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**Articles**

## Understanding Duties and Conflicts of Interest—A Guide for the Honorable Agent

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### Abstract

This article examines the importance of understanding agent duties and conflicts of interest, both for drafting a power of attorney that meets a principal's objectives and for providing guidance to the agent who will act under its authority. Professor Whitton suggests that current custom and practice with respect to powers of attorney often overlooks the need to adjust agent duties to accommodate the principal's expectations, thus resulting in inadvertent conflicts between the duty to do what the principal expects and default duties of loyalty. The article offers practical guidelines for identifying and reconciling these conflicts, as well as best practices to improve the agent's understanding of the authority granted in the power of attorney, the principal's expectations for exercise of that authority, and the duties an agent must meet when carrying out the principal's expectations.

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### INTRODUCTION

Powers of attorney typically make the news only when an agent has abused the principal-agent relationship.<sup>1</sup> Given the importance of powers of attorney for incapacity planning,<sup>2</sup> law reform has focused on statutory protections to prevent, detect, and redress abuse.<sup>3</sup> The Uniform Power of Attorney Act (“UPOAA”)<sup>4</sup> is the leading model for this reform.<sup>5</sup> Far less attention has been paid to honorable agents and the

1. See, e.g., Kristen Doerschner, *Power of Attorney Can Lead to Financial Abuse*, TIMESONLINE (Sept. 15, 2012, 11:45 PM), <http://bit.ly/ZalPJ3>; Dennis B. Roddy, *Courting Trouble: The Document Granting ‘Power of Attorney’ Often Leads to Abuse*, PITTSBURGH POST-GAZETTE (Sept. 2, 2007, 12:00 AM), <http://bit.ly/146kxqd>; Toddi Gutner, “License to Steal” from Seniors, BLOOMBERG BUSINESSWEEK (June 4, 2006), <http://buswk.co/Mkwih3>.

2. See Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 8-9 (2007) [hereinafter Whitton, *Lessons Learned*] (noting widespread use of powers of attorney in every jurisdiction).

3. See Linda S. Whitton, *The New Uniform Power of Attorney Act: Balancing Protection of the Principal, the Agent, and Third Persons*, in PROCEEDINGS OF THE 41ST ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING ¶¶ 900, 901.2 (Matthew Bender 2007) (providing an overview of the UPOAA provisions designed to prevent financial exploitation as well as those aimed at detecting and redressing abuse).

4. UNIF. POWER OF ATTORNEY ACT (2006), 8B U.L.A. 57 (Supp. 2012).

5. See Lori A. Stiegel & Ellen V. Klem, *Power of Attorney Abuse: What States Can Do About It*, AARP PUB. POL’Y INST. 1 (2008), available at <http://bit.ly/Xo3XLs> (comparing current state laws with the Uniform Power of Attorney Act). To date, 14 jurisdictions have adopted the Uniform Power of Attorney Act: Alabama, Arkansas, Colorado, Idaho, Maine, Montana, Nebraska, Nevada, New Mexico, Ohio, U.S. Virgin

guidance they may need to understand and perform their duties. Providing this guidance is essential because a power of attorney is only as effective as the agent who acts under it.<sup>6</sup>

The lack of attention given to the agent's perspective can be explained in part by the nature of the power of attorney relationship. A power of attorney is generally the co-creation of the principal and the principal's lawyer. Appointing the agent is a unilateral act, typically completed by the principal without the participation of the person named as agent and possibly without that person's knowledge.<sup>7</sup> The principal's lawyer likely will not have contact with the named agent until such time as the principal becomes incapacitated.<sup>8</sup>

When a principal has lost capacity, the agent takes the principal's place in the attorney-client relationship.<sup>9</sup> The principal's lawyer consults the agent as *the principal's appointed representative*, but does not represent the agent as *an individual serving in the agent's role*.<sup>10</sup> If the agent has questions about duties and conflicts of interest, the principal's lawyer may be reluctant to answer such questions for fear that the discussion could blur representational lines and violate the lawyer's ethical duties to the principal.<sup>11</sup>

Not only does the custom and practice with respect to powers of attorney seem to leave agents out of the loop, the law—common and

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Islands, Virginia, West Virginia, and Wisconsin. *Legislative Fact Sheet—Power of Attorney*, UNIF. LAW COMM'N, <http://bit.ly/16HGD29> (last visited Feb. 13, 2013).

6. See Whitton, *Lessons Learned*, *supra* note 2, at 10-38 (examining the role of the agent and discussing drafting and legislative reform strategies for optimal agent effectiveness and fidelity to the principal's objectives).

7. Given the unilateral process by which an agent is named in a power of attorney, some type of acceptance is necessary to provide a reference point for when the agency begins and agent duties arise. Under the UPOAA, "exercising authority," "performing duties as an agent," or "any other assertion or conduct indicating acceptance" is sufficient to establish that a principal-agent relationship has commenced. UNIF. POWER OF ATTORNEY ACT § 113 (2006), 8B U.L.A. 79 (Supp. 2012).

8. Russell E. Haddleton, *The Durable Power of Attorney: An Evolving Tool*, 14 PROB. & PROP. 58, 61 (2000) (describing the drafting lawyer's dilemma when approached by an agent for advice after the client has become incapacitated).

9. See Linda S. Whitton, *Durable Powers as a Hedge Against Guardianship: Should the Attorney-at-Law Accept Appointment as Attorney-in-Fact*, 2 ELDER L.J. 39, 53-67 (1994) (discussing the importance of client-centered decision making in the attorney-client relationship and the role of the agent as the representative of the incapacitated principal).

10. See MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 4 (2002) (stating, in pertinent part, that "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client").

11. See Haddleton, *supra* note 8, at 61.

statutory—provided little guidance to agents prior to the UPOAA.<sup>12</sup> Describing the agent’s role as “unscripted”<sup>13</sup> and “uniquely directionless,”<sup>14</sup> scholars urged law reform to set clearly articulated statutory standards.<sup>15</sup> The UPOAA contains detailed provisions about agent duties,<sup>16</sup> including the issue of conflicts of interest,<sup>17</sup> but no scholarship to date has focused specifically on what agents need to understand about duties and conflicts of interest or how agents are to receive that information. The purpose of this article is to explore best practices for drafting and client counseling to meet that need.

Using the UPOAA as a model, Part I provides an overview of agent duties, distinguishing the mandatory duties that all agents must meet from default duties that the principal may modify. The discussion highlights areas where agents may need more guidance if they are to understand their obligations. Part II addresses circumstances where the duty to follow the principal’s expectations may produce inadvertent conflicts with the agent’s duties of loyalty. Practical guidelines are offered for identifying and reconciling these conflicts.

## I. AGENT DUTIES

An agent’s duties emanate from three possible sources—the power of attorney statute, the language of the power of attorney, and, if not superseded by statute or the power of attorney, the common law of agency.<sup>18</sup> Under the first Uniform Act for powers of attorney—The

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12. Karen E. Boxx, *The Durable Power of Attorney’s Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 4, 42-62 (2001) (pointing out “numerous ambiguities regarding the attorney-in-fact’s duties”).

13. Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 584 (1996) (observing that “neither courts nor legislatures appear to have given much thought to the appropriate role of an agent”).

14. Boxx, *supra* note 12, at 44.

15. *Id.* at 44-46 (arguing that clear fiduciary duties are needed to compensate for the loss of monitoring function that accompanies a principal’s incapacity); Dessin, *supra* note 13, at 602 (noting the lack of standards to govern the agent’s behavior).

16. UNIF. POWER OF ATTORNEY ACT § 114 (2006), 8B U.L.A. 80-81 (Supp. 2012). “Section 114 clarifies agent duties by articulating minimum mandatory duties . . . as well as default duties that can be modified or omitted by the principal. . . .” *Id.* § 114 cmt.

17. *Id.* § 114(b)(2), 8B U.L.A. 80 (requiring the agent, unless otherwise specified in the power of attorney, to “act so as not to create a conflict of interest that impairs the agent’s ability to act impartially in the principal’s best interest”); *id.* § 114(d), 8B U.L.A. 81 (“An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.”).

18. *See id.* art. 1 cmt., 8B U.L.A. 64 (noting that “[a]lthough the UPOAA is primarily a default statute, Article 1 also contains rules that govern all powers of attorney subject to the Act”); *id.* § 121, 8B U.L.A. 95 (providing that the principles of law and equity supplement the UPOAA); *id.* § 121 cmt., 8B U.L.A. 95 (explaining that the Act is

Uniform Durable Power of Attorney Act<sup>19</sup>—agent duties were not articulated and thus left for discernment from the common law of agency.<sup>20</sup> The UPOAA Drafting Committee chose to enumerate specific duties because neither the common law nor existing state statutes provided a cohesive fiduciary standard for the power of attorney relationship.<sup>21</sup>

Agent duties under the UPOAA fall into two categories—mandatory and default.<sup>22</sup> Mandatory duties set the baseline for agent conduct and may not be altered in the power of attorney.<sup>23</sup> The default duties apply to agent conduct unless modified in the power of attorney.<sup>24</sup>

#### A. *Mandatory Duties*

Under the UPOAA, three mandatory duties set the minimum standard for agent conduct. The agent must:

- (1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
- (2) act in good faith; and
- (3) act only within the scope of authority granted in the power of attorney.<sup>25</sup>

These fiduciary duties form the foundation of the principal-agent relationship. Taken together, they in essence require that the agent act honestly within the granted scope of authority to do what the principal expects. In theory, this mandate seems straightforward, but the

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supplemented by the common law of agency “where the provisions of the Act do not displace relevant common law principles”).

19. UNIF. DURABLE POWER OF ATTORNEY ACT (amended 1987), 8A U.L.A. 233 (2003).

20. See John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 943 (2005) (observing that because the Uniform Durable Power of Attorney Act does not regulate an agent's duties, the common law of agency “sole interest rule” would apply to the fiduciary duties of such agents).

21. UNIF. POWER OF ATTORNEY ACT § 114 cmt. (2006), 8B U.L.A. 81-82 (Supp. 2012) (noting that existing statutory standards for agent conduct varied widely from a “due care standard” to a “trustee-type standard,” and explaining that the departure of the UPOAA from the “sole interest test” of the common law “comports with the practical reality that most agents under powers of attorney are family members who have inherent conflicts of interest with the principal”).

22. See *supra* note 16.

23. See *infra* notes 25-68 and accompanying text.

24. See *infra* notes 70-87 and accompanying text.

25. UNIF. POWER OF ATTORNEY ACT § 114(a) (2006), 8B U.L.A. 80 (Supp. 2012).

following discussion will demonstrate why, in practice, agents often lack the guidance they need to perform their duties.

1. The duty to act according to the principal's reasonable expectations if known; and otherwise, to act according to the principal's best interest.

The mandatory duty to follow the principal's reasonable expectations if known, and, if not known, to act according to the principal's best interest, sets the general decision-making standard for all agent conduct.<sup>26</sup> This standard reflects a public policy preference for surrogate decisions based on "substituted judgment" whenever that is possible.<sup>27</sup> Commentary to the UPOAA acknowledges that "[t]he Act does not require, nor does common practice dictate, that the principal state expectations or objectives in the power of attorney."<sup>28</sup> Thus, the Act contemplates that expectations may be communicated informally.

A power of attorney document in which specific expectations are stated creates a risk that the principal's expectations will be frozen in time, binding the agent's flexibility to respond to changing circumstances. Consider the following:

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26. *Id.* § 114 cmt., 8B U.L.A. 81 ("Establishing the principal's reasonable expectations as the primary guideline for agent conduct is consistent with a policy preference for 'substituted judgment' over 'best interest' as the surrogate decision-making standard that better protects an incapacitated person's self-determination interests.").

27. *Id.* Substituted judgment is the long-favored standard for surrogate health care decisions. See Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J.L. REFORM 739, 758-59 (2012) (noting that the Uniform Health-Care Decisions Act prioritizes substituted judgment over best interest). The standard was re-endorsed for guardian decisions by the Third National Guardianship Summit as Recommendation #1.5 of the Overview of Guardian Standards, which provides:

States should adopt by statute a decision-making standard that provides guidance for using substituted judgment and best interest principles in guardian decisions.

- These standards should emphasize self-determination and the preference for substituted judgment.
- The Uniform Guardianship and Protective Proceedings Act should be revised to embody these objectives.

*Third National Guardianship Summit Standards and Recommendations*, 2012 UTAH L. REV. 1191, 1199.

28. UNIF. POWER OF ATTORNEY ACT § 114 cmt. (2006), 8B U.L.A. 81 (Supp. 2012) (observing further that "one of the advantages of a power of attorney over a trust or guardianship is the flexibility and informality with which an agent may exercise authority and respond to changing circumstances").

*Client Scenario*

Pamela, a conscientious lawyer, conducts a thorough interview with Douglas, a client who wishes to establish a substitute decision-making plan using a power of attorney. Pamela discusses the various types of authority that Douglas can delegate, including extraordinary powers such as the authority to make a gift or to create and change beneficiary designations.<sup>29</sup> Pamela counsels Douglas about the benefits of a broad power of attorney as a hedge against guardianship.<sup>30</sup> She also identifies the potential dangers of delegating authority that could alter his estate plan.<sup>31</sup> They discuss at length the scope of authority needed to meet his needs and objectives. In addition, Pamela stresses the importance of selecting a trustworthy agent and successor agent. Douglas decides to name his wife as his initial agent and his 26-year-old son as his successor agent. Douglas has two other children—a daughter who is 22 and a younger son who is 18.

Douglas chooses to grant his wife the broadest possible authority. He states that they share the same views about handling property and finances and that he implicitly trusts her. Douglas wants his wife to have unlimited authority to make gifts and to retitle their property, for her benefit and for the benefit of their children. He stresses that his wife must have authority to create and change beneficiary designations because they periodically make adjustments to their non-probate distribution plan to offset differences in the financial support they give to their respective children. Examples of past support include a down payment for their oldest son's home, their daughter's law school tuition, and the legal bills for their youngest son's driving-while-intoxicated offense.

Douglas is not comfortable giving his successor agent—his oldest son—the same breadth of authority as granted to his

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29. *See id.* § 201(a), 8B U.L.A. 97 (listing these and other actions for which an express grant of authority is required in the power of attorney).

30. “There is unavoidable tension in the question of how much authority to give an agent. If the scope of authority is not broad enough, a guardianship may still be needed in the event of later incapacity; the broader the authority, however, the greater the potential for abuse.” Whitton, *Lessons Learned*, *supra* note 2, at 19.

31. *See* UNIF. POWER OF ATTORNEY ACT § 201 cmt. (2006), 8B U.L.A. 98 (Supp. 2012) (noting the risk that accompanies delegation of authority for actions enumerated in section 201, but observing that “such authority may nevertheless be necessary to effectuate the principal’s property management and estate planning objectives”).

wife. He states that his children do not know the exact level of financial support received by their siblings and that he wishes to keep that information confidential. Douglas also mentions significant sibling rivalry between his sons. Although Douglas believes that his oldest son would rise to the occasion if he were needed to serve as Douglas's agent, Douglas plans to postpone telling him about the appointment. Douglas views the successor appointment as merely a precaution against the unlikely event that his wife, ten years his junior, predeceases him.

Douglas's wife accompanies him to the follow-up appointment with Pamela. Pamela explains that Douglas is her client and that she represents solely his interests. Douglas's wife acknowledges the limits of Pamela's legal representation, but adds that she and Douglas are "on the same page." Before Douglas executes the power of attorney, Pamela reviews the scope of authority with him and his wife.

In the foregoing example, Douglas counts on the history of shared decision making with his wife to inform her future decisions as his agent.<sup>32</sup> This history, plus Douglas's implicit trust in his wife, supports Pamela's drafting decision to forego memorializing his expectations. In fact, reducing to writing all of the possible scenarios that might occur with the couple's three children would be impractical and probably counter-productive. The client does not wish to hamper his wife's ability to respond flexibly to the changing and differing needs of their children.<sup>33</sup>

The more difficult drafting and counseling challenge is posed by the possibility that Douglas's son may someday succeed to authority under the power of attorney. The son does not have a history of shared decision making with his father. In fact, Douglas indicated that he and his wife have kept financial decisions confidential. If the son succeeds to authority, how will he know his father's expectations?

Even where expectations have been communicated, if the principal loses capacity, the agent (or successor agent) will likely face decisions for which the principal left no specific directions. Turning to the statute for direction, an agent may find more questions than answers. Such questions include: What does the phrase "reasonable expectations"

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32. See Marshall B. Kapp, *Who's the Parent Here? The Family's Impact on the Autonomy of Older Persons*, 41 EMORY L.J. 773, 785 (1992) (observing that "[s]hared decision-making affords a chance for continuing dialogue that informs future proxies more fully about the individual's values and preferences concerning later decisions").

33. See *supra* note 28 and accompanying text.



mean? Are specific instructions required or will the principal's general objectives, values, and preferences suffice? If no expectations can be ascertained about a decision to be made, does "best interest" mean a decision that is solely beneficial to the principal, or may the agent take into account the interests of others that the principal likely would have considered?

These questions were explored by the author and Professor Lawrence Frolik in research conducted for the Third National Guardianship Summit.<sup>34</sup> We were charged with developing a practical understanding of "substituted judgment" and "best interest" based on a review of scholarly literature, statutes, case law, and empirical data collected from our guardian survey.<sup>35</sup> We found that notions of substituted judgment (*i.e.*, doing what the incapacitated person expects) and best interest (*i.e.*, doing what is best for the incapacitated person) do not fit neatly into two contrasting models.<sup>36</sup> Instead, each concept is more accurately understood as providing a process for decision making along a hierarchical continuum, moving from "strict substituted judgment" at the top of the hierarchy (where specific directions or expressed wishes exist to guide the decision), to "strict best interest" at the bottom of the hierarchy (where no information can be obtained about what the person would want).<sup>37</sup>

In between the ideal decision making circumstance of specific directions and the generic best interest inquiry of last resort, there are interim points on the hierarchy.<sup>38</sup> When no specific directions exist, an expanded notion of substituted judgment permits decisions based on "the incapacitated person's prior general statements, actions, values, and preferences."<sup>39</sup> If there are none, then the next interim point on the hierarchy is an expanded notion of best interest.<sup>40</sup>

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34. See Sally Hurme & Erica Wood, Introduction, *Symposium, Third National Guardianship Summit: Standards of Excellence*, 2012 UTAH L. REV. 1157 (providing an overview of the guardianship reform history predating the Summit, the issues considered during the Summit, and the standards and recommendations adopted by the Summit delegates).

35. See generally Linda S. Whitton & Lawrence A. Frolik, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491.

36. *Id.* at 1504-15 (synthesizing the spectrum of viewpoints on substituted judgment and best interest into five models).

37. Frolik & Whitton, *supra* note 27, at 750-57 (proposing the substituted judgment-best interest continuum model for surrogate decisions).

38. *Id.* at 752 (illustrating the substituted judgment-best interest continuum).

39. *Id.* at 754-55 (noting that although "Expanded Substituted Judgment does not afford the degree of certainty that Strict Substituted Judgment does," it facilitates a decision that is "a best estimate of what the incapacitated person would have done").

40. *Id.* at 755-56 (observing that "[a]t times, evidence of what the incapacitated person would have done is too thin to support even Expanded Substituted Judgment").

Expanded best interest permits decisions based on “the benefits and burdens for the incapacitated person, as discerned from available information, including the views of professionals and others with sufficient interest in the incapacitated person’s welfare.”<sup>41</sup> Decisions based on expanded best interest could “also include consideration of consequences for others that a reasonable person in the incapacitated person’s circumstances would consider.”<sup>42</sup> This expanded notion of best interest recognizes that individuals do not live in a vacuum. Most have family members—for example, a spouse, children, and grandchildren—whose interests would be considered if the individual were still able to make a contemporaneous decision.<sup>43</sup> Some of the earliest substitute decision-making cases recognize consideration of such interests even where the incapacitated person left no specific instructions.<sup>44</sup>

Based on our research, we proposed a revision to the decision-making standard in Section 314(a) of the Uniform Guardianship and Protective Proceedings Act.<sup>45</sup> The purpose of the proposal is to clarify the decision-making process along this hierarchical continuum so that guardians have better guidance for making substitute decisions.<sup>46</sup> In pertinent part, the proposed revised standard guides the guardian to:

- (1) act in accordance with the ward’s reasonable current or prior directions, expressed desires, and opinions to the extent actually known or ascertainable by the guardian; or if unknown and unascertainable,
- (2) act in accordance with the ward’s reasonable prior general statements, actions, values, and preferences to the extent actually known or ascertainable by the guardian; or, if unknown and unascertainable,
- (3) act in accordance with the ward’s best interest as determined from reasonable information received from professionals and persons who demonstrate sufficient interest in the

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41. *Id.* at 751.

42. Frolik & Whitton, *supra* note 27, at 751.

43. *Id.* at 756 (advising care, however, that consideration of the interests of others “does not cross the line into exploitation . . . of the incapacitated person”).

44. *See id.* at 756 n.49 (discussing the seminal case of *In re Whitbread*, (1816) 35 Eng. Rep. 878 (Ch.), in which the court granted a petition to increase the allowance of the incapacitated’s niece on the premise that a person in the circumstances of the incapacitated would prefer this outcome to the embarrassment of the niece’s poverty).

45. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 314(a) (1997), 8A U.L.A. 369 (2003).

46. Frolik & Whitton, *supra* note 27, at 758 (noting that the prioritization of substituted judgment over best interest in the proposal “is consistent with policies embodied in the Uniform Health-Care Decisions Act and the Uniform Power of Attorney Act”).

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ward's welfare, which determination may include consideration of consequences for others that a reasonable person in the ward's circumstances would consider.<sup>47</sup>

Although the proposal is framed in the context of guardianship, the hierarchical decision-making continuum is also useful in the context of powers of attorney. The drafting attorney could insert this language in a power of attorney to provide the agent with a process for decision making when the agent has no prior directions from, or shared decision-making history with, the principal. The goal is to guide the agent to a decision that approximates, as closely as possible, what the principal would have decided.

2. The duty to act in good faith.

The second mandatory duty—to act in good faith—is probably the easiest of the mandatory duties for layperson agents to understand. The UPOAA defines “good faith” as “honesty in fact.”<sup>48</sup> Applied to agent conduct, the duty of good faith does not require competence, but merely honesty.<sup>49</sup> In fact, the Act permits a principal to exonerate the agent for incompetent performance provided the agent's actions are not “committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal.”<sup>50</sup> In other words, an exoneration provision may not exculpate an agent for failure to act in good faith.<sup>51</sup>

3. The duty to act only within the scope of authority granted in the power of attorney.

The third mandatory duty—to “act only within the scope of authority granted in the power of attorney”<sup>52</sup>—presumes that an agent understands the meaning and limits of the authority granted. The trend in modern power of attorney practice is to use statutory short forms or brief descriptive terms that incorporate by reference lengthy statutory

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47. *Id.* at 757-58.

48. UNIF. POWER OF ATTORNEY ACT § 102(4) (2006), 8B U.L.A. 65 (Supp. 2012).

49. Honesty in fact represents a subjective standard, often described as “the ‘pure heart, empty head’ test of good faith.” Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement under Article Nine*, 137 U. PA. L. REV. 335, 381 (1988).

50. UNIF. POWER OF ATTORNEY ACT § 115 (2006), 8B U.L.A. 83 (Supp. 2012).

51. *Id.* § 115 cmt., 8B U.L.A. 84 (noting that “[t]he mandatory minimum standard of conduct required of an agent is equivalent to the good faith standard applicable to trustees”).

52. *Id.* § 114(a)(3), 8B U.L.A. 80.

definitions of authority.<sup>53</sup> This practice eases the drafting burden for lawyers and establishes accepted nomenclature upon which third persons can rely when conducting transactions with the agent.<sup>54</sup>

The practice of incorporating authority by reference may be convenient for lawyers and those who deal with agents, but it leaves layperson principals and their agents with little to inform their understanding of the authority granted. Even if the principal and agent read the statute (which is unlikely), the complexity for laypersons is daunting.<sup>55</sup> An overview of the authority provisions in the UPOAA illustrates this point.

The UPOAA distinguishes between areas of authority that must be delegated with express language<sup>56</sup> and those that can be inferred from a general grant of authority.<sup>57</sup>

An express grant is required for authority to:

- (1) create, amend, revoke, or terminate an inter vivos trust;
- (2) make a gift;
- (3) create or change rights of survivorship;
- (4) create or change a beneficiary designation;
- (5) delegate authority granted under the power of attorney;
- (6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or
- (7) exercise fiduciary powers that the principal has authority to delegate; or
- (8) disclaim property, including a power of appointment.<sup>58</sup>

The requirement of an express grant for the foregoing powers is a precaution against inadvertent delegation of authority that could alter the principal's property holdings and estate plan.<sup>59</sup>

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53. *Id.* art. 2 cmt., 8B U.L.A. 97.

54. *Id.* art. 3 cmt., 8B U.L.A. 117 (observing that "[t]he familiarity and common understanding achieved with the use of one statutory form also facilitates acceptance of powers of attorney").

55. Article 2 of the UPOAA, which sets out the authority provisions in the Act, comprises 17 sections of the Act and 9 pages of the Uniform Laws Annotated. UNIF. POWER OF ATTORNEY ACT §§ 201-17 (2006), 8B U.L.A. 97-116 (Supp. 2012).

56. *Id.* § 201(a), 8B U.L.A. 97.

57. *Id.* § 201(c), 8B U.L.A. 97 ("[I]f a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in Sections 204 through 216.>").

58. *Id.* § 201(a), 8B U.L.A. 97 (brackets in original omitted).

Authority over all other subject areas may be delegated by a general grant.<sup>60</sup> For example, the Act provides that a general grant empowering an agent “to do all acts that a principal could do”<sup>61</sup> includes authority to act on the principal’s behalf with respect to the following:

- real property
- tangible personal property
- stocks and bonds
- commodities and options
- banks and other financial institutions
- operation of an entity or business
- insurance and annuities
- estates, trusts, and other beneficial interests
- claims and litigation
- personal and family maintenance
- benefits from governmental programs or civil or military service
- retirement plans
- taxes<sup>62</sup>

Nonspecific general grants “to do all acts that a principal could do” are not common in lawyer-drafted powers of attorney, but lawyers frequently use brief descriptive labels to incorporate areas of authority by reference.<sup>63</sup> The UPOAA, which provides detailed descriptions for each area of general authority,<sup>64</sup> offers an optional statutory form for this

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59. *See id.* § 201 cmt., 8B U.L.A. 98. The Act’s optional statutory form cautions principals about the potential danger of delegating these powers. *Id.* § 301, 8B U.L.A. 119 (including on the statutory form power of attorney the following notice to the principal: “CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death.”).

60. UNIF. POWER OF ATTORNEY ACT § 201 cmt., 8B U.L.A. 98.

61. *See supra* note 57.

62. These are the brief terms for areas of authority described in UPOAA sections 204 through 216, UNIF. POWER OF ATTORNEY ACT §§ 204-16 (2006), 8B U.L.A. 102-14 (Supp. 2012), and are used to incorporate by reference those descriptions in the Act’s optional statutory form. *Id.* § 301, 8B U.L.A. 118.

63. Section 202 of the UPOAA permits incorporation by reference by using the descriptive term for the subject area or citing to the statutory section where the authority is described. *Id.* § 202, 8B U.L.A. 100. The concept of incorporating by reference statutory definitions of authority pre-dates the UPOAA. The Uniform Statutory Form Power of Attorney Act (1988) is representative of this approach. UNIF. STATUTORY FORM POWER OF ATTORNEY ACT (1988), 8B U.L.A. 194 (2001); *see also id.* § 202 cmt., 8B U.L.A. 101.

64. *See supra* note 62.

purpose.<sup>65</sup> Incorporation by reference may ease the drafting burden for the lawyer (and avoid lengthy power of attorney documents), but the short descriptive terms do not tell the layperson, whether principal or agent, much about the actual scope of authority granted.

If the scope of authority is not clear on the face of the power of attorney, how is the average agent to understand what it means to act within that scope? The practical response is that the agent needs some type of education. Unfortunately, the typical manner in which powers of attorney are created may leave this need unmet.

Consider again the example of Douglas, the client for whom Pamela drafted a power of attorney. Pamela verbally explained the power of attorney to Douglas and his wife, but she did not provide them with a written explanation of the scope of authority. An additional step in the representation—creating a separate explanatory document—could increase the likelihood that the agent and successor agent will understand what they are empowered to do if the power of attorney is later needed. Depending on the power of attorney, this separate document might be basic—simply restating the full statutory descriptions of granted authority,<sup>66</sup> or more complex—noting areas of authority that have been added by express grant or modified in the power of attorney.<sup>67</sup>

Such a document serves a dual purpose. First, the drafting lawyer can review the document with the principal to confirm that the power of attorney contains the delegation of authority intended by the principal. Second, the lawyer or the principal can use the document to explain the scope of delegated authority to the agent. If this discussion does not take place in the drafting lawyer's office or between the agent and principal before the principal loses capacity, the explanatory document at least provides a means of self-education for the agent.

A document that explains the scope of authority may also be required by persons who transact with the agent. The UPOAA permits such persons to request, as a condition to accepting the agent's authority, an opinion of counsel as to any matter of law concerning the power of

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65. UNIF. POWER OF ATTORNEY ACT § 301, 8B U.L.A. 117-22.

66. For example, see the full statutory descriptions of authority contained in the UPOAA. *Id.* §§ 204-17, 8B U.L.A. 102-16.

67. As explained in the comment to section 201 of the UPOAA:

[W]ith any authority incorporated by reference in a power of attorney, the principal may enlarge or restrict the default parameters set by the Act.

With respect to other acts listed in Section 201(a), the Act contemplates that the principal will specify any special instructions in the power of attorney to further define or limit the authority granted.

*Id.* § 201 cmt., 8B U.L.A. 98.

attorney.<sup>68</sup> As a “best practice,” an opinion letter prepared at the time the power of attorney is drafted may be the most efficient and cost effective means of educating the agent and facilitating prompt acceptance of the agent’s authority.

An opinion letter may be particularly useful in circumstances where the scope of authority granted to the initial agent is broader than that granted to the successor. Consider again the example of Douglas who appointed his wife as his initial agent and his oldest son as his successor agent.<sup>69</sup> He granted much broader authority to his wife than he granted to his son. Douglas also contemplated not informing his son about the appointment until a later point in time. If Douglas’s son has some awareness of the transactions conducted by his mother on his father’s behalf—such as making gifts or changing beneficiary designations—might he not conclude that he too will have that authority as the successor agent? This example illustrates why an opinion of counsel, or other explanatory document, should be considered a staple part of a drafting lawyer’s services. Without the benefit of the drafting lawyer’s verbal explanation or an explanatory document, a successor may misapprehend the scope of his authority and have nothing to inform him otherwise.

### *B. Default Duties*

Beyond the mandatory duties, the Act’s default duties also bind an agent unless the duties are removed or modified in the power of attorney.<sup>70</sup> The UPOAA default duties require the agent to:

- (1) act loyally for the principal’s benefit;
- (2) act so as not to create a conflict of interest that impairs the agent’s ability to act impartially in the principal’s best interest;
- (3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

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68. *Id.* § 119(d), 8B U.L.A. 88. An opinion of counsel might be requested, for example, when an agent presents the power of attorney to engage in a transaction somewhere other than the state in which the power of attorney was drafted. Default rules with respect to agent authority can vary jurisdiction to jurisdiction. See Linda S. Whitton, *Crossing State Lines with Durable Powers*, 17 PROB. & PROP. 28 (2003). For example, authority with respect to insurance transactions might include, in one jurisdiction, the ability to create or change beneficiary designations, while, in a UPOAA jurisdiction, an express grant of specific authority would be required. UNIF. POWER OF ATTORNEY ACT § 201(a), 8B U.L.A. 97.

69. See *supra* pp. 1043-44 (client scenario).

70. See UNIF. POWER OF ATTORNEY ACT § 114 cmt., 8B U.L.A. 81 (noting that the principal may modify or omit default duties).

- (4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- (5) cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and
- (6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:
  - (a) the value and nature of the principal's property;
  - (b) the principal's foreseeable obligations and need for maintenance;
  - (c) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
  - (d) eligibility for a benefit, a program, or assistance under a statute or regulation.<sup>71</sup>

In addition to the foregoing, the Act acknowledges an agent's duty to account (*i.e.*, "disclose receipts, disbursements, or transactions conducted on behalf of the principal") but limits the persons who can request this information.<sup>72</sup>

Most of the default duties have a direct correlate in the common law of agency—acting loyally<sup>73</sup> and with care, competence, and diligence;<sup>74</sup> avoiding conflicts of interest;<sup>75</sup> keeping records and accounting for transactions.<sup>76</sup> The other two default duties—cooperation with the principal's health-care agent and preservation of the principal's estate

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71. *Id.* § 114(b), 8B U.L.A. 80.

72. *Id.* § 114(h), 8B U.L.A. 81. An agent must only disclose information if "ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest to the principal's estate." *Id.* This duty is also subject to modification by the principal because the full statutory provision begins with the phrase "[e]xcept as otherwise provided in the power of attorney." *See id.* art. 1 cmt., 8B U.L.A. 64 (noting that "the default provisions are clearly indicated by signals such as 'unless the power of attorney otherwise provides,' or 'except as otherwise provided in the power of attorney'; "[t]hese signals alert the draftsman to options for enlarging or limiting the Act's default terms").

73. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

74. *Id.* § 8.08.

75. *Id.* §§ 8.02, 8.03.

76. *Id.* § 8.12.



plan—may be viewed as an outgrowth of the common law duty to follow a principal’s instructions,<sup>77</sup> but they are duties crafted specifically for the personal power of attorney relationship.<sup>78</sup> Their purpose is to “protect the principal’s previously-expressed choices.”<sup>79</sup>

Under the common law, agent duties are distinguished as either “duties of loyalty” or “duties of performance.”<sup>80</sup> Applying this distinction to the default duties under the UPOAA, two are duties of loyalty: the duty to “act loyally for the principal’s benefit”<sup>81</sup> and the duty to “act so as not to create a conflict of interest that impairs the agent’s ability to act impartially in the principal’s best interest.”<sup>82</sup> All of the remaining default duties are duties of performance.<sup>83</sup>

The advisability of removing or modifying the default duties will depend on a principal’s individual circumstances.<sup>84</sup> For example, if the principal anticipates that contentious family members will challenge the agent’s conduct, an exoneration provision may be considered to reduce the agent’s liability exposure (thus overriding the default duty to act with “care, competence, and diligence”).<sup>85</sup> If the principal prefers not to disclose the estate plan to the agent, or places a higher priority on *inter vivos* use of assets than post mortem distribution, the principal may choose to relieve the agent of the duty to preserve the principal’s estate plan.<sup>86</sup> In situations where the principal intends the agent to use property for the benefit of the agent (*e.g.*, paying tuition costs for the agent or the agent’s children), a partial override of the default duties to act loyally and avoid conflicts of interest may be necessary.<sup>87</sup> The following Part

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77. *Id.* § 8.09.

78. UNIF. POWER OF ATTORNEY ACT § 114 cmt., 8B U.L.A. 81-82.

79. *Id.*

80. *See* RESTATEMENT (THIRD) OF AGENCY ch. 8 (distinguishing duties of loyalty in Title B from duties of performance in Title C); Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1052-53 (discussing the distinction between duties of loyalty and duties of performance).

81. UNIF. POWER OF ATTORNEY ACT § 114(b)(1), 8B U.L.A. 80.

82. *Id.* § 114(b)(2), 8B U.L.A. 80.

83. *See id.* §§ 114(b)(3)-(b)(6), (h), 8B U.L.A. 80-81 (providing for duties of care, competence, and diligence; record keeping; cooperation with the principal’s health care agent; preservation of the principal’s estate plan; and the duty to account).

84. *Id.* § 114 cmt., 8B U.L.A. 81-82.

85. *See id.* § 115 & cmt., 8B U.L.A. 83-84.

86. *See* Whitton, *Lessons Learned*, *supra* note 2, at 28-29 (noting that “the principal has no affirmative obligation to disclose to an agent any information about the principal’s property or estate plan”).

87. UNIF. POWER OF ATTORNEY ACT § 114 cmt., 8B U.L.A. 81 (noting that “[i]f a principal’s expectations potentially conflict with a default duty under the Act, then stating the expectations in the power of attorney, or altering the default rule to accommodate the expectations, or both, is advisable”).

discusses at greater length the interplay of a principal's expectations with agent duties and conflicts of interest.

## II. RECONCILING CONFLICTING DUTIES AND CONFLICTS OF INTEREST

The UPOAA's distinction between mandatory and default duties provides drafting options for the principal's lawyer,<sup>88</sup> but, to choose among them, the drafting lawyer must determine whether the agent's duty to follow the principal's expectations (a mandatory duty) could produce inadvertent conflicts with the agent's duties of loyalty (default duties). In order to identify needed drafting adjustments, the principal's lawyer must gather information about the principal's objectives and any pre-existing conflicts of interest with the intended agent. The following discussion suggests an analysis for determining, based on that information, where drafting adjustments in the power of attorney should be made.

This discussion is divided into two sections. The first examines the treatment of conflicts of interest under the UPOAA and how that treatment differs from the common law. The second section looks at circumstances in which the agent's mandatory duty to follow the principal's reasonable expectations may cause inadvertent conflicts with the default duties of loyalty (*i.e.*, the duty to "act loyally for the principal's benefit,"<sup>89</sup> and the duty to "act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest"<sup>90</sup>). Practical guidelines will be offered for identifying and reconciling these conflicts.

### A. *The UPOAA Approach to Conflicts of Interest*

The commentary to the UPOAA acknowledges that inherent conflicts of interest are common when family members serve as agents.<sup>91</sup> Examples include circumstances where the agent will inherit whatever is not expended by the agent on the principal's behalf and where the principal and agent co-own real estate or business interests.<sup>92</sup> Where inherent conflicts exist, the agent needs to know whether conduct that is

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88. See Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 PHOENIX L. REV. 343, 345-51 (2008) [hereinafter Whitton, *Autonomy and Protection*] (describing how flexibility in tailoring delegated authority and the guidelines for agent conduct facilitates implementation of the principal's objectives).

89. UNIF. POWER OF ATTORNEY ACT § 114(b)(1) (2006), 8B U.L.A. 80 (Supp. 2012).

90. *Id.* § 114(b)(2), 8B U.L.A. 80.

91. *Id.* § 114 cmt., 8B U.L.A. 82.

92. *Id.*

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mutually beneficial to the principal and the agent is consistent with the agent's duty of loyalty.

Under the UPOAA, that question is answered by the following provision:

An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.<sup>93</sup>

In other words, a conflict of interest or an action that creates a benefit for the agent is not a *per se* violation of the agent's duty of loyalty provided the agent acts with care, competence, and diligence for the best interest of the principal.

Referring back to the client scenario in Part I, suppose that Douglas and his son share co-ownership of rental property. His son is now acting as the successor agent and learns of a lucrative opportunity to sell the property. The son has verified that the purchase price exceeds fair market value and believes the sale is in Douglas's best interest because funds are needed to pay for his rising medical costs. In this circumstance, the UPOAA would protect the son against breach of duty claims by his siblings because he acted with care, competence, and diligence for the best interest of the principal.<sup>94</sup> Suppose, however, that the son was in deep debt and needed a quick cash infusion. If he sells the rental property at less than fair market value so that he can salvage his finances, the UPOAA provision would not protect him (*i.e.*, he did not act with care, competence, and diligence, and the below-market price was not in his father's best interest). If under different circumstances, however, the below-market sale was necessitated to meet Douglas's medical bills, the son's decision would likely withstand scrutiny as a diligent effort to do what was best for the principal.

The result under the common law in a mutual benefit or conflict of interest situation is more complicated. The Restatement (Second) of Agency provides that "[u]nless otherwise agreed, an agent is subject to a duty to his principal to act *solely* for the benefit of the principal in all matters connected with his agency."<sup>95</sup> By contrast, the Restatement (Third) of Agency provides that "[a]n agent has a fiduciary duty to act *loyally* for the principal's benefit in all matters connected with the agency relationship."<sup>96</sup> The Reporter's note to this section explains:

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93. *Id.* § 114(d), 8B U.L.A. 80.

94. *Id.*

95. RESTATEMENT (SECOND) OF AGENCY § 387 (1958) (emphasis added).

96. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006) (emphasis added).

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In this Restatement, § 8.06 addresses on a comprehensive basis the circumstances under which a principal may consent to conduct by an agent that would otherwise constitute a breach of the agent's fiduciary duty. This Restatement also formulates the agent's duty as one to act "loyally" for the principal's benefit. This terminology is intended to clarify that an agent's loyal service to the principal may, concurrently, be beneficial to the agent.<sup>97</sup>

The Reporter's note seems to suggest that the principal's consent is necessary to deem as "loyal" agent conduct that would otherwise breach the duty of loyalty because it produced a benefit for the agent.

In her article, *Disloyal Agents*,<sup>98</sup> Professor Deborah A. DeMott, Reporter for the Restatement (Third) of Agency, writes the following about principal consent to otherwise "disloyal" agent conduct:

A principal may consent to conduct by the agent that would otherwise breach a duty of loyalty, but in obtaining the principal's consent, the agent must act in good faith and fully disclose material information to the principal. Although open-ended advance consents to disloyal conduct are not effective, the fact that a principal may consent to conduct that would otherwise breach an agent's duties of loyalty mitigates the stringency associated with the fiduciary regime and other consequences that follow breach. . . .<sup>99</sup>

Professor DeMott goes on to observe that the common law doctrine of loyalty is "prophylactic" in that "a breach of a duty of loyalty triggers remedies and other consequences, distinct from whether the person protected by the duty can establish that the breach in fact led to injury or in fact stemmed from disloyal motives on the part of the fiduciary."<sup>100</sup> In other words, under the common law, an agent with a conflict of interest, or who receives a benefit without the principal's consent, faces liability for breach of the duty of loyalty, even if the agent's benefit did not injure the principal.

The departure of the UPOAA from the common law is justified on two grounds. First, as previously noted, many family member agents have inherent conflicts of interest.<sup>101</sup> Second, a durable power of attorney, unlike a common law agency relationship, continues notwithstanding the principal's incapacity.<sup>102</sup> Thus, an incapacitated

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97. *Id.* § 8.01 rptr. n. a.

98. DeMott, *supra* note 80.

99. *Id.* at 1052-53 (citations omitted).

100. *Id.* at 1057.

101. *See supra* note 91 and accompanying text.

102. *See* UNIF. POWER OF ATTORNEY ACT § 104 (2006), 8B U.L.A. 68 (Supp. 2012) (creating a presumption of durability for powers of attorney).

principal cannot give prior consent nor ratify a transaction in which the agent has a conflict of interest or might receive a benefit.<sup>103</sup>

Although the UPOAA protects the agent who receives a mutual benefit or has a conflict of interest, provided the agent acts in the principal's best interest,<sup>104</sup> that protection may not go far enough in all circumstances. What if the principal expects the agent to continue a pattern of annual exclusion gifts to the agent and other family members, or to spend the principal's assets for the agent's living expenses or tuition? The agent will argue that such expenditures were made in conformance with the principal's expectations, but the agent cannot argue that the expenditures serve the principal's best interest.<sup>105</sup> Without drafting adjustments in the power of attorney, the agent's mandatory duty to follow the principal's expectations is at odds with the default duties of loyalty. The following discussion offers practical guidelines for reconciling these duties when they conflict.

*B. Reconciling the Mandatory Duty to Follow the Principal's Expectations with the Default Duties of Loyalty*

The UPOAA offers great flexibility for tailoring an agent's authority to meet the principal's needs.<sup>106</sup> Setting the scope of authority—the *what* of the authorization—is a separate issue, however, from the principal's expectations for *how* the authority is to be exercised. If these expectations are known, the agent has a mandatory duty to follow them.<sup>107</sup>

Conflicts in agent duties may arise when the principal expects the agent to use the principal's property in a way that would violate the agent's default duties to act loyally<sup>108</sup> and avoid conflicts of interest.<sup>109</sup> Consider again the example of Douglas, who wanted his wife to have unfettered authority to use his property for her own benefit and the benefit of their children.<sup>110</sup> If this expectation were stated on the face of the power of attorney, by implication it would override the default duties

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103. See Whitton, *Lessons Learned*, note 2, at 24-25 (explaining why statutory protection is necessary for the agent who has an inherent conflict of interest and is serving under a durable power of attorney).

104. See UNIF. POWER OF ATTORNEY ACT § 114(d) (2006), 8B U.L.A. 80 (Supp. 2012).

105. See generally DeMott, *supra* note 80.

106. See generally Whitton, *Autonomy and Protection*, *supra* note 88.

107. See *supra* notes 26-47 and accompanying text.

108. See UNIF. POWER OF ATTORNEY ACT § 114(b)(1), 8B U.L.A. 80.

109. See *id.* § 114(b)(2), 8B U.L.A. 80.

110. See *supra* notes 29-31 and accompanying text.

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of loyalty.<sup>111</sup> If, however, the power of attorney neither states the expectations nor modifies the duties of loyalty, Douglas's wife risks that her actions as agent are vulnerable to attack.

Failure to draft for the conflict in agent duties (*i.e.*, the conflict between the mandatory duty to follow the principal's expectations and the default duties of loyalty) burdens the agent with a potential risk of liability. This risk may also undermine the smooth operation of the power of attorney if the agent is reluctant to follow the principal's expectations for fear of incurring liability.

An inadvertent conflict in duties may also occur where the agent has a conflict of interest or may receive a mutual benefit from transactions with the principal's property interests. Assuming that the agent is bound by the default duties of loyalty in the Act, the agent with a conflict of interest is protected only if action on behalf of the principal is taken with care, competence, and diligence for the best interest of the principal.<sup>112</sup> What if a principal does not expect the agent to act in the principal's best interest with respect to co-owned property, but fails to express this expectation in the power of attorney *or* to modify the agent's duties of loyalty?

Consider again the example of Douglas who appointed his oldest son as his successor agent. Suppose that the rental property, titled in both of their names, was actually intended as a gift to the son. Douglas's name remained on the title so that his son could obtain better mortgage interest and insurance rates. If the oldest son needs money and uses his authority to sell the property quickly, at below market value, his siblings may feel justified challenging his conduct as a breach of his duties of loyalty. In this scenario, the power of attorney did not adjust the default duties of loyalty, and the oldest son will have no proof of his now incapacitated father's expectations.

The foregoing examples illustrate common circumstances in which an agent's mandatory duty to act according to the principal's expectations could conflict with the default duties of loyalty. How can the drafting lawyer anticipate such conflicts and create a power of attorney that is effective to achieve the principal's goals without exposing the honorable agent to inadvertent risk?

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111. Stating expectations in the power of attorney that are inconsistent with one or more default duties is a means of "providing otherwise" in the power of attorney. *See supra* note 72 (discussing the portion of UNIF. POWER OF ATTORNEY ACT art. 1 cmt. that addresses default rules in the UPOAA); *supra* note 87 (advising that, when the principal's expectations conflict with the agent's default duties, either the expectations must be stated in the power of attorney, the default duties must be modified, or both).

112. UNIF. POWER OF ATTORNEY ACT § 114(d) (2006), 8B U.L.A. 80 (Supp. 2012).

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A two-step analysis provides the answer. First, the drafting attorney should determine from the client interview whether the principal intends the agent to act in a manner that diverges from an objective view of the principal's "best interest."<sup>113</sup> Examples include making gifts or providing other types of support to the agent from the principal's property. Second, if the answer to this determination is yes, the client must choose between (1) explicitly stating the expectations in the power of attorney, thus cancelling by implication the default duties of loyalty<sup>114</sup> and (2) modifying the duties of loyalty in the power of attorney without explicitly stating the expectations, thus allowing those expectations to remain flexible.<sup>115</sup> Although the drafting attorney may be reluctant to recommend modification of the default duties of loyalty, which reduces certain protections for the principal,<sup>116</sup> the internal tension between these duties and the principal's expectations cannot be ignored.

#### CONCLUSION

Current practice with respect to powers of attorney falls short of adequately guiding the honorable agent who wants to "do right" by the principal. Agents need a clear understanding of their authority and how the principal wishes them to exercise that authority. The failure to communicate these parameters may undermine the principal's objectives and lead to an agent's inadvertent breach of duties.

Agents may have difficulty understanding their authority due to the cryptic labels commonly used on short form powers of attorney. Preparation of an opinion of counsel or other explanatory document to accompany the power of attorney should be an encouraged best practice in the power of attorney drafting process. An explanatory document will help ensure that the principal, agent, and persons who deal with the agent understand exactly what is delegated. This understanding is essential for the agent's compliance with the mandatory duty to act only within the scope of authority granted in the power of attorney.

Agents may also lack understanding of other duties and how to reconcile conflicting duties and conflicts of interest. The UPOAA requires an agent to act according to the principal's reasonable expectations if known and otherwise in the principal's best interest. If the principal expects the agent to act in a manner that may not comport

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113. See generally DeMott, *supra* note 80 (discussing the stringent common law view).

114. See *supra* note 111.

115. See *supra* notes 28-32 and accompanying text.

116. See generally Whitton, *Autonomy and Protection*, *supra* note 88 (discussing the inherent tension between drafting for the principal's autonomy and the principal's protection).

with the principal's best interest, such as using the principal's property for the support of the agent (a common expectation for family member agents), the principal's expectations will likely conflict with the agent's default duties of loyalty. The vigilant drafting lawyer should conduct a thorough client interview to identify the principal's expectations as well as potential conflicting duties and conflicts of interest. Armed with this information, the lawyer can make appropriate drafting adjustments in the power of attorney. Failure to do so may expose the agent to inadvertent risk and undermine the effectiveness of the principal's power of attorney.