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ARTICLES

"ABSOLUTE AND PERFECT CANDOR" TO CLIENTS

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I. THE LIMITS OF "ABSOLUTE AND PERFECT CANDOR"

Does an attorney owe a client a duty of "absolute and perfect candor?" More than a dozen recent cases from Texas, California, Oklahoma, and the District of Columbia have used this phrase to describe an attorney's fiduciary obligations.[1] Figuratively, the expression sets a useful moral tone, for it makes clear that lawyers must diligently apprise clients of matters bearing upon their affairs. Absent such information, a consumer of legal services would often be unable to chart an intelligent course, and to that extent would be deprived of the right to self-determination.[2]

However, "candor" entails a duty to disclose information without request, as well as a duty to respond honestly when an inquiry is made.[3] If the phrase "absolute and perfect candor" is read liter-

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1. *See* Part III *infra*.

2. *Cf.* JAMES E. MOLITERNO, CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS 191 (2000) (stating "[t]he communication duty is critical to maintaining a quality lawyer-client relationship. . . . [I]n order for the client to intelligently manage his own affairs, the lawyer must explain matters").

3. This interpretation is consistent with both dictionary definitions and case precedent. *See* THE RANDOM HOUSE DICTIONARY OF ENGLISH LANGUAGE 305 (2d ed. 1987) (defining "candor" as "the state or quality of being frank, open, and sincere in speech or expression"); WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 263 (2d ed. 1983) (defining "candor" as "frankness; sincerity; honesty in expressing oneself" and as "a disposition to treat others with fairness; freedom from prejudice or disguise"). The first Texas decision using the term "absolute and perfect candor" to describe the obligations of an attorney to a client involved an attorney's nondisclosure of the fact that he had received compensation from a third party. State v. Baker, 539 S.W.2d 367, 374 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (per curiam). Notwithstanding that the client had made no request for the information, the court held that the client, "as a matter of law, was entitled to know in detail whatever recovery . . . [the attorney] was able to obtain from the judgment debtor." *Id.* The conclusion that "absolute and perfect candor" requires disclosure of information in the absence of a request also finds support in cases arising in other fields. The phrase "absolute and perfect candor" can be traced to the definition of "*uberrimae fides*" in BLACK'S LAW DICTIONARY. *See id.* (applying the term to the attorney-client relationship). The doctrine of "*uberrimae fides*" has been held to apply to marine insurance. *See, e.g.*, Houston Cas. Co. v. Certain Underwriters at Lloyd's London, 51 F. Supp. 2d 789, 802 (S.D. Tex. 1999) (asserting that an omission material to risk violates the doctrine whether it is made willfully or accidentally). Addressing issues in the marine insurance context, courts have written:

> This stringent doctrine requires the assured to disclose to the insurer all known circumstances that materially affect the risk being insured. Since the assured is in the best position to know of any circumstances material to the risk, he must reveal those facts to the underwriter, rather than wait for the underwriter to inquire.

Home Ins. Co. v. Spectrum Info. Techs., Inc., 930 F. Supp. 825, 836 (E.D.N.Y. 1996) (quoting with approval Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 13 (2d Cir. 1986)).

ally and without qualification, it cannot possibly be an accurate statement of an attorney's obligations under all circumstances. To begin with, such a standard would be impractical. A duty of candor that is "absolute and perfect" would require a lawyer to convey to a client every piece of data coming into the lawyer's possession, no matter how duplicative, arcane, unreliable, or insignificant. Little would be gained by imposing such an exacting obligation, and much would be lost in terms of efficiency and expense.[4] If lawyers were required to be mere relayers of information and not permitted to exercise judgment in terms of what facts to convey to clients, the legal system would run far less smoothly than it does today. It has been impressively urged that the essence of good lawyering is the exercise of judgment.[5] Arguably, evaluative discretion must extend just as readily to communicating with clients, as to investigating facts, examining witnesses, negotiating deals, drafting documents, or crafting solutions.

An unbending requirement of "absolute and perfect candor" would also leave no room for competing interests favoring the privacy of information that a client might in some sense want or even need to know. Such competing interests arise in an infinite variety of situations, and occasionally they may be of sufficient weight to warrant accommodation. The issue here can be drawn in relief by just a few questions. Does the duty of "absolute and perfect candor" require a lawyer to disclose that he or she: (a) is currently suffering marital difficulties that could affect the quality of the representation?, (b) was granted special accommodations in law school for a learning disability?,[6] (c) failed the bar examination on

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4. *See generally* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 74-75 (5th ed. 1998) (discussing the conflict between an attorney's duty of diligence and duty to communicate).

5. *See* ANTHONY T. KRONMAN, THE LOST LAWYER 3 (1993) (discussing the ideal of the lawyer-statesman and asserting "it is this quality of judgment that the ideal of the lawyer-statesman values most"); *id.* at 61 (explaining "excellence of judgment"); *id.* at 93 (discussing "excellence of judgment").

6. *Cf.* Frances A. McMorris, *Aspiring Lawyer with Dyslexia Gets Test Access*, WALL ST. J., July 18, 1997, at B1, 1997 WL-WSJ 2428245 (stating, in a discussion of a lawyer who was granted double time to take the bar exam, "[a]lthough lawyers aren't required to disclose their disabilities to clients, he says he felt it wasn't ethical to charge for all of his time" that he took to read records and write letters while working for clients). In 1990, Congress passed the Americans with Disabilities Act. One of the consequences is that educational institutions are now required to provide special accommodations for students with learning disabilities, which may include such things as extra time to complete tests

the first try?, or (d) knows interesting, but nonessential, confidential information about a friend of the client? Each of these questions raises an issue as to whether other interests can take precedence over the attorney's duty of candor to the client. At a minimum, competing interests should not automatically be disregarded simply because a lawyer-client relationship exists. Consequently, "absolute and perfect candor" must inevitably mean something less than total disclosure of everything a lawyer knows that might be of interest or use to a client.

The question of what a lawyer must disclose to a client is of ubiquitous importance. Lawyers face this issue with respect to everything they learn about their client's affairs. This Article will probe the limits of the concept of "absolute and perfect candor" in the context of civil liability, for malpractice actions frequently allege that attorneys have failed to disclose sufficient information to a client.[7] This Article will show that the disclosure obligations owed by lawyers to clients, while of eminent importance and mightily demanding, are not always "absolute and perfect" in terms of the duties they entail. This Article argues that the concept of "absolute and perfect candor" applies only in selected areas of legal representation (such as business transactions between attorneys and clients[8] and within the terms of specific rules relating to matters such as conflict of interest,[9] client funds and property,[10] contract initia-

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(*e.g.*, double time), private exam rooms, and computers or other equipment. *See generally* Donald H. Stone, *What Law Schools Are Doing to Accommodate Students with Learning Disabilities*, 42 S. TEX. L. REV. 19, 26 (2000) (discussing accommodations).

7. *See, e.g.*, Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 900 (Tex. App.—Dallas 2001, pet. filed) (regarding an action for legal malpractice, breach of fiduciary duty and loyalty duty based on failure to disclose that the attorney, as a member of city council, would or could take positions that would affect the real estate transactions in which the firm represented the plaintiff). *See generally* JEFFREY M. SMITH & RONALD E. MALLEN, PREVENTING LEGAL MALPRACTICE 83 (1989) (suggesting that attorneys failure to sufficiently analyze clients and transactions has produced a significant amount of malpractice litigation).

8. *See* Golden Nugget, Inc. v. Ham, 589 P.2d 173, 175 (Nev. 1979) (holding that a corporate director, who obtained a leasehold with an option to purchase at a time when the corporation had an interest in acquiring such property, had a "duty to the corporation, as its attorney, not only to inform . . . [the corporation] fully of the factual circumstances of the transaction, but also . . . of its rights in regard thereto").

9. *See* Conoco Inc. v. Baskin, 803 S.W.2d 416, 419 (Tex. App.—El Paso 1991, no writ) (stating that the Texas Disciplinary Rules of Professional Conduct permit "an attorney or law firm to continue multiple representation of adversary clients where . . . consent is obtained from each client after full disclosure of the existence, nature, implications and

tion,[11] and settlement offers).[12] Otherwise the disclosure obliga-

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possible adverse consequences of such multiple representation"); *see also* Simpson v. James, 903 F.2d 372, 377 (5th Cir. 1990) (stating that, under Texas law for real estate transactions, once an attorney has undertaken full disclosure, in some circumstances there may not be a conflict of interest if the attorney represents both parties); Employers Casualty Co. v. Tilley, 496 S.W.2d 552, 558 (Tex. 1973) (stating that "[i]f a conflict arises between the interests of the insurer and the insured, the attorney owes a duty to the insured to immediately advise him of the conflict"); *Two Thirty Nine Joint Venture*, 60 S.W.3d at 900 (concluding that an attorney's fiduciary duty to a client includes the disclosure of any conflicts of interest that could affect an attorney's representation of the client's interests).

10. *See* MODEL RULES OF PROF'L CONDUCT R. 1.15(d) (2002) (stating that "[u]pon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person . . . and, upon request by the client or third person, shall promptly render a full accounting regarding such property").

11. *See* Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22-23 (Tex. App.—Tyler 2000, pet. denied) (holding that the evidence, which showed among other things that the attorneys were vague regarding their fee arrangement, was sufficient to support the jury's finding of breach of fiduciary duty); MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2002) (stating that "the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation"). According to the American Law Institute:

> The basis or rate might be a specified hourly charge, a percentage, or a set of factors on which the fee will be based. If the fee is based on a percentage of recovery (or other base), the client should also be informed if a different percentage applies in the event of settlement, trial, or appeal. For a client sophisticated in retaining lawyers, a statement that "we will charge our usual hourly rates" ordinarily will suffice. . . .
>
> The information should indicate the matter for which the fee will be due, for example, "preparing and trying (but not appealing) your auto injury suit." If the services are not specifically described, the lawyer will be held under § 18 to provide the services that a reasonable client would have expected.
>
> Most states require that contingent-fee contracts be in writing. . . .

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 38 cmt. b (2000). It is important to note, however, that the disclosure obligations pertinent to contract initiation are limited. If no professional relationship between the attorney and client exists at the time the agreement is entered into, the stringent rules applicable to business transactions between attorney and client do not apply, and therefore the contract is not presumptively fraudulent on the part of the attorney. *See* Johnson v. Cofer, 113 S.W.2d 963, 965 (Tex. Civ. App.—Austin 1938, no writ) (stating that the rule where a transaction between lawyer and client will be "strictly scrutinized" only applies after commencement of the attorney and client relationship).

12. *See* Joos v. Auto-Owners Ins. Co., 288 N.W.2d 443, 445 (Mich. Ct. App. 1979) (holding that an attorney breached applicable standard of care when he failed to inform his client of offers to settle prior to trial); Rizzo v. Haines, 555 A.2d 58, 66 (Pa. 1989) (holding that an attorney's failure to convey each settlement offer to clients in personal injury cases and failure to investigate offers that were proposed constituted malpractice); MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 1 (2002) (stating that "a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in

tions of attorneys should be defined by the reasonable-care standard of negligence.

II. Other Formulations of Disclosure Obligations

The rubric of "absolute and perfect candor" is rooted in the law of fiduciary duty.[13] In this area of the jurisprudence, American courts frequently have been moved to invoke the most demanding rhetoric,[14] perhaps because clients are often at a disadvantage in terms of expertise, information, or economic power.[15] The soaring imagery of Justice John B. Winslow of the Wisconsin Supreme Court is illustrative. He wrote:

> Attorneys are ministers of justice as well as courts, and justice will not be contented with half-hearted service on the part of her ministers, nor will she tolerate a bargain counter within her temple. If an attorney purchase[s] his client's property, concerning which his advice is sought, the transaction is always viewed with suspicion, and the attorney assumes the heavy burden of proving not only that there

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a criminal case must promptly inform the client of its substance unless" prior discussions with the client have left it clear that the proposal will be unacceptable).

13. *See* Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 199 (Tex. 2002) (discussing the general nature of fiduciary duty in a case involving the obligations of associate attorneys to law firms for which they work). The court wrote:

> Fiduciary duties are imposed by courts on some relationships because of their special nature. . . . [I]t "is impossible to give a definition of the term that is comprehensive enough to cover all cases." . . . "[G]enerally speaking, it applies to any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction." Our courts have long recognized that certain fiduciary duties are owed by a trustee to a beneficiary of the trust, an executor to the beneficiaries of an estate, and an attorney to a client.

Id.

14. *Cf.* Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 67 (5th ed. 1998) (stating "[s]ome fiduciaries have higher obligations than other fiduciaries, and lawyers have among the highest").

15. *See id.* (providing three reasons supporting fiduciary obligations). Gillers states:

> At least three reasons support imposing fiduciary obligations on a lawyer after the professional relationship is established. First, the client will likely have begun to depend on the attorney's integrity, fairness, superior knowledge and judgment. Second, the attorney may have acquired information about the client that gives the attorney an unfair advantage in negotiations between them. Finally, the client will generally not be in a position where he or she is free to change attorneys, but will rather be economically or psychologically dependent on the attorney's continued representation.

Id.

was no overreaching of the client, but that the client acted upon the fullest information and advice as to his rights.[16]

Similarly, Justice Alberto Gonzalez of the Texas Supreme Court wrote:

> In Texas, we hold attorneys to the highest standards of ethical conduct in their dealings with their clients. . . . As Justice Cardozo observed, "[a fiduciary] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." Accordingly, a lawyer must conduct his or her business with inveterate honesty and loyalty, always keeping the client's best interest in mind.[17]

However, in exploring the meaning of "absolute and perfect candor" as a fiduciary concept, it is useful to remember that fiduciary duty law is only one source of the legal principles that govern the actions of attorneys. Other important sources include tort law and contract law.[18] The obligations imposed by these various bodies of

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16. Young v. Murphy, 97 N.W. 496, 497 (Wis. 1903). The court further stated:

> In other words, the attorney must prove *uberrima fides*, or the transaction will be set aside by a court of equity. These principles are so well established as to need no citation of authorities, and to the credit of the profession, be it said, it is rarely necessary to invoke them.

Id. at 497 (emphasis added).

17. Lopez v. Muñoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 866-67 (Tex. 2000) (Gonzalez, J. concurring and dissenting) (quoting Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928)); *see also* Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964) (expanding on the attorney-client fiduciary relationship). The court stated:

> The relation between an attorney and his client is highly fiduciary in nature, and their dealings with each other are subject to the same scrutiny, intendments and imputations as a transaction between an ordinary trustee and his *cestui que trust*. "The burden of establishing its perfect fairness, adequacy, and equity, is thrown upon the attorney. . . ."

Id.

18. Of course, disciplinary rules also shape the duties of attorneys. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002) (stating the Rule for Communication). Model Rule 1.4 states: "(a) A lawyer shall . . . (3) keep the client reasonably informed about the status of the matter . . . (4) promptly comply with reasonable requests for information . . . (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* However, such ethics rules are intended to protect the public and do not purport to establish the standard of care for civil causes of action. Thus, paragraph 20 of the Preamble to the Model Rules states:

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. . . . The Rules are designed to provide guidance to lawyers and to provide a

law must, in the end, be consistent or at least reconcilable if lawyers are to be able to determine what is required of them when performing professional duties.

A. *Tort Law*

Under the law of torts, the obvious starting point for thinking about attorney liability for breach of the duty of candor is the tort of deceit.[19] That widely recognized action[20] requires proof of a false or misleading statement or of a failure to disclose information under circumstances where there is a duty to speak.[21] The plaintiff must also show, typically by more than a mere preponderance of evidence,[22] that the defendant acted with scienter (that is, knowl-

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structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

Id. at Preamble. The purpose of this article is to discuss malpractice liability of attorneys to clients, rather than attorney discipline. Consequently, the law of attorney discipline will be discussed only where it is important to an understanding of civil-liability principles.

19. *See, e.g.*, Holland v. Brown, 66 S.W.2d 1095, 1102 (Tex. Civ. App.—Beaumont 1933, writ ref'd) (stating the rule that "failure of an attorney dealing with his client to disclose to him the material facts and the legal consequences flowing from the facts constitutes actionable fraud"); *cf.* Thomas v. White, 438 S.E.2d 366, 369 (Ga. Ct. App. 1993) (discussing claim based on fraudulent concealment that client's case had been lost).

20. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 883 (2d ed. 1999) (stating that "[e]very jurisdiction recognizes an action for 'deceit'"); *see also* W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 727-28 (5th ed. 1984) (tracing the "ancient" origin of deceit back to a writ known as early as 1201).

21. *See* Ivey v. Neyland, 25 S.W.2d 313, 315 (Tex. Comm'n App. 1930, holding approved) (stating that "[w]e think the relation of attorney and client existed and that it was the duty of the attorney, and his agent in dealing with the client, to make a full and fair disclosure of all material matters known to the attorney in connection with the stock, and that a failure to do so would constitute legal fraud"); Johnston v. Andrade, 54 S.W.2d 1029, 1031 (Tex. Civ. App.—Fort Worth 1932, writ ref'd) (holding attorney liable to client based on failure to disclose knowledge of pending negotiations affecting the value of property being sold); RESTATEMENT (SECOND) OF TORTS § 551(1) (1977) (stating the rule on liability for nondisclosure); W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 728 (5th ed. 1984) (stating that deceit requires "[a] false representation made by the defendant"); *see also* Arnall, Golden & Gregory v. Health Serv. Ctrs., Inc., 399 S.E.2d 565, 567 (Ga. App. Ct. 1990) (holding in an action by a client against a law firm that a fraud claim was sufficient to raise issues of fact even though the claim was based on concealment, compared to actual misstatements, for "[c]oncealment per se constitutes actual fraud where one party has the right to expect full communication of the facts from another"); Hennigan v. Harris County, 593 S.W.2d 380, 383-84 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (permitting fraud action by third persons based on attorney's failure to disclose that a judgment had been satisfied).

22. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 883 (2d ed. 1999) (stating that "[f]raud, it is often said, must be established by 'clear and con-

edge of the representation's falsity or reckless disregard for its truth)[23] and intended to induce reliance.[24] However, even then liability will not be imposed unless the misrepresentation was sufficiently trustworthy[25] and material[26] that a reasonable person would

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vincing evidence' or by a 'clear preponderance of the evidence'"). *But see* Yeldell v. Goren, 80 S.W.3d. 634, 637 (Tex. App.—Dallas 2002, no pet.) (holding that "[s]light circumstantial evidence of fraud, when considered with the breach of a promise to perform, is sufficient to support a finding of fraudulent intent").

23. *See* RESTATEMENT (SECOND) OF TORTS § 526 (1977) (defining scienter in slightly different terms); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 741-42 (5th ed. 1984) (stating that "[t]he intent which becomes important is the intent to deceive . . . which has been given the name 'scienter[.]' . . . [I]t is present when the representation is made without any belief as to its truth, or with reckless disregard whether it be true or false"); *see also* Prudential Ins. Co. v. Jefferson Assoc., 896 S.W.2d 156, 163 (Tex. 1995) (stating that "[a] statement is not fraudulent unless the maker knew it was false when he made it or made it recklessly without knowledge of the truth").

24. *Cf.* Sears, Roebuck & Co. v. Meadows, 877 S.W.2d 281, 282 (Tex. 1994) (per curiam) (reversing judgment because trial court refused to include "intent to mislead" in definition of fraud).

25. *See* VINCENT R. JOHNSON, MASTERING TORTS 251 (2d ed. 1999) (stating that in part, trustworthiness is a precondition to proof of reliance, which is an element of deceit). The text explains:

> Unless the plaintiff has in fact relied upon the asserted misrepresentation, there is no factual connection between the defendant's conduct and the alleged damages (that is to say, no factual causation) and, hence, there can be no suit. . . .
>
> If the falsity of the defendant's statement is obvious to the plaintiff's senses at the time it is made (*e.g.*, the plaintiff sees that the horse has two eyes, not three, as claimed by the defendant) or could be discovered by a mere cursory examination, there may be no reliance. . . .
>
> . . . .
>
> Reliance is also not permitted if a "danger signal" or "red light" places the plaintiff on notice that further inquiry is required.

Id. at 251. Trustworthiness also underlies the so-called "fact" requirement. Thus:

> The tort actions for misrepresentation (including deceit) are intended to protect the right of individuals to decide intelligently their own affairs based on an assessment of relevant information. Consequently, for an action to lie, there must be a false assertion that carries with it sufficient definiteness and trustworthiness that it is likely to infect the plaintiff's decision-making process. It is frequently said that the assertion must be one of fact . . . and not merely an opinion. . . . Special circumstances may justify reliance on an opinion or prediction, in which case an action may lie if that statement is misleading. . . . But, in general, no reliance may be placed on statements of pure opinion. They are mere personal views which do not misrepresent the facts relevant to the plaintiff's decision-making process, even if they express an unfavorable conclusion of how the evidence should be viewed.

Id. at 246; *cf.* Cheney v. Barber, 242 S.E.2d 358, 359 (Ga. Ct. App. 1978) (stating that "[f]raud cannot consist of mere broken promises, unfilled predictions or erroneous conjectures as to future events").

have taken it into account in choosing a course of action. Statements that amount to mere puffing or that concern matters logically having no bearing on the client's decision-making process will not give rise to liability.[27] Presumably, if an attorney tells a client that the tract of land the client is considering buying is "beautiful," the utterance will not support an action for deceit even if the attorney in fact thinks that the land is ugly and makes the statement only out of "courtesy." Thus, even in cases of high culpability (*i.e.*, cases where there is clear and convincing evidence of scienter), the duty of candor falls short of being "absolute and perfect."

Deceit is not the only tort action bearing upon issues of candor. Malpractice claims against attorneys by clients are frequently founded not on intentional or reckless conduct, but upon nothing worse than mere negligence. In a tort action for professional negligence the legal question is whether the attorney did what an ordinary, reasonable, prudent attorney would have done under the same or similar circumstances.[28] Liability depends not on the defendant lawyer's state of mind (scienter),[29] but on whether the law-

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26. *See* Vincent Robert Johnson, *Fraud and Deceit, Including Negligent and Innocent Misrepresentation* § 1.03[7], *in* PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES (1988) (defining materiality). The text states:

> Virtually all common law forms of relief based on misrepresentation require that the statement relate to a material fact. A material fact is one to which a reasonable person would give some weight in making a decision; it need not be the sole or predominant factor in the recipient's decision making process.

Id. (citations omitted); *see also id.* § 1.03[1] (stating that "an action will not lie in the absence of some perversion of material factual data chargeable to the defendant").

27. *See* RESTATEMENT (SECOND) OF TORTS § 542 cmt. e (1977) (stating that buyers are not entitled to rely upon "puffing"); *see also* Streber v. Hunter, 221 F.3d 701, 728 n.40 (5th Cir. 2000) (recognizing that deceptive trade practices action cannot be based on "a vague, immeasurable opinion," but holding that the case before it "could not be more different"); Douglas v. Delp, 987 S.W.2d 879, 886 (Tex. 1999) (citing cases involving "mere" puffing and stating in an action against a law firm based on violation of the deceptive trade practices act, rather than deceit, that a general representation that a settlement agreement would protect the client's interests was too vague under the facts of the case to support liability); *Prudential Ins. Co.*, 896 S.W.2d at 163 (stating that representations that a "building was 'superb,' 'super fine,' and 'one of the finest little properties in the City of Austin'" were "merely 'puffing' or opinion, and thus could not constitute fraud").

28. *See* Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989) (stating that "[a] lawyer . . . is held to the standard of care which would be exercised by a reasonably prudent attorney. The jury must evaluate his conduct based on the information the attorney has at the time of the alleged act of negligence").

29. *See id.* at 665 (indicating that "[t]he standard is an objective exercise of professional judgment, not the subjective belief that his acts are in good faith").

yer's conduct measured up to what may reasonably be expected of a professional in the field of law.[30] If the conduct falls short of meeting the standard of care, the lawyer will be held liable regardless of what the lawyer thought about the risks or intended.[31]

There is a world of difference between a legal standard that requires "reasonable" disclosure and one that requires "absolute and perfect candor." By embracing a rule of reasonableness, negligence principles recognize that the complexities and uncertainties of law practice mandate existence of a scope of action within which, free from the risk of legal liability, attorneys must be able to exercise judgment as to how to conduct representation.

The reasonableness standard of negligence law is echoed in various expressions of state law[32] and in the blackletter law of the Restatement (Third) of the Law Governing Lawyers, which states:

> § 20. A Lawyer's Duty to Inform and Consult with a Client
>
> (1) A lawyer must keep a client *reasonably informed* about the matter and must consult with a client to a *reasonable extent* concerning decisions to be made by the lawyer . . . .
>
> (2) A lawyer must promptly comply with a client's *reasonable requests for information.*
>
> (3) A lawyer must notify a client of decisions to be made by the client . . . and must explain a matter to the extent *reasonably necessary* to permit the client to make informed decisions regarding the representation.[33]

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30. *Cf. id.* at 664-65 (stating that "allowing the attorney to assert his subjective good faith, when the acts he pursues are unreasonable as measured by the reasonably competent practitioner standard, creates too great a burden for wronged clients to overcome").

31. *See, e.g.*, Vaughan v. Menlove, 3 Bing. (N.C.) 468, 132 Eng. Rep. 490, 492 (1837) (holding that a defendant could not avoid liability for a fire that he caused merely by showing that he acted "bona fide to the best of his judgment"). This rule is not special to lawyers. It applies throughout the law of negligence, and has been followed for decades, if not centuries.

32. *See, e.g.*, CAL. BUS. & PROF. CODE § 6068(m) (Deering Supp. 2002) (stating that attorneys are under a duty "[t]o respond promptly to *reasonable* status inquiries of clients and to keep clients *reasonably informed* of significant developments in matters with regard to which the attorney has agreed to provide legal services") (emphasis added).

33. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 (2000) (emphasis added). Other provisions in the Restatement that might not ordinarily be described as imposing an obligation of candor nevertheless bear upon what information must be communicated to clients. Some of these provisions impose seemingly clear obligations. For example, section 38 states in relevant part:

> § 38. Client-Laywer Fee Contracts

Amplifying the flexible nature of the duty imposed by these provisions, the commentary to the section states:

> The duty includes both informing the client of *important developments* in a timely fashion, as well as providing a *summary of information* to the client at reasonable intervals so the client may be apprised of progress in the matter. . . .
>
> . . . .
>
> The appropriate extent of consultation is itself a proper subject for consultation. The client may ask for certain information or may ex-

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> (1) Before or within a reasonable time after beginning to represent a client in a matter, a lawyer *must communicate* to the client, in writing when applicable rules so provide, the basis or rate of the fee, unless the communication is unnecessary for the client because the lawyer has previously represented that client on the same basis or at the same rate. . . .

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 38 (2000) (emphasis added). Similarly, section 44 states:

> § 44. Safeguarding and Segregating Property
>
> . . . .
>
> (2) Upon receiving funds or other property in a professional capacity and in which a client or third person owns or claims an interest, a lawyer *must promptly notify the client* or third person. The lawyer *must promptly render a full accounting* regarding such property upon request by the client or third person.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 44 (2000) (emphasis added). Comment e to section 20 states:

> A lawyer must ordinarily report promptly to the client a settlement offer in a civil action or a proposed plea bargain in a criminal prosecution. Further disclosure is required when a proposed settlement is part of an aggregate settlement involving claims of several clients.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. e (2000). However, other related provisions impose obligations that are not absolute. For example, section 46 states in relevant part:

> . . . .
>
> (2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, *unless substantial grounds exist to refuse*.
>
> (3) Unless a client or former client consents to non-delivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client *reasonably needs*.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46 (2000) (emphasis added). Another provision of the Restatement states that "a lawyer must . . . deal honestly with the client." *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(3) (2000) (emphasis added). But that statement raises as many questions as it answers, for the issue still remains as to what must be disclosed in order to be honest.

> press the wish not to be consulted about certain decisions. The lawyer should ordinarily honor such wishes. . . . To the extent that the parties have not otherwise agreed, a standard of *reasonableness under all the circumstances determines the appropriate measure of consultation*. Reasonableness depends upon such factors as the importance of the information or decision, the extent to which disclosure or consultation has already occurred, the client's sophistication and interest, and the time and money that reporting or consulting will consume. So far as consultation about specific decisions is concerned, the lawyer should also consider the room for choice, the ability of the client to shape the decision, and the time available. . . . The lawyer may refuse to comply with unreasonable client requests for information.[34]

In the medical malpractice field, widespread recognition of the doctrine of informed consent has increased the disclosure obligations of physicians.[35] A medical professional, absent special circumstances, must disclose all material risks of, and alternatives to, a course of treatment, regardless of what is customary among professionals practicing in the community.[36] The informed-consent doctrine has not yet found equally clear recognition in the legal malpractice field, although there is good authority that the same principles apply as readily in law as in medicine.[37] But even an

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34. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmts. c & d (2000) (emphasis added).

35. *See* Ketchup v. Howard, 543 S.E.2d 371, 376, 381-86 (Ga. Ct. App. 2000) (recognizing informed-consent doctrine and summarizing, in an appendix, the law of the various states).

36. *See, e.g.*, Scott v. Bradford, 606 P.2d 554, 557 (Okla. 1979) (finding that "[t]he doctrine imposes a duty on a physician or surgeon to inform a patient of his options and their attendant risks").

37. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. e (2000) (the Restatement states:

> Before a client signs a contract, for example, the lawyer ordinarily should explain its provisions. . . . The lawyer ordinarily must explain the pros and cons of reasonably available alternatives. The appropriate detail depends on such factors as the importance of the decision, how much advice the client wants, what the client has already learned and considered, and the time available for deliberation);

see also Sierra Fria Corp. v. Donald J. Evans, P.C., 127 F.3d 175, 179-80 (1st Cir. 1997). The *Sierra* court explained:

> [W]hen a client seeks advice from an attorney, the attorney owes the client "a duty of full and fair disclosure of facts material to the client's interests." This means that the attorney must advise the client of any significant legal risks involved in a contemplated transaction, and must do so in terms sufficiently plain to permit the client to assess both the risks and their potential impact on his situation.

informed-consent standard requiring disclosure of risks and alternatives in legal representation would be less demanding than an unrestrained duty of "absolute and perfect candor." The informed-consent doctrine as recognized in the medical field is hedged not only by the requirement of materiality,[38] but by exceptions that dispense with disclosure if the information in question is already known to the patient, if an emergency exists, or if revelation would be detrimental to the best interests of the patient.[39]

B. *Contract Law*

Contract law is concerned mainly with obligations voluntarily assumed, rather than with duties imposed by law in the absence of consent by the parties.[40] A lawyer may contract to assume obligations greater than those mandated by otherwise applicable tort and

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Id. (citing Williams v. Ely, 668 N.E.2d 799, 806 (Mass. 1996)); *cf.* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 597 (3d ed. 2001) (stating that "[informed consent] standard has been incorporated in various conflict of interest provisions requiring that lawyers shall not represent clients in situations unless 'each client consents after consultation'"). "In principle, informed consent seems like an attractive alternative to paternalism; in practice it is often difficult to apply." *Id.*

38. *See, e.g.*, Scott v. Bradford, 606 P.2d 554, 557-58 (Okla. 1979) (describing disclosure of material risks in the medical field). According to the court:

> [A] physician's communications must be measured by his patient's need to know enough to enable him to make an intelligent choice. In other words, full disclosure of all *material risks* incident to treatment must be made. There is no bright line separating the material from the immaterial; it is a question of fact. A risk is material if it would be likely to affect patient's decision. When non-disclosure of a particular risk is open to debate, the issue is for the finder of facts.

Id. at 558.

39. *See Scott*, 606 P.2d at 558 (defining exceptions to disclosure in the medical field). The court wrote:

> [T]here are exceptions creating a privilege of a physician not to disclose. There is no need to disclose risks that either ought to be known by everyone or are already known to the patient. Further, the primary duty of a physician is to do what is best for his patient and where full disclosure would be detrimental to a patient's total care and best interests a physician may withhold such disclosure, for example, where disclosure would alarm an emotionally upset or apprehensive patient. Certainly too, where there is an emergency and the patient is in no condition to determine for himself whether treatment should be administered, the privilege may be invoked.

Id. at 558.

40. *See* Roy Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 246 (1994) (noting that "[t]he essence of an action for breach of contract is violation of an obligation assumed by consent").

fiduciary duty principles, and failure to meet such obligations will give rise to a malpractice claim framed as a breach of contract.[41]

Conversely, contract law may be used to waive legal protection that would otherwise be available. Thus, a legally enforceable waiver of rights by the plaintiff, such as a signed document assuming risks, can insulate the defendant from at least some types of liability.[42] Of course, whether a waiver is valid is often the crucial question. Waivers that are insufficiently specific to cover the underlying facts[43] or contrary to public policy[44] afford a defendant no protection. Thus, if a law firm seeking to rely on a client's release fails to rebut the unfairness or invalidity associated with a contract between a lawyer and client, the release will be held invalid.[45]

With respect to malpractice liability and the obligations imposed on attorneys by fiduciary duty principles, a key issue is whether a lawyer and client may vary the terms of the relationship. That is, can the lawyer and client determine what types of information must be communicated to the client and what need not be disclosed? If so,[46] the law of contracts imposes an important limitation on the requirements of "absolute and perfect candor."

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41. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 cmt. e (2000) (indicating that an appropriately structured contract to increase a lawyer's duties will be held valid).

42. For example, some jurisdictions hold that waivers of liability are not valid with respect to conduct more egregious than mere negligence. *See, e.g., In re* Pacific Adventures, Inc., 27 F. Supp. 2d 1223, 1225 (D. Haw. 1998) (holding that a release of liability for gross negligence violated public policy); Gross v. Sweet, 400 N.E.2d 306, 308 (N.Y. 1979) (holding that "[t]o the extent that agreements purport to grant exemption for liability for willful or grossly negligent acts they have been viewed as wholly void").

43. *See Gross*, 400 N.E.2d at 311 (holding a release from liability invalid because "instead of specifying to prospective students that they would have to abide any consequences attributable to the instructor's own carelessness, the defendant seems to have preferred the use of opaque terminology").

44. *See, e.g.*, Tunkl v. Regents of Univ. of Calif., 383 P.2d 441, 444-45 (Cal. 1963) (discussing factors bearing upon whether an agreement will be void as against public policy).

45. *See* Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co., 20 S.W.3d 692, 699 (Tex. 2000) (holding release invalid).

46. *See* Part IV-E *infra*.

C. *Reconciling the Standard of Care*

According to some observers, malpractice claims based on breach of fiduciary duty are increasingly common.[47] To the extent that is true, it is important to reconcile the expansive rhetoric often found in fiduciary duty cases with the more-precise and better-developed principles that have evolved in the fields of torts and contracts. Otherwise, there is a serious risk that application of fiduciary duty principles will undermine the important considerations of public policy that have shaped the law of deceit, negligence, and freedom to contract. To put the point somewhat differently, it makes no sense to say that negligence principles allow lawyers to exercise discretion on debatable questions, or that contract law permits a lawyer and client to tailor the disclosure obligations in a relationship, if the standard of care in a malpractice action is defined solely by reference to the law of fiduciary duty requiring "absolute and perfect candor." Consequently, fiduciary duty may be properly understood only in a broader context that includes the expectations and requirements that arise from basic tort and contract principles.[48]

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47. *See generally* Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1137 (1999) (stating that "[i]n a recent trend, courts have been permitting disgruntled clients to bring breach of fiduciary duty claims against their attorneys"); Lawrence J. Latto, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 742 (1998) (asserting that "[b]reaches of fiduciary obligations are increasingly the basis for the civil liability of lawyers and law firms"); Steve McConnico & Robyn Bigelow, *Summary of Recent Developments in Texas Legal Malpractice Law*, 33 ST. MARY'S L.J. 607, 625 (2002) (stating that fee forfeiture claims based on breach of fiduciary duty are being pled more frequently).

48. There is a matter of classification that deserves some attention. The RESTATEMENT (SECOND) OF TORTS took the position that breach of fiduciary duty is a tort. *See* RESTATEMENT (SECOND) OF TORTS § 874 cmt. b (1979) (stating that "[a] fiduciary who commits a breach of his duty as a fiduciary is guilty of tortious conduct to the person for whom he should act"). Other sources have echoed that categorization. *See, e.g.*, Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1148 (1999) (stating that breach of fiduciary duty is a tort). While it is true that an action for breach of fiduciary duty is a tort action in the sense that it provides a civil remedy for damages not based on contract, it is useful to remember that the action is based mainly on principles of the law of agency. In that sense, the action is animated by a source of law distinct from the law of torts, and it is therefore appropriate to draw a distinction. Ordinary tort principles say little about fiduciaries; the principles of agency say a great deal. An attorney seeking guidance about his or her fiduciary obligations is better advised to turn to the Restatement of Agency than to the Restatement of Torts. *See generally* Roy Ryden Anderson & Walter W. Steele, Jr., *Fiduci-*

III. CASELAW ON "ABSOLUTE AND PERFECT CANDOR"

A. *Texas Cases*

A line of eleven Texas cases, many of them quite recent, invoke the phrase "absolute and perfect candor" to describe the obligations of an attorney to a client. That series of decisions began more than a quarter of a century ago with a disbarment proceeding in *State v. Baker*.[49] The defendant attorney was charged with violating various rules of ethics by purchasing property at a sheriff's sale, allegedly on behalf of his client, and then using the title to secure further compensation for himself from a third party, without notice to or consent by his client.[50] In discussing the undisclosed purchase and a related settlement agreement, the court wrote, citing to *Smith v. Dean*,[51] that "[t]he relationship between attorney and client has been held to be one of *uberrima fides*."[52] Then, with citation only to *Black's Law Dictionary*,[53] the court explained "[t]his has been described as: 'The most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight.'"[54] Thus, it was with the talismanic invocation of a Latin term and a definition from a

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ary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle, 47 SMU L. REV. 235, 235 (1994) (asserting there are "[t]hree distinct causes of action . . . available to clients for misbehavior by their lawyers: (1) breach of fiduciary duty; (2) breach of contract; and (3) the tort of malpractice").

49. 539 S.W.2d 367 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (per curiam).

50. State v. Baker, 539 S.W.2d 367, 369 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (per curiam).

51. 240 S.W.2d 789 (Tex. Civ. App.—Waco 1951, no writ).

52. *Baker*, 539 S.W.2d at 374. In *Smith*, the court rejected an adverse possession claim asserted by an attorney. *Smith*, 240 S.W.2d at 791. The attorney had taken charge of property in his capacity as attorney and trustee for an estate and never gave notice to any of the beneficiaries that he was claiming the property adversely to them. *See id.* at 790 (establishing the factual background of the case). The court, citing earlier decisions, said that the "relationship of attorney and client is *uberrima fides*, but did not use the phrase "absolute and perfect candor." *Id.* at 791. The *Smith* court cited three decisions from the 1920s and 1930s which used the term "*uberrima fides*" in the course of stating that business transactions between attorney and client are presumptively fraudulent, but those cases also did not use the phrase "absolute and perfect candor." *See id.* at 791 (citing Bell v. Ramirez, 291 S.W. 655, 658 (Tex. Civ. App.—Austin 1927, writ ref'd n.r.e.); Johnson v. Cofer, 113 S.W.2d 963, 965 (Tex. Civ. App.—Austin 1938, no writ); and Baird v. Laycock, 94 S.W.2d 1185, 1189 (Tex. Civ. App.—Texarkana 1936, writ dism'd)).

53. BLACK'S LAW DICTIONARY 1690 (4th ed. 1951).

54. *Baker*, 539 S.W.2d at 374.

dictionary that the Texas line of cases on "absolute and perfect candor" began.

Black's Law Dictionary cites only one source in support of the quoted definition—the commentary of Justice Joseph Story.[55] In his work on *Equity Jurisprudence*, Story proclaimed in sweeping terms:

> [T]he burden of establishing . . . [the] perfect fairness, adequacy, and equity [of a transaction between lawyer and client] is thrown upon the attorney, upon the general rule, that he who [has] bargain[ed] in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other. If no such proof is established, courts of equity treat the cases as one of constructive fraud.[56]

However, Story was discussing only "contracts and transactions" between client and lawyer[57] and situations where "the latter . . . [might derive] . . . benefit . . . from the contracts, or bounty, or other negotiations of the former."[58] In such instances, the interests of the attorney and client are adverse and there are risks of "mischief, which may be brought about by means, secret and inaccessible to judicial scrutiny, from the dangerous influences arising from the confidential relation of the parties."[59] In that context, it is easy to understand the need to hold the attorney to a high standard that affords maximum protection to client interests. However, what Story would have said about an attorney's duty to disclose information to clients in other contexts is a matter of conjecture. So too, whether the *Baker* court would have found the same quotation from *Black's Law Dictionary* appropriate in a malpractice, rather than disciplinary context, or in a case not involving benefit to the attorney, is speculative.

The second Texas decision stating that attorneys have a duty of "absolute and perfect candor" was *Hefner v. State*,[60] a case which affirmed the criminal conviction of an attorney for theft of client

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55. BLACK'S LAW DICTIONARY 1690 (4th ed. 1951).

56. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 311 (12th ed. 1877).

57. *Id.* § 310.

58. *Id.*

59. *Id.*

60. 735 S.W.2d 608 (Tex. App.—Dallas 1987, pet. ref'd).

funds.[61] The attorney had argued that the trial court erred in failing to give a mistake-of-fact instruction.[62] The appellate court rejected this contention on several grounds, including that the attorney lacked a reasonable belief that the client had understood and approved the transfer of funds into the attorney's operating account.[63] The court declared, with citation to *Smith*, that the relationship between attorney and client is *uberrima fides*.[64] It then quoted the definition of that term from *Black's Law Dictionary*, but it cited that language only to *Baker*.[65] The court concluded that an ordinary, prudent man acting in a fiduciary relationship could not have reasonably believed that the client had consented to the transfer of the funds because the facts showed that the attorney-defendant was aware that the client had "been admitted to psychiatric hospitals on at least six occasions" and "was taking medication."[66] Because of its unusual criminal-law posture, *Hefner* offers no guidance as to how far the disclosure obligations of attorneys extend for purposes of civil liability.

The third Texas case using the phrase "absolute and perfect candor," *Resolution Trust Corp. v. H—, P.C.*,[67] is more instructive. In *Resolution Trust Corp.*, the federal district court held that the entire contents of an attorney's client file belongs to the client and must be returned to the client upon demand.[68] The court declined to endorse the law firm's arguments that the duty was limited to materials that the client had previously given to the firm, and that therefore documents created by the firm were not client property for purposes of the obligation to deliver them upon request.[69] In

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61. Hefner v. State, 735 S.W.2d 608, 627 (Tex. App.—Dallas 1987, pet. ref'd).

62. *See id.* at 610 (asserting the fourteen points of error on appeal).

63. *See id.* at 623 (noting the appellate court's opinion of Hefner's claim that the client understood and approved the transfers).

64. *See id.* at 624 (citing Smith v. Dean, 240 S.W.2d 789, 791 (Tex. Civ. App.—Waco 1951, no writ) and suggesting that Hefner was in a fiduciary relationship with the complainant).

65. *See id.* (citing State v. Baker, 539 S.W.2d 367, 374 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (per curiam) (suggesting why Hefner was not entitled to mistake of fact defense).

66. *Hefner*, 735 S.W.2d at 624.

67. 128 F.R.D. 647 (N.D. Tex. 1989).

68. *See* Resolution Trust Corp. v. H—, P.C., 128 F.R.D. 647, 650 (N.D. Tex. 1989) (summarizing the court's decision that a lawyer's client file belongs to the client, not the lawyer).

69. *Id.* at 648.

also rejecting the firm's contention that the "universal practice"[70] of delivering the entire file applied only "when the file is to be turned over to another attorney and not to the client,"[71] the court quoted the "absolute and perfect candor" statement from *Baker*.[72] It concluded:

> Defendant's argument boils down to a belief that only another lawyer can be trusted with the file. This argument cannot be taken seriously, since it would fundamentally undermine the open and trusting nature of the attorney-client relationship by building a wall between the client and attorney behind which an attorney could protect himself and his dealings from scrutiny.[73]

The court also expressly repudiated the firm's argument that because the case involved allegations of misconduct by the client against the firm, the firm had a right to retain the files in anticipation of litigation.[74] It wrote: "So long as an attorney represents his client, he owes that client a *fiduciary duty to disclose all information* to the client."[75] As such, the ruling in *Resolution Trust Corp.* was broad.

During the decade subsequent to *Resolution Trust Corp.*, the American Law Institute crafted the Restatement (Third) of the Law Governing Lawyers. The Restatement, by embracing a more nuanced approach, calls *Resolution Trust Corp.*'s holding into question. According to the Restatement:

> A lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved.[76]

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70. *Id.*

71. *Id.*

72. *Id.* at 649 (quoting State v. Baker, 539 S.W.2d 367, 374 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (per curiam)).

73. *Resolution Trust Corp.*, 128 F.R.D. at 649.

74. *Id.*

75. *Id.* (emphasis added).

76. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46 cmt. c (2000). Note, however, that immediately following the quotation set forth in the text, the comment goes on to state: "Even in such circumstances, however, a tribunal may properly order

Arguably, in light of these developments, the disclosure obligation recognized by *Resolution Trust Corp.* should be understood to apply only when information contained in the client's file was not prepared for internal law firm purposes. Thus limited, the duty recognized by *Resolution Trust Corp.* would be considerably more precise and circumscribed than a broadly worded duty of "absolute and perfect candor."

Perez v. Kirk & Carrigan,[77] the fourth Texas case referring to "absolute and perfect candor" provides no guidance on the disclosure obligations of attorneys.[78] That malpractice action focused not on what attorneys must tell their clients, but on whether liability may be imposed for improper disclosure of client information to third parties.[79] Quotation of the "absolute and perfect candor" and "*uberima fides*" language and citations to the earlier *Hefner* and *Baker* decisions served merely as a preface to the court's recognition that "because of the openness and candor within this relationship, certain communications between attorney and client are privileged from disclosure."[80] The court held that the defendant's disclosure of a client's statement to the district attorney could give rise to civil liability.[81]

The fifth Texas case invoking the language of "absolute and perfect candor" was *Soliman v. Goltz*.[82] Ironically, this unpublished decision is one of the most useful for understanding that there are limits of the disclosure obligations of attorneys. Soliman, the client, sued Goltz, the attorney, alleging in part that Goltz had breached his fiduciary duty by hiring his (Goltz's) daughter to assist in Soliman's suit against a third party without revealing that the

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discovery of the document when discovery rules so provide. The lawyer's duty to inform the client . . . can require the lawyer to disclose matters discussed in a document even when the document itself need not be disclosed." *Id.*

77. 822 S.W.2d 261 (Tex. App.—Corpus Christi 1991, writ denied).

78. Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).

79. *Perez*, 822 S.W.2d at 265-66 (explaining that the client's attorney disclosed confidential communications to the district attorney).

80. *Id.* at 265.

81. *Id.* at 266-67.

82. No. 05-93-00008-CV, 1993 WL 402740 (Tex. App.—Dallas Oct. 6, 1993, no writ) (not designated for publication).

daughter was on social terms with a co-defendant's attorney.[83] Essentially, the argument was that the social relationship gave rise to a conflict of interest that prejudiced Goltz and required disclosure.[84] There was evidence that Goltz's daughter's assistance consisted simply of filing several papers for Goltz.[85] After quoting the oft-cited language from *Baker* that a lawyer owes a client "the most abundant good faith, absolute and perfect candor or openness, and the absence of any concealment or deception, however slight," the court went on to write:

> While the scope of a confidential relationship is broad, the Texas Supreme Court has placed certain general limitations upon the breadth of a fiduciary's duty. The Court has recognized that the fiduciary duties extend only to dealings within the scope of the underlying relationship of the parties. Soliman argues that Goltz's fiduciary duty included an obligation to inform him that Goltz's daughter was dating the Prufrock attorney. We do not agree. Soliman has not cited, nor have we discovered, any authority holding that socializing between attorneys for adverse parties breaches a fiduciary duty. Nor did he allege any facts in his pleadings, summary judgment response or summary judgment evidence which persuade us that Goltz breached a fiduciary duty. We conclude that any obligation to apprise Soliman of such a situation was outside the scope of the fiduciary relationship established by their attorney-client employment relationship. We hold that the trial court correctly ruled that there was no legal basis for Soliman's breach of fiduciary duty claim.[86]

The *Rankin v. Naftalis*[87] decision cited in *Soliman* had involved fiduciary obligations among joint venturers, rather than fiduciary duties owed by attorney to client.[88] However, as discussed below,[89] the principle that fiduciary duties extend no further than the scope of the fiduciary relationship is well established in the attorney-client context. It is therefore not surprising that the *Soliman* court relied upon the rule. What *is* surprising, perhaps, is the court's application of the rule to the facts of the case. The relationship be-

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83. Soliman v. Goltz, No. 05-93-00008-CV, 1993 WL 402740, at *1-2 (Tex. App.—Dallas Oct. 6, 1993, no writ) (not designated for publication).

84. *Id.* at *9.

85. *Id.*

86. *Id.* (citing Rankin v. Naftalis, 557 S.W.2d 940, 944 (Tex. 1977)).

87. 557 S.W.2d 940 (Tex. 1977).

88. *Rankin*, 557 S.W.2d at 944.

89. *See* Part IV-A *infra*.

tween the defendant attorney's daughter/employee and opposing counsel was not clearly a matter wholly extraneous to the subject matter of the representation. Some persons would argue that the lawsuit was the subject matter of the representation and whether the attorney or his daughter/employee's conduct created a conflict of interest was highly relevant. On such matters, reasonable minds may differ as to where the line should be drawn with respect to disclosure.[90] What is important for present purposes is to note that the Dallas Court of Appeals, after invoking the "absolute and perfect candor rule," proceeded to countenance nondisclosure of information which the client, quite plausibly, would like to have known.

In re Legal Econometrics, Inc.,[91] the sixth Texas case in the line of decisions referring to a duty of "absolute and perfect candor," was the first in which a breach of the fiduciary duty to disclose gave

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90. *See* Rice v. Perl, 320 N.W.2d 407, 407, 411 (Minn. 1982) (holding that a law firm and attorney "were under an obligation to disclose to" a client existence of their relationship with claims adjuster who settled the client's claim). The *Rice* court stated: "The existence of the 'business relationship' created, at the very least, a substantial appearance of impropriety with respect to Perl, and a serious conflict of interest for Browne. A reasonable client would certainly wish to know, and has a right to this information, before proceeding with settlement negotiations." *Id.* at 411. Related issues have arisen in other contexts. In *People v. Jackson*, the court overturned a conviction based on ineffective assistance of counsel where neither the defendant or judge were informed that the defense counsel and prosecutor were dating. People v. Jackson, 213 Cal. Rptr. 521, 521-22 (Cal. Ct. App. 1985). California disciplinary rules now require a lawyer to reveal the facts if another party's lawyer is a close relative of, lives with, or has "an intimate personal relationship" with, the lawyer. CALIF. RULES OF PROF. CONDUCT R. 3-320 (West 2002). The Model Rules of Professional Conduct do not directly address relationships such as dating, although a comment to the general conflict of interest rule provides:

> When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, *e.g.*, as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent.

MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 11 (2002) (emphasis added).

91. 191 B.R. 331 (Bankr. N.D. Tex. 1995), *aff'd in part and vacated in part sub. nom* Vaughn v. Atkin, No. 3-95-CV-0457-R, 1997 WL 560617 (N.D. Tex. Aug. 29, 1997) (mem.), *appeal after remand*, No. CA 3:98-CV-2297-R, 1999 WL 304564 (N.D. Tex. May 11, 1999) (mem. and order).

rise to civil liability.[92] There, a law firm implemented a restructuring plan that gave a third-party trustee effective control over a debtor's businesses without disclosing the firm's own prior, close relationship with the third party.[93] After noting the requirement of "absolute and perfect candor," the court concluded, without discussion, that the defendants breached this duty by their acts.[94] However, the court also found, earlier in the opinion, that the same conduct also constituted negligence[95] and gross negligence.[96] Consequently, the case can be read to mean simply that negligent nondisclosure of material information is a breach of fiduciary duty. It is impossible to discern whether, in the view of the court, the "absolute and perfect candor" requirement could give rise to liability in a case involving a nonnegligent (*i.e.*, reasonable, rather than unreasonable) failure to disclose information. That, of course, is a critical question: Does the "absolute and perfect candor" standard require an attorney to do more than act reasonably in communicating with a client?

The language of "absolute and perfect candor" has never appeared in a majority opinion of the Texas Supreme Court. However, on two occasions the phrase has been mentioned as part of other high court opinions, namely in *Vickery v. Vickery*[97] and *Lopez v. Muñoz, Hockema & Reed, L.L.P.*[98]

Civil liability was imposed in *Vickery v. Vickery*,[99] the seventh Texas case referring to "absolute and perfect candor."[100] Citing the quoted phrase to *Perez*, the court of appeals affirmed a jury finding of breach of fiduciary duty in a suit arising from the mishandling of

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92. *In re* Legal Econometrics, Inc., 191 B.R. 331, 348 (Bankr. N.D. Tex. 1995), *aff'd in part and vacated in part sub. nom* Vaughn v. Akin, No. 3-95-CV-0457-R, 1997 WL 560617 (N.D. Tex. Aug. 29, 1997) (mem.), *appeal after remand*, No. CA 3:98-CV-2297-R, 1999 WL 304564 (N.D. Tex. May 11, 1999) (mem. and order).

93. *Id.* at 341.

94. *Id.* at 348.

95. *Id.* at 347.

96. *Id.* at 348-49.

97. 999 S.W.2d 342, 376 (Tex. 1999) (Hecht, J., dissenting from denial of petition for review).

98. 22 S.W.3d 857, 867 (Tex. 2000) (Gonzalez, J., concurring and dissenting).

99. No. 01-94-01004-CV, 1997 WL 751995 (Tex. App.—Houston [1st Dist.] Dec. 4, 1997) (not designated for publication), *pet. denied*, 999 S.W.2d 342 (Tex. 1999).

100. Vickery v. Vickery, No. 01-94-01004-CV, 1997 WL 751995, at *36-37 (Tex. App.—Houston [1st Dist.] Dec. 4, 1997) (not designated for publication), *pet. denied*, 999 S.W.2d 342 (Tex. 1999).

a divorce.[101] However, *Vickery* provides little guidance as to the extent of the duties imposed by "absolute and perfect candor" because the underlying facts were egregious.

The husband, an attorney, tricked his wife into getting an uncontested divorce on the pretext that they would later reunite after threat of certain litigation had passed.[102] There was evidence that a second attorney, while acting at the behest of the husband (a former law school classmate),[103] filed a petition for divorce in the wife's name without ever consulting her or obtaining her permission; prepared and filed a counterclaim for the husband, without disclosing those facts to the wife; and never informed the wife of her rights in a divorce.[104] Not surprisingly, the second attorney was found to have breached her fiduciary duties to the wife.[105] However, such conduct would be regarded as highly improper under virtually any theory of attorney liability (*e.g.*, negligence, fraud, or deceptive trade practices). Consequently, it is impossible to say whether the court of appeals thought that fiduciary duty law imposed obligations greater than those that arise under the rule of reasonable care, which is the touchstone for negligence analysis.

This assessment of *Vickery* finds support in the subsequent opinion of Texas Supreme Court Justice Nathan Hecht. In his dissent from the denial of a petition for review of the case, Hecht noted that the defaulting second attorney had not been charged with any form of heightened culpability and that the asserted breach of fiduciary duty was "no different than . . . [an] ordinary malpractice claim."[106] Justice Hecht did not discuss "absolute and perfect candor," but merely reprinted as an appendix the unpublished opinion of the court of appeals, which contains the phrase.[107] Because Justice Hecht's dissent was concerned primarily (if not exclusively) with the propriety of mental distress and exemplary damages awarded in the case, it would be improper to read his opinion as a

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101. *Vickery*, 1997 WL 751995, at *34 (citing Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied)).

102. *Id.* at *1.

103. *Id.* at *2.

104. *Id.* at *30-31.

105. *Id.* at *1.

106. Vickery v. Vickery, 999 S.W.2d 342, 345 (Tex. 1999) (Hecht, J., dissenting from denial of petition for review).

107. *Id.* at 376.

considered expression of views about the disclosure obligations of attorneys.

In *Lopez*, the eighth Texas case to refer to "absolute and perfect candor," the quoted phrase appeared in an opinion of Justice Alberto Gonzalez, concurring and dissenting.[108] The facts of the suit seemed to offer a good opportunity for the court to explore the disclosure obligations of attorneys, but that appearance proved to be illusory.

The law firm in *Lopez* was sued for breach of contract and breach of fiduciary duty based on its collection of an additional 5% contingent fee under contractual language providing that the supplemental fee would be paid if the subject personal injury suit was "appealed to a higher court."[109] After a tentative settlement of the underlying suit had been reached, the opposing party moved to preserve its right to appeal by filing a cash deposit in lieu of a cost bond with the trial court, and a few days later the case was settled.[110] The law firm took the position that under the contract these facts entitled it to the additional 5% because an appeal had been filed, and when the settlement proceeds were divided it received that amount.[111] However, three years later the client sued for a refund of the 5%.[112]

The Supreme Court held that because the language of the contract was unambiguous, the firm did not breach its contract with the client by collecting the additional 5% fee.[113] The court stated that "the case was 'appealed to a higher court' when the . . . [opposing party] initiated the appellate process by filing . . . [the] cash deposit."[114]

During the appeal in *Lopez*, counsel for the client had argued that the law firm was under a duty to disclose to the client "that there was an alternate colorable construction of the triggering clause,"[115] but that claim was not addressed by the Supreme Court

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108. Lopez v. Muñoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 867 (Tex. 2000) (Gonzalez, J., concurring and dissenting).

109. *Id.* at 859.

110. *Id.* at 859-60.

111. *Id.*

112. *Id.*

113. *Lopez*, 22 S.W.3d at 860.

114. *Id.* at 859.

115. *Id.* at 862.

because it had not been pleaded or briefed.[116] For the same reasons the court did not consider whether the law firm had "concealed the additional fee charge."[117]

Justice Gonzalez wrote separately "to advance the proposition that attorneys owe a fiduciary duty to fully explain the ramifications of their employment contracts to their clients."[118] He stated:

> [T]here are . . . ethical issues in this case, about which the Lopez family does not complain, that nonetheless deserve discussion. The first relates to a lawyers's duty to fully and honestly inform his or her client of a fee arrangement. . . . The fiduciary relationship between attorney and client requires "absolute and perfect candor, openness and honesty, and the absence of any concealment or deception." Fundamentally, a lawyer should always act in the client's best interests. A lawyer and client's negotiations are often imbalanced in favor of the lawyer because of information inequalities and the client's customary reliance on the lawyer's legal advice. Consequently, a lawyer *should fully explain* to the client the meaning and impact of any contract between them. Here, for example, to best serve their client, and to protect their own interests, the Muñoz firm *could have explained* to the Lopez family at the time the contract was signed that the firm believed it would be entitled to an additional fee the moment Westinghouse preserved their right to appeal, even though an agreement in principle had been reached to settle the case.[119]

Justice Gonzalez's opinion raises important issues, but his disposition of those questions seems equivocal. In discussing attorney disclosure obligations, he chose to speak in terms of the optional language of "should" and "could," rather than the mandatory language of "shall" and "must."[120] Was the Justice simply recommending a preferable course for attorneys who aspire to high moral standards, or was he stating that the conduct in question was legally required? It would be difficult to read the disclosure proposed in the final sentence quoted above as a mandatory obligation. Doing so would require a high degree of prescience on the part of the attorneys. Quite possibly, at the time the fee agreement

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116. *Id.*

117. *Id.*

118. *Lopez*, 22 S.W.3d at 864 (Gonzalez, J., concurring and dissenting).

119. *Id.* at 867 (Gonzalez, J., concurring and dissenting) (emphasis added) (quoting Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied) and citing Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988)).

120. *Id.*

in *Lopez* was signed, the law firm was not thinking about how the contract should be construed if at a considerably later point in time there was a large jury verdict and subsequent settlement negotiations moved so quickly that the case settled shortly after the opposing party filed notice of appeal. Surely Justice Gonzalez was not proposing that there is a legally enforceable obligation on attorneys to anticipate and make full disclosures with respect to that sort of distant contractual-interpretation issue concerning which, at that time, there was no binding legal precedent.

Only one other member of the Texas Supreme Court (Chief Justice Phillips) concurred in the Gonzalez opinion. The remaining Justices were content to note that the plaintiffs had failed to preserve any claims that the law firm "breached its fiduciary duty other than by breaching its contract."[121] Justice Harriett O'Neill's opinion noted that the plaintiffs had not alleged, for example, that the law firm "concealed the additional fee charge, improperly delayed execution of the settlement so that Westinghouse would perfect an appeal, or otherwise manipulated the settlement and appeal process in order to charge the higher fee."[122]

Lopez was followed by *Goffney v. Rabson*[123] which added a new grammatical twist by leaving out the word "and" between "absolute" and "perfect," and thus referred to "absolute perfect candor, openness and honesty, and the absence of any concealment or deception."[124] The action alleged that an attorney had improperly handled an estate lawsuit and had deserted the client on the day of trial.[125] However, the court held that the plaintiff's claims for breach of fiduciary duty, breach of contract, and deceptive trade practices merely restated her legal malpractice claim, which had been abandoned before trial.[126] Consequently, a verdict for the plaintiff was reversed.[127] The court did not discuss the disclosure obligations of attorneys, so the decision is not instructive as to the meaning of "absolute and perfect candor."

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121. *Id.* at 862.

122. *Id.*

123. 56 S.W.3d 186 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

124. Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

125. *Id.* at 189.

126. *Id.* at 193-94.

127. *Id.* at 194.

Wolfe v. Shellist,[128] the ninth Texas case involving an attorney in which the words "absolute and perfect candor" appear, also provides no assistance for interpreting the phrase, for it was stated simply as part of a recitation of what the plaintiff alleged in her breach of fiduciary duty claim against her former attorneys.[129] To the plaintiff's consternation, the attorneys, with court permission, had withdrawn from representing her after the plaintiff had given an unfavorable deposition in her underlying personal injury suit.[130] The appellate court did not discuss the "absolute and perfect candor" language or the disclosure obligations of attorneys in affirming a grant of summary judgment against the plaintiff.

The most recent Texas case using the phrase "absolute and perfect candor" is *Francisco v. Foret*,[131] a legal malpractice action arising from the alleged mishandling of a medical malpractice claim.[132] The appellate court held in an unpublished opinion that the trial court had erred in granting summary judgment for the attorneys because:

> The evidence that the Forets settled the Franciscos' claims without consent, withheld that information from the Franciscos, needed to settle the claims for personal financial reasons, and threatened and harassed the Franciscos to ratify the settlement constitutes more than a scintilla of evidence the Forets breached their fiduciary duty to the Franciscos.[133]

The court invoked the rubric of "absolute and perfect candor," but then quickly shifted to the use of other terms. It wrote "[t]he fiduciary relationship between attorney and client requires 'absolute and perfect candor, openness and honesty, and the absence of any concealment or deception.' An attorney is 'obligated to render

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128. No. 01-00-00587-CV, 2001 WL 1587348 (Tex. App.—Houston [1st Dist.] Dec. 13, 2001, no pet.) (not designated for publication).

129. Wolfe v. Shellist, No. 01-00-00587-CV, 2001 WL 1587348, at *4 (Tex. App.—Houston [1st Dist.] Dec. 13, 2001, no pet.) (not designated for publication).

130. *Id.* at *2.

131. No. 05-01-00783-CV, 2002 WL 535455 (Tex. App.—Dallas Apr. 11, 2002, pet. denied) (not designated for publication).

132. Francisco v. Foret, No. 05-01-00783-CV, 2002 WL 535455, at *1 (Tex. App.—Dallas Apr. 11, 2002, pet. denied) (not designated for publication).

133. *Id.* at *4.

a full and fair disclosure of facts material to the client's representation.'"[134]

The *Francisco* court did not explore whether there is a difference between candor that is "absolute and perfect" and disclosure that is "full and fair." Arguably, the latter phrase is more supple and might be expected to give rise to liability less frequently than the former. Certainly, a malpractice defendant would prefer to be judged according to whether his or her disclosures were "full and fair," rather than by whether they were "absolute and perfect."

The *Willis v. Maverick*[135] decision cited in *Francisco* (which was also cited by Justice Gonzalez in *Lopez*) involved a case submitted to the jury solely on a negligence claim.[136] That fact might lead one to conclude that the *Francisco* court was interpreting "absolute and candor" as roughly equivalent to a duty to act reasonably. The conduct in *Francisco*, which involved undisclosed settlement of the clients' claims, would have given rise to liability even under a negligence standard. Thus, neither the discussion nor application of the law in *Francisco* resolves the question whether the standard of "absolute and perfect candor" means that liability may be imposed when an attorney acts reasonably (*i.e.*, nonnegligently) in failing to disclose information.

B. *California, Oklahoma, and District of Columbia Cases*

The phrase "absolute and perfect candor" has appeared in at least seven other cases raising issues of attorney liability, including two malpractice suits from California, four disciplinary proceedings from Oklahoma, and a tort of outrage claim from the District of Columbia.

In *David Welch Co. v. Erskine & Tulley*,[137] the California Court of Appeals quoted the definition of "*uberrima fides*" from *Black's Law Dictionary* that refers to "absolute and perfect candor."[138] The court then went on to hold that the defendant attorney and

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134. *Id.* (quoting Vickery v. Vickery, 999 S.W.2d 342, 376 (Tex. 1999) (Hecht, J., dissenting from denial of petition for review) and Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988)).

135. 760 S.W.2d 642 (Tex. 1988).

136. Willis v. Maverick, 760 S.W.2d 642, 643 (Tex. 1988).

137. 250 Cal. Rptr. 339 (Cal. Ct. App. 1988).

138. David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr. 339, 341 (Cal. Ct. App. 1988).

law firm breached their fiduciary duties to Welch, a former client, by failing to disclose that they were "preparing proposals designed to undercut Welch's business relationships."[139] Welch was a licensed collection agency that had developed a highly profitable business by using confidential techniques to collect delinquent contributions to employee benefit trust funds.[140] The court wrote:

> [D]ue to the pre-existing attorney-client relationship during which defendants were in a position to and did obtain confidential information about Welch's business, *these defendants* had a higher duty [than other law firms], which was to refrain from acquiring any pecuniary interest involving collection work for these trust funds unless they first notified and obtained the informed consent of Welch to submit their business proposals. As they did not do so, the trial court properly found that they had breached their fiduciary duty towards Welch.[141]

Because the attorney-client relationship between Welch and the law firm had ended prior to the alleged breach,[142] *David Welch Co.* is best understood as a case based on continuing non-conflict-of-interest obligations owed to a former client (*i.e.*, the duty not to misuse confidential information), rather than on the obligation to disclose relevant information to a present client (*i.e.*, the duty to communicate). The case therefore is not helpful in understanding what "absolute and perfect candor" entails in the context of an ongoing attorney-client relationship.

The most recent California case also sheds little light on the meaning of "absolute and perfect candor." In *Fox v. Lichter, Grossman, Nichols & Sadler, Inc.*,[143] a minority shareholder brought a derivative claim alleging that the defendant law firm had committed several wrongs, including breach of fiduciary duty to the corporation, its client.[144] In addressing those claims, the court described attorney-client relationships as *uberrima fides*,[145] and

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139. *Id.* at 343.

140. *Id.* at 340.

141. *Id.* at 343.

142. *Id.* at 341.

143. No. B148488, 2003 WL 57979 (Cal. Ct. App. Feb 5, 2003) (not designated for publication).

144. Fox v. Lichter, Grossman, Nichols & Sadler, Inc., No. B148488, 2003 WL 57979, at *3 (Cal. Ct. App. Feb. 5, 2003) (not designated for publication).

145. *Id.* at *6.

quoted the definition of that term from *Black's Law Dictionary*.[146] However, the court did not explore the meaning of the phrase "absolute and perfect candor."

The court found that a cause of action was stated on two grounds. First, plaintiff alleged that the law firm had received payments in amounts greater than the 5% of profits that it was entitled to under its contract with the client.[147] The excessive nature of these payments was unknown to the minority director/plaintiff.[148] Second, the plaintiff also alleged that the law firm had failed to disclose to the client's directors the fact that the firm had facilitated a disadvantageous transfer of a valuable client asset (the name of the business) to another entity to which the client then had to pay royalties for using the name.[149] However, with respect to both of these claims, the plaintiff argued that the firm had engaged in intentional deception amounting to fraud.[150] Consequently, the case has no bearing upon whether a lawyer can be held liable for nonnegligent (*i.e.*, reasonable) nondisclosure that falls short of candor that is "absolute and perfect."

Of the four Oklahoma cases quoting the language of "absolute and perfect candor," three do not shed light upon the disclosure obligations of attorneys to clients. One of those three cases, *State ex rel. Oklahoma Bar Association v. Lacoste*,[151] concerned false statements made by an attorney to a nonclient and to the bar.[152] In the second case, *State ex rel. Oklahoma Bar Association v. Wallace*,[153] the issues related to an attorney's mishandling of funds as trustee of the client's irrevocable trust.[154] And in the third case, *State ex rel. Oklahoma Bar Association v. Taylor*,[155] the proceeding focused on an attorney's misapplication of insurance proceeds that belonged in part to the client's doctor.[156] All three of these cases

146. *Id.* at *6 n.3.

147. *Id.* at *3.

148. *Id.*

149. *Fox*, 2003 WL 57979, at *6.

150. *Id.* at *3 (alleging that assets were "fraudulently transferred" to the firm and that the firm "falsely stated" information related to the transfer of the business name).

151. 813 P.2d 501 (Okla. 1991).

152. State *ex rel.* Okla. Bar Ass'n v. Lacoste, 813 P.2d 501, 504 (Okla. 1991).

153. 961 P.2d 818 (Okla. 1998).

154. State *ex rel.* Okla. Bar Ass'n v. Wallace, 961 P.2d 818, 826 (Okla. 1998).

155. 4 P.3d 1242 (Okla. 2000).

156. State *ex rel.* Okla. Bar Ass'n v. Taylor, 4 P.3d 1242, 1249-50 (Okla. 2000).

used the term *uberrima fides* and quoted the definition of that term from *Black's Law Dictionary*.[157] However, none of the cases addressed the disclosure obligations of attorneys.

The remaining Oklahoma case, *State ex rel. Oklahoma Bar Association v. Busch*,[158] upheld the disbarment of an attorney based on unauthorized use of client funds and other misconduct relating to two different clients.[159] With regard to the one client "[t]he evidence . . . [was] clear and convincing that respondent failed to inform his client (a) that a judgment had been rendered against her and (b) that it contained language which would make the debt nondischargeable in bankruptcy."[160]

With regard to the other client, the court found that the attorney did not return calls[161] and that "[n]ot only did . . . [the attorney] fail to notify . . . [the client] upon receipt of the funds, but he . . . also failed to remit the proceeds."[162] In discussing the latter misconduct, the court wrote:

> A lawyer's highest fiduciary duty comes into being when a legal practitioner is entrusted with a client's funds. A fiduciary of the highest order, the trustee must meet the settlor's expectation that the obligations imposed on the office of trustee will be carried out for the exclusive benefit of the *cestui que trust*. To the *cestui que trust* a trustee always owes *uberrima fides*.[163]

The court then quoted the definition of *uberrima fides* from *Black's Law Dictionary* that refers to "absolute and perfect candor."[164] However, the invocation of that terminology was unnecessary, for the attorney had clearly violated the disciplinary rule that imposes an obligation to "promptly notify the client" after "'receiving funds or other property in which a client . . . has an interest.'"[165] In addition, the various failures to communicate, as the

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157. *Taylor*, 4 P.3d at 1254 n.42; *Wallace*, 961 P.2d at 826 & n.23; *Lacoste*, 813 P.2d at 505 & n.3 (Opala, C.J., dissenting). In *Lacoste* and *Wallace*, the opinions referred to the attorney-client relationships as *uberrima fides*, but in *Taylor* that term was applied to describe the obligations of a trustee to a *cestui que trust*.

158. 976 P.2d 38 (Okla. 1999).

159. State *ex rel.* Okla. Bar Ass'n v. Busch, 976 P.2d 38, 39 (Okla. 1999).

160. *Id.* at 51.

161. *Id.* at 54.

162. *Id.*

163. *Id.*

164. *Busch*, 976 P.2d at 54 n.85.

165. *Id.* at 53 n.78.

court recognized, were violations of the disciplinary rule requiring lawyers to keep clients "reasonably informed" as to the status of representation.[166] As such, the language about "absolute and perfect candor" was surplusage to the court's disciplinary holding and does not illuminate what types of disclosures must be made by attorneys to avoid civil liability.

Herbin v. Hoeffel,[167] a District of Columbia action referring to the duty of "absolute and perfect candor," was a suit in tort alleging, in relevant part, that a public defender had intentionally disclosed confidences to state prosecutors.[168] In finding that a cause of action was stated under the tort of outrage, the court, by way of background, quoted language from the *Perez* decision describing the attorney-client relationship as entailing duties of the "most abundant good faith" and "absolute and perfect candor."[169] However, inasmuch as *Herbin* involved an impermissible revelation of confidences to others, rather than a failure to communicate with the client, it is uninstructive about the duty of candor that is owed to a client.

C. *The Proper Scope of "Absolute and Perfect Candor"*

Although the phrase "absolute and perfect candor" has been invoked frequently by Texas courts, as well as by tribunals in other states, the cases fail to establish that the language imposes a broadly applicable duty, enforceable in civil actions, to disclose information even when exercise of reasonable care would not call for its disclosure. Some of the cases referring to "absolute and perfect candor" can be largely disregarded on the ground that in those suits the courts were faced not with issues of civil liability, but with the considerably different questions of whether disciplinary or criminal liability should be imposed.[170] Other cases can be discounted because while the phrase "absolute and perfect candor"

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166. *Id.* at 50 n.58, 54.

167. 806 A.2d 186 (D.C. 2002).

168. Herbin v. Hoeffel, 806 A.2d 186, 189 (D.C. 2002).

169. *Id.* at 197 (citing Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).

170. *See, e.g.*, Hefner v. State, 735 S.W.2d 608, 626 (Tex. App.—Dallas 1987, pet. ref'd) (involving criminal prosecution); State v. Baker, 539 S.W.2d 367, 369 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (per curiam) (involving disbarment).

was invoked it was not explored in any meaningful way[171] or was not critical to the disposition of those suits.[172] In addition, some of the decisions using the term "absolute and perfect candor" that have imposed liability can be explained simply by the fact that the conduct in question violated clearly established standards of attorney conduct, such as the rules relating to handling of client funds.[173]

It is reasonable to assume that the duty of "absolute and perfect candor" applies most forcefully in instances where the interests of the attorney and client are adverse,[174] as in the case of a business transaction between them.[175] Although cases involving these types of facts generally have not used the phrase "absolute and perfect candor," they frequently speak of "*urberrima fides*,"[176] which, as

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171. *See* Lopez v. Muñoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 862 (Tex. 2000) (finding that most breach-of-fiduciary duty claims were not preserved); Goffney v. Rabson, 56 S.W.3d 186, 190 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (restating fiduciary duty claim as legal malpractice claim which had been abandoned at trial); Wolfe v. Shellist, No. 01-00-00587-CV, 2001 WL 1587348, at *4-5 (Tex. App.—Houston [1st Dist.] Dec. 13, 2001, no pet.) (eliminating discussion of "absolute and perfect candor"). *See generally* State *ex rel.* Okla. Bar Ass'n v. Taylor, 4 P.3d 1242 (Okla. 2000) (failing to address the disclosure obligations of attorneys); State *ex rel.* Okla. Bar Ass'n v. Wallace, 961 P.2d 818 (Okla. 1998) (failing to address the disclosure obligations of attorneys); State *ex rel.* Okla. Bar Ass'n v. Lacoste, 813 P.2d 501 (Okla. 1991) (failing to address the disclosure obligations of attorneys).

172. *See, e.g.*, *In re* Legal Econometrics, Inc., 191 B.R. 331, 347 (Bankr. N.D. Tex. 1995), *aff'd in part and vacated in part sub. nom* Vaughn v. Akin, No. 3-95-CV-0457-R, 1997 WL 560617 (N.D. Tex. Aug. 29, 1997) (mem.), *appeal after remand*, No. CA 3:98-CV-2297-R, 1999 WL 304564 (N.D. Tex. May 11, 1999) (mem. and order) (finding the conduct in question to constitute negligence and gross negligence); Francisco v. Foret, No. 05-01-00783-CV, 2002 WL 535455, at *4 (Tex. App.—Dallas Apr. 11, 2002, pet. denied) (not designated for publication) (equating "absolute and perfect candor" with "full and fair" disclosure); Vickery v. Vickery, No. 01-94-01004-CV, 1997 WL 751995, at *33-34 (Tex. App.—Houston [1st Dist.] Dec. 4, 1997) (not designated for publication), *pet. denied*, 999 S.W.2d 342 (Tex. 1999) (finding the conduct could violate ordinary negligence principles).

173. *See* State *ex rel.* Okla. Bar Ass'n v. Busch, 976 P.2d 38, 53 (Okla. 1999) (finding the conduct clearly violated disciplinary rule regarding the handling of client property).

174. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(3) (2000) (expressing that "a lawyer must . . . not employ advantages arising from the client-lawyer relationship in a manner adverse to the client").

175. *See* Golden Nugget, Inc. v. Ham, 589 P.2d 173, 175 (Nev. 1979) (holding that a corporate director, who obtained a leasehold with an option to purchase at a time when the corporation had an interest in acquiring such property, had a "duty to the corporation, as its attorney, not only to inform . . . [the corporation] fully of the factual circumstances of the transaction, but also . . . of its rights in regard thereto").

176. *See* Lady v. Worthingham, 135 P.2d 205, 207 (Cal. Dist. Ct. App. 1943) (involving suit by attorney to enforce promissory note); Johnson v. Cofer, 113 S.W.2d 963, 965 (Tex.

discussed above, is defined by *Black's Law Dictionary* as requiring "absolute and perfect candor."[177] Judicial decisions irrefutably establish that business transactions between lawyer and client are presumptively fraudulent.[178] Such dealings will not survive scrutiny unless the lawyer proves that the highest standards of disclosure and fair dealing were observed.[179] Thus:

> If an attorney purchases his client's property, concerning which his advice is sought, the transaction is always viewed with suspicion, and the attorney assumes the heavy burden of proving not only that there was no overreaching of the client, but that the client acted upon the fullest information and advice as to his rights. In other words, the

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Civ. App.—Austin 1938, no writ) (involving suit to recover rents retained under employment contract); Baird v. Laycock, 94 S.W.2d 1185, 1189 (Tex. Civ. App.—Texarkana 1936, writ dism'd) (involving sale of land by client to attorney); Bell v. Ramirez, 299 S.W. 655, 658 (Tex. Civ. App.—Austin 1927, writ ref'd n.r.e.) (involving suit by client to cancel deed).

177. *See* State v. Baker, 539 S.W.2d 367, 374 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (per curiam) (explaining "*urberrima fides*" as "'[t]he most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight'").

178. *See Baird*, 94 S.W.2d at 1189 (applying the rule that the relation between an attorney and client is presumptively fraudulent in a suit for cancellation of deed); *Bell*, 299 S.W. at 658 (stating that "agreements between them in the course of the relation are prima facie presumed to be fraudulent"); *see also Cofer*, 113 S.W.2d at 965 (stating that the rule that a transaction between a lawyer and client will be "strictly scrutinized against the attorney, even to the extent of being considered prima facie fraudulent" only applies "after that relationship of attorney and client has come into existence; and does not apply to a contract of employment, whereby such relationship is created").

179. *See, e.g.*, Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co., 20 S.W.3d 692, 699 (Tex. 2000) (stating that "[b]ecause the relationship is fiduciary in nature, there is a presumption of unfairness or invalidity attaching to . . . contracts [between attorneys and clients]"). Similarly, in the case *In re Bretz* the court stated:

> When the evidence reflects, as it does in this case, that an attorney has seemingly profited at the expense of his clients, it is incumbent upon the attorney to show by clear and satisfactory evidence, not only that there was no undue influence or unfairness, but that his client had *all the information* and advice reasonably necessary to comprehend and understand the details of their business arrangement. . . .

In re Bretz, 542 P.2d 1227, 1245 (Mont. 1975) (emphasis added); *see also* Beery v. State Bar, 739 P.2d 1289, 1293 (Cal. 1987) (stating in a disciplinary action that business transactions between attorney and client will be "'set aside at the mere instance of the client, unless the attorney can show by extrinsic evidence that his client acted with full knowledge of all the facts connected with such transaction, and fully understood their effect'"); Ball v. Posey, 222 Cal. Rptr. 746, 749 (Cal. Ct. App. 1986) (stating that an "attorney must demonstrate that the client was fully informed on all matters related to any transactions between them").

> attorney must prove *uberrima fides*, or the transaction will be set aside by a court of equity.[180]

In such cases—the cases about which Justice Story was mainly concerned[181]—it is accurate to say that attorneys have a duty of "absolute and perfect candor."

The interests of attorney and client may also differ substantially even in cases not involving business transactions, and in such instances a high degree of disclosure may be required. Thus, some authorities hold that there is a duty to inform a client of when a malpractice claim might be brought against the lawyer[182] and others hold that there is a duty to fully disclose to class members

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180. Bell v. Ramirez, 299 S.W. 655, 658 (Tex. Civ. App.—Austin 1927, writ ref'd n.r.e.) (emphasis added) (citing Young v. Murphy, 97 N.W. 496 (Wis. 1903)).

181. *See* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 310 (12th ed. 1877) (discussing contracts and transactions between clients and lawyers).

182. Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 662 A.2d 509, 514 (N.J. 1995), *abrogated by* Olds v. Donnelly, 696 A.2d 633 (N.J. 1997). The court wrote:

> An attorney has an ethical obligation to advise a client that he or she might have a claim against that attorney, even if such advice flies in the face of that attorney's own interests. . . . Thus, an attorney who realizes he or she has made a mistake must immediately notify the client of the mistake as well as the client's right to obtain new counsel and sue the attorney for negligence. . . . [T]he attorney is under an overriding ethical obligation to inform the client of the accrual of a probable claim against that attorney.

Id. Circle Chevrolet was abrogated on other grounds by a later case that reaffirmed that "[t]he RULES OF PROFESSIONAL CONDUCT still require an attorney to notify the client that he or she may have a legal-malpractice claim even if notification is against the attorney's own interest." *See* Olds v. Donnelly, 696 A.2d 633, 643 (N.J. 1997) (holding that the entire controversy doctrine does not compel the assertion of a legal malpractice claim in underlying action that gives rise to the claim); *see also In re* Matter of Tallon, 447 N.Y.S.2d 50, 51 (N.Y. App. Div. 1982) (holding that an attorney's neglect of a client's claims and failure to notify the client of the nature and extent of the attorney's malpractice warranted a six month suspension: "An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (stating that "[i]f the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client"). Other sources have doubted whether a broadly applicable duty to disclose malpractice exists. *See* Nancy J. Moore, *Implications of* Circle Chevrolet *for Attorney Malpractice and Attorney Ethics*, 28 RUTGERS L.J. 57, 71-76 (1996) (discussing factors relevant to a duty to disclose and stating, "I have failed to uncover a single instance in which a lawyer was either successfully sued or disciplined as a result of a mere failure to advise the client of the lawyer's own malpractice"); Daniel M. Serviss, *The Evolution of the "Entire Controversy" Doctrine and Its Enduring Effects on the Attorney-Client Relationship: What A Long, Strange Trip It Has Been*, 9 SETON HALL CONST. L.J. 779, 806 (1999) (stating that "[a]n attorney . . . cannot conceivably be obligated to inform the client every time a mistake is made").

the amount of attorney's fees sought in a class action.[183] So too, "[t]he duty of loyalty requires a lawyer, at the time of retainer, to disclose to the client all the circumstances of his relations to the parties and any interest or connection with the matter at hand that could influence the client in the selection of counsel."[184]

In a relatively small number of areas, the legal profession has developed rules that call for a high degree of disclosure of information. For example, in seeking to obtain an effective client waiver of a conflict of interest, the lawyer must disclose the existence, nature, implications, and possible adverse consequences of the conflict.[185] In dealing with client property, a lawyer must promptly notify a client of its receipt.[186] In entering into an agreement for legal services with a new client, the lawyer must disclose the basis or rate of the fee.[187] And upon receiving a settlement offer, a lawyer ordina-

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183. *See* Gen. Motors Corp. v. Bloyed, 916 S.W.2d 949, 957-58 (Tex. 1996) (stating that "class action settlement notices must contain the maximum amount of attorney's fees sought by class counsel and specify the proposed method of calculating the award" and citing similar decisions).

184. Peaslee v. Pedco, Inc., 388 A.2d 103, 107 (Me. 1978) (involving an attorney's failure to disclose that he was an officer and stockholder of the other party to a proposed transaction).

185. Conoco Inc. v. Baskin, 803 S.W.2d 416, 419 (Tex. App.—El Paso 1991, no writ) (stating that Texas disciplinary rules permit "an attorney or law firm to continue multiple representation of adversary clients where . . . consent is obtained from each client after full disclosure of the existence, nature, implications and possible adverse consequences of such multiple representation"); *see also* Simpson v. James, 903 F.2d 372, 377 (5th Cir. 1990) (holding that under Texas law, "after full disclosure by the attorney, it may be proper in some circumstances for an attorney to represent both sides in a real estate transaction"); Employers Cas. Co. v. Tilley, 496 S.W.2d 552, 558 (Tex. 1973) (stating that "[i]f a conflict arises between the interests of the insurer and the insured, the attorney owes a duty to the insured to immediately advise him of 'he conflict"); Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 900 (Tex. App.—Dallas 2001, pet. filed) (holding that evidence was sufficient to raise a fact issue as to whether an attorney and law firm breached their fiduciary duty by failing to disclose that the attorney, as a member of "[c]ity [c]ouncil, would or could take positions that would affect the real estate transactions in which" the firm represented the plaintiff).

186. MODEL RULES OF PROF'L CONDUCT R. 1.15(d) (2002) (relating that "[u]pon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person . . . and, upon request by the client or third person, shall promptly render a full accounting regarding such property").

187. *See* Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22-23 (Tex. App.—Tyler 2000, pet. denied) (holding that the evidence, which showed among other things that the attorneys were vague regarding their fee arrangement, was sufficient to support the jury's finding of breach of fiduciary duty); MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2002) (stating that "[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in

rily must communicate the offer to the client promptly.[188] In these and perhaps other areas where specific rules of conduct have crystalized, attorneys are faced with demanding disclosure obligations.

However, outside of these limited contexts, the disclosure obligations of attorneys are more properly described by the rule of negligence than by a rule of "absolute and perfect candor": an attorney must act reasonably in providing information to the client.[189] There is little, if anything, in case law to suggest that, in a case not governed by a specific rule mandating disclosure, nonneg-

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writing, before or within a reasonable time after commencing the representation"). According to the American Law Institute:

> The basis or rate might be a specified hourly charge, a percentage, or a set of factors on which the fee will be based. If the fee is based on a percentage of recovery (or other base), the client should also be informed if a different percentage applies in the event of settlement, trial, or appeal. For a client sophisticated in retaining lawyers, a statement that "we will charge our usual hourly rates" ordinarily will suffice. . . . The information should indicate the matter for which the fee will be due, for example, "preparing and trying (but not appealing) your auto injury suit." If the services are not specifically described, the lawyer will be held under § 18 to provide the services that a reasonable client would have expected. Most states require that contingent-fee contracts be in writing.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 38 cmt. b (2000). It is important to note, however, that the disclosure obligations pertinent to contract initiation are limited. If no professional relationship between the attorney and client exists at the time the agreement is entered into, the stringent rules applicable to business transactions between attorney and client do not apply, and therefore the contract is not presumptively fraudulent on the part of the attorney. *See* Johnson v. Cofer, 113 S.W.2d 963, 965 (Tex. Civ. App.—Austin 1938, no writ) (stating that the rule where a transaction between lawyer and client will be "strictly scrutinized" only applies after commencement of attorney and client relationship).

188. *See* Rizzo v. Haines, 555 A.2d 58, 66 (Pa. 1989) (holding that an attorney's failure to convey each settlement offer to clients in personal injury cases and failure to investigate offers that were proposed constituted malpractice); Jones v. Auto-Owners Ins. Co., 288 N.W.2d 443, 445 (Mich. Ct. App. 1979) (holding that an attorney breached the applicable standard of care by failing to inform his client of settlement offers prior to trial); MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 1 (2002) (stating that "a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance" unless prior discussions with the client have left it clear that the proposal will be unacceptable).

189. Even authorities that define the fiduciary disclosure obligations of attorneys in highly demanding terms sometimes interpret those duties in a way that seems little different from a negligence analysis. *See, e.g.*, Burien Motors, Inc. v. Balch, 513 P.2d 582, 586 (Wash. Ct. App. 1973) (stating that an attorney must exercise reasonable care); 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 14.19 (5th ed. 2000) (stating "there must be complete disclosure of all information that may bear on the quality of the attorney's representation. . . . The test of disclosure is objective, measured by what an attorney of ordinary skill and knowledge should tell the client").

ligent failure to furnish information to a client will give rise to civil liability. Thus, not surprisingly, the Restatement says that "[a] lawyer who has acted with reasonable care is not liable in damages for breach of fiduciary duty."[190] Consequently, the "absolute and perfect candor" terminology should be confined to the context of lawyer-client business transactions or conduct that violates other well-established rules governing attorney conduct, such as those relating to conflict of interest, handling of client funds, communication of settlement offers, and contract initiation.

Unfortunately, the proclivity of courts to invoke Latin terms and repeat catchy phrases has given the "absolute and perfect candor" terminology a life of its own. The phrase is frequently repeated without consideration of its demands or proper scope of application.

The risk, of course, is that expansive judicial writing, even if it does not determine the outcome of appellate cases, has an undisciplined influence on subsequent legal scholarship and on daily law practice. The duty of "absolute and perfect candor" has been referred to in a number of articles,[191] including works by this author.[192] In light of sweeping judicial rhetoric about "absolute and

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190. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. d (2000) (noting, however, that remedies such as disqualification, restitution, and injunctive relief may be available).

191. *See, e.g.*, Roy Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 240 (1994) (referring to "absolute and perfect candor"); David J. Beck, *Legal Malpractice in Texas*, 50 BAYLOR L. REV. 551, 552 (1998) (referring to "absolute and perfect candor"); Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1152 (1999) (referring to "absolute and perfect candor"); Lawrence J. Latto, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 721 (1998) (noting that "some courts describe a lawyer's obligations in extravagant but vague terms," and then quoting the definition of *uberrima fides* as requiring "absolute and perfect candor"); Steve McConnico & Robyn Bigelow, *Summary of Recent Developments in Texas Legal Malpractice Law*, 33 ST. MARY'S L.J. 607, 622 (2002) (quoting the decision stating a duty of "'absolute perfect candor'"); John S. Pierce & Beverly A. Brand, *Recent Developments in Attorney Fee Disputes*, 7 U.S.F. MAR. L.J. 205, 207 (1994-95) (referring to "absolute and perfect candor"); Errin Martin, Comment, *The Line Has Been Drawn on the Attorney-Client Relationship: The Implications of* Burrow v. Arce *on Texas Practitioners*, 32 TEX. TECH. L. REV. 391, 396 (2001) (referring to "absolute and perfect candor").

192. *See* Vincent R. Johnson, *The Ethics of Communicating with Putative Class Members*, 17 REV. LITIG. 497, 519 n.72 (1998) (referring to "absolute and perfect candor"); *see also* Vincent R. Johnson, *Ethical Issues in Drafting Licensing Agreements*, *in* 458 PRACTISING LAW INSTITUTE PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY

perfect candor," a writer reflecting on a case requiring insurance defense counsel to disclose a conflict between the insurer and the insured may over-interpret the case as creating an obligation to disclose "any information that might prevent the fulfillment of" the obligations entailed by an attorney-client relationship.[193] Or a writer may over-construe a decision imposing liability based on the failure to disclose that the client's case had not been filed within the period of limitations as creating a duty to disclose "all information which may bear upon the quality of the attorney's representation."[194] Overstatements in legal scholarship should be avoided because words matter. Imprecise language can be costly to the legal system. It is but a short step from a judicial opinion stating that a lawyer has a duty of "absolute and perfect candor" to the filing of a lawsuit on behalf of a client who believes his or her lawyer's disclosures fell short of being "absolute and perfect."[195] Conse-

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COURSE HANDBOOK SERIES 173, 177-78 (1996), WL 458 PLI Pat 173 (referring to "absolute and perfect candor").

193. David J. Beck, *Legal Malpractice in Texas*, 43A BAYLOR L. REV. 1, 45 & 45 n.15 (1991), WL 43 BLRLR 43 (interpreting only *Employers Cas. Co. v. Tilley*, 496 S.W.2d 552, 558 (Tex. 1973), in the same paragraph that referred to the duty of "absolute and perfect candor"). The statement quoted above in the text also appears in David J. Beck, *Legal Malpractice in Texas Second Edition*, 50 BAYLOR L. REV. 551, 608 (1998), which cites three cases as support in addition to *Tilley*.

194. *See* David J. Beck, *Legal Malpractice in Texas*, 43A BAYLOR L. REV. 1, 46 & 46 n.22 (1991), WL 43 BLRLR 43 (interpreting *Ames v. Putz*, 495 S.W.2d 581, 583 (Tex. Civ. App.—Eastland 1973, writ ref'd), shortly after reference to duty of "absolute and perfect candor"). To be fair, an earlier Texas case, not cited by Beck, had held that an attorney owes to a client a duty "to affirmatively disclose to him, not only all material facts which would affect their relationship but to disclose the legal consequence of those facts as well." Bryant v. Lewis, 27 S.W.2d 604, 607 (Tex. Civ. App.—Austin 1930, writ dism'd w.o.j.). However, there is a difference—perhaps a significant difference—between being obliged to disclose "*all information* which may bear upon the quality of the attorney's representation" and being required to disclose *all material facts that may* affect the relationship. David J. Beck, *Legal Malpractice in Texas*, 43A BAYLOR L. REV. 1, 46 (1991), WL 43 BLRLR 43 (emphasis added). The statement quoted from the 1991 Beck article appeared more recently in David J. Beck, *Legal Malpractice in Texas Second Edition*, 50 BAYLOR L. REV. 551, 610 (1998).

195. *See, e.g.*, Wolfe v. Shellist, No. 01-00-00587-CV, 2001 WL 1587348, at *4 (Tex. App.—Houston [1st Dist.] Dec. 13, 2001, no pet.) (not designated for publication) (alleging that defendants "breached their respective fiduciary duties to . . . communicate with Plaintiff in absolute and perfect candor"); Kincaid & Horton, Mark L. Kincaid, & B. Russell Horton's Second Supplemental Responses to Requests for Disclosures, Wedge Management, Inc. v. Tobey, Exhibit A at 2-6, 10-15, 18-20 (345th Dist. Ct., Travis County, Tex. Nov. 13, 2002) (No. 98-09512) (alleging that the defendants' malpractice included no less than 23 different breaches of "failing to make full disclosure of material facts, and to exercise absolute and perfect candor").

quently, it is important to be precise in articulating the obligations of lawyers.

IV. Considerations Bearing on the Duty to Disclose

The disclosure obligations of attorneys to clients are limited by a variety of considerations, including scope of representation, materiality, client knowledge, competing obligations to others, client agreement, and threatened harm to the client or others. The following sections explore these important limitations on the duty of attorneys to communicate information.

A. *Scope of the Representation*

Perhaps no concept is more important to understanding the extent of attorney obligations than scope of representation.[196] This is true because lawyers and clients have great leeway in tailoring the range of the work that attorneys will perform.[197] At one extreme, a

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196. *See, e.g.*, Tex. Disciplinary R. of Prof'l Conduct R. 1.02, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 1998) (Tex. State Bar R. art. X, § 9) (stating the Texas rule bearing on representation, which is typically contained in state codes of attorney conduct). The commentary to Texas Rule 1.02 provides:

> The scope of representation provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined objective. Likewise, representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. Similarly, when a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The scope within which the representation is undertaken also may exclude specific objectives or means, such as those that the lawyer or client regards as repugnant or imprudent.

Id. cmt. 4.

197. *See* James E. Moliterno, Cases and Materials on the Law Governing Lawyers 192 (2000) (explaining how the relationship can be tailored). Moliterno states:

> Because the scope of their relationship is generally set by contract, lawyers and their clients may negotiate and settle upon the lawyer's scope of representation. Lawyer and client can negotiate over the lengths to which the lawyer is committed to proceed in the matter. The lawyer and client, for example, may agree that the lawyer will undertake representation short of litigation or through the first appeal. The lawyer and client may negotiate the breadth of the lawyer's service. They may agree, for example, that the lawyer will be responsible for legal matters relating to the client's sale of his ongoing business, but not the tax aspects of the transaction.

Id. Similar concepts apply in other fields. *Cf.* Carleton v. Tortosa, 17 Cal. Rptr. 2d 734, 741 (Cal. Ct. App. 1993) (stating that where an investor executed several agreements, which advised him that a real estate broker's duties did not include giving advice on tax consequences, the broker owed no duty to minimize adverse tax consequences); *see also* Re-

lawyer may agree to undertake a simple isolated task, such as the mere filing of a document. At the other extreme, the lawyer may consent to provide a wide array of services, including, for example, the rendering of advice on all legal issues affecting an individual or entity, or the management of a myriad of forms of dispute resolution. Between the extremes, there are infinite possibilities concerning the scope of the lawyer's undertaking. Thus, before one can determine what a lawyer must do in order to perform properly, it is necessary to first ascertain the nature of assignment.

Within the scope of the representation, whether it be large or small, the client is entitled to first-class treatment, meaning the lawyer must place the client's interests above all others. Within that sphere, the attorney owes a client a panoply of demanding duties, including, among others, full loyalty, complete confidentiality, diligence, and competence. Anything that threatens to interfere with the lawyer's performance of duties within the scope of representation is a potential or actual conflict of interest that requires special precautions or withdrawal.[198]

However, lawyers have no obligation to advance the interests of clients falling outside the scope of the representation.[199] They have

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STATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 cmt. b (2000) (stating "[t]he scope of a representation may properly change during a representation, and the lawyer may sometimes be obligated to bring changes of scope to a client's notice"); *id.* § 19 cmt. c (listing "five safeguards" that apply to contracts limiting the scope or objectives of a representation).

198. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 8 (2002) (stating that "[e]ven where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests").

199. *See* Macawber Eng'g, Inc. v. Robson & Miller, 47 F.3d 253, 256 (8th Cir. 1995) (holding that a malpractice claim failed because the negligent conduct alleged fell outside the scope of the attorney-client relationship); Spannaus v. Larkin, Hoffman, Daly, and Lindgren, Ltd., 368 N.W.2d 395, 398 (Minn. Ct. App. 1985) (finding that summary judgment was properly granted against a client's malpractice claim with respect to a matter that fell outside the scope of the attorney-client relationship); Klager v. Worthing, 966 S.W.2d 77, 83 (Tex. App.—San Antonio 1996, no writ) (holding that a law firm did not assume duty to supervise a client's entire "medical care by virtue of its referral" of the client to a breast surgeon, even if the law firm directed the handling of silicone implants and tissue samples as evidence for use in implant litigation), *on rehearing in part*, 957 S.W.2d 852 (Tex. App.—San Antonio 1996, writ denied); Armor v. Lantz, 535 S.E.2d 737, 747 (W. Va. 2000) (stating that "West Virginia authority supports the notion that a lawyer's duty may be limited by the terms of the attorney-client relationship"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. c (2000) (stating that "[t]he lawyer's duties are

not been hired to perform those tasks, and it would be unfair to impose such obligations on them in the absence of either a well-established customary practice or an agreement with the client accompanied, in the usual case, by compensation.[200] Consequently, the professional obligations of attorneys—the duties that exceed those generally owed by members of the public to one another—normally extend no further than the scope of the work the lawyer has been asked to handle.[201]

More specifically, the disclosure obligations of attorneys do not extend to all matters regardless of how remote or tangential to the task at hand. Rather, those duties are limited to the scope of the representation. They include only information bearing upon the legal services the lawyer has been asked to provide and information acquired during the performance of the work.[202] As to other

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ordinarily limited to matters covered by the representation"); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING 5-32 (3d ed. 2001) (offering an illustration showing that a lawyer owes a client no obligation "for matters outside the scope of that employment"); 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 8.2 (5th ed. 2000) (stating that "[t]he liability of the attorney depends on whether a duty was breached that was reasonably within the scope of the employment"); *see also* State v. Layton, 432 S.E.2d 740, 756 (1993) (stating that "[t]o prevail on a claim that counsel acting in an advisory or other limited capacity has rendered ineffective assistance, a self-represented defendant must show that counsel failed to perform competently *within the limited scope of the duties assigned to or assumed by counsel*"). The scope of representation issue in legal malpractice is similar to the scope of a voluntary undertaking issue that arises in many tort cases. *See generally* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 479-86 (2d ed. 1999) (discussing cases).

200. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING 5-29 to 5-30 (3d ed. 2001) (stating that in the normal course of events, "lawyers and clients normally should be able to agree that the lawyer will commit more or less time and energy to the client's cause, assume more or less responsibility, and generate more or less in the way of legal fees").

201. *See* Joseph v. State, 3 S.W.3d 627, 639 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (stating, incidental to its rejection of an ineffective assistance of counsel claim in a criminal case, that "[t]he nature of the attorney-client relationship defines an attorney's duties and the professional services to be rendered"); *see also* Soliman v. Goltz, No. 05-93-00008-CV, 1993 WL 402740, at *9 (Tex. App.—Dallas Oct. 6, 1993, no writ) (not designated for publication) (stating that "[w]hile the scope of a confidential relationship [between the attorney and client] is broad, the Texas Supreme Court has placed certain general limitations upon the breadth of a fiduciary's duty").

202. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2002) (indicating that, with limited exceptions, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent"). It is generally agreed that the client has the right to exercise control over the confidentiality of information that the lawyer acquires while working on the client's case.

information falling outside the scope of the representation, the lawyer has discretion as to how those facts should be handled. The attorney may elect to communicate those facts or may choose not to do so. There is no legally enforceable duty to disclose to the client information outside the scope of representation.

Similarly, with only limited exceptions,[203] when the representation terminates, the special duties that commence with the inception of the attorney-client relationship come to an end.[204] "A lawyer has no general continuing obligation to pass on to a former client information relating to the former representation."[205]

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203. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33 (2000) (discussing the duties incidental to termination of a attorney-client relationship—such as taking interim steps to protect client interests and returning client property. The duty of confidentiality survives the termination of the attorney-client relationship. *See id.* § 33 cmt. c (stating that "[a] lawyer's obligation to protect the confidences of a client . . . continues after the representation ends"). There is also a limited duty to convey information to a former client. According to the Restatement:

> After termination a lawyer might receive a notice, letter, or other communication intended for a former client. The lawyer must use reasonable efforts to forward the communication. The lawyer ordinarily must also inform the source of the communication that the lawyer no longer represents the former client . . . . The lawyer must likewise notify a former client if a third person seeks to obtain material relating to the representation that is still in the lawyer's custody.

Id. § 33 cmt. h.

204. *See* Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co., 20 S.W.3d 692, 699 n.3 (Tex. 2000) (relating that the presumption that a business transaction between a lawyer and client is invalid on the part of the lawyer would not apply "had Granada severed the attorney-client relationship with KMC and hired new attorneys before agreeing to the release"); Hall v. Stephenson, 919 S.W.2d 454, 465 (Tex. App.—Fort Worth 1996, writ denied) (stating that "a legal injury cannot occur after the attorney-client relationship has ended because the attorney has no duty to the client at that point"); *cf.* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 310a (12th ed. 1877) (stating that although a bargain between a principal and agent will be set aside if the agent has concealed facts within his knowledge that might influence the judgment of his principal, "if the relation of principal and agent has wholly ceased, the parties are restored to their common competency to deal with each other"); Steve McConnico & Robyn Bigelow, *Summary of Recent Developments in Texas Legal Malpractice Law*, 33 ST. MARY'S L.J. 607, 634 (2002) (stating that "[a]n attorney-client relationship generally terminates upon the completion of the purpose of the employment. Thus, a breach of fiduciary duty cannot be based upon conduct subsequent to the completion of the purpose of the employment").

205. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33 cmt. h (2000). However, the Restatement goes on to note:

> The lawyer might, however, have such an obligation if the lawyer continues to represent the client in other matters or under a continuing relationship. Whether such an obligation exists regarding particular information depends on such factors as the client's reasonable expectations; the scope, magnitude, and duration of the client-law-

In *Soliman v. Goltz*, a case using the phrase "absolute and perfect candor," the court said that "fiduciary duties extend only to dealings within the scope of the underlying relationship of the parties."[206] The invocation of that rule was undoubtedly correct. Although, as indicated above, the court may have erred in applying the rule to the facts of the case, the legal principle that the court sought to employ is an appropriate and well-established norm in the law of attorney conduct.[207]

B. *Materiality*

Courts have repeatedly recognized that the fiduciary obligations of an attorney require disclosure of facts that are material to the representation.[208] The implication of these expressions is that *immaterial* facts need not be disclosed. Such a construction is consistent with the fact that, even in the case of intentional misstatements, liability is imposed under the law of deceit only if materiality is established.[209]

In a recent Minnesota decision, the issue of materiality was squarely addressed. In *STAR Centers, Inc. v. Faegre & Benson, L.L.P.*,[210] the Minnesota Supreme Court affirmed a grant of sum-

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yer relationship; the evident significance of the information to the client; the burden on the lawyer in making disclosure; and the likelihood that the client will receive the information from another source.

Id.

206. Soliman v. Goltz, No. 05-93-00008-CV, 1993 WL 402740, at *9 (Tex. App.—Dallas Oct. 6, 1993, no writ) (not designated for publication).

207. *See* Part III-A *supra* (discussing *Rankin*).

208. *See, e.g.*, Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) (explaining that "[a]s a fiduciary, an attorney is obligated to render a full and fair disclosure of facts material to the client's representation"); Crean v. Chozick, 714 S.W.2d 61, 62 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (stating that "[t]he attorney/client relationship imposes on the attorney a duty to disclose facts material to his representation").

209. *See* Vincent Robert Johnson, *Fraud and Deceit, Including Negligent and Innocent Misrepresentation* § 1.03[7], *in* PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES (1988) (defining materiality). This chapter states:

> Virtually all common law forms of relief based on misrepresentation require that the statement relate to a material fact. A material fact is one to which a reasonable person would give some weight in making a decision; it need not be the sole or predominant factor in the recipient's decision making process.

Id. (citations omitted); *see also id.* § 1.03[1] (stating that "an action will not lie in the absence of some perversion of material factual data chargeable to the defendant").

210. 644 N.W.2d 72 (Minn. 2002).

mary judgment in favor of a law firm.[211] The suit alleged legal malpractice and breach of fiduciary duty, but the court found that the undisclosed information was not material to the firm's representation of the plaintiff.[212] The plaintiff in *STAR Centers* asserted that its law firm knew that it sought information about the viability of a lender known as Consortium.[213] Through certain dealings, the firm learned that Consortium denied a loan to another entity, but did not communicate that information to the plaintiff.[214] In holding that the nondisclosure would not support an action for breach of fiduciary duty, the court wrote:

> [T]hat a lender refused to fund a loan, without more, reveals nothing material about the lender. To a prospective borrower, the *reasons* for the lender's refusal are what matters. . . . There is no evidence in the record that Faegre learned why Consortium refused to fund the loan. . . . Finally, there is no evidence in the record that Faegre knew about Consortium's lending practices. . . . Therefore, reasonable minds can reach only one conclusion: that the information Faegre obtained about Consortium from Cemara's inquiry did not constitute a material matter bearing on its representation of STAR.[215]

Unreliable information is one type of information that may be found to lack materiality. In *STAR Centers*, the law firm had defended Consortium in a previous law suit.[216] In furthering its discussion, the court reprinted a portion of an affidavit by the plaintiff's attorney in the prior case attesting to the law firm's knowledge of Consortium's financial strength.[217] The affidavit stated:

> Shortly after Faegre made its first appearance on behalf of Consortium in the case, Denver Golf's attorney told Faegre that he "thought Consortium may have engaged in fraud." He also told Faegre that he did not believe that Consortium had sufficient capital to fund all of its commitments. He sought information that might substantiate

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211. STAR Centers, Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 74 (Minn. 2002).
212. *Id.*
213. *Id.* at 77 n.2.
214. *Id.*
215. *Id.* at 77-78.
216. *STAR Centers*, 644 N.W.2d at 75.
217. *Id.* at 75-76.

his belief that there was a misrepresentation in Consortium's brochure, and did not assert that he had such proof.[218]

In the subsequent malpractice suit one issue was whether it was a breach of fiduciary duty for the law firm not to disclose that information to STAR, since STAR was interested in Consortium's viability as a lender.[219] Focusing on the unreliable nature of the information, the court concluded that the law firm had not breached its fiduciary duties.[220] It wrote:

To determine whether the oral allegations of fraud constituted information that was material to Faegre's representation of STAR, we must analyze them within their context. First, Denver Golf and Consortium were litigating a claim that Consortium breached a contract by refusing to fund a loan. Denver Golf's complaint did not allege fraud. Second, there is no evidence in the record that Denver Golf offered evidence to support its allegations of fraud. The attorney mentioned fraud in the context of a request for information to support his belief that Consortium engaged in fraud. . . . Without some evidence to support the oral allegations, Faegre had no reason to think that they were anything but litigation tactics, and reasonable minds can conclude only that the unsubstantiated allegations of fraud were not material to Faegre's representation of STAR. Therefore, we hold as a matter of law that Faegre did not learn information that was material to its representation of STAR from the oral allegations of fraud.[221]

In other contexts, courts have similarly recognized that unreliable information need not be disclosed. Thus, courts have held that securities laws requiring revelation of material facts do not require dissemination of unreliable and speculative information.[222]

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218. *Id.* at 78.

219. *Id.* at 77.

220. *Id.* at 78.

221. *STAR Centers*, 644 N.W.2d at 78 (citation omitted).

222. *See* Garcia v. Cordova, 930 F.2d 826, 830 (10th Cir. 1991) (holding that the information at issue was too unreliable and speculative to be "material" under Rule 10b-5, and thus the defendant had no duty to disclose such information to shareholders before purchasing their stock); *cf.* Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1280-81 (Del. 1994) (noting that the law does not require the directors of a corporation to disclose "inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information," but holding that in light of partial and incomplete disclosure of historical information additional disclosure was required). The court also stated that "disclosure of an unreliable share valuation can, under some circumstances, constitute material misrepresentation." *Id.* at 1283.

Support for a materiality limitation on the duty of "absolute and perfect candor" can be drawn from the far removed field of reinsurance. The doctrine of *uberrima fides*, which as discussed above is defined as requiring "absolute and perfect candor,"[223] has been held to apply in that context. "Many courts [dealing with reinsurance issues], however, do not treat this duty to disclose as absolute, but, instead, analyze the materiality of the facts at issue, together with the circumstances surrounding the non-disclosure or misrepresentation."[224]

C. *Client Knowledge*

An attorney is not liable for failing to reveal facts of which the attorney has no knowledge.[225] Conversely, there is no duty to dis-

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223. *See* State v. Baker, 539 S.W.2d 367, 374 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (per curiam) (explaining "*uberrima fides*" as "'[t]he most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight'").

224. John S. Diaconis, *Utmost Good Faith and Recission: Non-Disclosure of Material Facts in Reinsurance Agreements*, *in* 756 PRACTISING LAW INSTITUTE: COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES 255, 266 (1997), *available at* WL 756 PLI/COMM 255; *see also* Stuart Cotton, *Utmost Good Faith–Follow the Fortunes, the Theory and the Reality: What are the Implications for Cedents and for Reinsurers?*, *in* PRACTISING LAW INSTITUTE: COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES 193, 198 (1999), *available at* WL 793 PLI/COMM. 193 (stating that "an insurer seeking reinsurance coverage has an unqualified duty to make full and accurate disclosure of all facts material to the risk, *i.e.*, those facts that a reinsurance underwriter would normally want to consider when evaluating whether to assume coverage"); Paula Hamilton Lee, *Untying the Gordian Knot and Opening Pandora's Box: The Need for a Uniform Federal Maritime Rule of* Uberrimae Fidei *with Respect to Marine Insurance*, 19 TUL. MAR. L.J. 411, 411 (1995) (discussing duty of full disclosure and stating that "a fact is considered material if, 'to a prudent insurer, its existence would affect decisions on the risk assumed'"); John P. Kavanagh, Jr., *"Ask Me No Questions and I'll Tell You No Lies": The Doctrine of* Uberrimae Fidei *in Marine Insurance Transactions*, 17 TUL. MAR. L.J. 37, 40 (1992) (stating "the assured must inform the underwriters of all known material facts which influence or affect the insured risk").

225. *See* Wright v. Lewis, 777 S.W.2d 520, 522-23 (Tex. App.—Corpus Christi 1989, writ denied) (holding that, because there was no evidence that a lawyer knew about a misdemeanor plea bargain, there was no duty to disclose that information); *see also* Affiliated Computer Servs., Inc. v. Kasmir & Krage, L.L.P., No. 05-98-00227-CV, 2000 WL 1702635, at *4 (Tex. App.—Dallas Nov. 15, 2000, review denied) (not designated for publication) (stating that:

> [A]t the time the settlement chart was prepared . . . [the law firm] did not know of the potential exposure to the five million dollar note . . . [and] could not have disclosed its intention to collect on the five million dollar note[.] . . . once [the firm] learned of the changed circumstances, it had a duty to disclose all information relevant to [the] representation).

close information that is already known. The latter rule, rooted in commonsense and efficiency, is applied throughout the law.[226] Thus, a doctor is not compelled by the informed-consent doctrine to warn a patient of risks that are already understood.[227] Nor is a possessor of land ordinarily obliged to disclose dangers that are "known or obvious."[228]

The same rule applies in the context of lawyer-client relations, for little would be gained by mandating disclosure of information already possessed by the client. To be sure, there will be cases where there are questions as to what the client "knows," and there will be instances where it is fair to conclude that what the client "knows" the client fails to appreciate adequately.[229] In such situa-

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Of course, if the attorney through the exercise of reasonable care should have known the information in question, the attorney may be sued for malpractice. However, in such instances, the attorney's default is more properly viewed as a breach of the duty of competence, rather than as a failure to disclose.

226. *See, e.g.*, Honeycutt v. Kendall, 549 F. Supp. 802, 805 (D. Del. 1982) (recognizing the duty of an insurer to a client); Quintana v. Tenn. Farmers Mut. Ins. Co., 774 S.W.2d 630, 634 (Tenn. Ct. App. 1989) (stating that "an [insurance] agent has no duty to inform a client of a policy's cancellation if the client knew or should have known of the cancellation by other means"); Salinas v. General Motors Corp., 857 S.W.2d 944, 950 (Tex. App.—Houston [1st Dist.] 1993, no writ) (holding that car manufacturers have no duty to warn elderly drivers about the known risks of driving while impaired or incompetent, or to warn car dealers about the known risks of selling cars to incompetent drivers).

227. *See, e.g.*, Yeates v. Harms, 393 P.2d 982, 991 (Kan. 1964) (rejecting an argument that would have required physicians to warn of known risks); Scott v. Bradford, 606 P.2d 554, 558 (Okla. 1980) (stating that "[t]here is no need to disclose risks that either ought to be known by everyone or are already known to the patient").

228. *See* RESTATEMENT (SECOND) OF TORTS § 343A(1) & cmt. e (1965) (stating that "[r]easonable care on the part of the possessor . . . does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them"); *see also* Brownsville Navigation Dist. v. Izaguirre, 829 S.W.2d 159, 160 (Tex. 1992) (holding that in a case where a trailer overturned while parked on muddy soil, a landlord had no duty to warn about the risks posed by "plain dirt").

229. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (commenting on the lawyer's duty to consult). The comment states that:

> The lawyer's duty to consult goes beyond dispatching information to the client. The lawyer must, when appropriate, inquire about the client's knowledge, goals, and concerns about the matter, and must be open to discussion of the appropriate course of action. A lawyer should not necessarily assume that a client wishes to press all the client's rights to the limit, regardless of cost or impact on others. . . . Even if a client fails to request information, a lawyer may be obligated to be forthcoming because the client may be unaware of the limits of the client's knowledge. Similarly, new and unforeseen circumstances may indicate that a lawyer should ask a client to reconsider a request to be left uninformed.

tions, the lawyer must err on the side of full disclosure.[230] But within a certain range of cases it is possible to conclude that the facts in question are both known and appreciated, and if that is true the duty of "absolute and perfect candor" does not require disclosure.

D. *Competing Obligations to Others*

Lawyers normally serve many clients, simultaneously and sequentially. Obligations of confidentiality are owed to all of those persons, even after the termination of an attorney-client relationship.[231] Sometimes the duties of confidentiality to one client conflict with disclosure obligations to another. A complex body of law relating to conflicts of interest governs how such cases must be handled. In the most extreme case, ethics rules require the lawyer to decline or withdraw from proposed or existing representation, rather than breach confidentiality.[232] However, there is never a

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Id.

230. *Cf.* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 59 (1990) (stating that "the lawyer's role in the decisionmaking process is not a passive one. On the contrary, the lawyer should 'exert his best efforts to [e]nsure that decisions of his client are made only after the client has been informed of relevant considerations'").

231. *See, e.g.*, *In re* Roseland Oil & Gas, Inc., 68 S.W.3d 784, 788 (Tex. App.—Eastland 2001, no pet. h.) (stating that "[c]lients, current and former, have a reasonable expectation that the information provided to an attorney in a professional setting is confidential in nature"); *see also* Summerlin v. Johnson, 335 S.E.2d 879, 881 (Ga. Ct. App. 1985) (stating that "[t]he obligation to preserve confidences continues after employment is terminated"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33 cmt. c (2000) (stating that "[a] lawyer's obligation to protect the confidences of a client . . . continues after the representation ends").

232. *See In re Roseland Oil & Gas, Inc.*, 68 S.W.3d at 788 (ordering disqualification because the attorney was "in a precarious position in which he may be forced to make the choice between zealously representing his clients and maintaining the confidentiality of information received from his former clients"); Los Angeles County Bar Ass'n Ethics Comm. Op. 463, 6 LAW. MAN. PROF. CONDUCT 459 (1991) (requiring withdrawal unless the lawyer obtains consent from a former client), *discussed in* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING 9-96 illus. 9-3 (3d ed. 2001); *cf.* Henriksen v. Great Am. Sav. & Loan, 14 Cal. Rptr. 2d 184, 186 (Cal. Ct. App. 1992) (stating that conflicts rules protect confidentiality and that the fiduciary nature of the attorney-client relationship allows a former client to seek disqualification of a former attorney possessing confidential information that is adverse to the former client); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-358 (1990) (stating that "[w]hen the information imparted by [a] would-be client [to whom a duty of confidentiality is owed] is critical to the representation of an existing or new client in the same or related matter . . . the lawyer must withdraw or decline the representation unless a waiver of confidentiality has been obtained").

duty to disclose to one client what must be held confidential to protect another.[233] Thus, the demands of "absolute and perfect candor" may compel a lawyer to step aside because those duties cannot be performed, but disclosure obligations never necessitate a breach of confidentiality.

This point has been recognized by the American Law Institute on various occasions. For example, in discussing a lawyer's duty to inform and consult with a client, the commentary to section 20 of Restatement (Third) of the Law Governing Lawyers observes "[s]ometimes a lawyer may have a duty not to disclose information, for example because it has been obtained in confidence from another client or because a court order limits its dissemination."[234]

In a similar vein, the same Restatement opines:

> A lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another. . . . That would occur, for example, if a court's protective order had forbidden copying of a document obtained during discovery from another party, or if the lawyer reasonably believed that the client would use the document to commit a crime. . . . Justification would also exist if the document contained confidences of another client that the lawyer was required to protect.[235]

Similarly, the Restatement (Second) of Agency, section 381, states that:

> Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated *without violating a superior duty to a third person.*[236]

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233. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002) (stating the general conflict-of-interest rule). The commentary to Rule 1.7 states:

> Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Id. cmt. 19.

234. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. d (2000).

235. *Id.* § 46 cmt. e.

236. RESTATEMENT (SECOND) OF AGENCY § 381 (1958) (emphasis added).

Consequently, obligations owed to others constrain the demands of "absolute and perfect candor."

E. *Client Agreement*

Within a broad range, fiduciary obligations, including the duty of candor, are subject to modification by the parties to the relationship.[237] The general rule is set forth in section 376 of the Restatement (Second) of Agency, which provides "[t]he existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made. . . ."[238]

Explaining that provision, the commentary opines:

> Thus, the duties . . . of care, . . . of obedience, and . . . of loyalty . . . [as set forth in various provisions of the Restatement] are inferences drawn from the conduct of the parties in light of common experience and what reasonable men regard as fair. The rules stated in such Sections are the rules applicable to the normal case, in which the parties have not made a different agreement. . . . [T]he parties can make what agreements they please. . . . [with limited exceptions].[239]

The principle that fiduciary parties have the ability to vary the terms of the relationship is also recognized in provisions of the Restatement (Third) of the Law Governing Lawyers, which in discussing the communication obligations of attorneys to clients expressly provides "*[t]o the extent that the parties have not otherwise agreed*, a standard of reasonableness under all the circumstances determines

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237. *See* Vincent Robert Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 105 (1988) (explaining that "fiduciary obligations are subject to alteration by agreement of the parties involved" and discussing the application of that rule to lawyers changing law firms).

238. RESTATEMENT (SECOND) OF AGENCY § 376 (1958); *see also* Van de Kamp v. Bank of Am. Nat'l Trust & Sav. Ass'n, 251 Cal. Rptr. 530, 551 (Cal. Ct. App. 1988) (stating that a "bank's duty as agent is limited to the scope of the agency set forth in the parties' agreement").

239. RESTATEMENT (SECOND) OF AGENCY § 376 cmt. a (1958). Comment a noted that such agreements between the parties would not be enforceable under the terms stated in Comment b, which provides:

> The agent's duties may be affected by the illegality of the employment, by the fact that he or the principal has been fraudulent, in which case the rules generally applicable to the effect of fraudulent conduct prevail; or by the fact that one of the parties is subject to a disability or has an immunity from liability to the other.

Id. cmt. b (citations omitted).

the appropriate measure of consultation."[240] More specifically, section 19 states: "(1) Subject to other requirements stated in this Restatement, a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances."[241]

However, there are limits on how far a lawyer and client can alter the usual "rules of the game."[242] The conduct of lawyers is constrained by ethical obligations imposed by disciplinary codes.[243] Such codes allow clients to waive certain protections afforded by the rules, even though other such protections are nonwaivable. For example, a client may consent to revelation of otherwise confidential information[244] or various low-level conflicts of interests provided there is full disclosure and informed consent.[245] At the other extreme, the safeguards afforded by the represented-person rule generally cannot be waived by the client.[246]

Other provisions of the Restatement (Third) of the Law Governing Lawyers, strongly suggest that the disclosure obligations of attorneys can be tailored to the needs of the client.[247] The sophistication of the client will be highly relevant as to how far the usual

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240. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (emphasis added); *cf.* Burlington N. & Santa Fe Ry. Co. v. Burlington Res. Oil & Gas Co., 590 N.W.2d 433, 438 (N.D. 1999) (holding that although "[a]gency law generally recognizes . . . [that an] agent's duties to the principal are determined by the parties' agreement and the nature of the fiduciary relationship[.] . . . if the principal consents to self-dealing by the agent, the agent must fully and completely disclose all relevant facts to the principal unless the agreement provides otherwise").

241. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 (2000).

242. *See id.* § 19 illus. 3 (2000) (offering facts on which a client's agreement "to waive the requirement of reasonable competence" would be invalid).

243. *See generally* Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 25, 29-36 (2000) (discussing how codes of legal ethics foster client protection and equality of client treatment).

244. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2002) (indicating that a client must give informed consent for lawyer to reveal confidential information).

245. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(2) (2002) (suggesting that absent a concurrent conflict of interest, "a lawyer may represent a client if . . . the representation is not prohibited by law").

246. *See* Vincent R. Johnson, *The Ethics of Communicating with Putative Class Members*, 17 REV. LITIG. 497, 502 (1998) (indicating with respect to Model Rule 4.2 and its state-law counterparts that "the demands of the Rule cannot be waived by the represented person whose interests are at stake").

247. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c, d (2000). The Restatement states:

duties of an attorney can be varied.[248] Consequently, the demands of "absolute and perfect candor" are limited by the existence of a valid lawyer-client agreement to the contrary.[249]

F. *Harm to Client or Others*

Finally, the disclosure obligations of attorneys may be limited if disclosure would be harmful to the client or others. According to the American Law Institute:

> Under conditions of extreme necessity, a lawyer may properly refuse for a client's own benefit to disclose documents to the client unless a tribunal has required disclosure. Thus, a lawyer who reasonably concludes that showing a psychiatric report to a mentally ill client is likely to cause serious harm may deny the client access to the report. Ordinarily, however, what will be useful to the client is for the client to decide.[250]

The same principles apply when disclosure threatens harm to third persons.[251] Presumably, only the rare case will justify nondisclosure.

> The appropriate extent of consultation is itself a proper subject for consultation. The client may ask for certain information . . . or may express the wish not to be consulted about certain decisions. The lawyer should ordinarily honor such wishes. . . . To the extent that the parties have not otherwise agreed, a standard of *reasonableness under all the circumstances determines the appropriate measure of consultation*. Reasonableness depends upon such factors as the importance of the information or decision, the extent to which disclosure or consultation has already occurred, the client's sophistication and interest, and the time and money that reporting or consulting will consume. So far as consultation about specific decisions is concerned, the lawyer should also consider the room for choice, the ability of the client to shape the decision, and the time available. . . . The lawyer may refuse to comply with unreasonable client requests for information.

Id. (emphasis added).

248. *See id.* § 19 cmt. c (stating that "[w]hen the client is sophisticated in . . . waivers, informed consent ordinarily permits the inference that the waiver is reasonable"). *But see id.* § 20 cmt. b (stating that "[a]rticulate and sophisticated clients typically call for frequent communication with their lawyers when a matter is important to them").

249. *See also* Diane L. Karpman, *Fiduciary Obligations and Practical Issues in Drafting Consents*, *in* 644 PRACTISING LAW INSTITUTE—LITIGATION & ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 191, 195 (2000), *available at* WL 644 PLI Lit 191 (stating that in California "[s]pecific duties and fiduciary obligations can be waived, as long as the client executes an informed written consent").

250. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46 cmt. c (2000) (citations omitted).

251. *See id.* § 20 cmt. c (referring to harm to "the client or others").

Diminished client capacity may also justify a reduced amount of disclosure, although in such cases "the lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship."[252] Moreover, impaired mental capacity, while excusing some nondisclosures, may impose other obligations on attorneys. In *Hefner v. State*, in upholding the conviction of an attorney for theft of client funds, the appellate court held that the trial court did not err in failing to give a mistake of fact instruction.[253] It wrote: "[The attorney] was not entitled to an instruction on the mistake of fact defense because his belief that the complainant consented [to the transfer of funds to the attorney's operating account] was an *unreasonable* belief that an ordinary, prudent man acting in a fiduciary relationship would not have held" because the attorney knew of the client's history of psychiatric problems.[254]

V. CONCLUSION

It is easy to write expansively about the fiduciary obligations of attorneys, and such rhetoric serves a useful purpose. It reminds both practitioners and courts that members of the legal profession have special duties because of the unique role they play in society and that it is incumbent on all lawyers to adhere to high standards.

However, it is also important to think precisely about the professional conduct demanded of attorneys, which is to say it is important to "think like a lawyer." A careful review of the cases stating that lawyers have a duty of "absolute and perfect candor" to clients fails to demonstrate that there is a broadly applicable duty, enforceable in civil actions, to disclose information to a client even when exercise of reasonable care would not call for its disclosure. Rather, the duty of "absolute and perfect candor" should be interpreted as limited to situations where the interests of attorney and client are adverse, as in the case of a business transaction, or to the few areas in which particular rules of conduct call for a high degree of disclosure, such as the rules relating to conflict of interest, client property, contract initiation, and settlement offers. Outside of these limited contexts, the disclosure obligations of attorneys are better described by the rule of negligence than by a rule of "abso-

252. *Id.* § 24(1).
253. Hefner v. State, 735 S.W.2d 608, 624 (Tex. App.—Dallas 1987, writ ref'd).
254. *Id.*

lute and perfect candor": an attorney must act reasonably in providing information to the client.

In all situations it is important to remember that the disclosure obligations of attorneys are limited by a variety of considerations including scope of representation, materiality, client knowledge, competing obligations to others, client agreement, and threatened harm to the client or others. Regardless of whether disclosure obligations are imposed under negligence law or fiduciary duty law, these considerations may justify the nondisclosure of information.