give rise to an implied obligation of confidentiality.⁷²

CONCLUSION

The nature of the information disclosed was a significant factor for courts that analyzed implied obligations of confidentiality. The cases revealed that, similar to the way courts considered the context factor, courts focused on information that could harm a vulnerable party if disclosed. Secret and proprietary information could harm the discloser of information if confidence was breached by the recipient. Additionally, courts seemed to find that information that intrinsically could be expected to connote confidentiality, such as highly personal information, contributed to finding an implied obligation of confidentiality. Conversely, disclosed information that was likely to be widely shared was unlikely to be part of an implied obligation of confidentiality.

Courts were most likely to find an implied obligation of confidentiality where it was unlikely that the information would have been disclosed without an obligation of confidentiality. Some information, like highly personal or sensitive health information, and valuable proprietary information, is likely to have connotations of confidentiality for the recipients of information. Courts seemed to recognize that an inference of confidentiality was much more reasonable when the information exchanged evoked or should have evoked a heightened sense of awareness of confidentiality by the recipient.

⁷² 2010 WL 743878 at *3 (D. Or.).

CHAPTER IV

HOW THE ACTOR ATTRIBUTES AFFECT IMPLIED OBLIGATIONS OF CONFIDENTIALITY

Often, assumptions of confidentiality are not based on the circumstances surrounding a disclosure of information or on the nature of what is being disclosed, but rather, on who is sending, receiving, or is the subject of the information. Every disclosure of information involves actors, and the attributes of these actors can affect implied obligations of confidentiality. This chapter will focus on the courts' consideration of actors and how actors' attributes affect implied obligations of confidentiality.

According to Nissenbaum's theory of contextual integrity, privacy and confidentiality cannot be adequately analyzed without looking at the informational norms within a given context.¹ Nissenbaum identified four factors that determine informational norms: 1) context, 2) the nature of the information, 3) actors, and 4) terms of disclosure.

Actors play a large role in developing the contextual integrity of information. Within her framework, Nissenbaum stated that "[i]nformational norms have three placeholders for actors: senders of information, recipients of information, and information subjects."² According to Nissenbaum, the sender and recipient can be single or multiple individuals or collectives such as organizations and companies. However, since privacy is an inherently personal concept, Nissenbaum believed that only people, not entities like corporations, could be the "subjects" of information under her theory.

¹ HELEN NISSENBAUM, *PRIVACY IN CONTEXT* 129 (2010).

² *Id.* at 141.

Nissenbaum held that “[i]n specifying an informational norm, it is crucial to identify the contextual roles of all three actors [sender, recipient, and subject] to the extent possible; that is, the capacities in which each are acting.”³ Nissenbaum gave the healthcare context as an example. She stated that “there are numerous informational norms prescribing information sharing practices where the subjects and senders are patients themselves, and where the recipients are physicians.... Other norms apply in cases where the recipients are receptionists, bookkeepers, nurses, and so forth.”⁴ The importance of actors also can be seen after the initial disclosure of information, i.e., in the “downstream” disclosure of confidential information to third parties. For example, Nissenbaum noted that different norms apply when a physician shares a patient’s information with fellow practitioners, insurance companies, and the physician’s spouse.

In sum, Nissenbaum argued that our sense of privacy in disclosed information is almost always at least somewhat affected by the attributes and roles of the sender, subject, and recipient of information. She stated, “Usually, when we mind that information about us is shared, we mind not simply that it is being shared but that it is shared in the wrong ways and with inappropriate others.... [M]ost of the time these requirements are tacit and the states of all parameters need not be tediously spelled out.”⁵ Nissenbaum maintained that “it is relevant to know whether the actors are government or private, and in what capacity they act, among an innumerable number of possibilities.”⁶

³ *Id.* at 142.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 143.

Of course, actors are an inherent part of every disclosure of information and every claim of implied confidentiality. Even if a person is not the subject of the information disclosed, such as with most trade secrets, there is a sender and recipient of information. When personal information is exchanged, the sender and subject of the information are often the same person, such as with a patient disclosing information to a physician.⁷ In 28 of the 132 cases analyzed for this dissertation, courts explicitly commented on the nature of the actors. In the remaining cases, no significance regarding the role of the actor could be inferred from the courts' analysis. The goal of this chapter is to identify which actor attributes had a noticeable impact on the courts' decision in those 28 cases.

The cases revealed that vulnerability and an imbalance of power or sophistication were the most significant actor-related factors for courts analyzing obligations of confidentiality. Courts most often merely mentioned an actor's job title or level of sophistication, which seemed to indicate that the court at least recognized that attribute.⁸ In all of the cases analyzed, information that involved a person as the subject was self-disclosed. Thus, there was no separate analysis for the "subject of the information" in these cases.

Figure 1 demonstrates the numbers of cases that addressed particular attributes of actors:

⁷ *Id.* at 142.

⁸ Obvious examples of implied confidentiality based on profession include claims of implied confidentiality based on a specific evidentiary privilege such as the attorney-client privilege. In *Wildearth Guardians v. U.S. Forest Serv.*, the U.S. District Court for the District of Colorado denied a claim of implied confidentiality based on the attorney-client privilege where an e-mail was "shotgunned" to more than ten recipients, "only two of whom were attorneys." 713 F. Supp. 2d 1243, 1266 (D. Colo. 2010); *see also* *Union Pacific Railroad Co. v. Mower*, 219 F.3d 1069, 1073 (9th Cir. 2000) (recognizing that employees categorically owe an implied duty of confidentiality to employers to protect their trade secrets and confidential information).

Figure 1: The Attributes of Actors

<u>Actor Attribute</u>	<u>Number of Cases</u>
Vulnerability or sophistication	22
Resources	8
Bad-faith	3

Ultimately, it appears that courts are receptive to finding an implied obligation of confidentiality when a discloser or subject of information is vulnerable and/or when a recipient of information is sophisticated. Some disclosers of information were seen as inherently vulnerable, such as the infirm and elderly, while others were vulnerable because they were significantly less sophisticated than the recipient of information. Courts also looked to whether an actor had more resources than the other party to a dispute, which in a few cases resulted in a *de facto* distinction between individuals and corporate or group actors. Finally, several courts considered whether actors were acting in good faith or bad faith, suggesting that dishonest representations of trustworthiness could be used to encourage a potential discloser of information to unjustly place her confidence in the recipient. Thus, these courts found that a recipient's bad faith could be evidence of an implied obligation of confidentiality.

VULNERABILITY OR SOPHISTICATION

If one party to a disclosure of information was more sophisticated than the other, courts seemed to find that there was an imbalance between the parties and that the less sophisticated party was vulnerable to harm. Additionally, some individuals were seen as inherently vulnerable, such as minors, the elderly, the feeble-minded, and the infirm. Similar to the vulnerability analyses in Chapters Two and Three, courts found that

vulnerable disclosers of information increased the likelihood of an implied obligation of confidentiality.⁹

Additionally, courts seemed to find sophisticated parties more likely than unsophisticated parties to understand that confidentiality was implied in a given context because sophisticated parties were more likely to be cognizant of norms of confidentiality in which information is disclosed. The recipient's awareness of the need for confidentiality with vulnerable parties¹⁰ could be the basis for an implied-in-fact confidentiality agreement or confidential relationship, but it also could subject the recipient to an obligation of confidentiality that was created by courts in the absence of an understanding between the parties.¹¹

The attributes of actors in implied obligations of confidentiality were most significant in the healthcare context.¹² For example, the case of *Overstreet v. TRW Commercial Steering*¹³ involved a worker's compensation dispute between an employer

⁹ To reiterate, in all of the cases analyzed that involved personal information, the discloser and the subject of the information were the same person. All of the sensitive personal information revealed in the cases was self-disclosed.

¹⁰ See, e.g., *McGuire v. Shubert*, 722 A.2d 1087, 1091 (Penn. 1998) ("It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolable secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors."); *Sharma v. Skaarup Ship Mgmt. Corp.*, 699 F. Supp. 440 (S.D.N.Y. 1988) ("New York recognizes an implied duty of confidentiality between a bank and its depositors, but not between a bank and its borrowers. Information about the status of a borrower's loan is 'not information that the borrower would normally expect would be kept confidential.'") (citations omitted).

¹¹ See, e.g., *Alsip v. Johnson City Medical Center*, 197 S.W.3d 722 (Tenn. 2006) ("[T]he covenant of confidentiality arises not only from the implied understanding of the agreement between a patient and a doctor, but also from a policy concern that such private and potentially embarrassing information should be protected from public view."); *Overstreet v. TRW Com. Steering Div.*, 256 S.W.3d 626, 634 (Tenn. 2008).

¹² See, e.g., *Biddle v. Warren General Hosp.*, 1998 WL 156997 at *12 (Ohio Ct. App.) (finding that in confidential relationships between physicians and patients "there is no indication that patients bargain for confidentiality; rather, it is assumed"); *Humphers v. First Interstate Bank Oregon*, 696 P.2d 527, 534 (Or. 1985).

¹³ 256 S.W.3d 626 (Tenn. 2008).

and employee and a question of whether an implied covenant of confidentiality existed between the employee and the physician who treated him. The Supreme Court of Tennessee found that “an implied covenant of confidentiality arises between an employee and any physician supplied by the employer.”¹⁴ Among the reasons why the court recognized this covenant was the fact that the role of the physician is to be exposed to bare bodies and sensitive information with the expectation such information will remain unknown to others.¹⁵ Thus, sophisticated parties, such as physicians, in relationships with vulnerable parties, such as patients, are likely to receive information under an implied obligation of confidentiality.

Courts largely found that sophisticated recipients of information were more likely to be bound by an implied confidentiality than unsophisticated recipients.¹⁶ For example, the case of *Young Design v. Teletronics*¹⁷ involved a trade secret dispute in which a salesman for Young Design disclosed proprietary amplifier technology in the course of business negotiations with a foreign representative of the technology company Teletronics. The salesman did not require the agent for Teletronics to sign a confidentiality agreement before disclosing the amplifier technology. When Teletronics made use of Young Design’s amplifier technology, Young Design brought a claim for

¹⁴ *Id.* at 634-35 (“The covenant is implied in law and does not depend on the mutual intent of the contracting parties.”).

¹⁵ *Id.* at 634; *see also* *Suarez v. Pierard*, 663 N.E.2d 1039, 1045 (Ill. Ct. App. 1996) (Breslin, P.J., specially concurring) (“[P]harmacists maintain extensive patient records and counsel patients on drug interactions. In doing so, they can literally reconstruct a patient’s medical history. Surely the public has a right to expect that pharmacists will keep the health conditions and treatments of their clients in confidence.”).

¹⁶ *See, e.g.,* *Fail-Safe LLC v. A.O. Smith Corp.*, 744 F.Supp.2d 831, 858 (E.D. Wis. 2010) (finding it remarkable the plaintiff failed to obtain a confidentiality agreement because, among other reasons, the plaintiff “was a sophisticated business operative that had entered into confidentiality agreements with companies who were doing business with the plaintiff in the past”)

¹⁷ 2001 WL 35804500 (E.D. Va.).

misappropriation of trade secrets. Young Design argued that an implied confidentiality agreement existed between Young Design and Teletronics. The U.S. District Court for the Eastern District of Virginia disagreed, finding that “[h]ere, we are faced with a very informal, off-the-cuff gentleman’s agreement between an avid sales-person who is familiar with [confidentiality agreements], and a corporate representative without a strong command of the English language.”¹⁸

The court focused on the imbalance in the sophistication of the two parties. Whereas Young Design’s salesman had experience with and understanding of trade-specific confidentiality agreements (“nondisclosure agreements”), the court found that the foreign representative of Teletronic’s “command of the English language is not strong.” Additionally, the court pointed out that the salesman had little knowledge of the technical aspects of the business. Thus he was not in a good position to bind the company to confidentiality regarding the trade secrets of other businesses.¹⁹ Based on the court’s logic, an obligation of confidentiality is less likely when it is the recipient, not the discloser, of information who is the vulnerable or unsophisticated party. This is a logical result, given that the disclosers or subjects of the information are the parties who will be harmed by a breach of confidentiality.

The Second Circuit gave perhaps the most nuanced analysis of inherently vulnerable parties in *L-3 Communications v. OSI Systems*.²⁰ This case involved a disputed business merger and the question of whether the plaintiff and defendant, two corporations, entered into a confidential fiduciary relationship. The district court found

¹⁸ *Id.* at *6.

¹⁹ *Id.*

²⁰ 2008 WL 2595176 (2d Cir.).

the parties to be in a confidential relationship, which was challenged on appeal. The Ninth Circuit summarized the relevant law when it stated:

A confidential relationship typically arises where one party is particularly vulnerable to another party; this vulnerability usually arises from “advanced age, youth, lack of education, weakness of mind, grief, sickness, or some other incapacity.” The vulnerability of one party to the other “is the necessary predicate of a confidential relation, and the law treats it as absolutely essential.” Where one party in a relationship is particularly vulnerable to the other because of such an infirmity, the need to impose a fiduciary duty on the stronger party is obvious. In some instances, the California courts have expanded the concept and found confidential relationships to exist in commercial dealings.²¹

However, here the court found that the defendant “was not vulnerable to [the plaintiff] in a way that could give rise to an implied confidential relationship. The parties started off on equal footing. Both were sophisticated corporations, experienced in acquisitions, and represented by counsel.”²² The court seemed to reason that because the parties were so sophisticated with confidentiality agreements and had the benefit of counsel, it was unlikely that an obligation of confidentiality or a confidential relationship was implied.²³ With such resources and time, any confidentiality agreement would likely have been express.

The defendant argued that it was vulnerable to the plaintiff because it trusted the plaintiff to represent both of them in business negotiations with third parties. The court

²¹ *Id.* at *5 (quoting *Richelle L. v. Roman Catholic Archbishop*, 106 Cal. App. 4th 257, 273 (Cal. Ct. App. 2003); *Persson v. Smart Inventions, Inc.*, 125 Cal.App.4th 1141, 1161 (Cal. Ct. App. 2005)).

²² *Id.*

²³ *Id.* (“[The defendant] could have insisted that the parties form a joint venture or one of the other formal legal relationships that carry fiduciary duties as a matter of law. Or [the defendant] could have insisted on explicit contract terms providing that [the plaintiff] would act in a fiduciary capacity.... But [the defendant] did not do any of those things.”). A discloser’s failure to request confidentiality when it easily could have done so was a significant contextual factor for courts and was discussed in Chapter Two. *See Flotec, Inc. v. Southern Research, Inc.*, 16 F. Supp. 2d 992, 1000 (S.D. Ind. 1998); *Rogers v. Desa Int’l, Inc.*, 183 F. Supp. 2d 955 (E.D. Mich. 2002).

stated that while the defendant may have rendered itself vulnerable, “where a sophisticated party that starts on equal footing bargains away its rights without ensuring in the terms of the contract that it is receiving a reciprocal duty, that is not the type of vulnerability that [triggers fiduciary duties.]”²⁴ Thus, it would appear that courts consider sophistication and vulnerability in relation to the other party.²⁵ If both parties are equally vulnerable or equally sophisticated, then it appears that courts are less likely to find an implied obligation of confidentiality than in relationships where the discloser is more vulnerable or sophisticated than the recipient.²⁶

While a feeble state of mind could render the discloser of information vulnerable to the recipient, such facts must be firmly established to give rise to an implied obligation of confidentiality. The case of *Harold ex rel. Harold v. McGann*,²⁷ involved, among other things, a claim of violation of fiduciary duty and confidential relationship arising out of the sale of a patent and confidential business negotiations. Here, a businessman alleged that the defendant, Bryan A. McGann, fraudulently induced the businessman’s elderly father, who died before the suit was filed, to sell McGann a patent for a product to help administer medicine to pets. The businessman claimed McGann breached the contract in

²⁴ *Id.* (citations omitted); *see also* Scott v. Kemp, 316 A.2d 883 (Penn. 1974) (“[A] business association may be the basis of a confidential relationship only if one party surrenders substantial control over some portion of his affairs to the other.”).

²⁵ *See, e.g., Harold ex rel. Harold v. McGann*, 406 F. Supp. 2d 562 (E.D. Pa. 2005).

²⁶ While this logic was seemingly employed by most courts, it was often countered by other factors. For example, in *Smith v. Snap-On Tools Corp.*, the Fifth Circuit reversed a finding of implied confidentiality by the district court where a “relatively unsophisticated individual” with little education submitted an invention to a large corporation. 833 F.2d 578, 580 (5th Cir. 1987). The district court accepted the plaintiff’s argument that “[u]nder the circumstances...the manufacturer should have known that he, as the inventor, expected [compensation or confidentiality] even if he did not request it.” *Id.* In reversing, the Fifth Circuit found that because the plaintiff disclosed his idea before requesting confidentiality, the court found no implied confidentiality existed. *Id.* at 581.

²⁷ 406 F. Supp. 2d 562 (E.D. Pa. 2005).

numerous ways and claimed that McGann and the company he formed to market the patented product breached their implied confidential relationship with the businessman and his father. The U.S. District Court for the Eastern District of Pennsylvania was asked to determine if a confidential relationship was implied between the parties. The court found that a confidential relationship exists “when one party ‘has reposed a special confidence in each another [sic] to the extent that the parties do not deal with each other on equal terms.’ This special confidence can result from ‘an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other.’”²⁸

The court did not find a sufficient power differential between the parties to support an implied confidential relationship. The court focused on the fact that the businessman failed to plead any facts demonstrating his father’s decreased capacity to understand the relationship between the parties notwithstanding a claim of advancing age. This attention to comprehension supported the court’s logic that if the parties are on an equal footing with each other, then an implied confidential relationship of a fiduciary nature is unlikely.²⁹

RESOURCES

Courts also found that an imbalance of resources between the parties contributed to a finding of an implied obligation of confidentiality. In eight cases, this was demonstrated in the practical distinction between individuals and corporate or group

²⁸ *Id.* at 571 (citations omitted).

²⁹ *See, e.g., Harold ex rel. Harold v. McGann*, 406 F. Supp. 2d 562 (E.D. Pa. 2005); *see also Lanius v. Donnell*, 432 S.W.2d 659 (Tenn. 1968); *Roberts v. Chase*, 166 S.W.2d 641, 650 (Tenn. Ct. App. 1942) (“The fiduciary relation may be of any kind which implies confidence, as trustee and beneficiary, attorney and client, parent and child, guardian and ward, physician and patient, nurse and invalid, confidential friend and adviser, indeed, any relation of confidence between persons which gives one dominion or influence over the other.”); *Omnitech Intern., Inc. v. Clorox Co.*, 11 F.3d 1316 (5th Cir. 1994).

actors. No court explicitly analyzed individuals under different standards than corporations or groups in disputes involving implied obligations of confidentiality.³⁰ However, in practice, corporate or group entities typically had access to more resources than individuals, and in eight cases, courts seemed to take this factor into consideration. A good example of this is the case of *Omnitech International v. Clorox*, a case between two corporations: a roach spray manufacturer (Omnitech) and potential investor (Clorox).³¹

The parties entered into negotiations about entering into a joint manufacturing venture, and Omnitech disclosed confidential business information to Clorox as part of the negotiations. However, the negotiations broke down, and eventually Omnitech brought suit against Clorox for, among other things, breach of contract, misappropriation of trade secrets, and breach of fiduciary duty. Specifically, Omnitech argued that a “special relationship of trust and confidence was created by virtue of the confidential information it conveyed to Clorox.”³²

However, the Fifth Circuit disagreed. It found that no confidential or fiduciary relationship existed because, among other things, “the record in this case is replete with evidence that Omnitech and Clorox had only an arms-length business relationship, including undisputed testimony that...both sides were represented by competent counsel

³⁰ Some courts did note that commercial entities were less likely to need confidentiality than individuals. *See, e.g.*, *Council on American-Islamic Relations, Cal. v. FBI*, 2010 WL 4024806 at *16 (S.D. Cal.) (noting that while it is possible for the government to claim an exemption to the Freedom of Information Act based on an implied promise of confidentiality to entities, that exemption is “is claimed sparsely with regard to commercial institutions”).

³¹ 11 F.3d 1316, 1331 (5th Cir. 1994).

³² *Id.*

in the drafting and consummation of the agreements.”³³ This focus on counsel demonstrates how equality in resources can diminish the likelihood of an implied obligation of confidentiality between the parties. This seems particularly true when the parties are engaged in complex business negotiations instead of simple verbal exchanges.³⁴

BAD-FAITH

In three of the cases analyzed, courts considered whether an actor was acting in bad faith. Bad-faith recipients of information were more likely to be subject to implied obligations of confidentiality than recipients acting in good faith.³⁵ According to these courts, acting in bad faith to gain information, for example, by pretending to be interested in business negotiations, demonstrated that the information was not freely obtainable otherwise and, thus, the information was likely disclosed in confidence.

For example, the case of *Phillips v. Frey*³⁶ involved a trade secret misappropriation dispute between a manufacturer of deer-hunting stands, W.C. Phillips, and potential purchasers of the manufacturer’s business. The potential purchasers

³³ *Id.* The court also found that no fiduciary relationship existed because the parties vigorously negotiated the terms of their proposed agreement and Omnitech concealed much of its financial information from Clorox, which would seem to indicate that Omnitech did not view Clorox as a confidant.

³⁴ *See, e.g.,* *Formex Mfg., Inc. v. Sullivan Flotation Sys., Inc.*, 972 F.2d 1355 (Fed. Cir. 1992) (Neis, dissenting) (arguing against the majority decision that no implied duty of confidentiality existed because the parties were simply two businesses negotiating at arm’s length with no preexisting contracts.).

³⁵ *See, e.g.,* *Bartell v. Onbank, Onbank & Trust Co.*, 1996 WL 421189 (N.D.N.Y.) (“New York law does not appear to recognize an implied duty of confidentiality, a fiduciary duty, or any other duty of care between a bank and its borrowers, absent a showing of malice or bad faith.”). In *Bartell*, the U.S. District Court for the Northern District of New York dismissed claims of breach of fiduciary duty and breach of an implied duty of confidentiality against a bank because the plaintiffs failed to allege any malice or bad faith on the part of the bank. However, it refused to dismiss the same claims against an individual employee of the bank who was the bank’s agent because it found that employee acted with malice and ill will toward the plaintiff in obtaining the plaintiff’s loan request documents and distributing the materials at a mergers and acquisitions seminar as a demonstrative aid. *Id.* at *1, *4.

³⁶ 20 F.3d 623 (5th Cir. 1994).

obtained Phillips's trade secrets while negotiating for the purchase of his business. The potential purchasers led Phillips to believe they had a legitimate interest in buying his business, including his trade secrets. The potential purchasers requested Phillips's financial statements, a complete and detailed inventory of his equipment and tools, information about how his deer stand was manufactured, and a tour of his manufacturing plant.³⁷

Shortly after Phillips turned over this information, the potential purchasers claimed to have problems securing financing, and the deal fell through. Several employees of the potential purchasers kept most of the documents containing Phillips's sensitive and proprietary information. Less than a year later, the formerly potential purchasers began selling a deer stand that was virtually identical to Phillips's deer stand. Phillips then brought a claim for trade secret misappropriation.³⁸ Regarding misappropriation, the court held that "[o]ne is liable for disclosure of trade secrets if (a) he discovers the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in one who is in a confidential relationship with another who discloses protected information to him."³⁹

The facts indicated that the potential purchasers negotiated in bad faith to purchase Phillips's business. The potential purchasers claimed that they did not have financing to purchase the business, but evidence at court revealed that they made no

³⁷ *Id.* at 626.

³⁸ The Fifth Circuit found that "protection will be awarded to a trade secret holder against the disclosure or unauthorized use by those to whom the secret has been confided under either express or implied restriction of nondisclosure or by one who has gained knowledge by improper means." *Id.* at 629 (citing *Kewanee Oil v. Bicron Corp.*, 416 U.S. 470, 475 (1974); *Carson Products Co. v. Califano*, 594 F.2d 453, 461 (5th Cir.1979); *Weed Eater, Inc. v. Dowling*, 562 S.W.2d 898, 901 (Tx. Ct. App. 1978); *Brown v. Fowler*, 316 S.W.2d 111, 115 (Tx. Ct. App. 1958)).

³⁹ *Id.* at 630 (citations omitted).

effort to obtain financing and that they most likely would have received financing had they applied. The potential purchasers had significant possible collateral.⁴⁰ The court found that “[i]n the face of such evidence, it does not amount to a miscarriage of justice for the jury to believe that the defendants improperly discovered the trade secret and breached their confidential relationship.”⁴¹ The court appeared to find an implied obligation of confidentiality arising out of the potential purchaser’s actions taken in bad faith to convince Phillips to disclose information.

In addition to the policy of discouraging malfeasance by holding bad-faith actors to obligations of confidentiality, the existence of actions taken in bad faith also served as evidence of the recipient’s state of mind. The court found that, even though the plaintiff never explicitly requested confidentiality, given the recipient’s bad faith, the jury “could validly accept . . . that the defendants knew or should have known that the information was a trade secret and the disclosure was made in confidence.”⁴² Thus, it would appear that, according to this court, confidentiality can be implied in some instances where the recipient of information acted in bad faith in order to receive information.

Although the court found no bad faith on the part of the actors, the case of *Flotec, v. Southern Research*⁴³ cited *Phillips* for the proposition that a jury can find an implied obligation of confidentiality “in view of evidence tending to show that the defendant had not been sincere in its interest in buying the business and had used negotiations merely as

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 632.

⁴³ 16 F. Supp. 2d 992 (S.D. Ind. 1998).

a guise for obtaining the secret manufacturing process.”⁴⁴ *Flotec* involved a dispute between a manufacturer of oxygen regulators and a competitor. The manufacturer, Flotec, sued the competitor, Southern Research, Incorporated (SRI), for misappropriation of trade secrets after a proposed business deal between the two parties dissolved and SRI began to manufacture its own oxygen regulators. SRI had received technical drawings for the oxygen regulators from Flotec while the parties were still in negotiations.

The U.S. District Court for the Southern District of Indiana was asked to consider whether SRI was under an implied obligation of confidentiality with respect to Flotec’s trade secrets. The court recognized that an explicit promise of confidentiality between the parties is not necessary “if the recipient of the information knew or should have known that the information was a trade secret and that the owner of the secret expected the recipient to keep the information secret.”⁴⁵ The court found that this standard, which is part of unfair competition law, was not met in this case. The facts did not reveal any bad faith by SRI. The court found, among other things, that “[t]here simply is no evidence here that SRI gave any indication that it agreed to keep Flotec’s information confidential. Nor does the evidence show that Flotec could reasonably have inferred such consent from SRI’s silence on the subject.”⁴⁶

The case law seems to suggest that if a recipient acted in bad faith to obtain information, then an implied obligation of confidentiality was more likely than when a recipient acted in good faith to obtain information. This factor is consistent with the courts’ concern for vulnerable parties since the discloser of information is often unaware

⁴⁴ *Id.* at 1006.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1007.

if a recipient is acting in bad faith. As a result, such an “ignorant” discloser of information is vulnerable to a betrayal and breached confidentiality.

CONCLUSION

Regarding the attributes of actors in implied obligations of confidentiality, courts seemed to look for three major traits: 1) vulnerability or sophistication, 2) resources, and 3) bad-faith. Vulnerability and sophistication were sometimes seen as polar opposites. If one party was more sophisticated than the other, then the less sophisticated party was seen as vulnerable. Other parties, such as the infirm and elderly, were seen as inherently vulnerable. Courts were more likely to find recipients dealing with vulnerable disclosers bound by an implied obligation of confidentiality than when the parties were more equally situated or inherently sophisticated.

Courts also looked to whether an actor had more resources than the other party to a dispute, which in a few cases resulted in a *de facto* distinction between individuals and corporate or group actors. When actors that received information had more resources than the discloser of information, then an implied obligation of confidentiality was more likely than when the parties had similar resources.

Finally, several courts considered whether the recipient of information acted in bad faith in receiving information. Bad-faith actors were more likely to be bound by an implied obligation of confidentiality than good faith actors. The courts seemed to justify this result under a policy and evidentiary rationale. First, courts sought to further the policy of discouraging recipients of information from acting in bad faith to gain the confidence of the discloser by preventing them from disclosing their unjustly received information. Additionally, bad faith also served as evidence to courts that the recipient

knew that the received information was disclosed in confidence. Otherwise, according to the logic of the courts, acting in bad faith would not have been necessary to gain the information. Ultimately, the role of the actor, while likely the least significant of Nissenbaum's four factors, was still an important aspect for courts in analyzing implied obligations of confidentiality.

CHAPTER V

HOW TERMS OF DISCLOSURE AFFECT IMPLIED OBLIGATIONS OF CONFIDENTIALITY

Terms regarding the disclosure of information are naturally present in express confidentiality agreements. However, terms can also shape an implied agreement of confidentiality. For example, a stamp of “confidential” on documents, by itself, is not sufficient to form an express confidentiality agreement. However, it might serve as evidence of an implied agreement of confidentiality. Often, terms of disclosure conflict with each other. Other times, external laws regarding the disclosure of information can serve as “terms” that can create (or abolish) an implied obligation of confidentiality.

This chapter seeks to analyze how terms of disclosure are analyzed by courts faced with an alleged implied obligation of confidentiality. According to Nissenbaum’s theory of contextual integrity, privacy and confidentiality cannot be adequately analyzed without looking at the informational norms within a given context.¹ Nissenbaum identified four factors relevant in informational norms: 1) context, 2) the nature of the information, 3) actors, and 4) terms of disclosure.

Within her framework, Nissenbaum, who also called terms “transmission principles,” defined terms as constraints “on the flow (distribution, dissemination, transmission) of information from party to party in a context.”² According to

¹ HELEN NISSENBAUM, *PRIVACY IN CONTEXT* 129 (2010).

² *Id.* at 145.

Nissenbaum, “The transmission principle parameter in informational norms expresses terms and conditions under which such transfers ought (or ought not) to occur.”³

While terms could be explicit, Nissenbaum found that they usually were implied. She stated, “The idea of a transmission principle may be the most distinguishing element of the framework of contextual integrity; although what it denotes is plain to see, it usually goes unnoticed.”⁴ Nissenbaum held that terms could stipulate many things: they could dictate that information could be shared freely. Alternatively, terms could stipulate that information can only be used if the subject of the information knows about the use (“notice”) or if the subject gives her permission for the use (“consent”).⁵ Terms giving notice or consent are quite prominent online, as the website privacy policy regime is nothing more than a system for giving notice of and obtaining consent for the use of personal information. Express online terms also provide for the commercial exchange of information. Under certain terms of disclosure on websites, information can be bought, sold, or leased under many or no restrictions on the use or further disclosure of the information.⁶ Other online terms, such as symbols, icons, and even website features, could serve as terms contributing to an implied obligation of confidentiality.⁷

In sum, Nissenbaum argued that terms are perhaps the most significant, but not sole, aspect of informational norms that restrict the flow of information.⁸ The cases

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Woodrow Hartzog, *Website Design as Contract*, 60 AM. U. L. REV. 1635 (2011).

⁸ HELEN NISSENBAUM, *PRIVACY IN CONTEXT* 145 (2010).

supported this assertion. She gave friendship as an example of a context laden with terms of disclosure. She observed, “Friends share information reciprocally, generally assuming that what they say to each other will be held in confidence.”⁹ According to Nissenbaum, this is an implied term of disclosure. Nissenbaum recognized that while some departures from this norm are generally allowable, certain implied terms of friendship are considered violated when friends stray too far from the term of confidentiality.¹⁰ For example, she held that “[f]erretting out information about a friend from third parties, peeking in a diary, or divulging to others information shared in a friendship are actions that not only may be judged as betrayals, but call into question the very nature of the relationship.”¹¹ In such instances, the terms of disclosure are deemed to have been breached.

Nissenbaum contrasted the terms of disclosure in friendships with those in health care relationships. This contrast highlighted the different ways terms are disclosed and can affect relationships. Like friendships, health care relationships carry an implication of confidentiality. Yet unlike with friendships, the information subject’s discretion does not “reign supreme.”¹² Instead, Nissenbaum stated, the physician can control the terms of disclosure, “in the sense that a physician might reasonably condition care on the fullness of the patient’s information disclosure.”¹³ This contrast demonstrates how the terms of disclosure are context specific. Terms can be stipulated within relationships by the

⁹ *Id.*

¹⁰ *Id.* at 146.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

discloser (who is typically the subject) or recipient of information. Terms also can be stipulated by some outside source, such as patient/client confidentiality laws or the voluntary oaths taken by physicians.

Terms of disclosure can be explicit in or inferred from a virtually limitless number of contexts. Yet scholars have not analyzed exactly how courts consider the terms in analyzing implied obligations of confidentiality. No framework for such an analysis has been adopted by the courts. Thus, the goal of this chapter is to determine which terms courts explicitly recognized as significant in implied confidentiality disputes.

The cases revealed that courts typically tried to locate the true understanding of the parties by looking at terms within and outside of disclosure relationships. Of the 132 cases analyzed in this dissertation, 66 specifically addressed terms of disclosure, recognizing or refusing to recognize an implied obligation of confidentiality.

Figure 1 demonstrates the numbers of cases that analyzed each kind of term or consideration involving terms:

Figure 1: The Kinds of Terms or Term-related Considerations in Implied Confidentiality Disputes

<u>The Kinds of Terms</u>	<u>Number of Cases</u>
Confidentiality indicators	38
Terms indicating a desire for confidentiality	24
Terms indicating confidence will be kept	14
External Terms	15

<u>Term-related Considerations</u>	
Conflicting terms	22
Explicitness	17

Courts placed the most emphasis on any term (statement, action, symbol, etc. indicating a preference regarding disclosure) that would have been apparent to the other party. Thus, the perception of terms seemed to be the most significant factor for courts in analyzing implied obligations of confidentiality. The most common terms explicitly recognized by courts were those that indicated either a discloser's desire for confidentiality or that confidentiality of information would be respected by the recipient. If perceived, these terms could justify one party's reliance on confidentiality, which can be the basis of a contract or a claim for promissory estoppel. These types of terms, which will be referred to here as "confidentiality indicators," were the most significant to courts in finding an implied obligation of confidentiality. Courts applied this logic even if subsequent terms conflicted with previous terms, unless an explicit contract prohibited implied terms of confidentiality.

Courts also found that explicit, that is, clear and specific terms contributed to a finding of an implied obligation of confidentiality. Courts held that terms that purportedly create implied obligations of confidentiality must be clear and definite enough for the promises and expected performances of each party to be reasonably certain. Finally, courts looked to external terms, e.g., terms like laws, business policies, and regulations that might shape an implied obligation of confidentiality. Courts typically found that external terms were significant in implied confidentiality disputes if the discloser or recipient either knew or should have known about the terms.

CONFIDENTIALITY INDICATORS

Courts often looked for what will be referred to as “confidentiality indicators,” i.e., signals, statements, or actions that indicate that either a desire for confidentiality or that the disclosed information would be kept confidential.¹⁴ In effect, courts held that two different kinds of confidentiality indicators could contribute to the formation of an implied obligation of confidentiality: terms indicating a desire for confidentiality and terms indicating that confidence would be kept.

Terms Indicating a Desire for Confidentiality. Unsurprisingly, one of the most important terms of disclosure to courts was a desire or request for confidentiality by the discloser of information. A simple request for confidentiality does not, by itself, constitute a binding agreement between the parties. However, courts were significantly more likely to find an implied obligation of confidentiality when the discloser of information displayed a desire to restrict the flow of information than when the discloser showed no interest in confidentiality.¹⁵ Conversely, the absence of an indicator or signal

¹⁴ See, e.g., *Grayton v. United States*, 92 Fed. Cl. 327 (Fed. Cl. 2010); *Nilssen v. Motorola, Inc.*, 963 F. Supp. 664, 679-82 (N.D. Ill. 1997) (finding that no obligation of confidentiality existed for any disclosure not explicitly marked as “confidential” under a pre-existed agreement regarding use of disclosed information within a business relationship.); *Klekas v. EMI Films, Inc.*, 150 Cal. App. 3d 1102, 1114 (Cal. Ct. App. 1984); *Rogers v. Desa Int’l, Inc.*, 183 F. Supp.2d 955, 957 (E.D. Mich. 2002) (finding that a claim of implied confidentiality is without merit where, among other things, the plaintiff “did not indicate on the video tape he sent [to the defendant], either in the video itself or on an outside label, that information contained therein was confidential.”); *Daily Int’l Sales Corp. v. Eastman Whipstock, Inc.*, 662 S.W.2d 60 (Tex. Ct. App. 1983) (finding no implied obligation of confidentiality where, among other things, “[n]o documents were stamped or labeled with the word ‘confidential’ or like warnings.”); *Neimi v. Am. Axle Mfg. & Holding, Inc.*, 2007 WL 29383 at *4 (Mich. Ct. App.) (finding no implied obligation of confidentiality where, among other things, plaintiffs “did not make any reasonable efforts to preserve the confidentiality of the designs provided to the defendants. They did not mark the documents as confidential, or require an express agreement of confidentiality”).

¹⁵ See, e.g., *Knapp Schenk & Co. Ins. Agency, Inc. v. Lancer Mgmt. Co., Inc.*, 2004 WL 57086 (D. Mass.); *WBAI-FM v. Proskin*, 42 A.D.2d 5, 9-10 (N.Y. Gen. Term. 1973) (“[T]he very scheme adopted for communicating the letter reveals a deliberate intention not to reveal the author’s personal identity. All these circumstances yield but one possible conclusion: that the author of the letter did not want his personal identity revealed and, therefore, that the letter was communicated under an implied understanding of confidentiality.”).

of confidentiality by the discloser was relied upon by courts to find that no implied obligation of confidentiality existed.¹⁶

These terms were created many different ways. Some terms were symbols or single words, such as a “confidential” stamp on documents.¹⁷ Other terms were vague assertions, such as “this is between us.”¹⁸ Other factors of contextual integrity – context, actors, and the nature of the information – served as evidence of an implied term of confidentiality in a relationship.¹⁹ The reason courts considered the expression of confidentiality so important is that, in order to find an implied obligation of confidentiality, courts asked whether the recipient “knew or should have known” that the

¹⁶ See, e.g., *Grayton v. United States*, 92 Fed. Cl. 327 (Fed. Cl. 2010); *FMC Corp. v. Guthery*, 2009 WL 485280 at *5 (D.N.J.) (“Here, the Court is not convinced that Guthery provided confidential information.... [W]hen he produced [documents], he did not request that they be marked ‘confidential.’”); *Mass. Institute of Tech. v. Harman Int’l Indust., Inc.*, 584 F. Supp.2d 297, 304 (D. Mass. 2008) (finding that no implied obligation of confidentiality existed where “[n]o record evidence shows either that the researchers gave any instructions to keep any information that drivers gathered while using the Back Seat Driver system confidential....”); *Young Design, Inc. v. Teletronics Int’l, Inc.*, 2001 WL 35804500 at *5 (E.D. Va.) (“There is no evidence in this record that plaintiff took any efforts to create a confidential relationship with defendant. There were no proprietary use warnings on invoices, no letters or emails reminding defendant about confidentiality obligations, and no evidence of oral discussions with any other of defendant’s employees.”); *Fail-Safe LLC v. A.O. Smith Corp.*, 2010 WL 3503427 at *21 (E.D. Wis.) (finding no implied duty of confidentiality exists where the plaintiff provided “no indication” to the defendant that the information the plaintiff was provided was intended to be kept in confidence.).

¹⁷ See, e.g., *Research, Analysis, & Dev., Inc. v. United States*, 8 Cl. Ct. 54 (1985).

¹⁸ See, e.g., *Lee v. State*, 418 Md. 136, 156 (Md. 2011) (“Detective Schrott’s words, ‘This is between you and me bud. Only me and you are here, all right? All right?’ on their face imply confidentiality.... No reasonable lay person would have understood those words to mean anything other than that the conversation, at that moment and thereafter, even if not before, was ‘between’ only Detective Schrott and Petitioner.”).

¹⁹ See, e.g., *Diodem, LLC v. Lumenis Inc.*, 2005 WL 6220720 at *10 (C.D. Cal.) (finding an implied obligation of confidentiality could exist from a totality of the circumstances, where, among other things, none of the recipients of information had any basis for inferring the information was disclosed for free and unrestricted use); *Young Design, Inc. v. Teletronics Int’l, Inc.*, 2001 WL 35804500 at *5 (E.D. Va.) (recognizing that indicators such as reminders about confidentiality obligations, oral discussions about confidentiality, or warnings on communications designating the information as confidential could demonstrate efforts to create a confidential relationship); *Hollomon v. O. Mustad & Sons (USA), Inc.*, 196 F. Supp. 2d 450, 460 (E.D. Tex. 2002) (finding no confidential relationship where the plaintiff failed to present any evidence that he informed the defendant his designs were being disclosed in confidence).

disclosed information was confidential.²⁰ One of the ways this knowledge is transmitted to the recipient of information is through terms of disclosure.

Some of the confidentiality indicators identified by courts were signals, statements, or actions that indicated to recipients a desire by the discloser for confidentiality or an assumption or expression that the disclosed information was confidential.²¹ A good example of this is found in *Grayton v. United States*.²² In this case, an individual brought suit against the United States seeking compensation for an alleged improper taking by the Social Security Administration (SSA). Maurice Grayton submitted a proposal to the SSA that certain Social Security benefits should be delivered via a debit card transaction instead of a paper check. Grayton claimed that an implied-in-fact contract was formed when he submitted his suggestion to the SSA. He claimed that

²⁰ See, e.g., *Fail-Safe LLC v. A.O. Smith Corp.*, 2010 WL 3503427 at *21 (E.D. Wis.) (“None of the letters or data...bared any symbol denoting that the information contained therein was confidential. Moreover, there is no evidence that FS even told AOS that the Colorado company considered the information in question confidential.”); *Faris v. Enberg*, 97 Cal. App. 3d 309 (Cal. Ct. App. 1979); *Flotec v. Southern Research, Inc.*, 16 F. Supp. 2d 992 (S.D. Ind. 1998); *Rockwell Graphics Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 177 (7th Cir. 1991); *Furr's Inc. v. United Specialty Adver. Co.*, 385 S.W.2d 456, 459-60 (Tex. Ct. App. 1964) (“Confidential relationship is a two-way street: if the disclosure is made in confidence, the ‘disclosee’ should be aware of it. He must know that the secret is being revealed to him on the condition he is under a duty to keep it.”); *Sentinel Products Corp. v. Mobil Chem. Co.*, 2001 WL 92272 (D. Mass. 2001).

²¹ See, e.g., *Grayton v. United States*, 92 Fed. Cl. 327 (2010); *Nilssen v. Motorola, Inc.*, 963 F. Supp. 664, 679-82 (N.D. Ill. 1997) (finding that an obligation of confidentiality existed for any disclosure not explicitly marked as “confidential” under a pre-existed agreement regarding use of disclosed information within a business relationship); *Klekas v. EMI Films, Inc.*, 150 Cal. App. 3d 1102, 1114 (Cal. Ct. App. 1984); *Rogers v. Desa Int’l, Inc.*, 183 F. Supp. 2d 955, 957 (E.D. Mich. 2002) (finding that a claim of implied confidentiality is without merit where, among other things, the plaintiff “did not indicate on the video tape he sent [to the defendant], either in the video itself or on an outside label, that information contained therein was confidential”); *Daily Int’l Sales Corp. v. Eastman Whipstock, Inc.*, 662 S.W.2d 60 (Tex. Ct. App. 1983) (finding no implied obligation of confidentiality where, among other things, “[n]o documents were stamped or labeled with the word ‘confidential’ or like warnings”); *Neimi v. Am. Axle Mfg. & Holding, Inc.*, 2007 WL 29383 at *4 (Mich. Ct. App.) (finding no implied obligation of confidentiality where, among other things, plaintiffs “did not make any reasonable efforts to preserve the confidentiality of the designs provided to the defendants. They did not mark the documents as confidential, or require an express agreement of confidentiality.”).

²² 92 Fed. Cl. 327 (Fed. Cl. 2010).

one of the implied terms of this contract was a “promise not to reveal or use [his] suggestion without compensating him for it” and a promise to keep his trade secret confidential otherwise.²³ He filed suit alleging that the SSA failed to keep its implied promise of confidentiality.

Grayton relied on the case *Airborne Data v. United States*²⁴ to support his implied-in-fact contract theory. This case held that an implied-in-fact contract of confidentiality can “arise[] from submission of trade secrets [to a federal agency] under a restrictive legend pursuant to a regulation.”²⁵ According to the U.S. Court of Federal Claims in *Grayton*, the *Airborne* case stands for the rule that “the government is bound by contract to obey regulatory restrictions on the use of trade secrets identified as such and may be liable for breach of that contract term.”²⁶

Unfortunately for Grayton, *Airborne Data* did not support his claim for implied confidentiality because he failed to place a restrictive legend on the proposal he sent to the SSA. The court made clear that “a federal agency is under no obligation to keep unsolicited proposals confidential, when restrictive legends that could identify the proprietary information therein are inadequate or missing.”²⁷ While this case deals with

²³ *Id.* at 334.

²⁴ 702 F.2d 1350 (Fed. Cir. 1983).

²⁵ *Id.* at 1353. According to the court, “As of 1976, it was the official policy of the Department of the Interior (and of USGS) to encourage the submission of unsolicited proposals containing relevant new ideas.” *Id.* at 1359 (citing 41 C.F.R. § 14-4.5101-2(c), 3(a) (1977)). To that end, valid departmental regulations how an individual might submit data not to be disclosed to the public for any purpose, or used by the department for any purpose other than evaluation of a proposal. The regulations also provided that a submission would indicate how it was to be used by way of a restrictive legend which dictated, among other things, what information was confidential.

²⁶ *Grayton*, 92 Fed. Cl. at 334.

²⁷ *Id.* (citing *Xerxe Group, Inc. v. United States*, 278 F.3d 1357, 1360 (Fed. Cir. 2002) (holding that the plaintiff’s “failure to identify and clearly demarcate what it considered restricted data is fatal to its claim”)); *Block v. United States*, 66 Fed. Cl. 68, 74 (Fed. Cl. 2005) (holding that “the plaintiff’s failure

the idiosyncratic context of submission of proprietary ideas to the government, it demonstrates the broader significance to courts of confidentiality indicators as terms of disclosure and the deference that courts give to the rules embedded in established systems designed for information disclosure.

Another example of the significance of confidentiality indicators is the case *Sentinel Products v. Mobil Chemical*,²⁸ which involved claims between a product developer and potential purchaser of a machine for making plastic bags. The developer, Sentinel, disclosed valuable trade secrets – including the actual machine – to the potential purchaser, Mobil, on a trial basis. At the end of the trial period, Mobil returned the bag-making machine to Sentinel and arranged to manufacture its own machine, which it had allegedly copied from Sentinel. Sentinel brought a number of claims, including misappropriation of trade secrets, breach of contract, and fraud and misrepresentation. Mobil’s principal defense was that the disclosed information was not a trade secret because it was not entrusted to Mobil in confidence nor was the machine a protected secret.²⁹

The court did not accept Mobil’s argument.³⁰ Instead, it found that an implied confidential relationship existed between the parties. The court noted that a number of facts supported this finding:

here to identify any proprietary information in his unsolicited Joint Proposal requires dismissal of the plaintiff’s implied-in-fact contract claim for protection of his alleged proprietary information”).

²⁸ 2001 WL 92272 (D. Mass.).

²⁹ A requirement to gain trade secret protection is that the owner must have taken reasonable steps to preserve the secrecy of the design. *See Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1165 (1st Cir. 1994).

³⁰ *Sentinel*, 2001 WL 92272 at *10-12.

[T]he fact that Sentinel made it clear that it had applied for a patent before it gave Mobil a machine to try, the fact that Mobil was to return the machine if it elected not to purchase the Sentinel 5000, the fact that all machines were stamped “patent pending,” the fact that the machines were kept under wraps at trade shows, and the fact that Mobil had been a customer, but never a competitor, of Sentinel, may lead a jury to find that Sentinel's precautions were sufficient to protect the trade secret status of the design of the machine.”³¹

The court seemed to focus on, among other things, privacy indicators in making its decision finding an implied confidential relationship, particularly the fact that the machine was “clearly marked patent pending.”³² According to the court, this particular indicator was capable of conveying a number of messages. The court held:

A jury could reasonably reject Mobil's argument that by emphasizing the patent, Sentinel was admitting that the design of the machine was not confidential. Another interpretation could be that Sentinel was putting Mobil and other potential buyers on notice that (1) it believed that the design of the machine was unique and gave it a competitive advantage in the marketplace; and (2) that Sentinel did not expect anyone to copy the machine without payment to Sentinel. In fact, I find this latter interpretation more persuasive and consistent with the law. Thus, while one cannot infringe a patent before a patent has issued, information can be afforded trade secret status during that time.³³

The court concluded, “In short, by notifying a potential buyer that a patent is pending, it would be reasonable to conclude that the buyer is being given notice that it is being entrusted with valuable, proprietary information which cannot be used without compensation to its owner.”³⁴ This case demonstrates why any framework for implied

³¹ *Id.* at *10.

³² *Id.* at *11.

³³ *Id.*

³⁴ *Id.*; *see also* Research, Analysis, & Dev., Inc. v. United States, 8 Cl. Ct. 54 (1985) (finding an implied contract for confidentiality based on, among other things, a “Proprietary Statement” suggesting the confidential nature of an unsolicited proposal).

obligations of confidentiality should be broad enough to encompass confidentiality indicators and their various interpretations.

The importance of a discloser's communication of a desire for confidentiality also is reflected in some courts' requirement that the recipient of the information be notified of the desire for confidentiality before the disclosure is made. Courts were hesitant to enforce an implied obligation of confidentiality if the recipient did not have the opportunity to reject the proposed confidentiality agreement. In *Faris v. Enberg*,³⁵ Edgar Faris, a television show developer, pitched an idea for a sports quiz show to a sports announcer, Richard Enberg. Sometime after the two met, a very similar show appeared on television with Enberg as the master of ceremonies. Faris brought a suit against Enberg and the television show's producer for misappropriation of the sports quiz show idea and for breach of an implied obligation of confidentiality. The California Court of Appeal found that in order for a valid confidentiality obligation to exist, "[t]here must exist evidence of the communication of the confidentiality of the submission or evidence from which a confidential relationship can be inferred."³⁶

Here, the court found that no rational recipient of the information disclosed by Faris could be bound to an understanding that a secret was being imparted. The court found, "One could not infer from anything Enberg did or said that he was given the chance to reject disclosure in advance or that he voluntarily received the disclosure with an understanding that it was not to be given to others."³⁷ The court appeared to be

³⁵ 97 Cal. App. 3d 309 (Cal. Ct. App. 1979).

³⁶ *Id.* at 323.

³⁷ *Id.* at 324.

looking for an external manifestation of the desire for confidentiality. The court observed:

Only in plaintiff's response to summary judgment is there reference to his own thoughts from which one might infer that he felt there was a confidence. But he never, so far as we can tell, communicated these thoughts to Enberg, and nothing of an understanding of confidence can be inferred from Enberg's conduct. No other special facts exist from which the relationship can be inferred: there was no implied-in-fact contract; the material was not protectable; and they were not yet partners or joint adventurers, and there was no buyer/seller or principal/agent relationship.³⁸

Thus, the court advanced a number of reasons, including the need for the recipient to understand his obligations, for focusing on whether the discloser of information expressed a desire for confidentiality in order to find an implied obligation of confidentiality.

Not all courts found that confidentiality indicators contributed to an implied obligation of confidentiality. One of two online-related cases involving terms expressing a desire for confidentiality was *Google v. Traffic Information*³⁹ This case involved a patent dispute over Google's popular "Google Maps" software. This lawsuit was triggered when Traffic Information, a technology company, sent Google's business partner, T-Mobile, an email. This email warned T-Mobile of a potential patent issue between Traffic's patents and Google maps. Traffic claimed that Google Maps violated its patents. The email from Traffic to T-Mobile's attorney was marked "confidential" and "for settlement purposes only."⁴⁰ T-Mobile subsequently disclosed the contents of the

³⁸ *Id.* Notice that the court draws upon the other factors of contextual integrity in its analysis.

³⁹ 2010 WL 743878 (D. Or.).

⁴⁰ *Id.* at *1.

e-mail to Google. Traffic asserted that it did not consent to such a disclosure and that a confidentiality agreement existed between T-Mobile and Traffic regarding the email.

The U.S. District Court for the District of Oregon found the confidentiality indicators in Traffic's email unpersuasive. The court held that "the record in this case contains no evidence of even an implied confidentiality agreement between T-Mobile and Traffic.... [T]he fact that the email was marked 'confidential' does not affect the justiciability analysis."⁴¹ Of course, the confidentiality indicator was not the sole factor considered by the court. The court also found that:

There is nothing inherently confidential about a statement accusing a third party's product of patent infringement. Traffic should reasonably have anticipated – and perhaps even intended – that its claim of infringement by Google's product would be communicated to Google – how better for T-Mobile to refute Traffic's infringement claim than by seeking Google's help in explaining [the software]?⁴²

Notice that this court, like the court in *Faris*, drew upon the other factors of contextual integrity in its analysis: the nature of the information (there was "nothing inherently confidential"), the actor's knowledge (the actor had no reasonable anticipation of disclosure), and the relationship between the parties (there was no need for confidentiality over the disputed information for the business relationship to work). Thus, this case is an excellent example of how the four factors of contextual integrity relate to each other. Nissenbaum metaphorically described the coexistence of the four factors in an image of "juggling balls in the air, moving in sync: contexts, subjects, senders, receivers, information types, and transmission principles."⁴³

⁴¹ *Id.* at *3.

⁴² *Id.*

⁴³ Nissenbaum, *supra* note 1, at 145.

The similar case of *Innospan v. Intuit*,⁴⁴ which also involved a confidentiality indicator in an email, reached a similar result. Here, Innospan, an IT business, shared a business plan via email with Intuit in an attempt to open a conversation about Intuit investing in Innospan. The e-mail contained a confidentiality statement.⁴⁵ Additionally, the business plan had the following phrase at the bottom of each page: “This document contains confidential and proprietary information that belongs exclusively to [Innospan].”⁴⁶

Ultimately Intuit failed to invest in Innospan’s business and instead invested in a different business. Innospan brought a claim for, among other things, breach of an implied-in-fact contract to keep certain information confidential. However, here the mere existence of the confidentiality indicator was not enough to rise to the level of an implied contract. The U.S. District Court for the Northern District of California found that this claim failed because

The only mention of confidentiality in the January 31 e-mail appeared in the e-mail's automated signature which read: “this e-mail message is intended for the personal use of the recipient(s) named above ... this message may be...privileged and confidential...if you are not an intended recipient, you may not review, copy or distribute.” This automated signature did not, however, create a binding contract to keep the contents confidential. The purpose of such a signature is merely to advise the recipient that the communication is potentially privileged. While an implied contract is created through conduct rather than words, there must be intent to contract. There is no meeting of the minds or intent to contract based on this boilerplate disclaimer. Thus, there can be no implied-in-fact contract based on the January 31 e-mail.⁴⁷

⁴⁴ 2011 WL 856265 (N.D. Cal. 2011)

⁴⁵ *Id.* at *1.

⁴⁶ *Id.*

⁴⁷ *Id.* at *6.

The court explicitly rebutted Innospan's argument that "because the business plan itself was marked as 'proprietary' and 'confidential,' defendant implicitly agreed to maintain confidentiality."⁴⁸ The court held that "[a] rote stamp cannot, in and of itself, create an implied-in-fact contract."⁴⁹ This opinion is consistent with the other cases analyzed in this dissertation demonstrating that disclosers of information cannot unilaterally impose terms of confidentiality outside of a confidential relationship. Some reciprocal act by the recipient of information is typically required. Yet it is clear that confidentiality indicators and other terms requesting confidentiality are critical components of any implied obligation of confidentiality analysis.

Another example of courts' consideration of indicators is *Flotec v. Southern Research*.⁵⁰ This was a misappropriation of trade secrets dispute between a manufacturer of oxygen regulators (Flotec) and a competitor (SRI). As with many misappropriation cases, the parties disclosed confidential information to each other as part of a business negotiation that eventually dissolved. Flotec brought suit after SRI began manufacturing its own line of oxygen regulators that reflected the ideas disclosed to SRI by Flotec. Flotec argued that the court should find that "when SRI accepted Flotec's technical drawings so that it could prepare a bid to manufacture components for Flotec, SRI had an *implied* duty to maintain Flotec's information in confidence and not to use that information for its own purposes."⁵¹

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 16 F. Supp. 2d 992, 1006-07 (S.D. Ind. 1998).

⁵¹ *Id.* at 1005 (emphasis in original).

The court rejected this argument for various reasons. One of them was that there were no indicators of confidentiality that would or should have led the recipient to know that the disclosure was made in confidence. The court asked, “What were the circumstances as they appeared to SRI? SRI knew that Flotec had not ever indicated in any way—on the drawings themselves, or in discussions between the parties—that it considered any information to be secret.”⁵² While confidentiality indicators do not unilaterally create a confidential agreement between the parties, this analysis reveals that courts consider such indicators significant in implying restrictions on the use of information.

Terms Indicating Confidence Will Be Kept. Courts were also more likely to find an implied obligation of confidentiality if the recipient of information gave some indication the information disclosed would remain confidential than when such an indicator was absent.⁵³ Terms recognizing that disclosed information was confidential also fulfilled the requirement that the recipient know about the implied confidentiality.⁵⁴ An assurance of confidentiality might seem counterintuitive to the concept of an implied obligation of confidentiality because the most obvious examples of assurances of confidentiality are explicit, e.g., “I promise not to tell a soul.” However, not all assurances of confidentiality are express or clear.

⁵² *Id.* at 1006-07.

⁵³ *See, e.g.,* Moore v. Marty Gilman, Inc., 965 F. Supp. 203 (D. Mass. 1997) (finding no implied or express obligation where, among other things, “Coach Moore did not request, and Gilman did not give, assurances of confidentiality”); Research, Analysis, & Dev., Inc. v. United States, 8 Cl. Ct. 54 (1985).

⁵⁴ *See, e.g.,* Faris v. Enberg, 97 Cal. App. 3d 309, 324 (Cal. Ct. App. 1979) (“[E]vidence of knowledge of confidence or from which a confidential relationship can be implied is a minimum prerequisite to the protection of freedom in the arts.... [N]othing of an understanding of confidence can be inferred from [Defendant’s] conduct.”).

A potential recipient's vague reassurances to the discloser that the information will be protected could form an implied obligation of confidentiality. This is true even if confidentiality was not expressly agreed upon otherwise. A wide range of statements, conduct, and symbols ("indicators") could demonstrate an implied willingness to keep the confidence of information.⁵⁵

One of the most significant acknowledgements of confidentiality in a case involving an implied-in-fact contract of confidentiality was in *Research, Analysis, & Development v. United States*.⁵⁶ In this case, an aviation research firm (RAD) alleged that the Air Force breached an implied-in-fact contract of confidentiality by releasing proprietary information that was contained in the firm's unsolicited proposal to the government asking for Air Force business.

RAD submitted its unsolicited proposal for business encompassing a "technical 'revolutionary' concept" for an advancement in aircraft sensor systems.⁵⁷ Along with the proposal, RAD submitted a "Proprietary Statement" that indicated the confidential nature of the information and detailed the limited ways in which the information could be used.⁵⁸ After presumably evaluating RAD's submission, the Air Force sent RAD a letter

⁵⁵ See, e.g., *Kashmiri v. Regents of the Univ. of California*, 156 Cal. App. 4th 809 (Cal. Ct. App. 2007) ("The terms of an express contract are 'stated in words,' while the terms and existence of an implied contract are 'manifested by conduct.');" *Flotec, Inc. v. Southern Research, Inc.*, 16 F. Supp. 2d 992, 1006-07 (S.D. Ind. 1998); *Sentinel Products Corp. v. Mobil Chem. Co.*, 2001 WL 92272 (D. Mass.).

⁵⁶ 8 Cl. Ct. 54 (1985)

⁵⁷ *Id.* at 55.

⁵⁸ *Id.* The text of the Proprietary Statement read:

This data shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than to evaluate the proposal; provided, that if a contract is awarded to this offeror as a result of or in connection with the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the contract. This restriction does not limit the Government's right to use information contained in the data if obtained from another

regarding the proposal. According to the U.S. Claims Court, “The letter continually referred to the plaintiff’s sensor ‘concept’ and acknowledged its novelty.”⁵⁹ Most importantly, the letter acknowledged the Air Force’s intent to keep RAD’s proposal confidential. In the third and final paragraph of the letter, the Air Force stated:

We appreciate the effort you have expended in keeping the USAF informed of your *novel concepts*. RAD will certainly be considered when future procurements related to novel sensor development and use are contemplated. *The information you have provided in the subject proposal will be appropriately safeguarded. No disclosure of the information will be made nor will any part of the proposal be reproduced without explicit permission from RAD Inc.*⁶⁰

Despite these assurances, the Air Force published a sensor system concept identical to that proposed by RAD in a publication called the *Commerce Business Daily* (CBD). RAD ultimately brought a claim for breach of an implied-in-fact contract for confidentiality. RAD claimed that, among other considerations, the Air Force’s letter to RAD agreeing not to disclose RAD’s proprietary data created an implied-in-fact contractual obligation on the part of the government to safeguard the data.⁶¹

The U.S. Claims Court agreed. The court found that RAD’s submission of a proposal with the proper restrictive legend and the government’s letter promising confidentiality constituted a “meeting of the minds,” which created an implied-in-fact

source without restriction. The data subject to this restriction is contained on the pages so marked.

Id. at 56.

⁵⁹ *Id.* at 57.

⁶⁰ *Id.* (emphasis added by the court).

⁶¹ *Id.* at 58.

contract.⁶² The court held that the actions of the parties, “specifically defendant’s... letter demonstrates a mutual intent to contract to safeguard plaintiff’s proprietary data.”⁶³ Thus, the Air Force’s indication that a confidence would be kept was a key term for the court in finding an implied obligation of confidentiality.

Conversely, terms that indicated that the recipient did not intend to keep information confidential could decrease the likelihood of an implied obligation of confidentiality.⁶⁴ An example of this is *Chief of Staff v. Connecticut Freedom of Information Commission*.⁶⁵ This case involved an administrative dispute resulting from Connecticut’s Freedom of Information Commission ordering the City of Hartford, Connecticut, to disclose, among other things, proposals for the redevelopment of city property. The proposals contained personal information, detailed business information, and business strategies.⁶⁶

The city attempted to withhold the records based on the claim that the responses were submitted by developers under an implied assurance of confidentiality by the city.

The court disagreed and stated:

⁶² *Id.* (“[Defendant’s] letter *agreeing* to safeguard plaintiff’s proprietary data provides further support for finding an implied-in-fact contract.” (emphasis in original)).

⁶³ *Id.*

⁶⁴ *See, e.g., FMC Corp. v. Guthery*, 2009 WL 485280 (D.N.J.).

⁶⁵ 1999 WL 643373 (Conn. Super. Ct.).

⁶⁶ *Id.* at *1. Specifically, the responses contained

the name and address of the entities involved in each proposed development plan, a summary of the developers’ sources of funding, finance plan, projected costs, intended uses of funds, projected development schedule, projected operating revenue and expenses, resume and experience, lender preferences, and property manager profile, as well as maps and drawings of the development plan and photographs of buildings. Some of the responses also contained individuals’ social security numbers and bank account information.

Id.

In the present case, there was no express assurance of confidentiality by the City to the developers. Whether there was an implied assurance of confidentiality presents a close question. On the one hand, some of the developers requested confidentiality and a majority apparently had an understanding that their proposals would remain confidential. On the other hand, the City informed the developers that their concepts would be shared among various city council and staff members and some of the developers shared their proposals with each other.⁶⁷

The notice provided by the city regarding its plans to disclose the information was important for the court, which refused to substitute its judgment for the judgment of the FOIC. The FOIC found that the responses were not given in confidence, and the court found that this was not a clearly erroneous holding.⁶⁸

EXTERNAL TERMS

Sometimes the terms of an agreement were not offered by the parties or did not originate within the relationship between the parties. Instead, they were supplied by reference to external laws, organizational codes, policies, and external arrangements and agreements. These “external terms” were often not expressed in the agreement between the parties, but they still contributed to an implied obligation of confidentiality. For example, in cases involving a physician’s implied obligation of confidentiality to his or her patient, courts looked to external laws such as a state’s professional licensing requirements, statutes, and the Hippocratic Oath to affirm the implied obligation.⁶⁹

⁶⁷ *Id.* at *3.

⁶⁸ *Id.*

⁶⁹ *See, e.g.,* Biddle v. Warrant Gen. Hosp., 1998 WL 156997 (Ohio Ct. App. 1998); Overstreet v. TRW Commercial Steering Div., 256 S.W.3d 626 (Tenn. 2008) (looking to state statutes such as the Patients’ Privacy Protection Act and the Workers’ Compensation Act that convey a public policy favoring the confidentiality of medical information in order to support an implied-in-law covenant of confidentiality between a patient and a doctor); Alsip v. Johnson City Med. Ctr., 197 S.W.3d 722, 726 (Tenn. 2006) (citing multiple sections of the Tennessee Code in finding an implied covenant of confidentiality in medical-care contracts between treating physicians and their patients. These statutes, according to the Supreme Court of Tennessee, “are indicative of the General Assembly’s desire to keep confidential a patient’s medical records and identifying information.”); Humphers v. First Interstate Bank of Oregon, 696 P.2d 527 (Or.

These external terms increased the likelihood of an implied obligation of confidentiality. Disclosers of information are more likely to rely on implied confidentiality when external terms apply to the disclosure than when they do not. For example, most patients likely know that their physicians take the Hippocratic Oath, which requires that doctors respect their patients' confidentiality.⁷⁰ Thus, a patient's inference of confidentiality is likely reasonable. External terms also increase the likelihood that the recipient of information knew or should have known of his or her obligation of confidentiality.

Courts looked to various laws, organizational codes, policies, and external arrangements and agreements to shape their analysis of implied obligations of confidentiality.⁷¹ Recall the case of *Grayton v. United States*,⁷² in which Maurice Grayton brought suit against the United States after the Social Security Administration (SSA)

1985) (looking to external sources such as professional regulations to find a physician's nonconsensual duty of confidentiality to his or her patient); *Hammonds v. Aetna Cas. & Surety Co.*, 243 F. Supp. 793, 801 (N.D. Ohio 1965); *MacDonald v. Clinger*, 84 A.D.2d 482, 484-46 (N.Y. Ct. App. 1982) (citing several statutes and regulations requiring physicians to protect the confidentiality of patients' information in finding that physicians impliedly promise to keep patients' information confidential as a matter of, among other things, contract); *Doe v. Roe*, 93 Misc. 2d 201 (N.Y. Gen. Term. 1977); *Givens v. Mullikin ex. Rel. Estate of McElwaney*, 75 S.W.3d 383 (Tenn. 2002) (finding an implied obligation of confidentiality via a contract between a patient and physician based on, among other things, statutes requiring the physician to respect the patient's confidential information); *cf. Suarez v. Pierard*, 663 N.E.2d 1039, 1044 (Ill. Ct. Ap. 1996) (finding that the state's Pharmacy Practice Act does not create an implied contract of confidentiality between pharmacists and their patients because, among other reasons, the relevant provision was not in effect when the alleged contract was made.); *Ghayoumi v. McMillan*, 2006 WL 1994556 (Tenn. Ct. App.) ("[T]here can be no covenant of confidentiality, implied or agreed, because the relationship between Plaintiff and Defendant resulted from a court order that necessitated disclosure of Defendant's communications with Plaintiff and his family members and mandated disclosure of his evaluations, report and recommendations to the Court and parties.").

⁷⁰ See, e.g., *Hammonds v. Aetna Cas. & Surety Co.*, 243 F. Supp. 793, 801 (N.D. Ohio 1965) ("Almost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, and every patient has a right to rely upon this warranty of silence.... Consequently, when a doctor breaches his duty of secrecy, he is in violation of part of his obligations under the contract.").

⁷¹ See, e.g., *Suarez v. Pierard*, 663 N.E.2d 1039, 1044 (Ill. Ct. Ap. 1996) (recognizing that "existing laws and statutes become implied terms of a contract as a matter of law...."); *Alsip v. Johnson City Med. Ctr.*, 197 S.W.3d 722, 726 (Tenn. 2006).

⁷² 92 Fed. Cl. 327 (2010).

allegedly adopted his proposal that certain social security benefits should be delivered via a debit card transaction instead of a paper check. Grayton claimed that an implied-in-fact contract was formed when he submitted his suggestion to the SSA. He claimed that one of the implied terms of this contract was a “promise not to reveal or use [his] suggestion without compensating him for it,” which included a term to keep his trade secret confidential.⁷³

The plaintiff relied on the case *Airborne Data v. United States*⁷⁴ to support his implied-in-fact contract theory. This case held that an implied-in-fact contract of confidentiality can “arise[] from submission of trade secrets [to a federal agency] under a restrictive legend pursuant to a regulation.”⁷⁵ The mention of a restrictive legend is a reference to an external regulation of the United States Geological Survey (USGS) which, according to the Federal Circuit in *Airborne Data*, “prescribed how an unsolicited proposal should be worded to incorporate such a restrictive legend, and prohibited departmental personnel from disclosing, or using the secrets for purposes other than evaluation.”⁷⁶

Unfortunately for the plaintiff, the *Airborne Data* case did not support his claim for implied confidentiality because he failed to place a restrictive legend that indicated the proposal was confidential on the proposal he sent to the SSA. The court made clear that “a federal agency is under no obligation to keep unsolicited proposals confidential, when restrictive legends that could identify the proprietary information therein are

⁷³ *Id.* at 334.

⁷⁴ 702 F.2d 1350 (Fed. Cir. 1983).

⁷⁵ *Id.* at 1353.

⁷⁶ *Id.*

inadequate or missing.”⁷⁷ These cases demonstrate how external terms can shape implied obligations of confidentiality. While simply placing a confidential stamp on a submission might not be enough to create an implied obligation, the courts in *Grayton* and *Airborne Data* acknowledged that a combination of the USGS regulation and the indicator (a stamp, for example) could be sufficient.⁷⁸

Another example of how external terms can shape implied obligations of confidentiality is the case of *United America Financial v. Potter*,⁷⁹ which involved a company’s request for documents from the Postmaster General and U.S. Postal Service (USPS). The requested documents purportedly contained allegations that the company was involved in an identity theft scam involving USPS employees. The USPS contended that Exemption 7(D) of the FOIA allowed the agency to withhold the documents. These documents identified USPS employees who made a complaint to the Inspector General about the company.⁸⁰ The USPS also claimed that the Inspector General Act (IGA)

⁷⁷ *Id.* (citing *Xerxe Group, Inc. v. United States*, 278 F.3d 1357, 1360 (Fed. Cir. 2002) (holding that the plaintiff’s “failure to identify and clearly demarcate what it considered restricted data is fatal to its claim”); *Block v. United States*, 66 Fed. Cl. 68, 74 (2005) (holding that “the plaintiff’s failure here to identify any proprietary information in his unsolicited Joint Proposal requires dismissal of the plaintiff’s implied-in-fact contract claim for protection of his alleged proprietary information”)).

⁷⁸ *See also* *Research, Analysis, & Dev., Inc. v. United States*, 8 Cl. Ct. 54 (1985) (citing federal regulations that suggested a restrictive legend indicating confidentiality for ideas submitted to the government as part of a finding that an implied-in-fact contract did exist obligating the government to maintain the confidentiality of an idea submitted by the plaintiff).

⁷⁹ 667 F. Supp. 2d 49 (D.D.C. 2009).

⁸⁰ Exemption 7(D) protects from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information...could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.” 5 U.S.C. § 552(b)(7)(D) (2011). To invoke Exemption 7(D), “an agency must show that an individual provided information to the government for the purpose of a criminal or national security investigation under either (1) an express assurance of confidentiality or (2) under circumstances that support an implied assurance of confidentiality.” *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. U.S. Dept. of Justice*, 503 F.Supp.2d 373, 384 (D.D.C.2007).

justified withholding the documents because the IGA provides that such complaints are to be anonymous to the public at large.

The IGA, which applies to the USPS, provided that “[t]he Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable.”⁸¹ The court determined that “these circumstances—the promise of confidentiality in the IGA and the pendency of the criminal investigation—constitute ‘circumstances that support an implied assurance of confidentiality...’ and, hence, information identifying the source will be considered properly redacted under Exemption 7(D).”⁸² Here, an external law had a direct impact as a term in an implied obligation of confidentiality.

The case of *Biddle v. Warren General Hospital*⁸³ demonstrates how external terms shape a physician’s implied duty of confidentiality to his or her patients. This case involved the unauthorized disclosure of patient records by a hospital to law firms and, ultimately, the media. Biddle, a patient at Warren General Hospital in Ohio, claimed, among other things, that the hospital breached its duty of confidentiality to him. The Court of Appeals of Ohio noted:

The duty of confidentiality is derived from several sources, the first of which is the statutory physician-patient privilege....Second, the Hippocratic Oath, although rather brief, focuses significantly on confidentiality and states, in part “[w]hat I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself

⁸¹ 5 U.S.C. app. 3 § 7 (2011).

⁸² *Potter*, 667 F. Supp. 2d at 61 (quoting *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. U.S. Dept. of Justice*, 503 F.Supp.2d 373, 384 (D.D.C.2007)).

⁸³ 1998 WL 156997 (Ohio Ct. App.).

holding such things shameful to be spoken about.” Third, an Ohio physician's certificate to practice medicine may be revoked or suspended for the willful betrayal of a professional confidence. Fourth, the relationship between physician and patient is fiduciary in nature.⁸⁴

The Hippocratic Oath and confidentiality requirements to maintain a physician's license can be seen as external terms to an obligation, which, according to the court, is “assumed.”⁸⁵ The court went on to explicitly recognize the tort of breach of confidentiality in Ohio and reverse a grant of summary judgment that had dismissed the plaintiff's claim for breach of patient confidentiality.

The common theme of all these cases was that if the discloser of information knew or should have known that the recipient was bound by some law, organizational code, policy, or external arrangement or agreements to keep the information confidential, then the law, policy, or regulation could be considered an external term regarding the disclosure of information and could create or dispel an implied obligation of confidentiality.

CONFLICTING TERMS

Often, a relationship can involve conflicting terms about whether certain information is confidential. This conflict can be significant in analyzing implied obligations of confidentiality. Even if the parties have a previous agreement, implied confidentiality can be created or dispelled by terms that conflict with that previous agreement. The purpose of this section is to analyze how courts responded to conflicting terms in claims of implied confidentiality. When faced with conflicting terms, most

⁸⁴ *Id.* at *3 (quoting Ohio Rev. Code Ann. § 2317.02(B), R.C. 4731.22(A)(4) and citing *Hammonds v. Aetna Cas. & Surety Co.*, 243 F. Supp. 793, 802 (N.D. Ohio 1965)).

⁸⁵ *Id.* at *12. The court made this statement as part of its determination that the tort of breach of confidentiality was a more appropriate theory of recovery in this case than an implied-in-fact contract of confidentiality. The court reasoned that the duty was imposed by law and not necessarily by contract.

courts looked at the most recent term regarding the disclosure of information to determine whether an implied obligation of confidentiality existed. A notable exception was in instances in which explicit terms prohibited implied agreements of confidentiality. In such cases, courts typically refused to find an implied obligation of confidentiality.

This research suggests that an implied obligation of confidentiality can be created by terms even if the parties are otherwise bound by a contract with no reference to confidentiality.⁸⁶ For example, in the case of *Prescott v. Morton*,⁸⁷ the plaintiff, Norman Prescott, claimed that an implied-in-fact confidentiality contract arose when he disclosed to the defendant proprietary designs for a shipping cylinder for chemical compounds containing metals, known as a bubbler. These designs contained statements indicating that they were Prescott's property. The defendant, Morton, disputed this claim and stated that an implied contract would contradict their express agreement, which was simply a warranty for compliance with Department of Transportation regulations.⁸⁸

The U.S. District Court for the District of Massachusetts refused to grant Morton's motion for summary judgment and stated that the contractual agreement between the parties "does not memorialize their entire relationship. A separate implied-in-fact contract governing the dissemination of information between the parties would not be contradictory."⁸⁹ Thus, the scope of a contract is critical in instances where an implied obligation of confidentiality is claimed within a contractual relationship. The fact that

⁸⁶ See, e.g., *DPT Lab., LTD. v. Bath & Body Works, Inc.*, 1999 WL 33289709 (W.D. Tex.).

⁸⁷ 769 F. Supp. 404 (D. Mass. 1990).

⁸⁸ *Id.* at 410.

⁸⁹ *Id.*

confidentiality is not provided for in a contract is not necessarily evidence that no implied agreement of confidentiality exists.

The case of *Knapp Schenk v. Lancer Management*⁹⁰ demonstrated how an implied obligation of confidentiality can exist even if the obligation conflicts with an explicit confidentiality agreement. Here, an insurance agency (Knapp) entered into business discussions with another business (Lancer) for the purposes of exploring the purchase of Knapp's insurance program. The parties executed a "Letter of Intent" (LOI) for the purchase of the program. The LOI contained a confidentiality section that bound the parties to confidentiality over any non-public information specifically designated as confidential by the disclosing party.⁹¹ Unfortunately, Knapp failed to designate much of the information it disclosed to Lancer as confidential, and Lancer ultimately disclosed information to third parties after negotiations between the parties dissolved.

Knapp brought a suit against Lancer, alleging unlawful use of confidential, proprietary, and trade secret information acquired during sale negotiations. Knapp argued that even though it did not designate the disclosed information as confidential, an implied confidential relationship arose between the parties with respect to the disclosed information. Testimony revealed that Knapp verbally requested and was assured of confidentiality while disclosing information.⁹² The U.S. District Court for the District of Massachusetts refused to dismiss the claim before a finding of fact because "a jury could find that the undisputed facts surrounding the exchange of information support an implied

⁹⁰ 2004 WL 57086 (D. Mass.).

⁹¹ *Id.* at *1-2.

⁹² *Id.* at *7 (noting that a deposition revealed an agent for the plaintiff asked, "You understand this is confidential and we don't give it to anybody," and an agent for the defendant responded, "Of course. Of course we do.>").

finding of confidentiality.”⁹³ This case demonstrates how implied obligations of confidentiality can exist even when disclosures fall outside of the scope of a previous confidentiality agreement.

The case of *DPT Laboratories v. Bath & Body Works*⁹⁴ also demonstrates how implied confidentiality can exist even if an express confidentiality agreement between the parties does not provide for it. This case involved a dispute between two businesses that entered into confidentiality agreements with each other in an attempt to explore a potential business relationship. As part of the agreements, DPT disclosed proprietary body lotions to Bath & Body Works. Bath & Body Works was promised manufacturing and licensing revenues if DPT could develop a new body lotion that met the defendant’s criteria.⁹⁵

At Bath & Body Works’s request, DPT sent Bath & Body Works a new body lotion for analysis. The purchase orders for these new lotions contained no restrictions on the use of the lotions or their underlying formulas. After receiving the new lotions, Bath & Body Works sent the bottles of lotion to a different laboratory with orders to create a formula that duplicated the qualities of DPT’s lotion. Bath & Body Works then declined to enter into a business relationship with DPT and instead entered into a manufacturing agreement with the laboratory that duplicated DPT’s lotions. DPT then brought a lawsuit alleging, among other things, trade secret misappropriation and breach of contract.

Bath & Body Works contended that it did not violate the terms of the confidentiality agreement with DPT because there was no language in the purchase

⁹³ *Id.*

⁹⁴ 1999 WL 33289709 (W.D. Tex.).

⁹⁵ *Id.* at *1.

orders for the lotion that would have prevented it from sharing the lotion with another lab for reverse engineering. The U.S. District Court for the Western District of Texas disagreed. The court found that Bath & Body Works's view of its confidentiality obligations was too narrow.⁹⁶ According to the court, Bath & Body Works "has provided no reasonable basis as to why the lack of restricting language on the purchase orders is dispositive of the nature of the parties' relationship. The Restatement counsels against taking a key-hole view toward the issues in this case as [Bath & Body Works] has done...."⁹⁷

The court held that Bath & Body Works's "narrow view toward the scope of the parties' understanding toward confidentiality ignores the fact that misappropriation can be based on implied confidentiality. The Fifth Circuit has held that confidentiality may be implied when the recipient actively solicits the disclosure."⁹⁸ Thus, the court clearly found that implied confidentiality can co-exist with express confidentiality agreements for similar disclosures in certain situations and, in the present case, that "the limitation on [Bath & Body Works]'s actions is not determined solely by the specific terms of the confidentiality agreements."⁹⁹

Ultimately, the court denied Bath & Body Works's motion for summary judgment and found that Bath & Body Works either knew or should have known that DPT's disclosures were made in confidence based on a number of factors:

⁹⁶ *Id.* at *6.

⁹⁷ *Id.* (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43 cmt c).

⁹⁸ *Id.* (citing *Phillips v. Frey*, 20 F.3d 623, 632 (5th Cir. 1994)).

⁹⁹ *Id.*

(1) BBW initiated contact with DPT, (2) BBW promised substantial revenues if DPT's product was selected to replace BBW's lotion, and (3) the parties executed confidentiality agreements, supports a finding that BBW should have known that the lotion samples it received from DPT must be held in confidence and could not be used to copy DPT's lotion formula.¹⁰⁰

The confidentiality agreement in this case was actually used as evidence to *support* a claim of implied confidentiality, even though it did not explicitly provide for confidentiality over a specific piece of information. This case serves as a good example of how courts consider a number of different factors, including terms inside and outside of contracts, in determining whether an implied obligation of exists.

Terms of disclosure also could dispel an obligation of confidentiality, even if such an obligation was previously implied.¹⁰¹ Some courts were hesitant to find an implied obligation of confidentiality in information when an express confidentiality agreement already existed between the parties and the information at issue was not included.¹⁰² The case of *Fail-Safe v. A.O. Smith*¹⁰³ involved a dispute between Fail-Safe, a manufacturer of devices used to prevent pool suction equipment accidents, against a manufacturer of motors for pool and spa pumps, A.O. Smith, over, among other things, misappropriation

¹⁰⁰ *Id.*

¹⁰¹ *See, e.g., Anderson v. Century Products Co.*, 943 F. Supp. 137 (D.N.H. 1996) (“[A]n implied confidential relationship can be defeated if the parties, by agreement, expressly disclaim any such relationship.”); *cf Medical Store, Inc. v. AIG Claim Serv.*, 2003 WL 25669175 (S.D. Fla.) (holding that subsequent agreements can imply modifications but not contradictions to previously existing confidentiality agreements).

¹⁰² *See, e.g., Jamison v. Olin Corp.-Winchester Div.*, 2005 WL 2388213 (D. Or.) (granting summary judgment for the defendant on a claim for breach of implied-in-fact confidentiality where the parties had an express confidentiality agreement that did not cover the disputed information); *Brandwynne v. Combe Int’l, LTD.*, 74 F. Supp. 2d 364, 379 (S.D.N.Y. 1999) (“Because the Secrecy Agreement exclusively governs the rights and obligations of the parties with respect to Combe’s use of Brandwynne’s ideas, no contract regarding the subject matter covered by the Secrecy Agreement may be implied-in-fact.”).

¹⁰³ 2010 WL 3503427 (E.D. Wis.).

of trade secrets. Here, the two parties entered into negotiations to develop technology to combat “pool suction entrapment” accidents.¹⁰⁴

After seeing Fail-Safe’s ad in a trade magazine, A.O. Smith contacted Fail-Safe to start a business relationship. The parties entered into a series of explicit agreements, one of which was a one-way confidentiality agreement: Fail-Safe had to keep A.O. Smith’s information confidential, but A.O. Smith was not obligated to keep Fail-Safe’s information confidential. Ultimately, the relationship between the parties dissolved, and A.O. Smith proceeded with its development of the technology, incorporating some of the information disclosed by Fail-Safe. Fail-Safe claimed that A.O. Smith took its information under an implied obligation of confidentiality.

The U.S. District Court for the Eastern District of Washington denied that A.O. Smith was obligated to keep Fail-Safe’s disclosures secret notwithstanding the fact that the parties entered into a confidentiality agreement that prohibited Fail-Safe from disclosing A.O. Smith’s information. The court held that it was “loathe to create out of wholecloth an implied confidentiality agreement where there [sic] the parties already signed an express confidentiality agreement that had clear provisions that were ‘one-way’ in nature and did not require [A.O. Smith] to keep [Fail-Safe]’s information confidential.”¹⁰⁵ The court focused on the fact that Fail-Safe willingly agreed to a confidentiality agreement that clearly protected A.O. Smith’s information, but did nothing to protect its own information.¹⁰⁶ According to the court, this agreement provided

¹⁰⁴ *Id.* According to the court, “Pool suction entrapment occurs when a swimmer is trapped by the suction forces created by water rushing out of a drain in an artificial pool, such as a swimming pool, hot tub, or spa.” *Id.* at *1.

¹⁰⁵ *Id.* at *21.

¹⁰⁶ *Id.*

an obvious signal to the defendant that the plaintiff knew how to ask for information to be considered confidential if it so desired.¹⁰⁷

While the court seemed to leave open the possibility that an implied obligation of confidentiality could exist notwithstanding potentially conflicting terms in an express agreement, the court found that there was no evidence that A.O. Smith actually knew or should have known that the information disclosed to it was a trade secret.¹⁰⁸ Indeed, Fail-Safe actually sent A.O. Smith a letter clarifying that no formal agreement was in place regarding Fail-Safe's proprietary information.¹⁰⁹ This finding is consistent with the rulings of other courts that refused to allow a unilateral imposition of confidentiality upon a party that did not or could not have been expected to know of its obligation.¹¹⁰

Explicit terms prohibiting implied agreements also can prevent an implied obligation of confidentiality.¹¹¹ For example, the case of *Best Western v. Furber*¹¹²

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See, e.g.,* Big Lots Stores, Inc. v. Jaredco, Inc., 182 F. Supp. 2d 644 (S.D. Ohio) (finding that there was no implied-in-fact contract allowing for disclosure of private information where an express contract of confidentiality already existed between the parties and the purported superceding implied contract was based on mere speculation, rather than a manifestation of intent or an affirmative act by the parties).

¹¹¹ *See, e.g.,* Watson v. Public Serv. Co. of Colo., 207 P.3d 860, 869 (Colo. Ct. App.2008) (“[C]lear and conspicuous disclaimers further preclude an implied contract.”); Nilssen v. Motorola, 963 F. Supp. 664 (N.D. Ill. 1997) (finding that no duty of confidentiality can be implied where the parties have an express agreement to protect only explicitly labeled confidential information); G5 Tech., Inc. v. Int’l Bus. Mach. Corp., 2005 WL 2271741 (S.D.N.Y.) (finding that a contract for confidentiality cannot be implied-in-fact where there is an express contract covering the same subject matter); BDT Products, Inc. v. Lexmark Int’l, Inc., 274 F. Supp. 2d 880 (E.D. Ky. 2003) (“Because it is undisputed that the parties repeatedly entered into confidentiality agreements that expressly and unambiguously disclaimed any [confidentiality], it is axiomatic that no express or implied duty restricting [Defendant’s] use of such information can be found here”); Union Pacific Railroad Co. v. Mower, 219 F.3d 1069 (9th Cir. 2000) (recognizing that an implied duty of confidentiality can be modified by a contract); Torah Soft LTD. v. Drosnin, 2001 WL 1425381 (S.D.N.Y.).

¹¹² 2008 WL 4182827 (D. Ariz.).

involved a claim for implied breach of contract that arose when members who own and operate hotels under the hotel chain name Best Western posted allegedly confidential and defamatory comments concerning Best Western to a website. Best Western asserted that an implied confidentiality contract existed between itself and its members “arising out of” the Best Western membership agreement and bylaws.¹¹³ Under Best Western’s theory, the fact that the bylaws require that executive sessions of the board of directors be confidential serves as evidence of the confidential nature of the relationship between Best Western and its members.¹¹⁴

The U.S. District Court for the District of Arizona disagreed. It noted that the confidentiality provisions in the bylaws applied to the Best Western board of directors, not Best Western members. Additionally, the court noted that Best Western’s membership agreement prohibited additional implied agreements between the parties via an integration clause, which provided that the written agreement represented the whole agreement between the parties with no other outside terms.¹¹⁵ Thus, at least one court found that an explicit agreement precluding implied obligations of confidentiality was effective.

The cases revealed that any disclaimer of implied confidentiality must be clear and unambiguous to be effective. The case of *Anderson v. Century Products*¹¹⁶ involved a claim by an inventor against a manufacturer for, among other things, misappropriation of ideas shared within a confidential relationship. This claim arose after the plaintiff, Dana

¹¹³ *Id.* at *3.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at *4.

¹¹⁶ 943 F. Supp. 137 (D.N.H. 1996).

Anderson, submitted an idea for a unique baby stroller to the defendant, Century, which was in the business of manufacturing baby strollers. Century asserted that it disclaimed any confidential relationship with Anderson when Anderson signed and agreed to Century's idea submission policy (ISP). Paragraph 8 of Century's ISP form contained a clause warning that "no confidential relationship is being established" between the parties.¹¹⁷

While the U.S. District Court for the District of New Hampshire acknowledged that implied confidential relationships may be expressly disclaimed, the language in the ISP was not sufficient to constitute a "clear and unambiguous" waiver of confidentiality. The court found that the term "confidential relationship" was open to a number of interpretations.¹¹⁸ According to the court, this language could easily be interpreted to cover only the obligations between the parties during Century's review of the idea for the stroller and, thus, to "exclude from the waiver's coverage any ties and obligations that arose after Century decided to affirmatively use the idea."¹¹⁹ The court continued:

The waiver appears to only address Century's potential liability for failure to maintain secrecy by consulting industry experts in aid of the review procedure, rather than for disrespecting plaintiff's proprietary rights should they decide to use the idea. Granted, this may be only one of several reasonable understandings of the language, but this is enough for the court to hold that the language does not constitute a clear and unambiguous waiver [of confidentiality].¹²⁰

Thus, the court found that implied obligations of confidentiality can survive explicit waivers if the waivers of confidentiality are not clear enough. This finding is

¹¹⁷ *Id.* at 151.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (citing *Burten v. Milton Bradley Co.*, 763 F.2d 461, 464-67 (1st Cir. 1985)).

¹²⁰ *Id.* at 151-52.

significant because it not only demonstrates the requirements for waiver, but it also demonstrates the relative strength of implied obligations of confidentiality. The court did not seem to give any less legal effect to the implied confidential relationship than it would an explicit one.

EXPLICITNESS

Courts held that terms that purportedly create implied obligations of confidentiality must be clear and definite enough for the promises and required performances of each party to be reasonably certain.¹²¹ When courts were presented with terms regarding the disclosure of information, they looked to the reasonable expectations of the parties at the time the terms were offered.¹²² The expectations of the parties are typically determined by examining “the totality of the circumstances” and may be “shown by the acts and conduct of the parties, interpreted in the light of the subject matter and of the surrounding circumstances.”¹²³ Part of this analysis looks to how explicit the representations at issue are.¹²⁴

The case of *Moore v. Marty Gilman*¹²⁵ involved a dispute between an inventor who created a foam ball for use in football coaching drills and a sporting goods

¹²¹ See, e.g., *Watson v. Public Serv. Co. of Colo.*, 207 P.3d 860, 868 (Colo. Ct. App. 2008).

¹²² See, e.g., *Kashmiri v. Regents of the Univ. of Cal.*, 156 Cal. App. 4th 809, 832 (Cal. Ct. App. 2007).

¹²³ *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 681 (Cal. 1988).

¹²⁴ See, e.g., *Sanchez v. The New Mexican*, 738 P.2d 1321, 1324 (N.M. 1987); *Jackson v. LSI Indus., Inc.*, 2005 WL 1383180 (M.D. Ala.) (finding that merely asking for a faxed sketch of an idea was not specific enough to warrant an implied promise to pay or keep the idea confidential); *Goldthread v. Davidson*, 2007 WL 2471803 at *5-7 (M.D. Tenn.); *Tecza v. Univ. of San Francisco*, 2010 WL 1838778 (N.D. Cal.) (dismissing a claim for breach of an implied-in-fact contract of confidentiality because the plaintiff failed to “specify any particular conduct” that would reflect the existence of the basic elements for such a claim).

¹²⁵ 965 F. Supp. 203 (D. Mass. 1997); *Faris v. Enberg*, 97 Cal. App. 3d 309 (Cal. Ct. App. 1979) (refusing to find an implied confidential relationship and no implied-in-fact contract where the plaintiff failed to specifically communicate his thoughts from which one might infer that the plaintiff felt there was a confidence).

manufacturer. The inventor contacted the manufacturer about the possibility of improving and mass producing the inventor's foam ball. However, negotiations broke down, and the manufacturer developed and sold its own improved foam ball. The inventor then brought suit alleging misappropriation of trade secrets, breach of express and implied contract, fraud, and unfair trade practices.¹²⁶

The plaintiffs – the inventor and his wife – alleged that an implied confidential relationship existed between the parties based on a number of express and implied terms, including the inventor's statement that negotiations would be “between you and I,” meaning between the inventor and the manufacturer. The U.S. District Court for the District of Massachusetts dismissed this claim of confidentiality, finding that the statement was not explicit enough.¹²⁷ According to the court, that statement “cannot reasonably be construed as a request for confidentiality with respect to the work that [the manufacturer] would be undertaking, as distinguished from a colloquial way of informing [the manufacturer] that he, [the inventor], would be interested in exploring the possibility of entering into a joint business venture with the [manufacturer].”¹²⁸

Because the statement could easily be interpreted in a way that was not a request for confidentiality, the court found it was not definite or specific enough to create a confidential relationship. Particularly harmful to the inventor's case was the fact that he admitted that there was no confidential agreement and that confidentiality was never addressed in the negotiations.¹²⁹ Although the court was open to the possibility that the

¹²⁶ *Id.*

¹²⁷ *Id.* at 208, 212.

¹²⁸ *Id.* at 208.

¹²⁹ *Id.* at 212.

facts, taken as a whole, could create an implied obligation of confidentiality even if it was not explicitly discussed, the court found that the evidence did not support such an inference.¹³⁰

It seems axiomatic that the more specific the terms regarding a waiver of confidentiality, the less likely it is that confidentiality is going to be implied. Indeed, highly specific terms dispelled any implied obligation of confidentiality in several of the cases analyzed.¹³¹ A good example of this is the case of *BDT Products v. Lexmark*,¹³² which involved a dispute between paper handling systems consultants (BDT) and a printer manufacturer (Lexmark). Here, the parties worked closely together on numerous printer projects and entered into a number of confidentiality agreements covering proprietary information exchanged between the parties. After Lexmark received BDT's confidential prototypes, the relationship between the parties broke down. Ultimately, Lexmark produced its own printer-related product that was very similar to BDT's. BDT subsequently brought suit based on an implied contract of confidentiality and misappropriation of trade secrets.

In establishing that Lexmark used BDT's trade secrets without express or implied consent, BDT relied upon evidence that confidentiality was implied. However, this evidence contradicted the explicit written terms between the parties. The court stated that "[b]ecause it is undisputed that the parties repeatedly entered into confidentiality agreements that expressly and unambiguously disclaimed any restrictions on Lexmark's use of information provided by BDT, it is axiomatic that no express or implied duty

¹³⁰ *Id.* at 213-16.

¹³¹ *See, e.g.,* *Watson v. Public Serv. Co. of Colo.*, 207 P.3d 860, 868 (Colo. Ct. App. 2008).

¹³² 274 F. Supp. 2d 880 (E.D. Ky. 2003).

restricting Lexmark's use of such information can be found here.”¹³³ BDT tried to establish that a subsequent confidentiality agreement, which could not be found, superseded the previous agreements and protected the information at issue. However, the court found that there was no “clear and satisfactory” proof that the subsequent agreement existed and that the plaintiff, at best, could provide only a “vague uncertain recollection” of the agreement.¹³⁴ Thus, these terms were not explicit enough to contradict the express agreement.

Courts would only infer a term of confidentiality between the parties only if it was abundantly clear that the parties intended to be bound to confidentiality.¹³⁵ A good example of this approach is the case of *Bakare v. Pinnacle Health Hospitals*,¹³⁶ which involved a claim by a physician, Dr. Bakare, against the hospital that employed him. Bakare alleged, among other things, breach of an implied obligation of confidentiality based on the disclosure of disciplinary and review proceedings against him by a hospital review board.¹³⁷ The plaintiff alleged that there was a contract of confidentiality between

¹³³ *Id.* at 894 (citations omitted).

¹³⁴ *Id.* at 895-96.

¹³⁵ *See, e.g.,* Learning Curve Toys, LLC v. PlayWood Toys, Inc., 1998 WL 46894 (N.D. Ill.) (“PlayWood offers a vague assertion that because a confidentiality agreement existed, there was an intention to be bound. But PlayWood does not specify what the parties were bound to....Thus, there is no evidence that there was a ‘meeting of the minds’....”); *Bergin v. Century 21 Real Estate Corp.*, 2000 WL 223833 (S.D.N.Y.) (denying a claim for breach of implied-in-fact contract for, among other things, confidentiality because the agreement between the parties was too vague and lacked essential terms such as payment); *Graney Dev. Corp. v. Taksen*, 92 Misc. 2d 764 (N.Y. Gen. Term. 1978).

¹³⁶ 469 F. Supp. 2d 272 (M.D. Penn. 2006).

¹³⁷ *Id.* at 269-98.

the parties based on a confidentiality policy expressed during the meeting of the “credentialing committee” or “MEC” that reviewed the allegations against him.¹³⁸

Bakare claimed that the breach of confidential contract occurred when a member of the MEC communicated the existence and substance of the proceedings against Bakare to nurses in an operating room lounge. Bakare claimed another breach occurred when another MEC member told the hospital’s potential business partner’s CEO that Bakare could no longer serve as supervisor of a joint business operation. Bakare also claimed a breach of confidentiality when another member of the MEC wrote letters to two midwives informing them that Bakare no longer had privileges at the hospital.¹³⁹ The U.S. District Court for the Middle District of Pennsylvania did not support these claims. First, the court recognized that “there is no express term of confidentiality in the Medical Staff Bylaws, the only written understanding between [defendant] Pinnacle and Dr. Bakare.”¹⁴⁰ The court went on to state:

To the extent that Dr. Bakare contends that Pinnacle breached an implied obligation of confidentiality based upon of Pinnacle's policy of confidentiality regarding MEC proceedings or the relationship between Pinnacle as a health care provider and Dr. Bakare as a staff physician, the court is unpersuaded. Under the doctrine of necessary implication in Pennsylvania, “[a] court may imply a missing term in a parties' contract only when it is necessary to prevent injustice and it is abundantly clear that the parties intended to be bound by such term.”¹⁴¹

¹³⁸ *Id.* According to the court, the “MEC is a committee of [the defendant’s] medical staff charged, in part, with ensuring competent clinical performance for all members with clinical privileges.” *Id.* at 281 n.7. The court did not specify what the letters in the acronym MEC stand for.

¹³⁹ *Id.* at 297 n.52.

¹⁴⁰ *Id.* at 297.

¹⁴¹ *Id.* (quoting *Glassmere Fuel Service, Inc. v. Clear*, 900 A.2d 398, 403 (Pa. Super. Ct. 2006)); *see also In re IT Group, Inc.*, 448 F.3d 661, 671 (3d Cir. 2006) (“[The doctrine of necessary implication] is only employed to imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract.” (emphasis removed)).

The court found that no clear evidence of an implied confidentiality agreement..¹⁴² The court found that it was erroneous for Bakare to rely upon the confidentiality policy expressed during MEC proceedings by MEC members. The court found that this “reliance is misplaced because no such policy is identified in or implicated by Dr. Bakare's contract with Pinnacle. MEC's confidentiality policy is irrelevant to Dr. Bakare's contract claim. Accordingly, the court finds that the parties did not clearly intend to be bound by a confidentiality term.”¹⁴³

As a result, the court did not imply confidentiality into the parties' contract. This case demonstrates that terms of confidentiality must not only be specific with respect to what information is to be kept confidential, but the term must also have a close nexus to the party asserting confidentiality. Otherwise, the term is potentially too vague to be seen as a recipient's expression of an intention to be bound by an implied obligation of confidentiality.

Vagueness of terms was not always a bar to an implied obligation of confidentiality, however. A good example of this is the case of *Copley Press v. Superior Court*,¹⁴⁴ which involved a request by a newspaper publishing company for access to confidential jury questionnaires completed by prospective jurors in a capital murder case. The court had informed the jurors that their responses to the questions would be distributed only to trial participants.¹⁴⁵ Specifically, a California Court of Appeal noted

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ 228 Cal. App. 3d 77 (Cal. Ct. App. 1991).

¹⁴⁵ *Id.*

that “each prospective juror was informed [that] the questionnaire he or she filled out would become part of the court's permanent record.... [Another representation was made] that the questionnaires they filled out would ‘not be distributed to anyone except [the judge], [the judge's] staff, and the attorneys in the case while it is pending.’”¹⁴⁶ The court held:

Despite the vagueness of this implied assurance of confidentiality, we have no doubt that the venirepersons inferred that the questionnaires they filled out were going to be permanently confidential. In our view, under the circumstances presented here, it does not matter that this representation was more of an implied promise of confidentiality than an explicit one.¹⁴⁷

Thus, according to this court, a certain amount of vagueness is tolerated so long as the obligations and expectations of the parties can be ascertained.¹⁴⁸ The court ultimately held that “general principles of estoppel should bar release of the questionnaires used in this case” and did not order their release.¹⁴⁹ This supports Nissenbaum’s holistic approach, which incorporates other factors besides the terms of disclosure in implied obligations of confidentiality.

CONCLUSION

The terms that in some way restrict the flow of information in a given context are arguably the most significant to courts in implied obligations of confidentiality. However, the cases revealed that these terms are only significant to the extent that they are or

¹⁴⁶ *Id.* at 89.

¹⁴⁷ *Id.* at 89 n.9.

¹⁴⁸ *See, e.g.,* Lee v. State, 418 Md. 136, 156 (Md. 2011) (“Detective Schrott's words, ‘This is between you and me bud. Only me and you are here, all right? All right?’, on their face imply confidentiality.... No reasonable lay person would have understood those words to mean anything other than that the conversation, at that moment and thereafter, even if not before, was ‘between’ only Detective Schrott and Petitioner.”).

¹⁴⁹ *Id.* at 90.

should be perceived by one or all of the parties to a disclosure of information. This desire to locate what was known or should have been known by the parties is consistent with the courts' analysis of the three other factors in Nissenbaum's theory of contextual integrity.

The most common terms explicitly recognized by courts were those indicating either a desire for confidentiality or that confidentiality of information would be respected. If perceived, these terms could justify reliance by the parties, which can be the basis of contract or promissory estoppel. These types of terms, referred to here as "confidentiality indicators," were perhaps the most significant to courts. Courts were more likely to find an implied obligation of confidentiality if confidentiality indicators were present. Courts applied this logic even if subsequent terms conflicted with previous terms, unless an explicit contract prohibited implied terms of confidentiality.

Courts also looked to the clarity of terms. Terms that purportedly create implied obligations of confidentiality must be clear and definite enough for the promises and performances of each party to be reasonably certain. Finally, courts looked to external terms, e.g., terms like external laws, organizational codes, policies, and external arrangements and agreements that might impact an implied obligation of confidentiality. Courts typically found external terms significant in implied confidentiality disputes only if the discloser or recipient either knew or should have known about the terms.

CHAPTER VI

CONCLUSIONS AND A DECISION-MAKING FRAMEWORK FOR IMPLIED OBLIGATIONS OF CONFIDENTIALITY

The primary purpose of this dissertation was to provide a clear picture of how courts determine whether an implied obligation of confidentiality exists and how such obligations are established when information is self-disclosed in various contexts. Unsurprisingly, the discloser and recipient's perception of confidentiality was considered paramount by courts deciding cases involving implied obligations of confidentiality. The cases revealed that a number of factors can affect the perceptions of the parties, including industry customs, unequal bargaining power, the sensitivity of information, the relative vulnerability or sophistication of the parties, and indications of a desire for confidentiality or indications that confidentiality will be kept. These factors have not been synthesized in the case law. Instead, the cases revealed these factors were considered by the courts without reference to a larger framework.

A second purpose of this research was to contribute to the existing scholarship on Nissenbaum's theory of privacy as contextual integrity. The theory of privacy as contextual integrity is the theory that privacy violations occur when the context in which information is disclosed is not respected when one person shares another's personal information. According to Nissenbaum, privacy and confidentiality cannot be adequately analyzed without looking at the informational norms within a given context.¹ Nissenbaum

¹ HELEN NISSENBAUM, *PRIVACY IN CONTEXT* 129 (2010).

identified four factors relevant to informational norms: 1) context, 2) the nature of the information, 3) actors, and 4) terms of disclosure.

The cases revealed that all four of Nissenbaum's factors were important to courts in analyzing implied obligations of confidentiality. The context of the disclosure and terms of disclosure were the most significant factors to courts. However, the nature of the information and the attributes of the actors also had significant effects on the creation of an implied obligation of confidentiality. Thus, the theory of contextual integrity seems to be a good basis for a framework for analyzing implied obligations of confidentiality. Indeed, virtually every fact considered important by the courts could fall within the ambit of at least one or more of the four factors.

The purpose of this chapter is to present the findings of this dissertation. First, this chapter presents a brief summary of the findings by answering the research questions posed in Chapter I. This summary includes a discussion of the themes arising out of the cases. Next, this chapter synthesizes the findings into a decision-making framework for courts in the digital era. This chapter concludes by suggesting areas of future research.

FINDINGS

The goal of this dissertation was to ascertain what courts consider important in disputes involving implied obligations of confidentiality. To accomplish this goal, this dissertation explored four primary research questions:

- * What factors have courts considered important in analyzing alleged implied obligations of confidentiality?
- * Are these variables considered differently in online and offline cases? If so, how?

* How does this analysis contribute to Nissenbaum's theory of privacy as contextual integrity?

* How can these factors best form a decision-making framework for courts to use in analyzing implied obligations of confidentiality?

These research questions were addressed as follows:

The first research question of this dissertation, what factors have courts considered important in analyzing alleged implied obligations of confidentiality, specifically asked:

- How have courts considered the context in which information was disclosed?
- How have courts considered the roles played by the senders, recipients, and subjects of disclosed information?
- How have courts considered the nature of the information disclosed?
- How have courts considered the terms of disclosure?

This dissertation reviewed 132 cases involving implied obligations of confidentiality to determine how courts consider contextual informational norms in these disputes. The charts below summarize the number of cases in which courts expressly found each of Nissenbaum's factors either contributed to or detracted from a finding of an implied obligation of confidentiality:

Figure 1: Factors Considered Important in Analyzing Implied Obligations of Confidentiality

<u>Factor</u>	<u>Number of cases</u>
Context	88
Nature of the information	44

Actor attributes	28
Terms of disclosure	66

In the cases analyzed for this dissertation, courts gave the most attention to context and the terms of disclosure. However, all four factors were relevant to courts. These numbers reflect only cases in which a court expressly considered one of the factors and where the court's consideration was significant. In a number of excluded cases, it was possible that one of the four factors influenced the judge's opinion, but because that consideration was not apparent, it was not included in the analysis. Additionally, in other excluded cases, courts expressly mentioned one or more of the four factors, but the factors did not appear to play a significant role in the legal analysis. For example, courts often would describe the job title of actors in disputes where the jobs held by the actors were largely immaterial to the implied confidentiality analysis. These cases also were not included in this dissertation.

Each factor considered by the courts consisted of numerous smaller considerations. In aggregate, these considerations reflected trends in judicial decision-making. For example, courts seemed to be looking for inequalities between the parties when they considered the relationship between the parties and the vulnerability or sophistication of the actors. Implied obligations of confidentiality were much more likely when the discloser of information was inherently vulnerable or not on equal footing with the recipient of information. Courts looked to factors outside of the relationship that could have shaped the actual perception of confidentiality by the parties when considering contextual factors such as industry customs and external terms of disclosure

such as professional codes of conduct. Thus, after the factors are considered individually, then as a group, themes of inequality and perceptions of the parties arise.

Figure 2: Context

<u>Contextual Factor</u>	<u>Number of Cases</u>
Relationship between the parties	44
Custom	23
Negotiation	22
Timing of the disclosure	15
Purpose of the disclosure	12
Solicitation	8
Public policy	5

Context was one of the two most important factors for courts in analyzing implied obligations of confidentiality. Many different contexts could contribute to or detract from a finding of an implied obligation of confidentiality. Courts looked to business and industry custom, the presence and nature of negotiations, the nature of the relationship between the parties, the purpose of the disclosure, whether and how the information was solicited, the timing of the disclosure, and public policy when determining whether an implied obligation of confidentiality existed. While no one factor seemed to dominate the analysis, it is clear that courts considered developed relationships, the ability to negotiate, unequal bargaining power, and entrenched normative expectations of confidentiality as key components of implied obligations of confidentiality.

All of these factors seemed to reveal two things important to courts: mutual agreement between the parties and one party being more vulnerable to harm or coercion than the other. The courts' search for mutuality is reflected in the courts' attempts to locate and support the shared goals and expectations of the parties. Some factors, such as custom and negotiation, were seen as evidence of a knowing and voluntary acceptance of implied obligations of confidentiality. For example, if confidentiality was a widely accepted custom between inventors and investors in certain industries, then courts were likely to find that the parties in a dispute understood and relied upon implied confidentiality.

Other factors, such as the purpose of the disclosure, were seen as supporting an implied obligation of confidentiality when the mutual goals of the parties could not be fulfilled without such an obligation. For example, physicians could not properly diagnose a patient without full disclosure of the patient's medical history. Given the sensitive nature of a person's medical history, implied confidentiality was seen as necessary for the physician-patient relationship to properly function.

Evidence that the parties to a disclosure had a developed relationship increased the likelihood of an implied obligation of confidentiality. The courts' logic seemed to be that as relationships develop, the need to explicitly request confidentiality decreases because the expectations between the parties become implicit through a course of dealing. Courts also consistently looked to whether one party in a relationship was more vulnerable to harm or coercion than the other. Contexts that left the disclosing party vulnerable to harm were seen as evidence of a voluntary assumption of confidentiality by the less vulnerable party as well as justification for building implied confidentiality into

certain relationships. Courts recognized that vulnerable parties were more likely to need, but be unable to request, confidentiality than parties on equal footing. Thus, it was reasonable and likely that the recipients of information knew or should have known confidentiality was implied in their relationships with vulnerable parties.

Figure 3: Type of the Information

<u>Type of information</u>	<u>Number of Cases</u>
Secret information	20
Highly personal information	16
Proprietary or useful information	15
Information Exposing Discloser or Subject to Physical Harm	8
Information that is likely to be shared	5

Courts used the vulnerabilities of the parties to justify their reliance on the type of information in analyzing implied obligations of confidentiality. Courts tended to find implied obligations of confidentiality in situations involving information that, if disclosed, could harm the discloser of information. Four types of information increased the likelihood of an implied obligation of confidentiality. These kinds of information are related and are often the same, but they are discreet enough to be considered separately. Secret information, highly personal information, proprietary or useful information, and information exposing the discloser or subject to physical harm all increased the likelihood of an implied obligation of confidentiality.

One kind of information decreased the likelihood of a finding of confidentiality. If courts found that information was inherently the kind that would be shared with others,

then an implied obligation of confidentiality was unlikely. This determination was highly contextual and usually depended on the relationship between the parties. Only highly “viral” information eroded the likelihood of an implied obligation of confidentiality.

Courts clearly believed that some types of information served as cues to the recipient that the information was confidential. Secrets, sensitive health information, and valuable proprietary information were the kinds of information that, by their nature, would or should be seen by the recipient as confidential. Courts seemed to recognize that an inference of confidentiality was much more reasonable in these circumstances because the average person should have been on notice to treat the disclosed information more discreetly than other kinds of information.

Figure 4: Actor Attributes

<u>Actor Attribute</u>	<u>Number of Cases</u>
Vulnerability or sophistication	22
Resources	8
Bad-faith	3

Courts considered the attributes of the actors in the fewest number of cases of any factor. Even with such a small number, the cases revealed courts’ tendency to look to party inequality when finding an implied obligation of confidentiality. The cases revealed that vulnerability and an imbalance of power or sophistication were the most significant actor-related factors for courts analyzing obligations of confidentiality. To courts, some actors who disclosed information were seen as inherently vulnerable, such as the infirm and elderly, while others were vulnerable because they were less sophisticated than the

recipient of information. Courts also looked to whether there was an imbalance of resources between the parties, which in a few cases resulted in a *de facto* distinction between individual disclosers and corporate or group recipients of information.

Finally, several courts considered whether the recipient of information acted in bad faith in receiving information. Bad-faith actors were more likely to be bound by an implied obligation of confidentiality than good-faith actors. Here, courts sought to discourage recipients of information from acting in bad faith to gain the confidence of the discloser by preventing them from disclosing their unjustly received information. Additionally, actions made in bad faith served as evidence to courts that the recipient knew that the received information was disclosed in confidence. Otherwise, according to the logic of the courts, acting in bad faith would not have been necessary to gain the information.

Figure 5: Terms of Disclosure

<u>Kinds of Terms</u>	<u>Number of Cases</u>
Confidentiality indicators	38
Terms indicating a desire for confidentiality	24
Terms indicating confidence will be kept	14
External Terms	15
<u>Term-related Considerations</u>	
Conflicting terms	22
Explicitness	17

Of Nissenbaum's four factors of context-relative informational norms, terms were perhaps the most significant to courts in analyzing implied obligations of confidentiality. Terms are defined as stipulations or conditions under which transfers of information ought (or ought not) to occur. Terms of disclosure can be explicit in or inferred from a virtually limitless number of contexts. Unsurprisingly, courts placed the most emphasis on any term that would have been apparent to the other party. Thus, the perception of terms seemed to be the most justification for courts relying on terms to analyze implied obligations of confidentiality. The most common terms explicitly recognized by courts were those indicating either a desire for confidentiality or that the confidentiality of information would be respected. If perceived, these terms could justify reliance by the parties. These types of terms, referred to here as "confidentiality indicators," were persuasive to courts in finding an implied obligation of confidentiality.

Courts also looked to external terms, e.g., terms like laws, organizational codes, policies, and external arrangements and agreements that might shape an implied obligation of confidentiality. For example, in cases involving a physician's implied obligation of confidentiality to his or her client, courts looked to external laws such as a state's professional licensing requirements, statutes, and the Hippocratic Oath to affirm the implied obligation. Courts typically found that external terms were significant in implied confidentiality disputes if the discloser or recipient either knew or should have known about the terms.

Courts found confidentiality indicators persuasive even if they conflicted with previous terms. The only time confidentiality indicators seemed to have no significance to courts was when a written agreement explicitly prohibited implied terms of

confidentiality. Courts also found that clear and specific terms contributed to an implied obligation of confidentiality. Courts held that terms that purportedly create implied obligations of confidentiality must be clear and definite enough for the promises and expected performances of each party to be reasonably certain.

THEMES FROM THE CASE LAW

A few themes dominated the cases. First, the cases made it clear that the parties' perceptions of confidentiality were paramount in implied obligations of confidentiality. This could be seen most prominently in the courts' focus on industry customs, sensitive information, confidentiality indicators, and external terms. Courts found that the presence of all of these factors contributed to a finding of an implied obligation of confidentiality because their presence made it likely that such an obligation was or should have been perceived by the parties.

Additionally, after the perception of confidentiality, the most important factor for courts in finding an implied obligation of confidentiality was the inequalities between the parties. A disclosure involving parties that had similar resources, sophistication, or bargaining power was unlikely to be subject to an implied obligation of confidentiality. However, if the discloser of information was either inherently vulnerable, had fewer resources, had less bargaining power, or was less sophisticated than the recipient, then an implied obligation of confidentiality was more likely than with similarly situated parties.

The Importance of Perception. Courts found that the parties' perception of confidentiality was paramount in implying an obligation of confidentiality. With the exception of duties of confidentiality that are implied-in-law, courts consistently looked to the facts to determine if the parties knew or should have known that the information

was disclosed in confidence.² The importance of perception can be seen in the factors of context, the nature of the information, and the terms of disclosure.

Regarding context, courts found that parties in developed relationships are more likely to be aware of implicit expectations of confidentiality than strangers.³ Additionally, courts looked to whether an industry or other entity maintained a custom of confidentiality.⁴ A discloser's reliance upon custom was reasonable because the common knowledge of a custom made it likely that the recipient of the information was aware of an expectation of confidentiality before the information was disclosed, or, in any event, should have known to keep the information confidential.

Courts found that certain kinds of sensitive information were significant in the formation of implied obligations of confidentiality. The sensitive nature of disclosed information, according to the courts, should have signaled to the recipient that the

² See, e.g., *Fail-Safe LLC v. A.O. Smith Corp.*, 2010 WL 3503427 at *21 (E.D. Wis.) (“None of the letters or data...bared any symbol denoting that the information contained therein was confidential. Moreover, there is no evidence that FS even told AOS that the Colorado company considered the information in question confidential.”); *Faris v. Enberg*, 97 Cal. App. 3d 309 (Cal. Ct. App. 1979); *Flotec v. Southern Research, Inc.*, 16 F. Supp. 2d 992 (S.D. Ind. 1998); *Rockwell Graphics Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 177 (7th Cir. 1991); *Furr's Inc. v. United Specialty Adver. Co.*, 385 S.W.2d 456, 459-60 (Tex. Ct. App. 1964) (“Confidential relationship is a two-way street: if the disclosure is made in confidence, the ‘disclosee’ should be aware of it. He must know that the secret is being revealed to him on the condition he is under a duty to keep it.”); *Sentinel Products Corp. v. Mobil Chem. Co.*, 2001 WL 92272 (D. Mass. 2001).

³ See, e.g., *Paul v. Aviva Life and Annuity Co.*, 2010 WL 5105925 (N.D. Tex.); *Hogan v. DC Comics*, 1997 WL 570871 at *6 (N.D.N.Y.); *Fischer v. Viacom Int’l, Inc.*, 115 F. Supp. 2d 535 (D. Md. 2000); *Markogianis v. Burger King Corp.*, 1997 WL 167113 (S.D.N.Y.).

⁴ See *Bergin v. Century 21 Real Estate Corp.*, 2000 WL 223833 at *2, *4 (S.D.N.Y.); *Vantage Point v. Parker Bros.*, 529 F. Supp. 1204, 1217-18 (1981); *Markogianis v. Burger King Co.*, 1997 WL 167113 (S.D.N.Y.) (noting that “[i]ndustry custom can create an implied-in-fact contract between the parties”); *Prescott v. Morton Int’l, Inc.*, 769 F. Supp. 404, 410 (1990) (holding that a genuine issue of material fact exists “as to whether the parties’ conduct would lead a reasonable person in the industry to infer that Morton promised not to use the information in the design plans without authorization”); *Metrano v. Fox Broadcasting Co.*, 2000 WL 979664 (C.D. Cal.); *Moore v. Marty Gilman, Inc.*, 965 F. Supp. 203 (D. Mass. 1997).

information was confidential.⁵ Conversely, courts found that information that was likely to be shared should have signaled to the discloser that the information was unlikely to be considered confidential.⁶

The importance of perception was most evident when courts considered confidentiality indicators, i.e., signals, statements, or actions that indicate either a desire for confidentiality or an assumption or an indication that confidence would be kept.⁷ Confidentiality indicators serve the evidentiary function of demonstrating that the parties knew or should have known that the information was disclosed in confidence.⁸ Courts applied this same logic of confidentiality indicators to external terms, i.e., external laws, organizational codes, policies, and external arrangements and agreements affecting the disclosure of information between the parties.⁹

⁵ See, e.g., *Flotec v. Southern Research, Inc.*, 16 F. Supp. 2d 992 (S.D. Ind. 1998).

⁶ See, e.g., *Google, Inc. v. Traffic Info., LLC*, 2010 WL 743878 (D. Or.).

⁷ See, e.g., *Grayton v. United States*, 92 Fed. Cl. 327 (Fed. Cl. 2010); *Nilssen v. Motorola, Inc.*, 963 F. Supp. 664, 679-82 (N.D. Ill. 1997) (finding that no obligation of confidentiality existed for any disclosure not explicitly marked as “confidential” under a pre-existing agreement regarding use of disclosed information within a business relationship); *Klekas v. EMI Films, Inc.*, 150 Cal. App. 3d 1102, 1114 (Cal. Ct. App. 1984); *Rogers v. Desa Int’l, Inc.*, 183 F. Supp.2d 955, 957 (E.D. Mich. 2002) (finding that a claim of implied confidentiality is without merit where, among other things, the plaintiff “did not indicate on the video tape he sent [to the defendant], either in the video itself or on an outside label, that information contained therein was confidential”); *Daily Int’l Sales Corp. v. Eastman Whipstock, Inc.*, 662 S.W.2d 60 (Tex. Ct. App. 1983) (finding no implied obligation of confidentiality where, among other things, “[n]o documents were stamped or labeled with the word ‘confidential’ or like warnings”); *Neimi v. Am. Axle Mfg. & Holding, Inc.*, 2007 WL 29383 at *4 (Mich. Ct. App.) (finding no implied obligation of confidentiality where, among other things, plaintiffs “did not make any reasonable efforts to preserve the confidentiality of the designs provided to the defendants. They did not mark the documents as confidential, or require an express agreement of confidentiality.”).

⁸ See *supra* note 5.

⁹ See, e.g., *Biddle v. Warrant Gen. Hosp.*, 1998 WL 156997 (Ohio Ct. App. 1998); *Overstreet v. TRW Commercial Steering Div.*, 256 S.W.3d 626 (Tenn. 2008) (looking to state statutes such as the Patients’ Privacy Protection Act and the Workers’ Compensation Act that convey a public policy favoring the confidentiality of medical information in order to support an implied-in-law covenant of confidentiality between a patient and a doctor); *Alsip v. Johnson City Med. Ctr.*, 197 S.W.3d 722, 726 (Tenn. 2006) (citing multiple sections of the Tennessee Code in finding an implied covenant of confidentiality in medical-care contracts between treating physicians and their patients. These statutes, according to the Supreme Court of Tennessee, “are indicative of the General Assembly’s desire to keep confidential a patient’s medical

The courts' focus on perception seemed to be motivated by a desire for fairness in the dealings between the parties. Courts held that in most circumstances a recipient of information could not be held to an implied obligation of confidentiality unless the recipient was or should have been aware of his or her obligation of confidentiality. According to courts, it would be unjust to hold a recipient to an obligation of which the recipient had no knowledge.

Courts also were hesitant to find an implied obligation of confidentiality when the discloser of information was aware or should have been aware that confidentiality was not implied. This too was a conclusion based on fairness and equity between the parties. To allow disclosers to claim confidentiality notwithstanding the fact that the discloser knew otherwise would be opportunistic. This result also would be unfair to recipients who were likely under the impression that they were not under an obligation of confidentiality. By focusing on the true agreement and expectations of the parties, courts attempted to make implied obligations of confidentiality as equitable as possible.

Party Inequalities. Apart from the perceptions of the parties, the single most substantial factor in finding an implied obligation of confidentiality was any significant

records and identifying information.”); *Humphers v. First Interstate Bank of Oregon*, 696 P.2d 527 (Or. 1985) (looking to external sources such as professional regulations to find a physician’s nonconsensual duty of confidentiality to his or her patient); *Hammonds v. Aetna Cas. & Surety Co.*, 243 F. Supp. 793, 801 (N.D. Ohio 1965); *MacDonald v. Clinger*, 84 A.D.2d 482, 484-46 (N.Y. Ct. App. 1982) (citing several statutes and regulations requiring physicians to protect the confidentiality of patients’ information in finding that physicians impliedly promise to keep patients’ information confidential as a matter of, among other things, contract); *Doe v. Roe*, 93 Misc. 2d 201 (N.Y. Gen. Term. 1977); *Givens v. Mullikin ex. Rel. Estate of McElwaney*, 75 S.W.3d 383 (Tenn. 2002) (finding an implied obligation of confidentiality via a contract between a patient and physician based on, among other things, statutes requiring the physician to respect the patient’s confidential information); *cf. Suarez v. Pierard*, 663 N.E.2d 1039, 1044 (Ill. Ct. App. 1996) (finding that the state’s Pharmacy Practice Act does not create an implied contract of confidentiality between pharmacists and their patients because, among other reasons, the relevant provision was not in effect when the alleged contract was made); *Ghayoumi v. McMillan*, 2006 WL 1994556 (Tenn. Ct. App.) (“[T]here can be no covenant of confidentiality, implied or agreed, because the relationship between Plaintiff and Defendant resulted from a court order that necessitated disclosure of Defendant’s communications with Plaintiff and his family members and mandated disclosure of his evaluations, report and recommendations to the Court and parties.”).

inequality between the parties. If the discloser of information was significantly disadvantaged due to an inequality with the recipient of the information, then an implied obligation of confidentiality was more likely than if the parties were on equal footing.

Courts looked at factors in relation to the other party to a disclosure, such as the amount of resources, sophistication, leverage, and ability to negotiate. They also looked at inherent vulnerabilities, such as whether the discloser of information was infirm, elderly, destitute, or otherwise of such a limited capacity as to justify imposition of an implied obligation of confidentiality. This implied confidentiality was justified as a way to protect the disclosers of information.

Party inequalities played a role in obligations of confidentiality both implied-in-fact and implied-in-law. In some instances, readily apparent inequality between the parties served as evidence that the recipient of information should have been more aware of a need for confidentiality or of the discloser's limited capacity to request confidentiality. For example, unsophisticated parties who are not familiar with formal confidentiality agreements are likely to trust a seasoned businessperson in business negotiations and exercise little scrutiny. These situations increase the likelihood that the discloser will assume confidentiality instead of requesting an explicit promise of confidentiality from the businessperson. Conversely, parties with equally sufficient resources and sophistication in business negotiations are unlikely to rely upon implied obligations of confidentiality because they both have significant experience with confidentiality agreements.¹⁰

¹⁰ See, e.g., *L-3 Comm. v. OSI Sys.*, 2008 WL 2595176 at *5 (2d Cir.) (“[The defendant] was not vulnerable to [the plaintiff] in a way that could give rise to an implied confidential relationship. The parties started off on equal footing. Both were sophisticated corporations, experienced in acquisitions, and represented by counsel.”); *Fail-Safe LLC v. A.O. Smith Corp.*, 744 F.Supp.2d 831, 858 (E.D. Wis. 2010)

Courts also found that party inequality could justify the implication of confidentiality in absence of an agreement between the parties.¹¹ For example, courts often were willing to find an implied obligation of confidentiality in relationships involving unequal bargaining power.¹² Unequal bargaining power was seen as a critical component in fiduciary relationships.¹³ Because one of the core tenants of fiduciary duties is to prohibit one party from taking advantage of a relationship at the expense of the vulnerable party, the courts' preference seems to be for equity between the parties.

Several courts specified that certain kinds of relationships, such as joint ventures, principal-agent,¹⁴ physician-patient,¹⁵ accountant/attorney-client,¹⁶ employer-employee,¹⁷

(finding it remarkable the plaintiff failed to obtain a confidentiality agreement because, among other reasons, the plaintiff "was a sophisticated business operative that had entered into confidentiality agreements with companies who were doing business with the plaintiff in the past"); *Young Design v. Teletronics*, 2001 WL 35804500 (E.D. Va.); *Omnitech v. Clorox*, 11 F.3d 1316, 1331 (5th Cir. 1994) (finding no implied obligation of confidentiality because, among other things, "the record in this case is replete with evidence that Omnitech and Clorox had only an arms-length business relationship, including undisputed testimony that...both sides were represented by competent counsel in the drafting and consummation of the agreements").

¹¹ *See, e.g., Alsip v. Johnson City Medical Center*, 197 S.W.3d 722 (Tenn. 2006) ("[T]he covenant of confidentiality arises not only from the implied understanding of the agreement between a patient and a doctor, but also from a policy concern that such private and potentially embarrassing information should be protected from public view."); *Overstreet v. TRW Com. Steering Div.*, 256 S.W.3d 626, 634 (Tenn. 2008); *Biddle v. Warren General Hosp.*, 1998 WL 156997 at *12 (Ohio Ct. App.) (finding that in confidential relationships between physicians and patients "there is no indication that patients bargain for confidentiality; rather, it is assumed"); *Humphers v. First Interstate Bank Oregon*, 696 P.2d 527, 534 (Or. 1985).

¹² *See, e.g., Paul v. Aviva Life and Annuity Co.*, 2010 WL 5105925 at *9 (N.D. Tex.) (citing *Martin v. State Farm Mut. Auto. Ins. Co.*, 808 N.E.2d 47, 52 (Ill. Ct. App. 2004)).

¹³ *Paul v. Aviva Life and Annuity Co.*, 2010 WL 5105925 at *9 (N.D. Tex.) (citing *Martin v. State Farm Mut. Auto. Ins. Co.*, 808 N.E.2d 47, 52 (Ill. App. 2004)).

¹⁴ *See, e.g. McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820 (Tex. Ct. App. 2010). The court of appeals of Texas elaborated on the nature of fiduciary and confidential relationships, stating:

There are two types of fiduciary relationships: formal fiduciary relationships that arise as a matter of law, such as partnerships and principal-agent relationships, and informal fiduciary relationships or "confidential relationships" that may arise from moral, social, domestic, or personal relationships. A fiduciary relationship is an extraordinary one and will not be created lightly. The mere fact that one party to a relationship subjectively trusts the other does not indicate the existence of a fiduciary relationship. A person is justified in believing another to be his fiduciary "only where he or she is accustomed to

and those involving trusted advisors, were likely to involve an implied obligation of confidentiality.¹⁸ All of these relationships involved vulnerable parties in that the party must disclose confidential information for the relationship to function. It is this disclosure of confidential information that leaves the disclosers of information vulnerable to the recipient. Courts also protected these relationships with implied obligations of confidentiality as a matter of public policy.¹⁹ Some relationships that required confidentiality, such as attorney-client and physician-patient, were seen as beneficial to society as a whole and, thus, warranted a legally implied obligation of confidentiality.

Ultimately, it appears that the perceptions of the parties and party inequality are the two most important factors to courts that have analyzed implied obligations of confidentiality. In nearly every case, the court either expressly mentioned or implicitly suggested that its decision was based on one or both of these factors. Thus, if a decision-

being guided by the judgment and advice of the other party, and there exists a long association in a business relationship, as well as a personal friendship.”

Id. at 829 (citations omitted).

¹⁵ See, e.g., *Crippen v. Charter Southland Hosp., Inc.*, 534 So. 2d 286 (Ala. 1988) (finding a duty of confidentiality in the doctor-patient relationship); *Anderson v. Strong Mem’l Hosp.*, 531 N.Y.S.2d 735, 739 (N.Y. Gen. Term 1988) (finding that “the physician-patient relationship itself gives rise to an implied covenant of confidence and trust when breached”); *Givens v. Mullikin ex rel Estate of McElwaney*, 75 S.W. 3d 383, 407 (Tenn. 2002).

¹⁶ See, e.g., *Wagenheim v. Alexander Grant & Co.*, 19 Ohio App. 3d 7, 12-13 (Ohio Ct. App. 1983).

¹⁷ See, e.g., *SI Handling Systems, Inc. v. Heisley*, 658 F. Supp. 362 (E.D. Pa. 1986) (citing established precedent that “in some circumstances, an agreement not to disclose a former employer’s trade secrets may be *implied* from the confidential nature of the employment relationship”) (emphasis in original); *Sweetzel, Inc. v. Hawk Hill Cookies, Inc.*, 1995 WL 550585 at *12 (E.D. Pa. 1995).

¹⁸ See, e.g., *Omnitceh Intern., Inc., v. Clorox Co.*, 11 F.3d 1316 (5th Cir. 1994) (recognizing a fiduciary relationship between business partners, attorneys and their clients, the insured and their insurers, and majority shareholders and minority shareholders).

¹⁹ *Metrano v. Fox Broadcasting Co., Inc.*, 2000 WL 979664 (C.D. Cal.); *Doe v. Roe*, 93 Misc. 2d 201, 214 (N.Y. Gen. Term. 1977); *MacDonald v. Clinger*, 84 A.D.2d 482, 484 (N.Y. Ct. App. 1982); *Ghayoumi v. McMillan*, 2006 WL 1994556 (Tenn. Ct. App.); *Givens v. Mullikin*, 75 S.W.3d 383, 407 (Tenn. 2002); *Alsip v. Johnson City Medical Center*, 197 S.W.3d 722 (Tenn. 2006).

making framework is to be constructed based on judicial considerations of implied obligations of confidentiality, it should be built around these central concerns.

No Difference Between Online and Offline Cases. The second research question was “Are these variables considered differently in online and offline cases?” Ultimately, this dissertation found no discernable difference between online and offline implied obligations of confidentiality. This finding indicates that the rationale employed by courts in offline cases would apply to online cases as well. Almost all of the cases analyzed were offline, and of those offline cases, most of them were in the healthcare or business negotiations context. Of the 132 cases analyzed for this dissertation, only seven dealt with online-related disputes.²⁰ Those seven disputes, like the offline cases, were largely commercial.

It is unclear exactly why so few cases of implied obligations of confidentiality arose online. The scarcity of case law might be partially due to the fact that the Internet is a relatively new technology. The earliest case analyzed in this dissertation dealing with an online-related dispute was in 2007. Additionally, the prevalence of privacy policies and terms-of-use agreements, which typically address confidentiality-related agreements, might be seen as preempting implied obligations of confidentiality between websites and users. Thus, given the presence of these explicit agreements, implied agreements of confidentiality might not play a large role in the relationships between websites and users.

²⁰ *In re Easysaver Rewards Litigation*, 2010 WL 3259752 (S.D. Cal.); *Google, Inc. v. Traffic Info, LLC*, 2010 WL 743878 (D. Or.); *Best Western Int'l v. Furber*, 2008 WL 4182827 (D. Ariz.); *London v. New Alberton's, Inc.*, 2008 WL 4492642 (S.D. Cal.); *Watson v. Public Serv. Co. of Colo.*, 207 P.3d 860 (Colo. Ct. App. 2008); *Pisciotta v. Old Nat. Bancorp.*, 449 F.3d 629 (7th Cir. 2007); *Southwest v. Boardfirst, LLC*, 2007 WL 4823761 (N.D. Tex.).

However, the omnipresence of terms of use and privacy policies is deceptive because they are not always enforceable. Additionally, implied confidentiality can exist in a number of online contexts. For example, implied confidentiality could exist between two Internet users, not just between users and websites. The high cost of litigation along with the unwanted publicity litigation can bring might be dissuading many Internet users from making claims of implied obligations of confidentiality.

Additionally, although terms of use are seemingly on every website, it is unlikely that they apply to every Internet user.²¹ Many websites on the Internet post their terms of use and privacy policy at the bottom of their homepage or otherwise do not make the terms very visible. Courts rarely enforce these terms against Internet users because it is unlikely the users were on notice that the terms existed.²² In instances where no binding contract addressing confidentiality exists between the parties, implied obligations of confidentiality could play a significant role in the law. Finally, the terms of use and privacy policies are often vague. If the term is vague enough, a court's analysis would likely be similar to analysis of implied terms since both vague and implied terms compel courts to look to context to ascertain the intention of the parties.

Because of the extremely small number of Internet cases and the factually-contingent nature of the cases, no relevant similarities or distinctions could be drawn between online and offline cases. Both online and offline cases were highly contingent on the specific facts of each dispute, and the judicial analysis applied was the same. Thus, it

²¹ See, e.g., Woodrow Hartzog, *The New Price to Play: Are Passive Online Media Users Bound by Terms of Use?*, 15 COMM. L. & POL'Y 415 (2010) (finding that terms of use are rarely enforced against online readers, listeners, or viewers who do not "click" to indicate their agreement to the terms).

²² *Id.*; see also Mark Lemley, *Terms of Use*, 91 MINN. L. REV. 459 (2006).

would appear that the logic and rules of law articulated in the offline cases, the bulk of the cases analyzed in this dissertation, remain the same online.

Theoretical Implications. The third research question was “How does this analysis contribute to Nissenbaum’s theory of privacy as contextual integrity?” This dissertation contributes to Nissenbaum’s theory of contextual integrity by demonstrating how Nissenbaum’s “context-relative informational norms” are considered by courts. This study demonstrates which context-relative informational norms are significant enough to rise to the level of a legal obligation of confidentiality. It helps validate Nissenbaum’s theory by demonstrating courts’ implicit, if inconsistent, consideration of context-relative informational norms. However, the cases supported a collapse of Nissenbaum’s four factors into two: context and terms.

Context is a broad enough concept to encompass both actors and the nature of the information. While the multiple considerations within the context factor were based on both the perceptions of the parties and party inequalities, courts’ consideration of the terms of disclosure seemed motivated almost entirely by concern for the perceptions of the parties. Conversely, the courts’ consideration of the attributes of the actors focused almost entirely on the question of party inequalities.

Virtually every significant consideration by the courts could be categorized into one of the four factors, which could be collapsed into the “context” and “terms” factors. Because the question of confidentiality is ultimately a relationship-based question, this theory, originally designed to conceptualize privacy, is well-suited to frame the analysis of disputes involving implied obligations of confidentiality. Contextual integrity, like the law of confidentiality, is squarely focused on the conditions surrounding the disclosure

and flow of information. Nissenbaum's theory provides a good starting point for a framework for courts deciding cases involving implied obligations of confidentiality. The cases reveal that courts already implicitly rely on Nissenbaum's factors, although they do so inconsistently. Using a decision-making framework derived from the theory of contextual integrity would have the advantage of a clear and consistent application of all of the factors deemed important by courts. Such a framework is proposed below.

A DECISION-MAKING FRAMEWORK FOR IMPLIED OBLIGATIONS OF CONFIDENTIALITY

The fourth and final research question asked in this dissertation was "How can these factors best form a decision-making framework for courts to use in analyzing implied obligations of confidentiality?" The cases analyzed in this dissertation provided a rich and nuanced picture of the factors considered important by courts in analyzing implied obligations of confidentiality. The purpose of this section is to create a decision-making framework for courts confronted with these disputes both online and offline in the future.

Notwithstanding the myriad of factors to analyze implied obligations of confidentiality, no unifying framework has been used by the courts. Instead, courts seem to highlight various facts that either contribute to or detract from a finding of an implied obligation of confidentiality. As previously mentioned, courts implicitly utilize considerations that fall within Nissenbaum's four factors of context-relative informational norms: context, actors, nature of the information, and the terms of disclosure. Given this utilization, the theory of contextual integrity can help create a much needed decision-making framework for courts analyzing implied obligations of confidentiality.

This dissertation proposes a framework that is designed as a test with four distinct factors. These factors are to first be analyzed independently, then collectively to determine if an implied obligation of confidentiality existed in a given dispute. In this sense, the envisioned framework is similar to the four-factor test used to establish whether use of a copyrighted work is fair.²³ As in fair-use disputes, courts should engage in a case-by-case analysis of the factors, with no explicit preference for any particular factor.²⁴ This framework is designed to help courts ascertain the two most important considerations in implied obligations of confidentiality, according to the themes arising from own analysis: party perception and inequalities. To that end, when courts are presented with a claim of an implied obligation of confidentiality, they should ask the following questions:

1. What was the context surrounding the disclosure?
2. What was the nature of the information?
3. Who were the actors and what was their relationship?
4. What were the internal and external terms of disclosure?

Courts would ask each question individually, then analyze their answers as a whole to determine if an implied obligation of confidentiality existed. Like the fair use factors, each question would include several considerations that may or may not be applicable in a given factual scenario. This framework will not completely eliminate uncertainty from the law surrounding implied obligations of confidentiality. The concept of implied

²³ Copyright Act of 1976, 17 U.S.C. §107 (1976).

²⁴ *See, e.g.,* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (“The task [of deciding whether a work is a fair use] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”). It is important to note that the similarity between this proposed framework and fair use is in form rather than in substance.

confidentiality is too dependent upon specific facts for a completely consistent application of the law. However, the adoption of this decision-making framework can increase clarity and minimize uncertainty by asking the same questions in every dispute.

What was the context surrounding the disclosure? Here the court should determine a number of things, including the existence of any customs of confidentiality, whether the disclosure was made in the process of ongoing negotiations, whether the disclosure was solicited by the recipient of the information, and why the information was disclosed. Industry customs of confidentiality and the solicitation of a disclosure would support a finding of an implied obligation of confidentiality. However, according to previous case law, the absence of custom or solicitation would not necessarily be seen as weakening the likelihood of an implied obligation of confidentiality. Rather, the absence of such factors would simply transfer the courts' focus to other contextual considerations.

If the parties are found to be relatively equal in sophistication and resources, then the presence of negotiations would weigh against a finding of implied confidentiality. Courts typically found that parties in these situations had every opportunity to request confidentiality and likely would have done so expressly had they desired it. However, if the discloser has significantly fewer resources or is less sophisticated, negotiations between the parties should only slightly weigh against a finding of implied confidentiality because the opportunity for the discloser of information to explicitly request confidentiality is diminished.

Finally, courts should ask why the information was disclosed. Disclosures made in order to promote a common goal between the parties or to further develop the parties' relationship would weigh in favor of an implied obligation of confidentiality. For

example, disclosures made to a physician in order for a patient to receive proper treatment would weigh in favor of an implied obligation of confidentiality. The same could be said for disclosures made within a business relationship toward a common goal such as manufacturing a product together. Inversely, a strictly gratuitous disclosure of information that was not made in furtherance of a common goal or to develop a relationship would weigh against a finding of implied confidentiality. For example, a publicly accessible blog post describing an Internet user's frustration over a particular topic would not be seen as furthering a common goal in a relationship.

What was the nature of the information? For this factor, the courts should look for specific kinds of information that would either contribute to or detract from the likelihood of an implied obligation of confidentiality. If information was highly personal, proprietary or useful, or if its disclosure would expose the discloser to physical harm, then this factor would weigh in favor of an implied obligation of confidentiality. Consideration of these types of information would reflect the courts' attempt to protect vulnerable parties as well as the courts' observation that recipients would or should perceive such information as confidential.

Alternatively, if information is the type that is inherently or within a specific context likely to be shared with others, then this factor would weigh against an implied obligation of confidentiality. For example, information designed to be viewed by third parties such as blueprints, resumes, headshot photographs, and most artistic expression would weigh against a finding of an implied obligation of confidentiality. This consideration would reflect the courts' observation that when such information is

disclosed, the discloser would either know or should know that the information would not be treated as confidential.

Who were the actors and what was their relationship? This factor consists of two equally important parts, actor attributes and relationships. Courts should first ask whether either of the parties was inherently vulnerable and seek to ascertain each party's level of sophistication and adequacy of resources. Disclosers of information who were vulnerable, unsophisticated, or had very few resources such as legal representation would weigh in favor of a finding of an implied obligation of confidentiality. This would particularly be true in situations where the recipient of information is sophisticated and has adequate resources.

Courts should also ask whether the recipient of information acted in bad faith. For example, if a recipient pretended to be interested in buying a discloser's idea in an attempt to gain access to confidential information, then this factor would also weigh in favor of a finding of an implied obligation of confidentiality as a matter of equity. In essence, the law would bind the recipient to confidentiality because it is unjust to reward recipients acting in bad faith.

The court also should ask a critical question in determining an obligation of confidentiality: what was the nature of the relationship between the parties? To answer this question, courts would look to three different aspects of the relationship: 1) what was the history between the parties; 2) was the relationship of a specific kind that involves a heightened probability of implied confidentiality; and 3) was there unequal bargaining power between the parties?

Regarding the history between the parties, courts should seek to determine how developed a relationship was. Long-standing and developed relationships would weigh in favor of an implied obligation of confidentiality because developed relationships likely involve trust and customs. Developed relationships have less of a need to express expectations of confidentiality, increasing the likelihood of an implied obligation of confidentiality. Parties in developed relationships can draw upon their history of protecting each others' information, whereas strangers disclosing information for the first time have no such context to shape their expectations.

The law has traditionally recognized that certain kinds of relationships are likely to involve an implied obligation of confidentiality, such as principal-agent,²⁵ physician-patient,²⁶ accountant/attorney-client,²⁷ employer-employee,²⁸ and those involving trusted

²⁵ See, e.g. *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820 (Tex. Ct. App. 2010). The court of appeals of Texas elaborated on the nature of fiduciary and confidential relationships, stating:

There are two types of fiduciary relationships: formal fiduciary relationships that arise as a matter of law, such as partnerships and principal-agent relationships, and informal fiduciary relationships or "confidential relationships" that may arise from moral, social, domestic, or personal relationships. A fiduciary relationship is an extraordinary one and will not be created lightly. The mere fact that one party to a relationship subjectively trusts the other does not indicate the existence of a fiduciary relationship. A person is justified in believing another to be his fiduciary "only where he or she is accustomed to being guided by the judgment and advice of the other party, and there exists a long association in a business relationship, as well as a personal friendship."

Id. at 829 (citations omitted).

²⁶ See, e.g., *Crippen v. Charter Southland Hosp., Inc.*, 534 So. 2d 286 (Ala. 1988) (finding a duty of confidentiality in the doctor-patient relationship); *Anderson v. Strong Mem'l Hosp.*, 531 N.Y.S.2d 735, 739 (N.Y. Gen. Term 1988) (finding that "the physician-patient relationship itself gives rise to an implied covenant of confidence and trust when breached"); *Givens v. Mullikin ex rel Estate of McElwaney*, 75 S.W. 3d 383, 407 (Tenn. 2002).

²⁷ See, e.g., *Wagenheim v. Alexander Grant & Co.*, 19 Ohio App. 3d 7, 12-13 (Ohio Ct. App. 1983).

²⁸ See, e.g., *SI Handling Systems, Inc. v. Heisley*, 658 F. Supp. 362 (E.D. Pa. 1986) (citing established precedent that "in some circumstances, an agreement not to disclose a former employer's trade secrets may be implied from the confidential nature of the employment relationship") (emphasis in original); *Sweetzel, Inc. v. Hawk Hill Cookies, Inc.*, 1995 WL 550585 at *12 (E.D. Pa.).

advisors.²⁹ Courts should determine if the relationship at issue could be categorized as one of these special relationships. Disclosures involving these special relationships would weigh in favor of an implied obligation of confidentiality. Otherwise, courts should ignore this consideration in determining the weight of this factor.

Finally, the courts should examine the parties' relative bargaining power. It should be noted that to some extent this consideration overlaps with the relative attributes of the actors. A discloser of information with significantly less power to bargain for confidentiality than the recipient of information would weigh in favor of an implied obligation of confidentiality. If the parties to a disclosure had relatively equal bargaining power, or if the discloser of information had more power to bargain for confidentiality than the recipient, then this factor would weigh against an implied obligation of confidentiality. In previous similar situations, courts typically found that the discloser's failure to request confidentiality with ample opportunity to do so served as evidence that an obligation of confidentiality was not implied in the disclosure.

What were the internal and external terms of disclosure? Finally, courts should analyze any internal and external terms of disclosure between the parties. Regarding internal terms, courts would look for the presence of any "confidentiality indicators," which are signals, statements, or actions that indicate that either a desire for confidentiality or that the information would be kept in confidence. Confidentiality indicators are internal terms because they take place within the relationship between the parties. The presence of confidentiality indicators would weigh in favor of an implied

²⁹ See, e.g., *Omnitceh Intern., Inc., v. Clorox Co.*, 11 F.3d 1316 (5th Cir. 1994) (recognizing a fiduciary relationship between business partners, attorneys and their clients, the insured and their insurers, and majority shareholders and minority shareholders).

obligation of confidentiality. The absence of confidentiality indicators would weigh against an implied obligation of confidentiality. Confidentiality indicators help courts ascertain the perception of the parties.

Additionally, courts should seek to identify any external terms of disclosure. External terms are laws, organizational codes, policies, and external arrangements and agreements that affect the disclosure of information between the parties. For example, in cases involving a physician's implied obligation of confidentiality to his or her patient, courts could look to external laws such as a state's professional licensing requirements, statutes, and the Hippocratic Oath to affirm the implied obligation. If the parties knew or should have known of external terms that restrict the disclosure of information, then this factor would weigh in favor of an implied obligation of confidentiality. However, if there are no known external terms or if the parties are aware of external terms that diminish the possibility of confidential disclosure, then this factor would weigh against an implied obligation of confidentiality. For example, if an individual disclosed information to an entity that must include that information in public records because of government reporting requirements, then an implied obligation of confidentiality would be unlikely.

Courts also should address two additional considerations within this factor. In the case of conflicting terms of disclosure, courts should seek to identify the most recent term as the controlling term in most cases. In determining the relative weight of terms, courts also must examine their clarity. Terms that are clear and definite enough for the promises and required performances of each party to be reasonably certain would weigh in favor of an implied obligation of confidentiality. Meanwhile, vague terms that are subject to

numerous credible interpretations would weigh against a finding of implied confidentiality.

Application Offline. This proposed framework could serve as a tool for courts to analyze implied obligations of confidentiality in a clear and consistent way. This section will apply the framework to an existing offline dispute to demonstrate its utility. Recall the case of *Faris v. Enberg*.³⁰ Here, Edgar Faris, a television show developer, pitched an idea for a sports quiz show to a sports announcer, Richard Enberg. Sometime after the two met, a very similar show appeared on television with Enberg as the master of ceremonies. Faris brought a suit against Enberg and the television show's producer for misappropriation of the sports quiz show idea and for breach of an implied obligation of confidentiality. The California Court of Appeal found that in order for a valid confidentiality obligation to exist, "[t]here must exist evidence of the communication of the confidentiality of the submission or evidence from which a confidential relationship can be inferred."³¹

Here, the court found that no rational recipient of the information disclosed by Faris could be bound to an understanding that a secret was being imparted. The court held, "One could not infer from anything Enberg did or said that he was given the chance to reject disclosure in advance or that he voluntarily received the disclosure with an understanding that it was not to be given to others."³² The court analyzed a number of factors:

³⁰ 97 Cal. App. 3d 309 (Cal. Ct. App. 1979).

³¹ *Id.* at 323.

³² *Id.* at 324.

Only in plaintiff's response to summary judgment is there reference to his own thoughts from which one might infer that he felt there was a confidence. But he never, so far as we can tell, communicated these thoughts to Enberg, and nothing of an understanding of confidence can be inferred from Enberg's conduct. No other special facts exist from which the relationship can be inferred: there was no implied-in-fact contract; the material was not protectable; and they were not yet partners or joint adventurers, and there was no buyer/seller or principal/agent relationship.³³

Applying the decision-making framework proposed here to this same case would clarify the court's decision-making method and ensure that all the important contextual factors are fully considered. The result might be the same – or it might be better.

For example, if the court were to use the suggested framework, it would first seek to ascertain the context of the disclosure. Here it would appear that the disclosure was unsolicited, which weighs against a finding of an implied obligation of confidentiality. Additionally, the disclosure occurred within the context of negotiations. The court could follow the lead of other courts and find that this served as evidence that Faris had ample opportunity to request an express promise of confidentiality. Additionally, the disclosure was made before any request or indication of confidentiality which, as the court in reality found, strongly weighed against a finding of implied confidentiality. Finally, while other cases discussed a potential industry custom of confidentiality when pitching ideas for television shows, no such custom was alleged in this case. Thus, this factor weighs against a finding of implied confidentiality.

The second factor, the nature of the information, only slightly weighs in favor of a finding of implied confidentiality. Here, the information was proprietary and useful in

³³ *Id.* Notice that the court draws upon the other factors of contextual integrity in its analysis.

nature, but only minimally so. The idea of a sports quiz show was not novel or concrete enough for copyright protection and arguably only minimally valuable to the discloser.

The third factor, the attributes of the actors, would likely weigh against a finding of implied confidentiality. It would appear that Faris had some experience in the industry and understood the protocol for pitching a television idea. Enberg does not appear to have acted in bad faith. Finally, while as an employee of a television studio Enberg might have more resources than Faris, he did not appear to utilize those resources in his negotiations with Faris. Thus, Faris was not inherently vulnerable and also was not vulnerable relative to the power of Enberg.

The fourth factor, the terms of disclosure, also weighs against a finding of confidentiality. The court was most persuaded by a lack of a confidentiality indicator. While Faris told Enberg his idea for the sports quiz show was his “creation” and “literary property,” neither of those are equal to a request for confidentiality. Additionally, Enberg apparently in no way indicated he would keep Faris’s ideas confidential. There appear to be no external or conflicting terms in this relationship.

Looking at the factors as a whole, the court correctly concluded that Enberg was not bound by an implied obligation of confidentiality. Three of the four factors weigh against such a finding, and the sole factor that favored an implied confidentiality did so only marginally. However, while the same result was reached under the framework as the court’s actual opinion, this analysis better demonstrates the court’s justifications for its ruling and addresses more of the potential concerns regarding implied confidentiality than the court’s original analysis.

Application on the Internet. This decision-making framework is necessary if the concept of implied confidentiality is to be clearly and consistently applied where it is most needed – on the Internet. The framework should be applied to online cases, the cases that originally prompted this research, the same way it should be applied to offline cases. Recall the plight of Cynthia Moreno discussed at the beginning of this dissertation.³⁴ Moreno published her “Ode to Coalinga” on the journal section of her personal profile on the social network site myspace.com. Roger Campbell, the principal of Coalinga High School, read the Ode before it was removed and forwarded it to the local newspaper, the *Coalinga Record*, which published the Ode in the newspaper’s letters-to-the-editor section. The Coalinga community reacted violently to the publication of the Ode, threatening Moreno and her family and ultimately causing the Moreno family to close its 20-year-old family business.³⁵ Moreno filed suit against Campbell alleging invasion of privacy and intentional infliction of emotional distress. For the sake of exposition, assume Moreno also alleged breach of an implied obligation of confidentiality against Campbell, who originally accessed Moreno’s post.³⁶

First, the court would attempt to ascertain the context of the disclosure. There is some debate as to whether customs of confidentiality exist in social network sites.³⁷ This

³⁴ *Moreno v. Hanford Sentinel*, 172 Cal. App. 4th 1125, 1128 (Cal. Ct. App. 2009); John Ellis, *Coalinga grad loses MySpace rant lawsuit*, THE FRESNO BEE (Oct. 12, 2010, 2:07 pm), <http://www.fresnobee.com/2010/09/20/2085862/ex-student-loses-myspace-rant.html#storylink=mirelated>.

³⁵ *Id.*

³⁶ Note that the claim here is against an audience member, not an intermediary. Had MySpace disclosed her poem to a third party, this analysis would be different.

³⁷ See, e.g., Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887 (2006); Patricia Sanchez Abril, *A (My)Space of One’s Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 77 (2007); Emily Christofides et al., *Information Disclosure and Control on Facebook: Are They Two Sides of the Same Coin or Two Different Processes?*, 12 CYBERPSYCHOLOGY & BEHAV. 341 (2009); Zeynep Tufekci, *Can You See*

is a factually specific inquiry, particularly because customs vary by site and user.

However, given that seemingly no persuasive evidence was introduced at trial to support the notion that a custom of confidentiality existed on MySpace, this factor does not favor a finding of implied confidentiality. The disclosure was not made in the process of ongoing negotiations, nor was the disclosure solicited by Campbell. Indeed, the Ode was simply a gratuitous post for friends to read. Indeed, there was no purpose for the disclosure other than to vent. Thus, the context weighs against a finding of an implied obligation of confidentiality.

Next, the court would look to the nature of the information. Here, the information was arguably personal. The ode was a confessional that divulged raw emotions and personal histories with classmates. Additionally, the information subjected Moreno and her family to potential physical harm as bricks were thrown at her house. However, it is debatable whether Campbell either knew or should have known this would be the result of his disclosure. Unlike revealing the identity of a government informant, it does not necessarily follow that disclosing an angry blog post will lead to physical violence against the blogger. Thus, this factor only slightly weighs in favor of an implied obligation of confidentiality.

Third, the court would identify the attributes of the actors and their relationship to each other. Here, there is no evidence Campbell acted in bad faith to access the information. There does not appear to be any inequality between the parties. Both Moreno and Campbell seem to be relatively sophisticated parties with no advantage of resources or bargaining power over another. Additionally, the parties have no history

Me Now? Audience and Disclosure Regulation in Online Social Network Sites, 28 BULL. SCI. TECH. & SOC'Y 20 (2008).

together. Indeed, it would appear that Moreno and Campbell were strangers. This factor weighs against a finding of an implied obligation of confidentiality.

Finally, courts would seek to identify any internal or external terms of disclosure. Internally, there appear to be no confidentiality indicators. Moreno did not utilize privacy settings to restrict access to her post, which might have indicated the confidential nature of her Ode. Instead, her post was accessible to anyone with an Internet connection.³⁸ Nor did Campbell give any indication that he was going to keep the information confidential. Moreno could have created a small group for disclosure of the Ode and premised invitations to the group upon an indication the group members would keep the information disclosed within confidential, but she did not.

However, there was one external term that might weigh in favor of an implied obligation of confidentiality. The MySpace terms of use prohibit “publicly post[ing] information that poses or creates a privacy or security risk to any person,” violating “the privacy rights, publicity rights, [or] copyrights...of any person,” or “using or distributing any information obtained from the MySpace Services in order to harass, abuse, or harm another person or entity, or attempting to do the same.”³⁹ Thus, by accessing the Ode subject to these terms, Campbell was potentially legally bound to confidence via an agreement with MySpace. However, the facts do not indicate that this term was relied upon or even known by Moreno. This matters because the courts focus on the perception of the parties. Nor do the facts indicate that Campbell intended to harm Moreno by

³⁸ *Moreno v. Hanford Sentinel*, 172 Cal. App. 4th 1125, 1130 (Cal. Ct. App. 2009).

³⁹ *Terms of Use*, MYSPACE, <http://www.myspace.com/index.cfm?fuseaction=misc.terms#ixzz12AolEv1N> (last visited Oct. 12, 2010).

redistributing the post. Ultimately, this factor weighs against a finding of an implied obligation of confidentiality.

Looking at the factors as a whole, a court would likely conclude that Campbell was not bound by an implied obligation of confidentiality. Three of the four factors weigh against such a finding, and the sole factor that favored an implied confidentiality did so only marginally. This analysis demonstrates how the framework might be applied online.

Contrast the Moreno case with a similar dispute that might have a different result under the framework: *Pietrylo v. Hillstone Restaurant Group*.⁴⁰ In this case, the U.S. District Court for the District of New Jersey was asked to determine the privacy interest in information contained on a “closed” webpage on myspace.com. A waiter at a local restaurant called Houston’s, Brian Pietrylo, created a group for he and his fellow employees to vent about their employer “without any outside eyes spying in on [them]”⁴¹ Pietrylo stated on the group’s page that “[t]his group is entirely private, and can only be joined by invitation.” The court noted that the icon for the group, which was Houston’s logo, “would appear only on the MySpace profiles of those who were invited into the group and accepted the invitation.”⁴²

Because each member accessed her or his own profile by entering in a username and password, Pietrylo effectively restricted the website to authorized users in possession of an invitation to the group and a password-protected MySpace profile. Under pressure at a party one night, a Houston’s hostess disclosed her password to her managers. Pietrylo

⁴⁰ 2008 WL 6085437 (D.N.J.).

⁴¹ *Id.* at *1.

⁴² *Id.*

was then fired for creating the group, which resulted in a lawsuit alleging that the managers violated the group's privacy. The court found that "[p]laintiffs created an invitation-only Internet discussion space. In this space, they had an expectation that only invited users would be able to read the discussion."⁴³ Ultimately, a jury found that Houston's managers had violated the Stored Communications Act and the New Jersey Wire Tapping & Electronic Surveillance Act. However, the jury did not support Pietrylo's claim for invasion of privacy. The jury found that Pietrylo had no reasonable expectation of privacy in the MySpace group, presumably because so many people were in the group, although it gave no official reasoning.⁴⁴

Suppose the fired employees brought a claim for breach of an implied obligation of confidentiality against the hostess.⁴⁵ The first factor of the framework, context, would likely weigh in favor of an implied obligation of confidentiality. Like in *Moreno*, the facts do not reveal that access to the group was solicited by the hostess. However, unlike in *Moreno*, these disclosures were made for a specific purpose, to vent "without any outside eyes prying" on the members of the group. Thus, confidentiality was seemingly necessary to further the purpose of the group.

⁴³ *Id.* at *6.

⁴⁴ *Hillstone Restaurant Group v. Pietrylo*, CITIZEN MEDIA LAW PROJECT (July 13, 2009), <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-06-16-Marino%20Verdict.pdf>.

⁴⁵ Additionally, under some theories of the breach of confidentiality tort in the United States and England, a claim for inducement of breach of confidentiality could be successful against the managers. *See, e.g.*, STANLEY, THE LAW OF CONFIDENTIALITY: A RESTATEMENT 1-5 (2008); *Attorney Gen. v. Observer, Ltd.*, (1990) 1 A.C. 109, 268 (H.L.) (appeal taken from eng.); *Campell v. MGN Ltd.*, [2002] EWCA Civ 1373 [2003] Q.B. 633, 662; *see also* Patricia Sanchez Abril, *Private Ordering: A Contractual Approach to Online Interpersonal Privacy*, 45 WAKE FOREST L. REV. 689 (2010); Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 124, 178 (2007) ("[A] third party can freely disclose private facts about a person as long as the third party did not learn the information from a confidant.").

The second factor, the nature of the information, also favors a finding of implied confidentiality. Like in *Moreno*, the information disclosed here was personal in nature because it revealed the negative thoughts of the employees toward their manager. While the information might not inherently expose the discloser to physical harm, it certainly exposes the discloser to some form of retaliation, as evidenced by the fact that Pietrylo was fired for creating the group.

Regarding the third factor, the attributes of the actors and their relationship to each other, there is no evidence the hostess acted in bad faith to receive an invitation to the group. Additionally, there does not appear to be any inequality between the parties. The hostess and the waiters who created the group all were employees of Houston's of relatively the same status with no apparent advantage of resources or bargaining power over another. Unlike in *Moreno*, however, the parties likely had at least a partially developed relationship. Ostensibly, the parties worked together and got to know each other at least slightly before the invitation to join the group was sent out. This factor weighs in favor of finding of an implied obligation of confidentiality.

The final factor – terms of disclosure – is applied the most distinctly from *Moreno*. The website in *Pietrylo* explicitly stated that “[t]his group is entirely private, and can only be joined by invitation.” The website also provided that the icon for the group, which was the restaurant's trademarked logo, “would appear only on the MySpace profiles of those who were invited into the group and accepted the invitation.”⁴⁶ The fact that the privacy settings were used to restrict access to the group also served as a confidentiality indicator. Although the word confidential was apparently not used, the

⁴⁶ *Id.*

confidential nature of the group postings was indicated throughout the website and invitation. This factor weighs heavily in favor of an implied obligation of confidentiality for every member of the group.

Thus, three of the factors weigh in favor of an implied obligation of confidentiality, and one is neutral. Observing the factors as a whole, it is likely that a court would find an implied obligation of confidentiality under this framework. The *Moreno* and *Pietrylo* cases demonstrate the various ways the framework for implied obligations of confidentiality could be applied online in the same way it would be applied to offline cases.

Further Implications for Online Disputes. It should be noted that the framework proposed here could be applied in disputes involving two distinct recipients of information: 1) audience members and 2) intermediaries. The distinction between these two parties is simple but important: An audience member is any individual who was intended to or did access an individual's disclosed information on the Internet. An intermediary is a website, Internet service provider, or similar entity that routes or displays information on the Internet.

Both audience members and intermediaries are recipients of information, but their implied duties of confidentiality might vary under this decision-making framework. Audience members typically have smaller amounts or individual pieces of data, such as a friend who has access to a Facebook profile or the recipient of an e-mail. Intermediaries typically receive much more data and have more motivation to use these "big data" in a commercial way. The merits to and drawbacks from disclosing to both are outside the scope of this article, but it is sufficient to say that in many instances a discloser of

information could benefit from an implied obligation of confidentiality from one or both of these recipients.

As demonstrated above, this proposed framework could guide judges in online disputes and those who disclose and receive information. In order for the concept of implied confidentiality to be useful on the Internet, websites would need to provide greater transparency in their data collection and use practices. While it might be apparent when intended audience members such as recipients of personal e-mails betray the confidence of the discloser, it would be more difficult for Internet users to know when websites have disclosed their information in breach of their implied obligation of confidentiality. A full exploration of this problem is beyond the scope of this dissertation.

Perhaps the most significant implication that would arise from the development of implied obligations of confidentiality on the Internet is utilitarian: implied confidentiality can sometimes serve as a remedy when other privacy remedies, such as the disclosure tort, would fail. As previously discussed, the privacy torts are often ineffective in online disputes, particularly when personal information is self-disclosed. In some instances a claim of an implied obligation of confidentiality might be more appropriate.

SUGGESTIONS FOR FUTURE RESEARCH

This dissertation focused exclusively on cases that expressly addressed claims of implied obligations of confidentiality. Future research could look at other privacy-related disputes where implied confidentiality was ignored when it might have been a viable claim. For example, future research could examine claims for the tort of public disclosure of private facts that stem from one party distributing information that was originally self-disclosed.

Recall the problem identified at the beginning of this dissertation: The rampant self-disclosure of personal information concomitant with an expectation of privacy is a problem because courts have struggled to determine whether and to what degree self-disclosed information is private.⁴⁷ Professor Lior Strahilevitz stated, “Despite the centrality of this issue, the American courts lack a coherent, consistent methodology for determining whether an individual has a reasonable expectation of privacy in a particular fact that has been shared with one or more persons.”⁴⁸ Future research could target these cases of ambiguity and apply the framework proposed in this dissertation in order to test the framework and improve upon it. Particular emphasis could be placed on claims for public disclosure of private facts in online contexts, which have been particularly problematic.⁴⁹

Additional research could also empirically explore the considerations important to disclosers and recipients of information. For example, research could explore which indicators are effective at conveying the implication of confidentiality or which kind of relationships give rise to implied expectations of confidentiality. Future research could ethnographically explore customs of confidentiality in online social networks and attempt to uncover reasons for disclosure of online information. Many disciplines could contribute to this research including media effects, human-computer interaction, psychology, sociology, and behavioral economics. A number of research methods

⁴⁷ Lior Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 920-21 (2005).

⁴⁸ *Id.*

⁴⁹ See, e.g., Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 7-12 (2007) (articulating problems with the public disclosure tort’s application to disputes on the Internet).

including experiments, surveys, and in-depth interviews could be utilized to empirically explore implied obligations of confidentiality on the Internet.

In the information age, the law must adapt to protect certain kinds of self-disclosed information. Given the limited effectiveness of other privacy remedies, the law of confidentiality might be one of the few options left for those seeking to protect their disclosures. The law of implied obligations of confidentiality must be organized and clear in order to effectuate the intentions of parties operating in rapidly changing contexts.

APPENDIX

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