



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8F

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: 41 out of 50

Well done!

Where the student copied and pasted from the GT only half of the possible marks were awarded.

Note from Course Leader: Both the Course Handbook and instruction 5 of the assessment warn against copying and pasting from the guidance texts – this constitutes plagiarism! Since marks have been deducted, no further sanction will be imposed.

Commented [JL2]: 9 out of 10

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 [JL3]: 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]

Commented [JL4]: 6 out of 10

Question 2.1 [maximum 4 marks]

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

[The main fiduciary duties are:

(a) the duty to act in good faith;

(b) the duty to act in the best interest of the beneficiary of the fiduciary duties; and

(c) the duty to exercise the powers of the office in an impartial and independent manner (including a duty to avoid a conflict of interest).

The duty of care is not fiduciary in nature, but is inevitably linked to the fiduciary duties since a fiduciary who acts in a negligent manner cannot be said to act in the best interest of the beneficiaries of his or her duties.]

Commented [JL5]: 4

Question 2.2 [maximum 4 marks]

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

[An insolvency practitioner (IP) should not allow bias, a conflict of interest, or undue influence of others to override his professional and/or business judgements in the execution of his duties and obligations.

Independence is two-fold, the IP must be *independent in fact* and also *be seen to be or perceived to be independent*.

Independence in fact requires the IP to be factually free from any influences that could compromise his judgement. The IP must avoid any personal or professional relationships, and direct or indirect interests, that may impair his ability to make impartial decisions.

Independence in perception, on the other hand, includes the avoidance of circumstances that would lead a reasonably informed third party to conclude that the IP's independence and impartiality have been compromised.]

Commented [JL6]: You have primarily copied and pasted this from the GT.
2

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.

[There is no preferred method of calculation of IP's remuneration. Many jurisdictions allow for a combination of methods (fixed fees; percentage-based fees; time-based fees; or contingency fees).

Using a combination of methods provides the opportunity to utilise the best of each whilst the drawbacks, in as far as ethical behaviour is concerned, can be avoided.

However, using the combined method does not provide the creditors with certainty as to the fees that the IP will **claim.**

Commented [JL7]: Unfortunately this answer is factually wrong. There is a global trend for IPs to prefer time-based remuneration.
0

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

Commented [JL8]: 11 out of 15

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.

[IPs should exhibit the highest levels of objectivity, independence and impartiality in the exercise of their powers and duties. IPs should avoid circumstances likely to result in a conflict of interest.

(a) Remuneration, Bribery or Secret Commissions (Self-interest Threat)

IPs appointed over an estate should not acquire or remove any assets or cash from the estate except as prescribed or as properly authorised remuneration. IPs should not be unjustly enriched, for example, by receiving secret kick-backs or commissions. Bribery or payment or receipt of secret commissions in order to receive work or provide work to others should be unacceptable.

(b) Personal, Family or Professional Relationships (Familiarity Threat)

An IP should not accept an appointment in connection with the estate if his (or a related party's) relationship with the directors of the company or any of the stakeholders would give rise to a possible or perceived lack of independence.

(c) Disposition of Assets of an Estate (Self-interest & Self-review Threat)

Where an IP purchases or removes assets or cash from the estate (excluding appropriately approved remuneration and disbursements payments), it is likely that there will be a perception that independence, objectivity and/or impartiality has been breached, even if it has not in fact been breached. Such action may erode trust in the integrity of such IP and the process.

Acquisitions by close connections, e.g. family, connected / related parties, will generally give rise to the same concerns as acquisitions by the IPs themselves. Therefore, immediate relatives and close business connections should be subject to the same restrictions as IPs.

In some jurisdictions an IP (or relative or connection) may be permitted to purchase assets where the stakeholders have given explicit permission in advance. Even then great care should be taken by the IP to protect their independence and impartiality.

Additionally, a self-review threat is created where an IP's firm carried out the disposal of certain assets of the insolvent estate prior to insolvency, and there are suspicions that the disposal is in some way improper.

(d) Purchase of goods or services from an Estate (Self-interest Threat)

Where an IP is appointed over the estate of a commercial retailer is purchasing goods or services from a commercial retailer that sells to the public, it should generally be permissible for such an IP to purchase such items from the retailer in the ordinary course of business (for example, buying food from the retailer on the same terms as every other purchaser).

However, IPs should not take advantage of staff discounts or special payment terms, as doing so may impair, or be perceived to impair, independence.

(e) Advocacy Threat

A situation in which an IP promotes a position or opinion to the point that subsequent objectivity may be compromised (e.g., where the IP has acted on behalf of a significant creditor to advance such creditor's position). In such case, it is unlikely that other creditors would consider the IP to be impartial.

(f) Intimidation Threat

A situation in which an IP is, or may be, threatened or pressured (e.g., with litigation, unfounded complaints, or even physical harm). Then again the IP may find themselves unable to maintain [impartiality].

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?

[Administrative costs paid to legal professionals can be a very contentious issue this is because multiple sets of professionals (legal professionals and insolvency practitioners (IPs)) results in multiple sets of fees and disbursements.

In *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn and others* [2015] SGHC 260 court pointed out the problem of duplication of work where multiple sets of professionals (legal professionals and insolvency practitioners (IPs)) are engaged in the same matter. Court laid out the issue as follows:

That this problem typically manifests in two different scenarios:

- (a) The first is where the costs of the other professionals are being claimed as part of the insolvency practitioner's disbursements (see *Mirror Group Newspapers plc v Maxwell and others* (No 2) [1998] 1 BCLC 638 ("Mirror Group") - where the receivers had engaged lawyers and later included the legal fees that they had been charged in their bills of costs (as a claim for disbursements).

In such a situation, the onus lies first on the IP, as the paying party, to decide whether they want to accept the bill put forward by the legal professional before they come to court to make a claim. After all, the IPs are hired for their commercial judgment, part of which encompasses the independent evaluation of the propriety of bills put up by service providers (including legal professionals) they hire. This acts as a preliminary filter. It is only after the insolvency practitioners have finalised their position on the bill that the court will consider whether the expenditure was reasonably incurred and therefore should be allowed.

- (b) The second scenario is where the costs of the legal professionals are not claimed as disbursements incurred by the IP *per se*, but have been separately billed to the company. In such a situation, the court can and should still take cognisance of the possibility that the work performed by the IP in relation to matters within the legal

Commented [JL9]: This question required you to identify elements of the insolvency PROCESS that might cause issues in relation to independence and impartiality. See page 16 of the GT for this discussion. It seems that you have misread or misunderstood the question. Your discussion is an accurate explanation of issues or rather threats to independence and are not elements of the insolvency process although you do refer to the elements of the process. However, the question was not answered in full. I have awarded discretionary marks.

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professional's scope of responsibility is unnecessary and his contribution redundant. The onus lies on the IP to justify his involvement when there are legal professionals instructed on the same matter. In *Liquidators of Dovechem Holdings Pte Ltd v Dovechem Holdings Pte Ltd (in compulsory liquidation) [2015] SGHC 167* ("Dovechem"), for example, the court permitted the liquidators to recover the costs they incurred in relation to the prosecution of a suit because the liquidators were able to demonstrate that their roles and responsibilities differed from that done by the lawyers. In that case, the liquidators had to spend an extensive amount of time going through the primary source documents in order to give proper instructions to their lawyers. Their work, in other words, was anterior to and distinct from the work performed by the lawyers.

Where an IP intends to rely on the advice or work of a legal professional, it is advisable that the IP evaluates whether such advice or work is warranted (see ICAEW Insolvency Code of Ethics R2320.3). The IP should document the reasons for choosing the specific legal professional. The IP should also, where personal or professional relationship exists with the legal professional, fully disclose the relevant relationship and the process undertaken to evaluate whether the service will be the best value for the creditors.

The process undertaken to evaluate whether the legal professional's service will be the best value for the creditors should consider:

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

Commented [JL10]: 7

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

WeBuild Ltd is a private company registered in Eurafriclia. 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.

[Issue 1: Family and Personal Relationship]

Mr Relation is a brother-in-law to Mr B InLaw and godfather to his daughter. Mr B InLaw is director and shareholder in WeBuild Ltd, where Mr Relation has been appointed the Administrator. The close family and personal relationship between the two brings the independence and impartiality of Mr Relation into question.

Ethical Principle - Objectivity, Independence and Impartiality – IPs are expected to exhibit the highest level of objectivity, independence and impartiality in the exercise of their powers and duties.

Independence of an IP is considered both as a matter of fact and from the perspective of an informed observer. An IP should not accept appointment in connection with an estate if his relationship with the directors or shareholders of the company would give rise to a possible or perceived lack of independence.

The relationship between Mr Relation and Mr B InLaw would, to a fair-minded person, create doubt as to whether Mr Relation would be able to perform his duties in an independent manner. It would therefore have been appropriate for Mr Relation not to accept or continue to be Administrator of WeBuild Ltd (see *Commonwealth Bank Australia Vs Irving (1996) 65 FCR 291*).

Moreover, Mr Relation's lack of independence cannot be cured by disclosure or by appointment of an independent joint practitioner or officeholder. Disclosure in this case, by Mr Relation, does not provide a sufficient safeguard and does not serve as guarantee of impartial and objective conduct by Mr Relation.

Issue 2: Pre-Appointment, Appointment and Subsequent Appointment

Prior to his appointment Mr Relation was engaged by WeBuild Ltd to provide information and advice on the available options. Upon his appointment as Administrator, Mr Relation gave assurances to Mr B InLaw and the directors that he would not focus on their personal liability, but would instead focus on saving the company. Subsequently, Mr Relation is appointed the Liquidator of the same company he served as Administrator.

Ethical Principle - Objectivity, Independence and Impartiality – IPs are required to avoid circumstances likely to result in a conflict of interest.

2.1 Pre-commencement Involvement

Prior consultations often occur between the IP and the company or its stakeholders and constitute a crucial part of the insolvency process. These consultations may create an impression of lack of independence. However, not all forms of contact between the IP and the directors prior to the IP's appointment would necessarily result in a lack of independence.

Therefore the involvement of Mr Relation prior to appointment would not, in and of itself, have impaired his independence as it appeared to be limited to advice on the company's financial position, potential insolvency and alternatives to insolvency (see *Re Korda, Ten Worldwide Holdings Ltd (Admn Apptd) (Recs and Mgrs Apptd) [2017] FCA 914*)

2.2 Appointment

Where the IP is appointed by the directors or shareholder, this may lead the appointee to expect that the IP would prioritise their interests. It is thus important for the IP to be alert and aware about his responsibilities in this regard.

Mr. B InLaw informed Mr Relation about his fears of personal liability for breach of duty as a director, when the company continued trading even while the directors were aware about its dire financial situation. Mr Relation breached his duty of independence and impartiality by giving assurances, to those who appointed him that he would act in their interests.

Instead Mr Relation would have been expected to dispel any perception that he would serve the interests of the directors, rather Mr Relation should have explicitly stated that his appointment as Administrator was to act in the best interests of all the beneficiaries.

Where Mr Relation is unable to take reasonable steps to manage this conflict of interest then he should have declined the appointment.

2.3 Subsequent Appointment

Mr Relation's subsequent appointment as a Liquidator may be permissible in some jurisdictions. Mr Relation would need to determine whether this acceptable or prohibited in Euraflicia.

Even where this permissible, Mr Relation ought to be alive to the potential conflict of interest that may arise and the self-review threat where the Liquidator has to evaluate his services and judgement rendered as an Administrator.

Additionally, Mr Relation must consider and guard against the self-interest threat that arises where the Administrator may not put in his best effort in saving the company due to the fact that he would be interested in being appointed as Liquidator and paid again for the new role.

In the circumstances, Mr Relation may resign the appointment.

Alternatively, Mr Relation could consider safeguards such as:

- (a) Having an appropriate reviewer, independent of his team, to review the work performed and advise as necessary; or
- (b) Involving another IP to perform or re-perform parts of the engagement; and
- (c) Disclose any fees or commission arrangements with WeBuild Ltd.

Issue 3: Duty of Care, Skill and Diligence

Mr Relation conducted a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulties. Mr Relation relied on reports drafted by Mr B InLaw as a basis for his investigation and found no evidence of wrongdoing and maladministration by any of the directors.

Ethical Principle – Professional and Technical Competence / Acting with Sufficient Expertise
– IPs should maintain an acceptable level of professional competence.

This ethical principle requires an exceptional level of self-realisation and introspection by the IP. This principle is also closely related to duty of care, skill and diligence.

While WeBuild Ltd is in financial distress, it is extremely important that Mr Relation does not act recklessly with regard to the affairs and property of the WeBuild Ltd.

Mr Relation cannot be said to have acted with the necessary care expected of an IP. He did not independently obtain an adequate understanding of the nature of the affairs of WeBuild Ltd. Mr Relation instead relied on the reports drafted by Mr B InLaw who was clearly conflicted on the issue.

Owing to breach of this duty of professional competence and due care, Mr Relation ought to decline the appointment. In the alternative, Mr Relation should recommend the appointment of another IP to perform or re-perform parts of the engagement.

Commented [JL11]: 15

*** End of Assessment ***