

# ARE LITERARY AGENTS (REALLY) FIDUCIARIES?

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*2018 was a big year for “bad agents” in the publishing world. In July, children’s literature agent Danielle Smith was exposed for lying to her clients about submissions and publication offers. In December, major literary agency Donadio & Olson, which represented a number of bestselling authors, including Chuck Palahniuk (Fight Club), filed for bankruptcy in the wake of an accounting scandal involving their bookkeeper, Darin Webb. Webb had embezzled over \$3 million of client funds. Around the same time, Australian literary agent Selwa Anthony lost a battle in the New South Wales Supreme Court involving royalties she owed to her ex-client, international bestselling author, Kate Morton (The Lake House, The Shifting Fog).*

*These are not the only literary agent scandals that have rocked the publishing world in recent years. However, litigation involving these agents is the exception rather than the rule, possibly because of a lack of knowledge by many authors, even famous authors, of their legal rights, or because the money made (or lost) by a number of authors is not worth the costs of litigation. The lack of legal precedent on the literary agent-author relationship can also lead to confusion about what the legal rights between the two parties entail. This Article*

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*analyzes the existing case law in the area, with a particular emphasis on teasing out the nature of fiduciary, contractual, and tortious duties owed by agents to authors. Recent cases suggest that, although literary agents are unquestionably fiduciaries, this characterization is of little practical importance, and that most of the obligations owed by agents to authors can more easily be explained and addressed as a matter of contract and tort law. To the extent that fiduciary duties have any significant work to do here, it seems to be in the “effective communication” area rather than in the more fundamental aspects of the relationship, like making deals and promoting the financial and reputational interests of the author.*

#### INTRODUCTION

In July of 2018, the publishing world was rocked by the revelation that Darin Webb, a bookkeeper for Donadio & Olson, a high profile literary agency, pled guilty to embezzling over \$3.3 million in royalties owed to clients from the agency.<sup>1</sup> He was ultimately sentenced to two years in prison,<sup>2</sup> while the agency itself filed for bankruptcy.<sup>3</sup> This was big news because the authors affected included bestsellers like Chuck Palahniuk, Mario Puzo, and Edward Gorey.<sup>4</sup> The embezzlement had gone on for years, but no one had noticed because the agency’s practice was to leave bookkeeping to the accounts department.<sup>5</sup> Many of the authors (or their estates) were likely not sufficiently sophisticated to properly read and comprehend their royalties’ statements or were not paying enough attention to them. In the aftermath of the discovery of Webb’s crimes, and the subsequent bankruptcy of the agency, it seems

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1. Rachel Deahl, *Reverberations Continue in Donadio & Olson Embezzlement Scandal*, PUBLISHERS WKLY. (Aug. 10, 2018), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/77742-reverberations-continue-in-donadio-embezzlement-scandal.html>; see Alison Flood, *Chuck Palahniuk ‘Close to Broke’ as Agent’s Accountant Faces Fraud Charges*, GUARDIAN (May 30, 2018), <https://www.theguardian.com/books/2018/may/30/chuck-palahniuk-agent-accountant-faces-charges-fight-club>.

2. Andrew Albanese, *Bookkeeper Gets Two Year Sentence for Scheme that Destroyed Donadio & Olson*, PUBLISHERS WKLY. (Dec. 17, 2018), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/78860-darin-webb-gets-two-years-in-prison-for-embezzlement-scheme-that-destroyed-donadio-olson.html>.

3. Jim Milliot, *Donadio & Olson Files for Bankruptcy*, PUBLISHERS WKLY. (Dec. 18, 2018), <https://www.publishersweekly.com/pw/by-topic/industry-news/financial-reporting/article/78862-donadio-olson-files-for-bankruptcy.html>.

4. See Albanese, *supra* note 2.

5. See Milliot, *supra* note 3.

unlikely that affected clients will receive much, if any, of the money in question.<sup>6</sup>

Around the same time, Australian literary agent Selwa Anthony sued her past client, internationally bestselling author Kate Morton, for commissions withheld from Anthony by Morton in relation to royalties earned after Morton terminated the agency agreement.<sup>7</sup> In a cross-claim, Morton alleged that Anthony breached her fiduciary duty by failing to secure the best offers on Morton's work that were reasonably available under the circumstances.<sup>8</sup> Anthony ultimately lost the case and was ordered to pay over half a million dollars to Morton, but not on the basis of fiduciary law.<sup>9</sup> Rather, the court held that Anthony had breached tort duties owed to Morton in relation to advice negligently given about several publishing contracts.<sup>10</sup>

In 2017, international bestselling romance author Mary Kuczkir (writing under the pen-name Fern Michaels) was sued by her agent, Martin Friedman, for attempting to cut him out of a deal he had initially brokered for her.<sup>11</sup> Kuczkir's defenses included an allegation of breach of fiduciary duty by Friedman, which ultimately failed.<sup>12</sup>

These cases tell us a number of things about the literary agent-author relationship, particularly in terms of the fiduciary nature of the relationship and the practical utility of that categorization. It seems to be accepted as common practice that a literary agent owes a fiduciary duty to their clients. This makes sense because fiduciary duties are typically attached to all agency arrangements. However, the scope of a literary agent's fiduciary duties is not always clear and, even to the extent it is clear, analysis of it can be, and often is,

6. See Milliot, *supra* note 3 (Neil Olson, a principal of Donadio & Olson, stated "we will never untangle the theft completely, or account for all of the loss. We have simply run out of time and resources.").

7. *Anthony v Morton* [2018] NSWSC 1884 ¶ 2 (Austl.). It is standard practice in literary agency contracts for agents to receive commission in perpetuity for deals they brokered, even if the client/author later moves to another agency. See *An Author's Guide to Agency Agreements*, AUTHORS GUILD, <https://www.authorsguild.org/member-services/writers-resource-library/all-about-literary-agents/authors-guide-agency-agreements/> (last visited Jan. 15, 2020).

8. *Anthony* [2018] NSWSC 1884 ¶ 2; see Louise Hall, *Author Kate Morton Accuses Literary Agent Selwa Anthony of Favouring Her Own Interests*, SYDNEY MORNING HERALD (Feb. 12, 2017, 12:42 PM), <https://www.smh.com.au/national/nsw/author-kate-morton-accuses-literary-agent-selwa-anthony-of-favouring-her-own-interests-20170208-gu8afx.html>.

9. *Anthony* [2018] NSWSC 1884 ¶ 731.

10. *Id.* ¶ 10.

11. See *Friedman v. Kuczkir*, 272 F. Supp. 3d 613, 618, 625–28 (S.D.N.Y. 2017).

12. *Id.* at 635–36.

sidestepped by courts in favor of simpler forms of legal analysis typically involving basic contract and tort principles.

In light of recent cases on literary agent contracts and conduct, this Article takes a timely look at the scope of the fiduciary relationship between agents and authors, and the extent to which fiduciary principles can be of practical assistance to aggrieved authors. It concludes that the major role played by these duties relates to the obligation to communicate effectively with a client and, even then, contract and tort law may play a more significant role than fiduciary law.

Part I surveys the basic principles of agency law as they apply to literary agents, along with the extent to which the principles may be effectively supplanted by contract and tort principles.<sup>13</sup> Part II employs a series of case studies to illustrate problematic aspects of author-agent relationships and to identify the extent to which fiduciary principles, in contrast to, say, tort or contract principles, are necessary to address some of the issues that have arisen in the past. This discussion also highlights the particular fiduciary duties likely to be of greatest importance in an author-agent relationship, emphasizing the role of the duty of effective and timely communication. Part III considers ways in which legal solutions to author-agent problems may be augmented by industry codes of conduct and the practical limitations of reliance on those codes. The Article concludes by making recommendations for better understanding the nature of a literary agent's responsibilities to their client, based on the law, industry norms, and codes of practice discussed in the earlier sections, as well as acknowledging the practical limitations of legal recourse for many aggrieved authors.

#### I. AGENCY LAW, FIDUCIARY PRINCIPLES, AND LITERARY AGENTS

Literary agents are obviously fiduciaries under general American legal principles relating to agency. Section 1.01 of the Restatement (Third) of Agency, adopted by the American Law Institute in 2006,

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13. Some courts have suggested that where an author knowingly signed an agreement that allowed the agent to take certain personal benefits from contracts brokered on behalf of the author, these arrangements would typically be enforced as a matter of general contract law in the absence of any factors that would tend to negate or mitigate the agreement, such as duress or undue influence. In other words, the sophistication and business savvy of the author seem to be key issues here. *See, e.g., Friedman*, 272 F. Supp. 3d at 634–35; *Levin v. Grecian*, 974 F. Supp. 2d 1114, 1132 (N.D. Ill. 2013).

provides that: “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”<sup>14</sup>

A written contract is not generally required to establish agency.<sup>15</sup> Section 1.02 goes on to state that: An agency relationship arises only when the elements stated in Section 1.01 are present.<sup>16</sup> “Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling.”<sup>17</sup> In other words, if the parties refer to their agreement as an “agency,” but the elements set out in the relevant law, as reflected in the Restatement, are not present, the agreement will not be treated as an agency agreement and will not necessarily carry fiduciary responsibilities. Most literary agency agreements are in writing and describe themselves as “agency” agreements.<sup>18</sup> More importantly, the agreements typically meet the requirements of Section 1.01 in that the literary agent agrees to act on the principal’s (author’s) behalf and subject to the principal’s (author’s) control, even though in practice many authors, particularly new authors, feel that agents have all the power and control over the relationship because of their greater experience in the publishing industry than most novice authors.<sup>19</sup>

Of course, an agent’s greater experience is often the reason why anyone retains the services of any kind of agent. A realtor is often engaged because of their greater knowledge of a particular real estate market. A lawyer is engaged by a client because of their greater knowledge of the law, their ability to represent a client in a dispute, or both. There is nothing particularly unusual about an agency

14. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

15. The requirements to create an agency relationship revolve around the principal manifesting assent to give authority to the agent to act on her behalf, regardless of whether that intent is written or in some other form (oral, conduct, etc.). See *id.* § 1.03 (“A person manifests assent or intention through written or spoken words or other conduct.”).

16. *Id.* § 1.02.

17. *Id.*

18. See *An Author’s Guide to Agency Agreements*, *supra* note 7 (categorizing these agreements as agency agreements or agency clauses).

19. See Sangeeta Mehta, *Ethics & the Literary Agent: What Rights Do Authors Have?*, JANE FREIDMAN (Nov. 30, 2017), <https://www.janefriedman.com/ethics-and-literary-agents/> (interviewing agents Mary C. Moore and DongWon Song about the perceived imbalance of power in the author-agent relationship).

relationship where the agent appears to have a degree of power based on knowledge of the relevant industry or transaction. However, even in literary agent agreements, the author is the principal and the agent is bound to act subject to the author's instructions,<sup>20</sup> although those instructions may be based in large part on advice given to the author by the agent.

At its heart, the fiduciary relationship rests on a duty of loyalty when the agent is acting on the principal's behalf.<sup>21</sup> Alongside the fiduciary duties imposed by law, a literary agent is also bound by relevant contractual duties<sup>22</sup> and tortious acts.<sup>23</sup> According to the Restatement and case law, fiduciary duties can also be modified by contract, typically requiring the principal's consent.<sup>24</sup>

The fiduciary duty attached to an agency relationship can extend to some elements of that relationship but not others.<sup>25</sup> This can be especially relevant in the publishing context, particularly where an agent is exercising functions to which it may be difficult to attach meaningful, or at least quantifiable, legal obligations, such as editorial assistance in the hopes of improving a client's manuscript prior to submission to publishers.<sup>26</sup> In the modern publishing world, it is very common for literary agents to be involved in a number of aspects of manuscript development prior to submission of the work to

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20. See *An Author's Guide to Agency Agreements*, *supra* note 7 (noting that "an agency has a fiduciary obligation to its clients, and must therefore always put the author's interests above its own").

21. See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e; see also *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (describing the fiduciary duty of loyalty in the following terms: "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.").

22. See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e.

23. See *id.* § 7.01.

24. Section 8.06(1) of the Restatement (Third) of Agency contemplates that an agent will not breach a fiduciary duty if they obtain the principal's consent to particular actions. *Id.* § 8.06(1). This consent must be obtained in good faith, on disclose of all material facts, and the agent must continue to deal fairly with the principal in all other respects. *Id.*; see *Levin v. Grecian*, 974 F. Supp. 2d 1114, 1132 (N.D. Ill. 2013) ("[A]n agent cannot be liable for a breach of fiduciary duty where he has acted in keeping with his principal's express consent." (citations omitted)).

25. See RESTATEMENT (THIRD) OF AGENCY, § 1.01 cmt. e ("Fiduciary duty does not necessarily extend to all elements of an agency relationship, and does not explain all of the legal consequences that stem from the relationship.").

26. See Sandra Haurant, *How Do I Become . . . a Literary Agent?*, *GUARDIAN* (July 1, 2015, 10:37 AM), [https://www.theguardian.com/money/2015/jul/01/how-do-i-become-a-literary-agent?CMP=share\\_btn\\_link](https://www.theguardian.com/money/2015/jul/01/how-do-i-become-a-literary-agent?CMP=share_btn_link) (explaining the various functions agents undertake, including reading and commenting on early draft material from an author and contract negotiations with publishers).

publishers and prior to any deals being made.<sup>27</sup>

It is difficult to see how a fiduciary obligation regarding, say, loyalty or due care could meaningfully attach to the developmental editing functions that many agents undertake.<sup>28</sup> How would a court ever measure whether an agent had performed developmental editing tasks in line with a duty of loyalty and due care? An agent may give an author terrible advice about developing the manuscript, but this is a very subjective question. In any event, it is not in the agent's financial interests to give the author bad editing advice because the agent's ultimate commission is tied to the author's success in respect to the work's ultimate publication.<sup>29</sup> Agents generally work on a commission-only basis, based on sales of their client's work.<sup>30</sup> Thus, it would be counterproductive for an agent to hijack a client's chances of success by giving poor editorial advice about a manuscript.

Likewise, the literary agent's typical contractual duty to use "best efforts" to sell a manuscript<sup>31</sup> may or may not be supplemented by a similar fiduciary duty. While it may be easier to see how fiduciary obligations could attach to this duty rather than to obligations arising in an agent's editorial capacity, it is also arguable that contractual duties suffice to protect the parties' respective interests in making publication deals. Again, the agent's and author's interests are pretty closely aligned when the agent sends the author's manuscript out for submission to publishing houses. Thus, it seems unlikely that an agent would consciously attempt *not* to sell the manuscript.

An agent may not be sufficiently well versed in the relevant market to make a sale or to make a sale on the most favorable terms possible, but this will be a very difficult factual question in a highly

27. *See, e.g., id.*

28. *See id.*

29. *See id.*

30. *Id.* ("Agents are paid through a commission-based system, typically earning 15% of any advance or royalties.")

31. *See* LAURA CROSS, *THE COMPLETE GUIDE TO HIRING A LITERARY AGENT: EVERYTHING YOU NEED TO KNOW TO BECOME SUCCESSFULLY PUBLISHED* 271 (2010) (providing an example of the "best efforts" provision). A brief note on terminology: throughout this Article, I refer to the colloquial industry terms "sale" and "deal" relating to publishing contracts brokered by literary agents for their clients. It should, however, be noted that generally these contracts are not, legally speaking, "sales" but rather either licenses for a set period of time over certain aspects of an author's copyright in particular works or a copyright transfer to the publisher. *See, e.g., Copyright Guidance: Copyright for Authors & Creators*, YALE U. LIBR., <https://guides.library.yale.edu/copyright-guidance/CopyrightForAuthors> (last visited Jan. 15, 2020).

subjective industry. In the 2013 case of *Levin v. Grecian*,<sup>32</sup> an author attempted to establish that their agent had breached a “best efforts” duty to sell a manuscript, but the court held that this question could not be dispensed on a summary judgment motion because it involved highly subjective matters of fact.<sup>33</sup> Even in judgments on the merits, it can be difficult for a judge, after the fact, to second-guess an agent’s efforts to make a sale.

An analogy might be made here to case law in the business associations area involving a corporate director’s fiduciary duty of care when transacting in the name of the company.<sup>34</sup> In American law, directors are typically given the benefit of the doubt when they have acted in a reasonable manner, free from undue influences, and on the basis of information reasonably available to them.<sup>35</sup> The “business judgment rule” is imposed in the corporate context<sup>36</sup> to give directors (those with the expected level of skill in the relevant transaction) the benefit of the doubt when making business decisions.<sup>37</sup>

In the more general fiduciary duty context, Section 8 of the Restatement (Third) of Agency sets out many aspects of an agent’s

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32. 974 F. Supp. 2d 1114, 1124 (N.D. Ill. 2013).

33. *Id.* (the court noted that “whether Levin breached the Agreement’s best efforts obligation cannot be resolved on summary judgment”).

34. See JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 10:1 (3d ed. 2018) (“Directors and officers are fiduciaries in a position of great power. As such, each is subject to duties of care and loyalty.”).

35. *Id.* § 10:2 (“In general, courts will not undertake to review the expediency of contracts or other business transactions authorized by the directors. Directors have a large degree of discretion. Questions of value and policy have been said to be part of the directors’ business judgment, although their errors may be so gross as to show their unfitness to manage corporate affairs. According to the better view, the business judgment rule presupposes that reasonable diligence and care have been exercised. But are there not, in addition, some limits on the immunity for losses due to honest errors resulting from a director’s lack of intelligence, foresight, and business sense? Hasty action by an ill-informed board will not be insulated by the business judgment rule. However, directors and officers do not operate in a world that permits them to have all the information they would prefer to have before they act. ‘The need to make judgments with only imperfect information available, and other elements of risk taking, are often inherent in business decisionmaking.’ When the board has not acted in breach of a fiduciary duty, its members will be entitled to the protection of the business judgment rule.” (quoting PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01 (AM. LAW INST. 1994))).

36. *Id.* (“What is the liability of directors for incompetence? Although directors are commonly said to be responsible both for reasonable care and for prudence, the formula is continually repeated that directors are not liable for losses due to imprudence or honest errors of judgment. This formula is frequently referred to as the ‘business judgment rule.’”).

37. See *id.*

fiduciary duties. For example, Section 8.01 sets out the general fiduciary duty of loyalty: “An agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.”<sup>38</sup> This general duty is supplemented by other more specific duties, including the duties to avoid acting in competition with a principal,<sup>39</sup> to maintain the confidentiality of the principal’s information,<sup>40</sup> and to avoid making a material benefit from an opportunity that rightfully belongs to the principal.<sup>41</sup>

All of these duties are qualified by the ability for the principal to consent to waive the duties in certain contexts. Section 8.06(1) provides that the principal’s consent to conduct that would otherwise be a breach of fiduciary duty is valid provided that:

- (a) in obtaining the principal’s consent, the agent
  - (i) acts in good faith,
  - (ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal’s judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and
  - (iii) otherwise deals fairly with the principal; and
- (b) the principal’s consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.<sup>42</sup>

There is no reason why these principles would not apply to an agent-author relationship. It may be that many authors are not

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38. RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006).

39. *Id.* § 8.04.

40. *Id.* § 8.05(2).

41. *Id.* § 8.02 cmt. d (“[A]ll agents, even those whose assigned work does not involve the assessment or pursuit of business opportunities, have a fiduciary duty to the principal not to take personal advantage of an opportunity and not to give the opportunity to a third person, when either the nature of the opportunity or the circumstances under which the agent learned of it require that the agent offer the opportunity to the principal.”).

42. *Id.* § 8.06(1).

particularly sophisticated business people so that the application of rules about the ability for a principal to meaningfully consent to breaches of duty may have to be weighed in light of the author's (the principal) actual level of commercial sophistication in practice. However, there are likely fewer practical circumstances in which a literary agent's interests might come into conflict with those of an author's or client's interests. Usually, as noted above, the agent's and author's interests are closely aligned—the more money the author makes, the greater commission the agent receives on advances and royalties.<sup>43</sup> The author-agent situation may be contrasted with that of other fiduciaries, such as corporate directors who often have interests in a number of different entities which may conflict with the director's duties to the company.<sup>44</sup>

Alongside the general fiduciary duties, the Restatement (Third) of Agency also acknowledges the contractual duties an agent may owe to a principal: "An agent has a duty to act in accordance with the express and implied terms of any contract between the agent and the principal."<sup>45</sup> In the literary agent context, some of these terms may be implied from industry custom.<sup>46</sup> Thus, even if a contract does not expressly require an agent to use their "best efforts" to sell an author's manuscript, that term would likely be implied from trade usage or custom.<sup>47</sup>

In practice, many agent contracts are expressed to be complete

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43. Royalties are the percentage payment an author obtains from a publisher on copies of a book sold and advances are payments made to the author by the publisher prior to publication which are usually set off against royalties ultimately paid. An author who receives an advance from her publisher typically does not receive any royalties until the book "earns out" (i.e., the royalties made equal the amount of the advance already paid). For more detail on advances and royalties in the publishing context, see Gary Smailes, *A Guide to Book Advances and Royalties*, BUBBLECOW, <https://bubblecow.com/blog/a-simple-guide-to-book-advances-and-royalties> (last visited Jan. 15, 2020) (explaining the difference between advances and royalties in book publishing).

44. See Didier Cossin, *The Four Tiers of Conflict of Interest Faced by Board Directors*, IMD, <https://www.imd.org/research-knowledge/articles/the-four-tiers-of-conflict-of-interest-faced-by-board-directors/> (last visited Jan. 15, 2020) (discussing the various conflicts of interest faced by corporate board of directors).

45. RESTATEMENT (THIRD) OF AGENCY § 8.07.

46. See *id.* § 8.07 cmt. b ("A contract may create duties of performance on the part of an agent through its express or implied terms. The terms of an agreement between a principal and an agent may incorporate, either expressly or impliedly, the custom or usage of a particular trade.").

47. See *id.* ("Other terms may be implied as well, for example, a requirement that an agent exercise best efforts.").

agreements,<sup>48</sup> so that, for the purposes of the parol evidence rule, there will be circumstances where outside terms do not enter the scope of the contract, at least where those terms conflict with the stated terms of the written agreement.<sup>49</sup>

In contrast, some agency agreements are not written at all.<sup>50</sup> This was the case in the Selwa Anthony-Kate Morton litigation, where the original agency agreement was purely verbal.<sup>51</sup> In such cases, terms implied from trade usage or custom may be particularly relevant to resolve ambiguities.

The duty imposed on agents under Section 8.08 of the Restatement (Third) of Agency will also be somewhat familiar to anyone who has studied fiduciary principles more generally. Section 8.08 sets out the duty of a fiduciary to act with due care and skill on behalf of the principle.<sup>52</sup> It states that:

*Subject to any agreement with the principal, an agent has a duty . . . to act with the care, competence, and diligence normally exercised by agents in similar circumstances. Special skills or knowledge possessed by an agent are circumstances to be taken into account in determining whether the agent acted with due care and diligence. If an agent claims to possess special skills or knowledge, the agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents with such skills or knowledge.*<sup>53</sup>

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48. It is common for such contracts to contain “merger clauses” (also known as “integration clauses”). See DAVID FRISCH, LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-202:48 (3d ed. 2018) (“An integration clause is indicative that the parties intended the writing to be the exclusive statement of the parties’ agreement, and will usually be given that effect.”).

49. See, e.g., *Allen v. United States*, 119 Fed. Cl. 461, 481 (2015) (holding that “[u]nder the parol evidence rule, extrinsic evidence pre-dating a written agreement may not be used to . . . ‘modify the terms of a written agreement’” expressed to be the parties’ “final understanding” (quoting *TEG-Paradigm Envtl., Inc. v. United States*, 465 F.3d 1329, 1338–39 (Fed. Cir. 2006))).

50. See *An Author’s Guide to Agency Agreements*, *supra* note 7.

51. *Anthony v Morton* [2018] NSWSC 1884 ¶ 4 (Austl.) (“There was . . . clearly an agency relationship between the parties and Ms Morton does not dispute this. However, there was never any written agency agreement between them. Ms Anthony’s usual practice was not to enter into written agreements with the authors she represented.”).

52. RESTATEMENT (THIRD) OF AGENCY § 8.08.

53. *Id.* (emphasis added).

As discussed in Part II, *infra*, there is much case law on the level of care, competence, and due diligence that corporate directors are expected to exercise in relation to corporations. The same holds true for other fiduciaries, such as investment advisors and real estate agents.<sup>54</sup> However, there is very little case law on what it means for a literary agent to exercise due care and skill, especially in circumstances where the agent has held themselves out as possessing particular skills and knowledge, like high-level editorial skills.

All literary agents will of course claim to have a certain level of skill in relation to the particular markets in which they operate. For example, a romance agent should hopefully know something about the romance market, and an agent who represents authors of thrillers and suspense novels should hopefully know something about those markets. However, the levels of knowledge between agents are likely to vary. For example, an agent who has sold twenty bestsellers to leading publishers may claim to know more than an associate agent just starting out. But how do you quantify those different skill levels in practice, and is it something courts are equipped to do? We will return to these questions in Part II. We will also consider whether these questions are more appropriately addressed under the rubric of contractual or fiduciary obligations, or whether, in certain contexts, the two effectively merge in practice.

Other specific fiduciary duties that may be less contentious or easier to interpret include the duties of the literary agent: (a) to act only within the scope of their actual authority;<sup>55</sup> (b) “to comply with all lawful instructions received from the principal”;<sup>56</sup> (c) “to act reasonably and to refrain from conduct that is likely to damage the principal’s enterprise”;<sup>57</sup> (d) to protect the principal’s confidential information;<sup>58</sup> (e) “not to mingle the principal’s property with anyone else’s”;<sup>59</sup> (f) to maintain and render appropriate accounts;<sup>60</sup> and (g) not to deal with the principal’s property as if it belongs to the agent.<sup>61</sup>

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54. See, e.g., *S.F. Residence Club, Inc. v. Amado*, 773 F. Supp. 2d 822, 832 (N.D. Cal. 2011) (discussing the requirement of due care and skill of investment advisors); *Kravetz v. U.S. Trust Co.*, 941 F. Supp. 1295, 1310–11 (D. Mass. 1996) (same); see also *Haldiman v. Gosnell Dev. Corp.*, 748 P.2d 1209, 1212–14 (Ariz. Ct. App. 1987) (discussing the duty of due care owed by real estate agents).

55. RESTATEMENT (THIRD) OF AGENCY § 8.09(1).

56. *Id.* § 8.09(2).

57. *Id.* § 8.10.

58. *Id.* § 8.05(2).

59. *Id.* § 8.12(2).

60. *Id.* § 8.12(3).

61. *Id.* § 8.12(1).

Many of these duties, especially those relating to responsible handling of client funds, are relatively self-explanatory and typically match the contractual duties expressed in agency agreements.

Of potentially more relevance to the agent-author relationship are the duties to keep the principal informed, which can become a charged issue in these relationships when authors vie with other clients for their agent's attention.<sup>62</sup> Section 8.11 of the Restatement (Third) of Agency states that:

An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when

- (1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and
- (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.<sup>63</sup>

In the author-agent context, it may be difficult to quantify from agency to agency and author to author what the duty to provide information to a particular author or client entails. Some agents make it their practice to regularly "check in" on clients about things like submissions, progress on drafting and editing new manuscripts, ideas for new projects, and anything else that may be relevant to the author's career.<sup>64</sup> This is probably a good practice, but it can become unwieldy for agents with large client lists and little administrative help.

However, even where an agent is theoretically in breach of the

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62. In *Levin v. Grecian*, for example, one of the author's complaints was that his agent was not communicating actively with him about his work. 974 F. Supp. 2d 1114, 1124 (N.D. Ill. 2013). The court notes, in particular, that "[t]he fact that the parties exchanged 781 emails and that only 271 were sent by Levin [the agent] implies that Grecian sent the other 510, a lopsided ratio consistent with the picture Grecian paints of Levin as a disengaged and often unresponsive agent." *Id.*

63. RESTATEMENT (THIRD) OF AGENCY § 8.11.

64. See Kerrie Flanagan, *The Literary Agent-Author Relationship*, WRITER (Nov. 4, 2019), <https://www.writermag.com/get-published/the-publishing-industry/agent-author-relationship/> (discussing communication practices between authors and agents).

duty to keep an author informed, it may be difficult to quantify damages and fashion appropriate remedies. For example, think about the agent who does not regularly check in with the author about progress on new projects. What damage could be suffered by the client as a result? That the author does not complete a project as quickly as they theoretically could? Is it not arguably the author's responsibility to manage their time and meet their deadlines, whether set by a publisher or self-imposed? This duty is another example of a fiduciary duty that may be well understood in some industries but is of questionable application in the agent-author context.

While some commentators have argued that fiduciary principles should develop broadly in a non-sectoral-specific manner,<sup>65</sup> there are good arguments for sectoral (industry-specific) treatment of some fiduciaries because of the particular nature of their relationships with their principals. Author-agent relationships are an obvious example of an agency relationship that clearly implicates general fiduciary duties in some contexts, but also a relationship where fiduciary duties may have developed, or are developing, differently than in other industries.

As compared with, say, corporate directors and investment advisors, literary agents' interests are arguably more closely aligned to those of their clients because commission is solely based on their clients' successes.<sup>66</sup> Most literary agents do not take salaries (unlike, say, corporate directors).<sup>67</sup> Rather, their commission is solely based on the success of their clients.<sup>68</sup> Because of the commission-based model, literary agents may be more closely analogized with agents like realtors. However, literary agents are likely to have a much closer personal and working relationship with clients than realtors, whose function is to identify relevant properties and make a sale. Literary agents are much more involved in their clients' ongoing careers and bodies of work over many years or even decades.<sup>69</sup>

Literary agents are probably most easily analogized to other

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65. See, e.g., Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 796–97 (1983) (arguing against the historically sector-specific approach to developing fiduciary duties).

66. See Haurant, *supra* note 26.

67. See Mehta, *supra* note 19 (“Although we are in this for the love of books, agents only make money when their clients make money. We HAVE to be advocates, because that’s what makes us successful.”).

68. *Id.*

69. See, e.g., *Inside the Agent-Author Relationship*, WRITER’S DIGEST (Dec. 1, 2018), <https://www.writersdigest.com/editor-blogs/writers-perspective/inside-the-agent-author-relationship> (discussing various author’s experiences with agents).

entertainment-based agents (e.g., talent and sports agents) who typically become involved with all aspects of their clients' careers over significant periods of time. The movies *Jerry Maguire* and *Tootsie* include colorful examples of long-term sports and entertainment agents respectively.<sup>70</sup> However, talent agents tend to be more heavily involved in *identifying* and seeking to secure projects for their clients as opposed to literary agents who work on *developing* projects with their clients and selling the projects once completed.<sup>71</sup>

In other words, there is really no one form of agent that a literary agent is most “like.” Because of the way a typical author-agent relationship works—the personal and developmental aspects of the relationship, alongside the business opportunity and sale aspects—it is unique in many respects. These factors may impact the way fiduciary principles should ideally govern the relationship. The following Part examines the current fit (or lack thereof) between fiduciary principles and author-agent activities, with a view to better identify the appropriate work of fiduciary principles in this context.

## II. LITERARY AGENTS' OBLIGATIONS TO THEIR CLIENTS

### A. *The Nature of the Literary Agent Profession*

One reason why the nature of the author-agent relationship is perhaps less well understood as a legal matter than other kinds of fiduciary relationships is that the publishing industry is not subject to much scrutiny or oversight by external bodies. Compared with professions like realtors,<sup>72</sup> lawyers,<sup>73</sup> corporate directors,<sup>74</sup> and the like, literary agents operate in a less transparent manner. There are

70. JERRY MAGUIRE (TriStar Pictures 1996); TOOTSIE (Columbia Pictures 1982).

71. See *What Does a Talent Agent Do?*, CAREEREXPLORER, <https://www.careerexplorer.com/careers/talent-agent/> (last visited Jan. 15, 2020); see also Flanagan, *supra* note 64.

72. See Bob McWilliams & Donna McWilliams, *Realities of Real Estate: So Who Regulates Real Estate Agents?*, CAP. GAZETTE (Aug. 2, 2015, 3:00 AM), <https://www.capitalgazette.com/ph-ac-housing-0802-20150802-story.html>.

73. See, e.g., *Model Rules of Professional Conduct: Preamble & Scope*, AM. BAR ASS'N, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/) (last visited Jan. 15, 2020).

74. See, e.g., H. Stephen Grace Jr., S. Lawrence Prendergast & Susan Koski-Grafer, *Board Oversight and Governance: From Tone at the Top to Substantive Checks and Balances*, AM. BAR ASS'N: BUS. L. SEC. (Feb. 14, 2019) <https://businesslawtoday.org/2019/02/board-oversight-governance-tone-top-substantive-checks-balances/>.

no regulatory requirements that must be satisfied to become a literary agent: no licensing scheme for literary agents.<sup>75</sup> The qualifications to become a member of the Association of Authors' Representatives, Inc. (AAR), the American literary agents' association,<sup>76</sup> are basically that an agent has been performing the job of an agent.<sup>77</sup> There are no external examinations or certifications required to become a member.<sup>78</sup> There are no ongoing licensing requirements.<sup>79</sup> This situation is very different from many other professions that attract fiduciary duties, such as law and medicine, as well as many paramedical pursuits.<sup>80</sup> Even beauticians are required to be state licensed.<sup>81</sup> However, literary agenting is largely self-regulating. Fiduciaries like corporate directors and investment advisors are also not required to hold any specific qualifications or certifications, but they are required to make particular disclosures to regulatory authorities.<sup>82</sup>

When authors seek agents, they generally do so by word of mouth. They ask other authors for advice on respectable agents; they troll websites for comments on agents; they check services like Publishers Marketplace<sup>83</sup> and Publishers Weekly<sup>84</sup> to see which agents are

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75. See *Do I Need a Literary Agent to Self-Publish a Book?*, AUTHORHOUSE, <https://www.authorhouse.com/en/get-published/literary-agents-and-self-publishing> (last visited Jan. 15, 2020).

76. See *Welcome*, ASS'N AUTHORS' REPRESENTATIVES, INC., <http://aaronline.org/> (last visited Jan. 15, 2020).

77. See *Membership Criteria*, ASS'N AUTHORS' REPRESENTATIVES, INC., <http://aaronline.org/page-1758487> (last viewed Jan. 15, 2020).

78. See *id.*

79. See *id.*

80. See, e.g., *Model Rules of Professional Conduct*, *supra* note 73; see also FED'N OF STATE MED. BDS., U.S. MEDICAL REGULATORY TRENDS AND ACTIONS 2018, at 6–7 (2018), <https://www.fsmb.org/siteassets/advocacy/publications/us-medical-regulatory-trends-actions.pdf>.

81. See Dick M. Carpenter II et al., *License to Work: A National Study of Burdens from Occupational Licensing*, INST. FOR JUST., <https://ij.org/report/license-work-2/ltw-occupation-profiles/ltw2-cosmetologist/> (last visited Jan. 15, 2020).

82. See, e.g., 17 C.F.R. § 229.401 (2018) (outlining required disclosures of corporate directors and other senior officers in matters including background and business experience).

83. For a list of agents maintained by Publishers Marketplace, see *Browse Member Pages: Agents*, PUBLISHERS MARKETPLACE, <https://www.publishersmarketplace.com/browse/category.cgi?c=8> (last visited Jan. 15, 2020).

84. See PUBLISHERS WKLY., <https://www.publishersweekly.com/pw/home/index.html> (last visited Jan. 15, 2020).

actively making deals.<sup>85</sup> Technology has enabled more sophisticated ways of researching potential agents. For example, online services such as QueryTracker and AgentQuery allow authors to not only research agents, but to find out what others have said about: (a) how long each agent takes to respond to queries; (b) what kinds of feedback authors get on their queries; (c) how long the agent takes to read a full manuscript and decide whether to make an offer of representation; and (d) what percentage of queries to the agent receive offers of representation.<sup>86</sup> Services such as Preditors and Editors and the Science Fiction & Fantasy Writers of America's (SFWA) Writer Beware website give authors advice about who and what to look out for in terms of agents and editors.<sup>87</sup>

As noted above, literary agents are not the only fiduciaries who are not professionally licensed.<sup>88</sup> However, because the nature of their work is so subjective, and because the relationship with clients can become quite emotionally charged, there is a need to understand the legal obligations of an agent to their client. The comparatively small number of author-agent problems that reach courts, receive media attention, or both are perhaps a testament to how well the system works for the most part. On the other hand, the lack of media and judicial attention to the agent-author relationship may have more to do with authors feeling that they have little meaningful recourse in a case of perceived agent malfeasance, particularly when they either do not fully understand their rights vis-à-vis their agents or cannot quantify any particular losses attributable to an agent's malfeasance. For example, if an agent makes major editorial recommendations about a manuscript which the author makes, and then the manuscript fails to sell or sells at a lower price than the author expected, how does the author quantify the extent to which the agent's recommendations positively or negatively impacted the sale?

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85. See, e.g., Stephanie Elliot, *11 Authors Discuss the Road to Getting a Literary Agent*, WRITER'S DIGEST (July 30, 2018), <https://www.writersdigest.com/writing-articles/by-writing-goal/get-published-sell-my-work/11-authors-discuss-the-road-to-getting-a-literary-agent>.

86. See AGENTQUERY.COM, <https://www.agentquery.com/> (last visited Jan. 15, 2020); QUERYTRACKER, <https://querytracker.net/> (last visited Jan. 15, 2020).

87. See Preditors and Editors, FACEBOOK, <https://www.facebook.com/preditors/> (last visited Jan. 15, 2020); see also *Writer Beware*, SCI. FICTION & FANTASY WRITERS AM., <https://www.sfwawriterbeware.org/other-resources/for-authors/writer-beware/> (last visited Jan. 15, 2020).

88. Other examples include partners in partnerships, trustees, executors and administrators of estates, and guardians. See Frankel, *supra* note 65, at 795 (providing a list of fiduciaries, some of which are historically licensed and others are not).

The following survey of some of the higher profile agent-author issues in recent years (not all of which ended up in court) will hopefully shed some light on the legal duties owed by agents to authors, and whether those duties are best imposed via fiduciary principles or standard contract and tort rules.

### B. *Anthony v Morton*

The most recent and comprehensive legal decision on the scope of an agent's duties to an author is an Australian decision from December of 2018.<sup>89</sup> The case involved international bestselling author Kate Morton and her former agent, Selwa Anthony.<sup>90</sup> While the case involves Australian state law (the law of New South Wales), in many salient respects the laws applied here are largely analogous to similar legal rules in the United States.

This case could almost be a textbook on the law of literary agency in and of itself because of the amount of ground the court covered in terms of the relationship between an agent and author, although, ultimately, the decision itself turned on a small number of salient issues.<sup>91</sup> Two of the major questions in contention were: (a) whether an oral contract sufficed for an agency arrangement and if so, what the terms of the agreement were;<sup>92</sup> and (b) whether the contract, if it existed, was infringed by the agent failing to disclose certain information to the client about a series of book deals.<sup>93</sup>

It should not come as a surprise to learn that the Supreme Court of New South Wales had little trouble identifying the existence of an oral agency contract, acknowledging that Anthony had entered into a verbal agency agreement with Morton,<sup>94</sup> who, at the time of their initial arrangement, was an unpublished author.<sup>95</sup> The terms of the oral agreement included the standard commission of 15% to Anthony on Morton's earnings for book deals brokered by Anthony.<sup>96</sup> However, there was confusion as to: (a) whether the 15% covered only advances

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89. *Anthony v Morton* [2018] NSWSC 1884 ¶ 1 (Austl.).

90. *Id.*

91. *See id.*

92. *See id.* ¶¶ 4, 5–8 (discussing the existence of oral agency agreement and the issues related to the oral agreement).

93. *See id.* ¶¶ 9, 10 (explaining the allegations and the respects in which the agent, Anthony, may have insufficiently explained the nature of certain “world rights” publishing deals she brokered for Kate Morton).

94. *See id.* ¶¶ 4, 5 (acknowledging existence of oral agency agreement).

95. *See id.* ¶ 33.

96. *See id.* ¶¶ 7–8.

paid by the publisher to Morton or also included royalties if the book earned out; (b) whether the 15% on royalties, if it was part of the contract, continued in perpetuity (i.e., for the commercial life of the book even after termination of the agency agreement); and (c) whether Anthony had failed to fulfill a duty to Morton to explain the calculation of royalties and commissions on foreign publication deals for her books.<sup>97</sup>

The first two issues were matters of interpretation of the oral contract between Anthony and Morton. The court upheld the 15% commission on both advances and royalties,<sup>98</sup> but not in perpetuity.<sup>99</sup> Despite some evidence of trade usage and past practice in relation to ongoing royalties, the court was not convinced that this term had been made sufficiently clear to Morton when the oral contract was negotiated to become part of the contract.<sup>100</sup>

The third issue is the most important for the purposes of this discussion. It deals with the interplay between tort, contract, and fiduciary law in the context of Anthony's failure to explain the terms of the "foreign rights" deals she made for some of Morton's books. Ultimately, the court held that, while an agent is a fiduciary, no fiduciary duties were breached under the circumstances, but there was a breach of either contract or tort duties.<sup>101</sup>

The facts on this issue are somewhat complex. Anthony had negotiated a deal for Morton's early works with leading Australian publisher Allen & Unwin (AU).<sup>102</sup> The deal involved the license of "world rights" to AU.<sup>103</sup> This enabled AU to sublicense agents in foreign countries to sell the books in those countries, and AU would take a commission on any foreign sales along with the commission

97. *See id.* ¶¶ 7–10.

98. *Id.* ¶ 462 ("I accept that there was a course of dealing between Ms Morton and Ms Anthony from 2005 onwards from which it can be concluded that Ms Anthony was entitled to deduct 15% commission from gross amounts payable to Ms Morton by way of both advances and royalties. Although Ms Morton was adamant that she was not told about commission on royalties (as opposed to advances) it is clear that, over the period up to 2015, Ms Anthony's practice once the advances had been earned out was to deduct commission from the subsequent royalty payments and there was no demur from Ms Morton as to this practice.")

99. *Id.* ¶ 433 ("I am unable to accept that any discussion between Ms Morton and Ms Anthony in 2005 as to the 15% commission which Ms Anthony would take extended to a discussion as to that commission entitlement continuing beyond the term of the agency relationship as such.")

100. *See id.* ¶ 537.

101. *Id.* ¶ 635.

102. *Id.* ¶¶ 9, 28–64 (describing the claim and negotiations for the first two books).

103. *Id.*

charged by the foreign agent.<sup>104</sup> This resulted effectively in Morton paying three layers of commission on foreign sales for her work: the 15% commission to Anthony, an additional commission to AU, and a further commission to any foreign agent retained by AU to make foreign deals for the books.<sup>105</sup>

This practice is relatively unusual in the foreign sales context. Most agents will try to retain foreign rights and sell them separately to avoid those higher commissions to the authors.<sup>106</sup> In other words, Anthony could have sold only Australia/New Zealand rights to AU, and retained foreign rights (UK, Europe, North America, etc.) to sell herself to publishers in those regions. In that scenario, Anthony would have taken her 15% commission and would likely have retained a foreign agent who would also have taken a percentage, but the Australian publisher would not have taken an additional commission. The country-by-country approach is more work for the agent, but better for the author.

With respect to the original deal for Morton's first two books, there was a greater argument to be made for giving "world rights" to AU because, at the time, Morton was an unpublished and unknown author, and AU had a large overseas network that could be tapped for foreign sales.<sup>107</sup> In fact, AU did so with tremendous success, eventually launching Morton into her bestselling position in the UK and many other regions.<sup>108</sup>

The problems arose with book deals on subsequent books, when Anthony encouraged Morton to continue contracting with AU on a similar basis to the first contract, albeit with higher advances.<sup>109</sup> It took Morton many years and a change of domicile to the United Kingdom (UK), where she spent more time talking to her UK publishers, to discover that the licensing of world rights to AU in

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104. See *id.* ¶¶ 9, 352.

105. See *id.* ¶¶ 352, 644 (discussing the breakdown of commissions and the "financial consequences in terms of additional layers of commission payable under a world rights publishing deal.").

106. See, e.g., *id.* ¶¶ 351–56; see also Claire Fuller, *Publishing Interviews: The Foreign Rights Agent*, WRITERS & ARTISTS, <https://www.writersandartists.co.uk/writers/advice/1093/preparing-for-submission/what-does-a-literary-agent-do/> (last visited Jan. 15, 2020) ("Generally speaking, we try and keep the rights to handle here – in the majority it's better for the client since any rights a publisher handles will be split with them in a larger percentage than we take on commission of our deals.").

107. This was the argument that Anthony attempted to make. *Anthony* [2018] NSWSC 1884 ¶ 40.

108. *Id.* ¶¶ 382, 588.

109. See *id.* ¶ 9.

Australia was no longer in her best interests and that she had, in fact, been paying significantly higher commissions than she would have been paying had her agent advised her to sell foreign rights on a country-by-country basis (and cut out the middleman—the commission going to AU on each foreign sale).<sup>110</sup>

Anthony's reasons for not explaining the difference between licensing "world rights" to AU and licensing foreign rights on a country-by-country basis were that she felt Morton, Anthony, and AU had a great working relationship and the deals were ultimately in Morton's best interests for this reason.<sup>111</sup>

However, Anthony's failure to advise Morton of the options—the other ways to sell foreign rights—arguably put Morton at a significant financial disadvantage in contrast to where she would have been if she had the benefit of this information.

The court held that the failure to advise Morton of the different models for selling foreign rights amounted to a breach of both a contractual and tortious duty of care.<sup>112</sup> Under both contract and tort law, a reasonable agent acting with the skill and judgment to be expected of a person in that position, according to the court, would have advised Morton of the pros and cons of the different ways of selling foreign rights.<sup>113</sup> However, the court was less convinced that the failure to advise Morton of this information also amounted to a breach of fiduciary duty.<sup>114</sup> Several fiduciary theories were advanced by Morton, including: (a) a duty of loyalty in relation to a conflict of interest or personal benefit;<sup>115</sup> and (b) failure to communicate relevant

110. *See id.* ¶¶ 96, 111, 384.

111. *Id.* ¶ 583.

112. *Id.* ¶¶ 635, 664.

113. *Id.* ¶ 664 ("I conclude that Ms Anthony's duty of skill and care owed in contract and tort required that she draw Ms Morton's attention to material features of the arrangement which were likely to affect Ms Morton's decision making. It was clearly a material feature of the world rights arrangements that Ms Anthony's duties as agent (in that context) would be reduced to almost nil, whilst Ms Anthony continued to obtain the same rate of commission. I conclude that no disclosure of this aspect was made to Ms Morton, and that this was a breach of Ms Anthony's duty to keep her principal informed. I would thus uphold Ms Morton's cross-claim.")

114. *See id.* ¶ 635.

115. *Id.* ¶ 628 ("A further proposition put by Ms Morton was that there was a potential conflict as between Ms Anthony's personal interests in a world rights deal insofar as this would necessarily involve much of the work involved in the collection of revenue and other administrative functions in dealing with overseas publishers being carried out by A&U (which Ms Anthony considered had the resources to do and would do so more effectively than her) and her duty to Ms Morton to consider all the ramifications of a world rights, as opposed to a territory by territory, deal.")

information.<sup>116</sup>

With respect to the duty of loyalty issue, Morton raised various arguments including: (a) Anthony benefited from the “world rights” deal to AU because it relieved Anthony from having to engage in the work of entering separate foreign negotiations for the books;<sup>117</sup> (b) as a corollary, Anthony retained the same commission for less work thus amounting to a “personal benefit” to her;<sup>118</sup> and (c) Anthony had made several communications where she demonstrated concern for her contacts at AU, seemingly expressing a desire to make a deal in their interests and thus arguably preferring their interests over Morton’s.<sup>119</sup>

The court considered in some detail, and ultimately rejected, these arguments in relation to personal benefit and conflict of interest.<sup>120</sup> With respect to the concern that Anthony was prioritizing other interests over Morton’s, Judge Ward noted that: “At all material times, the three parties (Ms Anthony, A&U and Ms Morton) were engaged in a professional (and commercial) relationship which would to some extent see each of them benefited (albeit in different ways) by the same steps.”<sup>121</sup> The judge saw no problem with this because of the mutual benefit element of the argument.

This reasoning actually highlights one of the ways in which fiduciary duties may not be the best yardstick for measuring issues between agents and authors. Because the agent’s commission is often so closely aligned with the author’s best interests, one of the main avenues of fiduciary law—that of preventing conflicts of interest—is often missing in an agent-author relationship. Typically, the agent is pursuing deals that will maximize their own profits alongside those of

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116. *Id.* ¶ 185 (“Thus the allegations of breach of fiduciary duties and of breach of contractual and tortious duties of care are all founded on the fact that the A&U publishing agreements contained worldwide rights and the failure of Ms Anthony to communicate all information relevant to the acceptance of those offers (and, in particular, whether those offers were the most advantageous offers reasonably available in the circumstances).”).

117. *Id.* ¶ 617 (“[T]he complaint is that [Anthony] failed to advise as to all relevant information in relation to [foreign] transaction[s] and failed to disclose the benefits she would (in effect) obtain by divesting the tasks of managing royalties and publishing arrangements from foreign territories if those tasks were sub-licensed through A&U. In that sense I accept that it might be said that this is a case of failure to disclose a personal benefit from the transaction . . .”).

118. *Id.*

119. *Id.* ¶¶ 84–85 (evidence that Anthony expressed concern about rushing through a deal for the peace of mind of the representatives of AU).

120. *See id.* ¶ 635.

121. *Id.* ¶ 624.

the author and the publisher. Many agents will say to their clients: “We only make money when you do.”<sup>122</sup> That really is the crux of the issue. Thus, issues of conflicting interests between agents and authors (and publishers) hardly ever arise in practice.

In terms of the question of whether Anthony was able to avoid work she would have otherwise had to do if she had not urged Morton to take the “world rights” deals with AU, the court was similarly unconvinced.<sup>123</sup> Judge Ward noted on this point:

I am not persuaded that Ms Anthony made a profit or other benefit, or had a personal interest in the world rights deals inconsistent with her duties to Ms Morton, by reason only of the fact that the world rights deals may have decreased her work as an agent. It is not clear to me that there was such a clear discrepancy between Ms Anthony’s effective rate of commission and the work she was doing so as to amount to an “interest” as such in the arrangement (of a kind which would potentially conflict with her duty to Ms Morton).<sup>124</sup>

This holding makes sense if one considers that the nature of the fiduciary rule against acting in an agent’s own self-interest is part of the overarching fiduciary duty of loyalty.<sup>125</sup> The court here did not seem to think that an agent negotiating one type of contract versus another, where both obviously benefited the client, would, in and of itself, amount to a breach of fiduciary duty where the agent was clearly acting for the client’s benefit.<sup>126</sup>

The court also considered the notion that a fiduciary or agent should be careful of advice given to a client to enable the client to make the best business decisions under the circumstances. Judge Ward seemingly accepted the existence of this duty in theory but, for some reason, perhaps based on the intricacies of relevant Australian precedent, held that in circumstances such as the literary agent relationship, this duty is more about communicating information to a

122. See Mehta, *supra* note 19 (According to Mary C. Moore, “[a]lthough we are in this for the love of books, agents only make money when their clients make money. We HAVE to be advocates, because that’s what makes us successful.”).

123. *Anthony* [2018] NSWSC 1884 ¶ 632.

124. *Id.*

125. See, e.g., *Chou v. Univ. of Chi.*, 254 F.3d 1347, 1362 (Fed. Cir. 2001) (“The existence of a fiduciary relationship prohibits the dominant party with the duty from seeking or obtaining any selfish benefit for himself at the expense of the servient party while the fiduciary duty exists.” (internal citations omitted)).

126. See *Anthony* [2018] NSWSC 1884 ¶ 632.

client about the *existence* of actual offers, than about nuanced explanation of offers.<sup>127</sup> In other words, an agent may breach the duty by failing to disclose the existence of a competing, advantageous offer, but not for failing to sufficiently explain the terms of an offer the client actually knows about.<sup>128</sup>

Judge Ward opined that these situations fall more squarely under the rubric of a breach of contractual or tortious duty than fiduciary duty, as both would effectively cover the failure to explain the world rights situation without any need to impose a fiduciary duty.<sup>129</sup> Further, the damages would be the same under either duty, because they would, in any event, be calculated by ascertaining how much commission Morton had effectively overpaid as a result of the sub-par advice.<sup>130</sup>

What does all of this tell us about fiduciary principles in author and agent contracts? Arguably that the main fiduciary underpinnings (those relating to an overarching duty of loyalty) may not have much of a place in the author-agent relationship because of the nature of the relationship itself. To the extent that fiduciary duties are concerned with an agent's exercise of due care and skill, those issues may be effectively covered, in large part, by contract or tort law without the need to rely on fiduciary principles.

### C. Friedman v. Kuczkir

Probably the most analogous American case to *Morton*, in terms of the legal issues addressed, is the 2017 case of *Friedman v. Kuczkir* in the United States District Court for the Southern District of New York.<sup>131</sup> Interestingly, both the *Morton* and *Friedman* cases are examples of an agent suing a bestselling author for failure to pay commissions after termination of the agency relationship.<sup>132</sup> In both cases, the discussion of the nature of the agency relationship arose in the context of counterclaims by the authors.<sup>133</sup> In *Friedman*, the author in question was Mary Kuczkir, known under her pen name Fern Michaels as a bestselling romance author.<sup>134</sup> The case involved

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127. *See id.* ¶ 634.

128. *Id.*

129. *Id.* ¶ 635.

130. *See id.*

131. *See* *Friedman v. Kuczkir*, 272 F. Supp. 3d 613 (S.D.N.Y. 2017).

132. *See id.* at 617; *Anthony* [2018] NSWSC 1884 ¶¶ 1–2.

133. *See Friedman*, 272 F. Supp. 3d at 618; *Anthony* [2018] NSWSC 1884 ¶ 2.

134. *Friedman*, 272 F. Supp. 3d at 617.

commissions allegedly due to her attorney and agent Martin Friedman in relation to a multi-book deal with her publisher.<sup>135</sup>

Friedman initially worked as Kuczki's attorney and she had a separate agent.<sup>136</sup> However, after Kuczki expressed dissatisfaction with that agent, Friedman offered to take over the agent role, while simultaneously maintaining his attorney role.<sup>137</sup> He negotiated an 11% commission on book deals as an agent, and continued to charge his standard hourly fee to Kuczki as an attorney.<sup>138</sup> Friedman thus put himself into a position that was rife with potential conflicts of interest, particularly in terms of benefiting as an attorney from Kuczki's success as an author. Friedman appears not to have been particularly careful about maintaining separate records or billing for his legal versus agenting work.<sup>139</sup> However, the court was convinced that Kuczki paid Friedman's bills in full knowledge that they covered both his agenting and legal services and that, with respect to the former, she was paying him 11% (as agreed) on deals he brokered for her.<sup>140</sup>

Kuczki ultimately formed the view that Friedman was not earning his 11% commission and that she would be better off renegotiating her publishing contract herself, which she attempted to do by forming a new corporation to enter into the contract as a new entity, but with the contract on substantially the same terms as the one Friedman had originally negotiated for her.<sup>141</sup> Basically, she was attempting to cut him out of the deal so he would not get his 11% commission.

Friedman was successful in his claim for the 11% commission on the deal he had negotiated for Kuczki, despite her arguments that he had breached both the New York Disciplinary Rules for attorneys and his fiduciary duties to her.<sup>142</sup> Kuczki's arguments largely failed, not because there were no breaches of duty, but because the court was not convinced that the breaches of duty resulted in demonstrable damages or impacted her decision making.<sup>143</sup>

Friedman breached his obligations under the New York Disciplinary Rules as they related to engaging in business

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135. *See id.*

136. *Id.* at 619.

137. *Id.*

138. *Id.* at 620.

139. *Id.* at 622–23.

140. *Id.* at 623–24.

141. *Id.* at 627–28.

142. *Id.* at 631–32, 635–36.

143. *Id.* at 635–36.

transactions with clients.<sup>144</sup> He failed to advise Kuczkir to seek the advice of independent counsel before entering into the commission arrangement with him.<sup>145</sup> However, the court held that this breach, in and of itself, did not render the contract unenforceable because there was no exploitation of Kuczkir's confidence in Friedman.<sup>146</sup> She had significant experience working with both lawyers and literary agents.<sup>147</sup>

In terms of fiduciary duties specifically, the court held that Friedman had made no attempt to benefit at the expense of his client; thus, there was no breach of the fiduciary principle relating to conflicts of interest or self-interest.<sup>148</sup> The court noted that Friedman negotiated deals that were certainly no worse than those negotiated by Kuczkir's previous agents and were arguably on better terms.<sup>149</sup> Additionally, Friedman took a lower commission than most agents (11% as opposed to the standard 15%).<sup>150</sup>

Moreover, the court noted that, even if the contracts had been unconscionable in any sense, they had clearly been ratified by Kuczkir as a savvy business person herself.<sup>151</sup> Thus, in situations where an author is particularly savvy about the publishing world, that author may have more difficulty succeeding on a breach of fiduciary argument against an agent. This is consistent with the Restatement of Agency, which notes that most fiduciary duties can be waived if the principal (author) gives informed consent.<sup>152</sup>

What does this case tell us about the scope and nature of fiduciary principles as applied to literary agents? Here, we see that fiduciary principles do not play much of a role in a situation where the author is a savvy business person, at least where the agent has not concealed salient information. One of the main reasons for Friedman's success in the case appears to have been the fact that he communicated so effectively with Kuczkir about the work he was doing for her. The fact that he had, in fact, breached, disciplinary rules was ultimately unavailing because of the combination of his effective communication of salient facts, and Kuczkir's experience and ability to understand

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144. *Id.* at 632.

145. *Id.*

146. *Id.* at 632–33.

147. *Id.* at 633.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 634.

152. *See* RESTATEMENT (THIRD) OF AGENCY § 8.06(1) (AM. LAW INST. 2006).

them.<sup>153</sup>

If Kuczkir had been less sophisticated and had more trouble understanding her arrangement with Friedman, it may be that the breach of Friedman's duty to advise Kuczkir to seek independent legal advice would have proved fatal to his claim. In some circumstances, it may be that providing effective communication, without more, is insufficient to cure certain kinds of deficiencies in an agent-author relationship. However, it is important to bear in mind that what was breached here was a disciplinary rule as it applied to Friedman in his capacity as an *attorney* (an attorney seeking to engage in a profitable business transaction with a client). If he had not been an attorney, and thus not subject to the disciplinary rule, would he have breached any other law?

Arguably not. Friedman was an agent who charged a below-market rate to a client and secured deals for her that were agreeable to her.<sup>154</sup> While it is true that Kuczkir may have been able to secure similar deals on her own, that is not relevant to the question of whether Friedman breached any agent's duties. Authors often have the option of attempting to secure contracts on their own versus working through agents.<sup>155</sup> If an author chooses to work with an agent who fulfills the duty of effective communication and whose interests do not conflict with the author's, there is likely little scope for claiming a breach of fiduciary duty.

The facts of this case are somewhat unique because of the level of business experience of both parties. However, the case itself again points to some of the limits of fiduciary principles in regulating the agent-author relationship, because, assuming appropriate levels of communication, there is typically no conflict of interest where the agent's commission is based on successful sales of the author's work. Effective communication seems to be the key to both this case and *Morton*. Where agents explain business issues clearly and/or clients consent freely to proposed courses of action, fiduciary principles do not have much work to do. In *Morton*, the agent lost their case because they failed to communicate relevant information clearly and

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153. See *Friedman*, 272 F. Supp. 3d at 634.

154. See *id.* at 633.

155. See Jane Friedman, *Start Here: How to Get Your Book Published*, JANE FRIEDMAN (June 12, 2017), <https://www.janefriedman.com/start-here-how-to-get-your-book-published/> (discussing the pros and cons of working with agents versus submitting directly to publishers, and the circumstances in which, realistically, agents are more or less necessary in a particular genre or market).

effectively to their client,<sup>156</sup> while in *Friedman*, the agent succeeded because they communicated with their client and obtained consent to their proposed courses of action.<sup>157</sup>

#### D. Levin v. Grecian

An earlier case, which is perhaps of somewhat more limited use in teasing out a literary agent's legal responsibilities to a client, is a 2013 decision of the United States District Court for the Northern District of Illinois, *Levin v. Grecian*.<sup>158</sup> As with the two cases discussed above, *Levin* involved an action by an agent for breach of contract where the author cross-claimed and raised breach of contract and breach of fiduciary duty defenses.<sup>159</sup> The case makes some interesting points about the legal nature of the agent-author relationship, but does so in the context of a summary judgment motion,<sup>160</sup> so many of the issues were not as fully fleshed out as in the previous two cases.

Unlike the *Morton* and *Friedman* cases, *Levin* involves discussion of the agent's editorial role and the nature of the agent's responsibility to attempt to secure profitable deals for the client.<sup>161</sup> *Levin* involves the gradual breakdown in the relationship between author Alexander Grecian and his agent, Ken Levin.<sup>162</sup> Grecian complained that Levin had not used his best efforts to make deals in relation to Grecian's work, and also that Levin had not been sufficiently communicative with Grecian about business matters.<sup>163</sup> Grecian put forward examples of communications to Levin that had gone unanswered for significant periods of time.<sup>164</sup> The court took particular note of the fact that out of 781 emails exchanged between the parties, only 271 were sent by Levin, suggesting to the court "a lopsided ratio" of communication "consistent with the picture Grecian paints of Levin as a disengaged and often unresponsive agent."<sup>165</sup>

While the court was convinced that there was significant evidence that Levin had failed to use his best efforts to sell Grecian's work, it largely addressed this issue on the basis of an implied contract term

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156. *Anthony v Morton* [2018] NSWSC 1884 ¶ 664 (Austl.).

157. *Friedman*, 272 F. Supp. 3d at 634–35.

158. *See Levin v. Grecian*, 974 F. Supp. 2d 1114 (N.D. Ill. 2013).

159. *Id.* at 1116–17.

160. *See id.* at 1117.

161. *See id.* at 1123–24.

162. *Id.* at 1116.

163. *Id.* at 1123–24.

164. *Id.* at 1124.

165. *Id.*

relating to “best efforts,” rather than on fiduciary principles.<sup>166</sup> Thus, the court here took a similar approach in interpreting the business nature of the agent-author relationship as the court in *Morton*, relying on contractual principles rather than fiduciary law.<sup>167</sup> Because there were triable questions of fact remaining about whether Levin had materially breached the contract, and, if so, whether Grecian had waived such a breach, the court refused to grant summary judgment on these issues.<sup>168</sup>

With respect to the implied contractual duty of an agent to use “best efforts” with respect to a client’s work, the court noted that the alleged duty involves an agent employing *best efforts* to make sales, rather than *an affirmative duty* that the agent make sales.<sup>169</sup> While these aspirations sound similar, the court took pains to point out that the agent makes no guarantees of sales, but rather promises to use best efforts to pursue deals.<sup>170</sup> Thus, under contract law at least (and presumably also fiduciary principles), an agent has no affirmative duty to make sales, but rather to simply act in the best interests of the principal (author) in pursuing deals.

As noted above, in this case, the court was able to identify several respects in which it seemed that Levin was not making best efforts vis-à-vis Grecian’s work, noting that Levin was uncommunicative and slow.<sup>171</sup> In particular, the court noted that the fact that Grecian’s first significant sale was made rapidly after a second agent (co-agent) was brought on board, combined with the failure of Levin to sell any prior work on his own, constituted “persuasive evidence that Levin did not exercise his best efforts.”<sup>172</sup> Again, this is a purely contract-based analysis and does not involve any discussion of, say, the fiduciary principle that an agent will act with due care and skill.<sup>173</sup>

166. *Id.* at 1123.

167. *Id.* at 1131 (the fiduciary claim here was based on an alleged conflict of interest in relation to passive profits Levin hoped to receive on movie deals); *see also Anthony v Morton* [2018] NSWSC 1884 ¶ 664 (Austl.).

168. *Levin*, 974 F. Supp. 2d at 1124, 1126.

169. *Id.* at 1123.

170. *See id.*

171. *See id.* at 1124.

172. *Id.*

173. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 8.08 (AM. LAW INST. 2006) (“Subject to any agreement with the principal, an agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances. Special skills or knowledge possessed by an agent are circumstances to be taken into account in determining whether the agent acted with due care and diligence. If an agent claims to possess special skills or knowledge, the agent has a duty to the principal to act with the care, competence, and diligence normally exercised

Perhaps of more significance is the court's holding that even if Levin did breach this contractual duty, Grecian failed to prove damages with respect to the breach as required under Illinois law.<sup>174</sup> Thus, summary judgment was made against Grecian on the damages claim.<sup>175</sup> Because Grecian was a new author at the time he entered into the agency agreement with Levin, there was no basis (e.g., no past sales record) on which to base a damages calculation for Levin's failure to use his best efforts to sell Grecian's work.<sup>176</sup> Grecian argued that his subsequent sales provided a basis on which to calculate damages, but the court was not convinced by this argument.<sup>177</sup> The subsequent sales involved later-written works.<sup>178</sup> The court held that sales of those works could not be used as the basis for the failure to sell an earlier work, especially because Grecian was a less seasoned author and there was no evidence that the work would ever have been saleable.<sup>179</sup>

The court cited an earlier decision, *MindGames v. Western Publishing*,<sup>180</sup> to the effect that a bestselling author may be entitled to prove from past success that a new book, that a representative failed to promote, would be likely to have enjoyed success comparable to the average of the author's previous works if it had been promoted as promised.<sup>181</sup> Again, this is a contract analysis and the proposition may not hold in all cases. For example, in *Morton*, the court acknowledged that even bestselling authors do not always, or even typically, enjoy equivalent successes on later books as on previous works.<sup>182</sup>

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by agents with such skills or knowledge.”).

174. *Levin*, 974 F. Supp. 2d at 1127 (“Merely showing that a contract has been breached without demonstrating actual damage does not suffice, under Illinois law, to state a claim for breach of contract.” (quoting *TAS Distrib. Co. v. Cummins Engine Co.*, 491 F.3d 625, 631 (7th Cir. 2007))).

175. *Id.* at 1130–31.

176. *Id.* at 1128.

177. *Id.* at 1127–28.

178. *Id.*

179. *Id.* at 1128 (“Grecian does not identify any one novel in particular and say that it was of saleable quality or that Levin should have sold it. And Grecian certainly provides no evidence that any such novel would have had success comparable to *The Yard's*.”).

180. *MindGames, Inc. v. W. Publ'g Co.*, 218 F.3d 652, 658 (7th Cir. 2000).

181. *Levin*, 974 F. Supp. 2d at 1129.

182. *Anthony v Morton* [2018] NSWSC 1884 ¶ 374 (Austl.) (discussing evidence that many successful authors' sales decline as their career progresses, making it almost impossible to calculate the likely success of subsequent books from past success); see also Keith Gessen, *The Book on Publishing*, VANITY FAIR (May 23, 2014),

One of the most interesting aspects of this discussion, for the purposes of this Article, is that it appears that overall, courts are prepared to assume that contract law analysis suffices to determine questions relating to an agent's efforts to sell work. To the extent that any of these cases end up in court, the courts do not tend to default to fiduciary principles, largely holding fiduciary analysis to be unnecessary where contract law covers the situation in question. It is not clear why this is the case. Perhaps courts are more comfortable with contract law in cases that revolve so heavily around interpreting the terms of relatively simple and standard contracts. Perhaps author-agent relationships do not strike courts as being paradigm cases for application of fiduciary principles unlike, say, cases involving corporate directors, investment advisors, or attorneys. Whatever the reason, contract law appears to do a lot of the work in agent-author cases that one might expect fiduciary law to do.

The only fiduciary argument that was actually raised in *Levin v. Grecian* was related to a claim by Grecian that Levin breached the fiduciary duty against self-dealing with respect to: (a) Levin's encouragement to Grecian to work as a co-writer on projects with him; (b) only having interest in making pitches to publishers in which Levin had some ownership interest; and (c) Levin's interest in promoting his own film business with respect to options on Grecian's work.<sup>183</sup> These arguments were specific to the Levin-Grecian scenario and do not arise in typical literary agent scenarios, although obviously they can arise, as exemplified by this case.

All of these fiduciary claims failed largely for lack of supporting evidence, and also because the agency agreement included a provision in which Grecian consented to Levin acting in a producing capacity in relation to film and television projects.<sup>184</sup> With respect to the claim

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<https://www.vanityfair.com/news/2011/10/how-to-publish-fielding-keith-gessen>  
 ("Nielsen BookScan, which tracks sales of individual books at about three-quarters of the bookselling cash registers across the country, can tell you how much an author's last book sold—this is her 'sales track,' and it gives you some idea of how well her next book might sell. But it can be the wrong idea: Emma Donoghue had published six novels before her 2010 *Room*, the two most recent of which 'BookScan' at 1,852 and 1,119 copies, respectively, in hardcover in the U.S. *Room* has sold more than half a million in hardcover and digital and is still going. If it's the writer's first book, and she has no sales track, you can come up with similar-seeming books ('comp titles') and see how many copies they sold. But this is precision masquerading as insight. No two books are the same book, and no two authors are the same author. The fact is: *no one has any idea how many copies of a book will sell.*")

183. *Levin*, 974 F. Supp. 2d at 1131.

184. *Id.* at 1131–32.

about co-authoring, the court noted that Grecian had conceded that “he was not harmed in any way by Levin’s alleged requests that they co-write something.”<sup>185</sup>

Thus, while acknowledging that fiduciary duties will apply to some aspects of the agent-author relationship, including the duty against self-dealing, the court also acknowledged that fiduciary duties may be waived by consent of the principal.<sup>186</sup> Again, effective communication between an agent and client is the key concern here.

In sum, this case demonstrates little practical role for fiduciary law in the agent-author context because the main issues that could be addressed by fiduciary principles, relating to the agent’s lack of diligent conduct under the agent agreement, were, as in *Morton* and *Friedman*, dealt with as matter of contract law, rather than agency/fiduciary law.<sup>187</sup>

Interestingly, the lack of communication from Levin to Grecian regarding Grecian’s earlier work was categorized by the court as an aspect of the contractual duty involving “best efforts” rather than as a fiduciary duty.<sup>188</sup> It could have been addressed as a fiduciary duty, as agency law typically comprises a duty for an agent to communicate effectively with a principal.<sup>189</sup> As we noted above, the need for effective communication was a decisive factor in the *Morton* case as well and was discussed in the context of the fiduciary duty analysis, but ultimately the court held that the effective communication requirement was part of Anthony’s obligations under contract law, so the fiduciary argument on this point failed.<sup>190</sup>

#### *E. Donadio & Olson, Danielle Smith*

Most cases involving concerns about agent malfeasance never get to court, likely primarily because most of them do not involve large sums of money (particularly if they involve mid-list or beginning authors), and because many authors do not fully understand their legal rights. The costs of litigation are also prohibitive for many authors. However, as noted in the Introduction of this Article, some

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185. *Id.* at 1131.

186. *See id.* at 1131–32.

187. *See* *Friedman v. Kuczki*, 272 F. Supp. 3d 613, 629–34 (S.D.N.Y. 2017); *Levin*, 974 F. Supp. 2d at 1124, 1126; *Anthony* [2018] NSWSC 1884 ¶ 664.

188. *See Levin*, 974 F. Supp. 2d at 1123–24.

189. *See* RESTATEMENT (THIRD) OF AGENCY § 8.11 (AM. LAW INST. 2006) (duty to provide information to principal).

190. *See Anthony* [2018] NSWSC 1884 ¶¶ 597, 664.

cases end up in the news even if there is no litigation.<sup>191</sup> Two recent examples are the bankruptcy of Donadio & Olson in December 2018 as a result of accounting malpractice<sup>192</sup> and the situation involving the principal of Lupine Grove Creative (a literary agency), Danielle Fox, who, over a period of several years, made fraudulent representations to her clients about sending their work to publishers and about deals allegedly offered by those publishers.<sup>193</sup> What do these scenarios add to our discussion of the role of fiduciary duties in the agent-author relationship?

The Donadio & Olson situation clearly involved breaches of contract in terms of major agency clients. The failure to pay complete royalties to clients obviously and clearly breaches the agency's contractual duties.<sup>194</sup> Whether or not the authors will have a practical claim in relation to moneys owed is questionable in light of the bankruptcy and the fact that the bookkeeper, who engaged in the fraudulent accounting, no longer has funds to repay.<sup>195</sup> Regardless of whether an actual remedy is possible or likely, there is a clear contract breach in this situation—or rather a series of breaches to a variety of clients. There is likely no need to impose fiduciary principles on top of the contract principles, unless doing so would lead to a greater likelihood of a meaningful remedy in the bankruptcy context.

The situation involving Danielle Smith's misrepresentations to her clients about the work she was doing likely infringes fiduciary principles involving acting with due care and skill and communicating effectively with clients.<sup>196</sup> However, the imposition of these duties may be secondary, if litigation ever arose, to the contractual duties, which cover substantially the same thing. Contract principles require best efforts, as we saw in *Levin v. Grecian*.<sup>197</sup> Smith obviously was not making best efforts on behalf of her clients. She was also likely infringing tort laws relating to false and misleading statements in

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191. See *supra* notes 1–6 and accompanying text.

192. See Milliot, *supra* note 3.

193. See Claire Kirch, *Agent Danielle Smith's Former Clients Speak Out*, PUBLISHERS WKLY. (Aug. 2, 2018), <https://www.publishersweekly.com/pw/by-topic/childrens/childrens-industry-news/article/77656-agent-danielle-smith-s-former-clients-speak-out.html>.

194. See Milliot, *supra* note 3 (discussing the failure of the agency to pay clients).

195. See Albanese, *supra* note 2 (“There was no fine, (since, the judge concluded, Webb had no ability to pay) but a final restitution order for roughly \$3.3 million will be added pending a submission by the government, within 90 days.”); see also Milliot, *supra* note 3.

196. See Kirch, *supra* note 193.

197. See *Levin v. Grecian*, 974 F. Supp. 2d 1114, 1123–24 (N.D. Ill. 2013).

business. If her clients brought actions against her, they could arguably do so more easily in terms of contract and tort principles rather than fiduciary principles.

Additionally, as with *Levin v. Grecian*, Smith's clients may have significant trouble establishing damages if they pursue litigation.<sup>198</sup> Many of them were relatively new authors without significant track records.<sup>199</sup> How would they calculate damages—what they lost as a result of Smith's deception and failure to actually make best efforts to sell their work? They were misled about what she was doing, and she breached contractual, and likely tortious, obligations to her clients, but how could their damages be calculated? Most authors would not be able to identify specific deals or amounts they lost as a result of Smith's conduct. Here, we see two problematic examples of breaches of duty with no effective remedies. However, in neither example would the imposition of fiduciary duties, rather than contractual or tortious duties, likely change the ultimate practical results.

### III. CODES OF ETHICS

Many countries have agents' associations that have developed codes of ethics for their members.<sup>200</sup> However, membership by agents in these associations is not mandatory, and anyone can hold themselves out as a literary agent regardless of qualifications or of membership, or lack thereof, in an agency association.<sup>201</sup> The codes of ethics of most of these organizations are also relatively basic and do not typically go into much detail about the finer points of the author-agent relationship.<sup>202</sup> In other words, they provide a fairly minimal floor, rather than a comprehensive set of principles to govern an agency contract.

The Association of Authors' Representatives, Inc. (AAR) is the American agents' association.<sup>203</sup> Its Canon of Ethics includes only eight clauses,<sup>204</sup> while the equivalent British organization, the Association of Authors' Agents (AAA), has adopted a Code of Practice

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198. *See id.* at 1127.

199. *See* Kirch, *supra* note 193.

200. *See infra* notes 204–06 and accompanying discussion.

201. *See supra* Section II.a.

202. *See infra* notes 204–06 and accompanying discussion.

203. *See* ASS'N OF AUTHORS' REPRESENTATIVES, INC., <http://aaronline.org/> (last visited Jan. 15, 2020).

204. *See AAR Canon of Ethics*, ASS'N OF AUTHORS' REPRESENTATIVES, INC., <http://aaronline.org/canon> (last visited Jan. 23, 2019) [hereinafter *AAR Canon*].

that contains nineteen articles,<sup>205</sup> and the Australian Literary Agents' Association (ALAA) Code of Practice contains ten.<sup>206</sup>

Unlike its British and Australian counterparts, the AAR's Canon of Ethics does include a number of provisions that relate specifically to issues lawyers might think of as involving fiduciary duties. For example, the first clause contemplates that members "pledge themselves to loyal service to their clients' business and artistic needs," as well as avoiding conflicts of interest that could interfere with such service.<sup>207</sup> This appears to be a fairly direct statement of what could be described as a fiduciary duty of loyalty.

Clause 4 of the AAR's Canon of Ethics provides that members "shall keep each client apprised of matters entrusted to the member and shall promptly furnish such information as the client may reasonably request."<sup>208</sup> Again, this appears to be a fairly straightforward adoption of the fiduciary principle relating to effective communication between an agent and principal.<sup>209</sup> Of course, it also corresponds with the implied contract term identified in both *Morton* (albeit in the Australian law context) and *Levin* to keep a client informed.<sup>210</sup>

Clause 6 of the AAR's Canon of Ethics prohibits the receipt by an agent of a secret profit and notes that any such profits must promptly be paid to the client.<sup>211</sup> This reflects the fiduciary principle against self-dealing,<sup>212</sup> but a similar provision would likely also be implied under contract law.

The AAR's Canon of Ethics and the British and Australian equivalents all require responsible dealing with client funds<sup>213</sup> and maintenance of the confidentiality of relevant client information.<sup>214</sup>

205. See *Code of Practice*, ASS'N AUTHORS' AGENTS, <http://www.agentsassoc.co.uk/about/code-of-practice/> (last visited Jan. 15, 2020) [hereinafter *AAA Code*].

206. See *Code of Practice*, AUSTL. LITERARY AGENTS' ASS'N, <https://austlitagentsassoc.com/about-2/code-of-practice/> (last visited Jan. 15, 2020) [hereinafter *ALAA Code*].

207. *AAR Canon*, *supra* note 204.

208. *Id.*

209. RESTATEMENT (THIRD) OF AGENCY § 8.11 (AM. LAW INST. 2006).

210. See *Levin v. Grecian*, 974 F. Supp. 2d 1114, 1123–24 (N.D. Ill. 2013); *Anthony v. Morton* [2018] NSWSC 1884 ¶ 664 (Austl.).

211. *AAR Canon*, *supra* note 204.

212. See RESTATEMENT (THIRD) OF AGENCY §§ 8.01, 8.04.

213. *AAR Canon*, *supra* note 204 (in clause 2); *AAA Code*, *supra* note 205 (in clauses 4 and 5); *ALAA Code*, *supra* note 206 (in clauses 3 and 8).

214. *AAR Canon*, *supra* note 204 (in clause 7); *AAA Code*, *supra* note 205 (in clause 10); *ALAA Code*, *supra* note 206 (in clause 8).

The British and Australian Codes of Practice both include the somewhat redundant requirement for an agent to conduct their business lawfully.<sup>215</sup> The fact that these organizations felt the need to specify a requirement to act according to the law suggests concern about illegal conduct in the past, although it does not have much practical substance. If an agent breaks the law, a client will be entitled to sue regardless of what the code of conduct says.

None of the codes of conduct are incorporated into agency agreements by default, although agents are free to expressly incorporate them into particular agreements. Well-drafted agency agreements will contemplate many of the clauses set out in relevant codes of conduct and, as we have already seen, courts will generally be ready to imply such provisions in contracts where they are not specified.

Interestingly, the Australian and British Codes of Practice both specify that, where an agency agreement has been terminated, the agent is entitled to ongoing commissions for deals they brokered.<sup>216</sup> This provision was in existence at the time of the *Morton* case and was actually referred to by the plaintiff (agent) in evidence.<sup>217</sup> However, it was found not to apply by default or by trade custom to the oral agreement between Morton and Anthony in the absence of clearer contractual negotiation on the point.<sup>218</sup>

While codes of ethics can be useful in practice, the literary agents' codes of practice in the jurisdictions under consideration in this Article have proven to be of little use in developing the law. The *Morton* court cited the Australian Code of Practice but did not apply it to the contract under consideration,<sup>219</sup> and none of the American cases discussed above even referred to the AAR or its Canon of Ethics. While these codes may have some guiding force when member-agents are drafting contracts, agents are not required to be members of these associations, nor are they required to draft agency contracts in compliance with the codes. The codes seem largely aspirational and not well utilized in legal debates or decisions.

The AAR's Canon of Ethics in the United States may deserve more notice in litigation or at least online debates about appropriate agent

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215. AAA Code, *supra* note 205 (in clause 15); ALAA Code, *supra* note 206 (in clause 6).

216. AAA Code, *supra* note 205 (in clause 3); ALAA Code, *supra* note 206 (in clause 2).

217. *Anthony v Morton* [2018] NSWSC 1884 ¶ 346 (Austl.).

218. *Id.* ¶¶ 460–63.

219. *Id.* ¶¶ 346, 460–63.

conduct. However, it is unlikely to be referenced or interpreted in litigation unless the parties raise it in evidence, which appears not to have been the case to date. The emphasis in the AAR's Canon of Ethics on ideals that appear to comport with fiduciary principles may help to develop fiduciary law in the agency context to the extent that such development is necessary. However, as noted above, the principles enshrined in the Canon of Ethics could equally be implied as a matter of contract law for the most part.

In any event, nothing in the Canon of Ethics particularly fleshes out or informs the questions that have arisen to date before courts and in the media involving agents' duties to clients. The provisions provide little more than the obligations courts have already identified when interpreting specific agent contracts involving the duty to effectively represent a client, the duty to keep a client fully informed, and the duty to avoid conflicts of interest with a client.

#### CONCLUSION

What the case law and basic agency principles as applied to literary agents tell us is that while agents are unquestionably fiduciaries, this characterization may not mean much in practice outside, say, the particular duty to effectively communicate with clients. The main problems that have arisen between authors and agents in recent years seem to have a lot less to do with whether an agent is best characterized as a fiduciary and more to do with whether a remedy is available or even possible under the circumstances. Standard breaches of business duties, like duties to make the best deals for clients, seem to be just as easy to resolve as a matter of contract law, tort law, or both than as a matter of fiduciary duty, which perhaps suggests that the fiduciary characterization is, at best, somewhat redundant.

What has proved more problematic in practice is: (a) quantifying damages where a breach of duty is alleged; and (b) crafting an appropriate remedy. The *Morton* case is an unusual example where damages for failing to effectively advise a client of different methods for making foreign sales could be relatively easily quantified by simply subtracting the extra commission taken by the Australian publisher.<sup>220</sup> However, that situation is the exception rather than the rule.

As this Article demonstrates, most of the complaints about breach of agents' duties have to do with clients second-guessing how involved

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220. *Id.* ¶ 721.

or communicative the agent should have been and whether the agent could have made a “better” sale than they, in fact, made. The damages for these kinds of breaches of duty, even where a breach is made out on the facts, are notoriously difficult to identify and quantify.

As author Keith Gessen has noted, even for seasoned authors: “The fact is: *no one has any idea how many copies of a book will sell.*”<sup>221</sup> This means that attempting to quantify damages for breach of effective communication by an agent with a client, poor advice on sales, or lack of sales may be extremely difficult. It would be very difficult to ascertain what a different agent might have done better because each situation is so specific and subjective.

While agents undoubtedly owe duties to make best efforts to sell their clients’ work, to keep their clients informed, and to avoid conflict of duty situations, the fact that the agent ultimately benefits when the client does (their interests are closely aligned because of the commission structure of their payment) suggests that fiduciary duties have little work to do in the author-agent context. Additionally, even when the duties do have a role to play, often alongside contractual and tortious duties, damages will often be difficult or impossible to quantify in practice, so the imposition of an additional fiduciary duty will not likely give much comfort to most clients.

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221. Gessen, *supra* note 182.