



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 9

ETHICS AND PROFESSIONAL PRACTICE

This is the **summative (formal) assessment** for **Module 9** of this course and is compulsory for all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 9. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentnumber.assessment9]**. An example would be something along the following lines: 202021IFU-314.assessment9. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentnumber” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Please choose the **most correct answer** from the options below.

INSOL International's *Ethical Principles for Insolvency Professionals*

- (a) are mandatory and apply to all its members.
- (b) creates a set of rules which all jurisdictions have to incorporate into their insolvency frameworks.
- (c) creates a set of rules by which stakeholders and the public in most jurisdictions would be able to determine whether insolvency practitioners are acting in accordance with ethical principles.
- (d) creates a set of best practice principles to inform and educate insolvency practitioners and stakeholders by providing ethical and professional guidance on issues of importance.

Question 1.2

The "Enlightened Creditor Value" approach to insolvency proposes the following with regard to the protection of competing interests in insolvency proceedings:

- (a) creditors' interests are of paramount importance and as such only these interests should be protected in insolvency.
- (b) The interests of stakeholders should be regarded in the same manner as those of creditors.
- (c) Creditors' interests are of paramount importance, however, the interests of other stakeholders should also be considered where this would be in the creditors' interests.
- (d) Only the shareholders of the company and the creditors of the company should be protected by the insolvency law (and in that order).

Question 1.3

All insolvency professionals are fiduciaries.

- (a) True
- (b) False

Commented [JL1]: TOTAL: 20.5 out of 50
Please refrain from copying and pasting from the Guidance Text. See point 5 above.

Where the student copied from the GT only half of the marks were awarded for the question.

Note from Course Leader: The Course Handbook and instruction 5 of the assessment clearly warn about copying and pasting from the Guidance Text. Considering that marks have been deducted for this, not further steps will be taken against you.

Commented [JL2]: 8 out of 10

Commented [JL3]: b Although most IPs are regarded as fiduciaries not all are e.g. Supervisors in a CVA. See section 3.2 of the GT.

Question 1.4

Being truthful and being honest is **not** the same thing.

(a) True

(b) False

Question 1.5

Tony has been appointed as a liquidator of Company X. Company X has several major creditors, including ABC Bank. A year prior to the liquidation of the Company, Tony was acting in an advisory capacity for ABC Bank in litigation against Company X where he attempted to advance ABC's position as a creditor.

This situation is an example of a/an _____ threat.

(a) self-review

(b) self-interest

(c) advocacy

(d) intimidation

Commented [JL4]: c

Question 1.6

A lack of independence and impartiality due to a prohibited relationship with a stakeholder can always be remedied by disclosing the relevant relationship to the relevant parties and issuing a declaration of independence.

(a) True

(b) False

Question 1.7

Julie is a well-known insolvency practitioner and is often sought out for her knowledge and expertise. She currently has ten ongoing insolvency matters (most of them quite complex) and has been feeling somewhat overwhelmed. Due to her impressive *curriculum vitae* she is contacted by a very large designer company in distress inquiring whether she would be able to take an appointment as an administrator. Julie should:

(a) Accept the appointment as it will boost her career even further.

(b) Accept the appointment as she can get one of her junior associates to take over all her other cases.

(c) Accept the appointment because as a professional she will have the ability to give all of the cases she is involved in some attention, although some of them will now only be overseen by her.

(d) Refuse the appointment as she will not be able to give all of the cases she is involved in the requisite level of attention.

Question 1.8

Johnson has been appointed as a new associate at the firm where he is employed. In his new role he has to meet certain targets in relation to the fees he earns for taking appointments. Johnson is currently appointed as a liquidator for a small company. He realises that he will not meet the firm's target for fees. The most ethical thing for Johnson to do would be to:

- (a) Call a creditors' meeting requesting an adjustment to his agreed fees due to unforeseen circumstances.
- (b) Ask his administrative assistant to invoice the estate for the use of the firm's conference venue for meetings held there at a 50% increased fee.
- (c) Carry out his duties in a timely fashion and complete the appointment efficiently and without undue delay, only invoicing for work properly performed.
- (d) Ask his administrative assistant to double check all the calculations in the case file and then bill the hours as part of his invoice.

Question 1.9

Please choose the **most correct answer** from the options below.

An insolvency practitioner using a fixed fee calculation method for determining the amount of remuneration owed to him, will receive a fair amount of remuneration.

- (a) This statement is true since jurisdictions always allow for an adjustment of fees where it is necessary.
- (b) This statement is false since the practitioner might have carried out more work and invested more resources than is reflected in the fee.
- (c) This statement is false since the practitioner will always receive more remuneration than what is reflected in the work carried out.
- (d) This statement is false since the only way to receive a fair amount of remuneration is to calculate the remuneration on an hourly rate.

Question 1.10

Please choose the **most correct answer** from the options below.

Fathima has just completed Module 9 of INSOL International's Foundation Certificate. She works as a junior insolvency practitioner at a large firm. Her firm is contemplating the acquisition of a new information technology system to help ease the administrative burdens of the practitioners at the firm. This new system will digitise all of the documents in relation to insolvency appointments. All the practitioners and administrative personnel employed by the firm will have access to these files as long as they have access to an internet connection. Fathima should advise someone in the office to implement procedures and policies on _____ in relation to this proposed new system.

- (a) quality Control
- (b) risk Management

(c) compliance management

(d) fidelity insurance

QUESTION 2 (direct questions) [10 marks]

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Question 2.1 [maximum 4 marks]

What are the main fiduciary and other duties usually associated with insolvency professionals?

[the duty to act in good faith – this duty implies honesty and fair dealing;

- the duty to act in the best interest of the beneficiary of the fiduciary duties;
- the duty to exercise the powers of the office in an independent and impartial manner – this duty includes the duty to avoid a conflict of interest; and
- a duty which is usually not regarded as being fiduciary in nature, the duty to act with care, skill and diligence.]

Commented [JL6]: 4

Question 2.2 [maximum 4 marks]

Briefly explain the two-pronged nature of the duty to act with independence and impartiality.

[The CIP's duty to act with independence and impartiality therefore encapsulates the same values as the familiar "no-profit" and "no-conflict" rules in Corporate Law and underpins his duty of undivided loyalty to the beneficiaries.

The no-profit rule determines that a fiduciary may not profit from his position of trust (his position as CIP) and thereby be unjustly enriched, for example by receiving secret kick-backs or commissions.

The no-conflict rule determines that a fiduciary may not allow a conflict to arise between his duty and the interests of the beneficiaries, for example transacting with the debtor company in his personal capacity.]

Commented [JL7]: The answer does relate to a specific element of the duty to independence but does not relate to the nature of the duty. Please see p 15 of the GT
Independence in fact and perception
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Question 2.3 [maximum 2 marks]

What is the preferred method of calculation of insolvency practitioner remuneration? Name one ethical issue in relation to this method of calculation.

[Despite the controversies often related to remuneration, it remains a crucial part of any insolvency regime. CIPs are entitled to receive reasonable remuneration that is commensurate with their qualifications, experience, and the risks involved in the particular case.

Time-based fees

Perhaps one of the most contentious ethical issues in relation to the remuneration of IPs is the profession's partiality for charging on the basis of time. Despite the contentiousness of the issue it remains the preferred method for calculating the remuneration of IPs in many jurisdictions, as it is believed to provide for a fair compensation for work done.

It is accepted that IPs making use of this calculation method are to be remunerated only for "time properly spent on attending to the case".

The rate of calculation on which the remuneration is to be based could be the IP's own hourly or daily rate, or a rate prescribed by legislation or the profession to which the IP belongs.

The UNCITRAL Guide submits that this system might operate to incentivise time spent on the administration without necessarily achieving any outcome.⁹² Moreover, that it is also possible that this method of calculating remuneration might not be reflective of actual work done by the IP.

Time-based fees were considered in the seminal case of *Mirror Group Newspapers plc v Maxwell*,

where Ferris J stated three important principles in relation to timebased costing. He stated that:

(a) time spent represents the cost of rendering services, not the value of the service rendered;

(b) time spent should be only one of a number of relevant factors to assess value;

and

(c) it follows from the first two that the real task is to assess value and not cost. However, it will only be possible to make an assessment regarding the value of the

services ex post [facto.]

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 8 marks]

Which elements of insolvency proceedings are especially prone to create or give rise to threats to independence and impartiality? Please elaborate.

[The elements of the insolvency proceedings below gives rise to threats to the independence and impartiality of the IP and specifically the CIP.

1 Nature of pre-commencement / appointment involvement

In practice, prior consultations often occur between the CIP and the company or stakeholders. These consultations may also create the impression of a lack of independence and impartiality on the part of the CIP. Yet the prior consultations need not result in the disqualification of that person as practitioner and may in fact constitute a crucial part of the insolvency process. Therefore, not all forms of contact between the CIP and stakeholder parties prior to the practitioner's appointment would necessarily result in a lack of independence. Nevertheless, there should be limits to what would be deemed acceptable engagement during such consultations. Should the consultation involve material engagement by any of the stakeholder parties, the CIP would no longer be independent and should therefore not be appointed as practitioner. The advice provided by the practitioner in the prior consultation should be limited to the company's financial position, the company's solvency, the effects of potential insolvency, and any alternatives to insolvency. It would also make sense for the CIP to set out the nature and extent of prior consultations in a disclosure statement. This would facilitate improved transparency and help prevent accusations of a lack of independence.

Appointment

In many jurisdictions the CIP can be appointed by either the board of directors or a stakeholder (usually a shareholder or creditor). This may lead the appointee to

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expect that the practitioner would prioritise their interests. In some instances, these persons, being the “principal”, even believe that it is within their power to influence the CIP. Thus, it is vitally important for the CIP to be aware of his responsibilities in this regard. The practitioner should not make any promises to those who appointed him and should make it very clear that he is expected to act in the interests of all the beneficiaries. The duty of independence also obliges the CIP to scrutinise each given situation prior to accepting an appointment. Such scrutiny would include reasonable steps to determine any possible association or conflict of interest with any stakeholder.

3 Subsequent appointments

Subsequent appointments refer to a scenario where the same CIP is allowed to act in different insolvency capacities in relation to the same debtor company. In some jurisdictions, such as England and Wales, CIPs are allowed to be appointed in this manner.

Subsequent appointments pose problems in relation to independence and impartiality due to the self-review and self-interest threat it creates. The Insolvency Code of Ethics of the Institute of Chartered Accountants of England and Wales (ICAEW) recognises the potential conflict of interest in this regard and utilised the scenario “sequential insolvency appointments” as an example of circumstances that might lead to a self-review threat being created.⁶² A self-review threat refers to a situation where a CIP, due to being involved in prior decision-making, will not be able to appropriately evaluate the results of previous judgements made or services rendered.

The self-interest threat relates to the issue of remuneration of the CIP. The reason subsequent appointments might pose an issue in relation to the remuneration of the CIP, is that the CIP will be remunerated twice for work done in relation to the same company. A self-interest threat refers to a situation where the interests (including

financial interests) of the CIP might inappropriately influence his judgement or behaviour.

An example of a way in which a subsequent appointment and the

corresponding subsequent remuneration might influence the behaviour of the CIP,

could be that a rescue or turnaround practitioner might not put his best effort into

saving the debtor from liquidation due to the fact that he knows he would

subsequently be appointed as the liquidator and be paid again. CIPs who engage in

subsequent appointments often hold the view that the previous appointment does

hold some benefits and advantages in the subsequent appointment (such as

institutional knowledge) and as professionals have the opinion that they are able to

act with independence and impartiality. In jurisdictions where subsequent

appointments are allowed, the opinion is held that the benefits outweigh the risks.

In certain jurisdictions subsequent appointments in relation to the same debtor

company are prohibited due to the threats expressed above. South Africa is a good

example of this. The South African Companies Act of 2008 provides that a business

rescue practitioner may not be appointed as the liquidator of the debtor in

subsequent liquidation proceedings. As already mentioned, other jurisdictions such

as England and Wales and New Zealand permit subsequent appointments.

4 Secret monies and personal transactions with the company

The CIP should act in the best interests of the beneficiaries of his duties at all times

and in all transactions. As a fiduciary, a CIP is not allowed to make a secret profit at

the expense of the beneficiaries, or place himself in a position where his personal

interests (or that of parties related or connected to him) conflict with his duties. If his

judgement was influenced by the fact that he stands to gain personally from a

decision, it cannot be said that he was acting in the best interests of the beneficiaries

of his duties. This is of particular importance in situations where the CIP (or family /

friend of the CIP) would like to purchase assets from the company. This could in

effect place the CIP at both ends of the contract, which may cause a strong suspicion

that the practitioner, being a fiduciary, is serving his own interests instead of those of the beneficiaries. There are also a number of ways in which the CIP would be able to manipulate such a transaction for his own benefit, for example fixing an advantageous price, as the CIP would have knowledge of the bare minimum the company would accept and drafting (or having input into the drafting of) a contract with favourable clauses. To this end it is important that a CIP follows the necessary procedural steps (disclosure) and obtains the necessary informed consent where a jurisdiction permits transactions between the CIP and the company.]

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Question 3.2 [maximum 7 marks]

As insolvency appointments often involve complex legal issues, it is common practice for insolvency practitioners to rely on the advice and services of legal professionals. What ethical considerations should be borne in mind, especially regarding the fees of these legal professionals?

[In order to establish whether the service provider

will be offering best value and service, the IP would have to consider:

- (a) the cost of the service, the expertise and experience of the provider;
- (b) whether the provider holds appropriate regulatory authorisation; and
- (c) the professional and ethical standards applicable to the service provider.

The requirements and guidance set out in the Code could be applied effectively to the use of legal professionals. Where an IP requires the advice and services of a legal professional he should be able to show that it is indeed necessary and should be able to explain why he chose a specific legal professional. Where he has a relationship that could create the perception that he is not independent from the legal professional, he should disclose the relationship to the stakeholders. He should also be able to provide details of the process he followed to make sure the service provider would offer the best value for the beneficiaries.]

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Copied from the GT

QUESTION 4 (fact-based application-type question) [15 marks in total]

WeBuild Ltd is a private company registered in Eurafriolia. The company specialises in construction and property development and is well known in the area where it conducts business. Mr B Inlaw, Dr I Dontcare and Mrs I Relevant are the directors of the company.

The company has ten shareholders, with Mr B Inlaw and Dr I Dontcare also holding shares in the company.

The company traded profitably for the last 10 years but recently started to experience financial difficulties. One of the main reasons for the decline is the fact that several of the company's employees have instituted a class action claim against WeBuild for workplace related injuries due to faulty machinery. This also resulted in bad publicity that led to a decline in contracts. The directors of the company were made aware of the issues relating to the machinery but chose not to take any action to remedy the situation. When the company's financial position started to decline the directors continued to trade as if nothing was amiss and even made several large payments to themselves by way of performance bonuses. When they received a letter of demand from the company's major secured creditor, ABC Bank, the directors decided to call a shareholders' meeting to discuss the company's options.

Present at this meeting were the shareholders, the directors and Mr Relation, a lawyer, to provide them with information and advice in relation to their options. Some of the shareholders recognised Mr Relation as Mr B Inlaw's brother-in-law and godfather to his daughter. During the meeting, Mr Relation suggests that the company enter into a voluntary administration procedure. Mr B Inlaw suggests that the company appoint Mr Relation as administrator. He accepts the appointment, ensuring that he discloses his relationship with Mr B Inlaw and says that he will declare that he believes that he will still be able to act with the required independence and impartiality.

After the meeting adjourns, Mr B Inlaw requests the other directors and Mr Relation to stay behind for a brief "planning" meeting. During this subsequent meeting the directors inform Mr Relation that they are concerned about their personal liability for breach of duty. Moreover, they are worried that they might land in hot water due to their decision to continue trading when the company was clearly in dire financial straits. Mr Relation assures them that his focus will not be on them but on trying to rescue the company.

In the weeks that follow, Mr Relation conducts a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulty of the company. He relies on detailed reports drafted by Mr B Inlaw regarding the company's business and drafts a strategic plan for recovery based on his investigation and the reports he received.

At a meeting of creditors to consider the plan, Mr Relation states that he has found no evidence of any wrongdoing or maladministration by the company's directors. Mrs Keeneye, a lawyer attending the meeting on behalf of ABC Bank, the major secured creditor, recognises Mr Relation from a television interview where Mr Relation expressed the opinion that banks should be more accommodating in restructuring proceedings and that he thinks that the interests of lower ranking creditors should sometimes outweigh "big money" (referring to financial institutions). She immediately feels uncomfortable with his appointment as administrator.

Several months later the administration fails due to a "lack of funding" to finance the rescue. The administration is subsequently converted to liquidation proceedings and Mr Relation is appointed as the liquidator.

INSTRUCTIONS

There are at least THREE major ethical issues in this factual scenario.

Please identify these ethical issues and explain in detail why they are in fact ethical issues. Your answer should include reference to the ethical principles and the

commentary thereon. Where appropriate and suitable, you should also endeavour to elaborate on possible remedies or safeguarding mechanisms to minimise or remove the ethical threats.

You may also make use of case law and secondary sources to substantiate your answer.

[Type your answer [here](#)]

Commented [JL12]: 0

*** End of Assessment ***