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The fundamental duty of the fiduciary practitioner

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Not all advisory relationships require the same level of trust. Although many service providers, including financial advisors, are expected by their clients to fulfil their duties with honesty, diligence and fairness, the benchmark set for the fiduciary practitioner is higher than just that. The reason being that the fiduciary practitioner's position establishes a relationship with a third party who is often in a vulnerable position. The fiduciary concept is derived from the Latin term *fides*, referring to trust, loyalty, and good faith. The fiduciary practitioner, particularly in the role of trustee or executor, is expected to conform to the highest level of integrity. The practitioner has a fiduciary duty towards the third party who must be able to trust him or her.

The trustee is directed by legislation to perform his or her duties and exercise their powers with the care, diligence and skill that can reasonably be expected of a person who manages the affairs of another. A trustee is prohibited from being exempted or indemnified against liability for breach of trust where he or she fails to show the required degree of care, diligence and skill. Whereby a person manages the affairs of another to whom he or she owns a fiduciary duty, the law requires such a person to act with more care and diligence than when dealing with his or her own matters. This concept, which is contradictory to the selfishness of humans in general, has been referred to as an 'other-regarding duty'. It is not the trustee's duty to fulfil the expectations or to grant the wishes of a particular person, but to objectively act in the best interest of all the parties that he or she has a fiduciary duty towards.

"To act with integrity includes honesty, fairness, objectivity and independence of thought and behaviour"

A well-known law professor liked to equate the duty to act with the necessary care and diligence when dealing with another's affairs as that of a person wearing a belt and braces at the same time. It is generally accepted that besides the duty to act with the necessary care, diligence and skill, the trustee's fiduciary duty also includes the duties of impartiality, accountability and independence. An executor of a deceased estate is potentially placed in several complex relationships with parties who may have an interest in the deceased estate. These may include spouses, legatees, heirs, business partners, and creditors of the deceased. Many, but not necessarily all, of these relationships may be of a fiduciary character. Even if not, everyone will have the right to expect from the executor to at least act lawfully and in good faith.

A fiduciary practitioner who is a member of the Fiduciary Institute of Southern Africa (FISA) is bound by the association's code of ethics, focused on two broad principles, namely integrity and diligence. To act with integrity includes honesty, fairness, objectivity and independence of thought and behaviour. The fiduciary is also expected to take all reasonable steps to avoid conflicts of interest. To pass the test of diligence, a high level of knowledge and competence is required. The fiduciary must further treat relevant information with confidentiality and do everything necessary to ensure their personal financial stability.