



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

Question 1.4

Commented [JL1]: TOTAL: 44 out of 50
Well done!

Commented [JL2]: 7 out of 10

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

(a) True

(b) False

Commented [JL3]: a

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.

Commented [JL5]: c

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 [JL6]: 9 out of 10

Question 2.1 [maximum 4 marks]

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

Answer

The main fiduciary and other duties usually associated with insolvency professionals are:

(a) the duty to act in good faith this means that the insolvency professional should act honestly and deal fairly with the estate and all concerned.

(b) Duty to act in the best interest of the beneficiary of those to whom a fiduciary duty is owed.

(c) A duty to exercise all powers of the holder of the office in an independent and impartial manner which includes a duty to avoid a conflict of interest.

(d) Though generally not regarded as of a fiduciary nature the duty to act with care, skill and diligence.

Commented [JL7]: 4

Question 2.2 [maximum 4 marks]

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

Answer

The two-pronged nature of the duty to act with independence and impartiality means that insolvency practitioners should in fact be independent and impartial and should also be seen or perceived to be independent and impartial.

IPs should be free from influences that could result in their judgements being compromised factually. They should stay clear of all personal and professional relationships, direct and indirect interests that will adversely influence, impair or threaten their integrity and ability to make decisions. Independence in perception means the avoidance of circumstances that would result in a reasonably informed third party concluding that the IPs integrity, independence and impartiality have been compromised.

If ignored the above can result in the IP being perceived to be biased or to lack independence by the stakeholders involved. Some jurisdictions have taken steps to deal with threats to independence and impartiality. These include an obligation to IPs to disclose relationships and a declaration of independence. The effectiveness of such in dealing with relationships that pose a risk to the IPs independence is questionable.

Commented [JL8]: 4

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.

Answer

The preferred method of calculating the insolvency practitioner's remuneration is time-based fees.

The ethical issue that relates to the time-based fees calculation is that of partiality when remuneration is calculated on this basis.

Commented [JL9]: I am unconvinced of how this method of calculation could cause partiality and you have not really explained how you see this being an issue.

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

Commented [JL10]: 15 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.

Answer

There are several instances that could give rise to threats to independence and impartiality of both the IP and the CIP. These are covered below.

Firstly, prior consultations that take place between the CIP and the company or its stakeholders may give the impression of a lack of independence and impartiality by the CIP. It should be noted that not all types of contact between the CIP and stakeholders prior to appointment could result in lack of independence. Such consultations should not involve material engagement by any of the stakeholders as such would undermine the independence of the CIP. The advice that the CIP provides prior to appointment should also be limited to the financial position of the company, the company's solvency, the effect of a possible insolvency and any alternatives to insolvency. The disclosure of any such advice including its nature and extent can help to prevent accusations of the CIP not being independent.

Secondly, the appointment of the CIP is an area that can lead to the independence and impartiality of the CIP being questioned. In cases in which the CIP has been appointed by the board of directors or a stakeholder, such an appointment may lead to those making the appointment expecting the CIP to act in their best interest. The CIP should be clear at the onset that he/she is obliged to act in the best interest of all beneficiaries and should not make any promises to the appointees.

Thirdly, cases in which the same CIP can act in different insolvency capacities in relation to the same debtor. Such subsequent appointments can be a threat to independence and impartiality due to the self-review and self-interest challenges it presents. A self-review threat could be seen in a situation where a CIP is unable to appropriately evaluate previous judgements or services rendered due to being involved in the prior decision-making process. There is a possibility of the CIP being remunerated twice for work done in relation to the same company thereby resulting in a self-interest threat. In South Africa, all such subsequent appointments in relation to the same debtor is prohibited by statute.

Lastly, secret monies and personal transactions with the company by the CIP can result in a compromise. The CIP is not allowed to make a secret profit or place himself in a position where his personal interest or that of persons connected or related to him conflicts with his duties. The CIP is in an advantageous position and should not use this for his benefit. In instances in which transactions between the CIP and the company is permitted the CIP should follow the necessary procedure to obtain informed consents.

All of the above can give rise to the CIPs independence and impartiality being questioned. Where possible the CIP should take prudent steps to ensure that his or her actions do not lead to any such threat. Laid down procedures that are in place to ensure the avoidance of any such threat should be followed by the CIP.

Commented [JL11]: 8

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?

Answer

Often, IPs have to rely on the services of legal professionals in carrying out of his duties. Such services can be paid as disbursements or third-party costs as was illustrated in the Singaporean Kao case. There is an obligation of the IP to monitor the fees claimed where the cost is claimed as disbursement. The IP needs to consider whether the bill is appropriate and reasonable in the given circumstances. This reasoning was adopted in the Australian case Korda.

Such cost can also be billed to the company directly then all such bills must be scrutinised. This gives rise to the issue of duplication of work by the legal professional. The CIP will need to justify claims for work performed when other professionals are instructed on the same matter. In the Singapore case of Dovechem, majority shareholders complained to the court that the liquidators had charged four times as much as the solicitors that were instructed to commence action on behalf of the company. However, the liquidators were able to successfully prove that the work they did was different to that performed by the solicitors.

In the United Kingdom the Insolvency Code of Ethics by the Institute for Chartered Accountants of England and Wales requires that when an IP intends to rely on the advice or work of a third party such as a legal professional, the IP should first assess whether or not the advice or work is warranted. The IP is also obliged under the code to document the reasons for choosing a specific adviser. It also provides for the full disclosure by the IP where there is a personal or professional relationship between the IP and a third party/service provider. This is done to evaluate whether the service provider will be offering best value and service. The IP in carrying out such evaluation should consider (a) the expertise, experience of the service provider and the cost of the service (b) does the provider hold the appropriate regulatory authorisation and (c) the professional and ethical standards applicable to the service provider.

Commented [JL12]: 7

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

Commented [JL13]: 13 out of 15

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.

Answer

The three ethical issues that are covered in the above scenario are (1) integrity, (2) objectivity, independence and impartiality and (3) professional behaviour. I will deal with these in turn explaining why they are ethical issues making reference to the ethical issues and commentary. I will also elaborate on safeguarding mechanisms and remedies aimed at removing such threats.

Insolvency practitioners are expected to comply with all applicable laws and also to demonstrate the highest levels of integrity. This can be demonstrated by them being straightforward, honest and truthful. They are also expected to adhere to high moral and

ethical standards in all areas of their professional practice. Integrity means that the IP is expected to deal fairly with all, act in honesty and truthfulness. The IP is expected to demonstrate impeccable probity and honesty as is expected of members of his/her professional calling such as lawyers, accountants and auditors. The beneficiaries are at the mercy of the IP's discretion, they rely on the IP to protect their interests. Such reliance requires honesty, truthfulness and transparency.

Honesty means that the IP should not lie and truthfulness means the IP should not hide any facts from interested parties. This does not seem to have been followed by the IP in this case. In stating at the meeting of creditors that he found no evidence of wrongdoing or maladministration by the company's directors the IP is lying. He was advised by the directors of such wrongdoing at the meeting he had with the directors. He went on to advise them that his focus would not be on them, this clearly demonstrates lack of integrity on the part of the IP. He clearly concealed facts such as these from interested parties. The IP should have taken an honest and transparent approach as this would have resulted in confidence amongst the beneficiaries.

The second ethical issue that is likely to have been compromised in this case is that of objectivity, independence and impartiality. This principle demands IPs to demonstrate the highest standard of objectivity, independence and impartiality in carrying out their duties and exercise of their powers. IPs should avoid circumstances likely to result in a conflict of interest. IPs are not allowed to acquire or remove assets unless if so prescribed or as authorised remuneration. IPs are not allowed to receive secret bribes and commission.

Independence means that the IPs conduct is and should be seen not biased towards any party. IPs are not allowed to accept an appointment if they have a relationship with any of the directors or stakeholders that could possibly give rise to possible or perceived lack of independence. This ethical principle can be threatened by self-interest, self-review, advocacy, familiarity and intimidation. From the facts we have been given in this case it seems as if this principle has been compromised. Mr Relation is the brother-in-law of one of the directors and also a shareholder of the company. Mr Relation cannot be or seen to be independent in these circumstances. In the case of **Commonwealth Bank of Australia v Irving (1996) 65 FCR 291 (Australia)** it was noted by the court that even though allegations had not been made against the IP due to his long standing relationship with Mr Townsend who had resigned as a director two weeks prior to the commencement of proceedings, his longstanding relationship with Mr Townsend would create doubt as to whether he is able to perform his duties in an independent manner. There should be no bias or any appearance of bias.

I do not believe that this lack of independence can be cured by Mr Relation's disclosure of his relationship with Mr B Inlaw. In fact this was dealt with in the case of **Commonwealth Bank of Australia v Irving (1996) 65 FCR 291 (Australia)**. The fact that the IP disclosed his relationship with Mr Townsend did not influence the outcome of the proceedings, this supports the belief that mere disclosure is not a remedy. The stakeholders involved need to have confidence in the system. This is not the case here, they believe the IP is biased and lacks independence. There is evidence that he has failed to act independently, for example he only conducted "superficial investigation into the affairs of the company" and he relied on the reports drafted by Mr B Inlaw.

The decision in the case of **Re Korda, Ten Network Holdings Ltd (Admn Apptd) (Recs and Mgrs Apptd) (2017) FCA 914 (Australia)** should be noted where it was held that prior appointment is not necessarily a bar to future appointment. However, it was clearly stated that safeguards should be in place to ensure that such an appointment does not result in a conflict. Such safeguards should include proper record keeping of all meetings held and tasks performed. Although in the above case the court did not find actual or apprehended bias or conflict, it is unlikely a similar decision would be reached in this scenario.

The third principle is professional behaviour. This provides that in communicating with stakeholders IPs should strive to be accurate, honest, clear, succinct and timely. Communications should be used to inform stakeholders of the progress of the case. Members should act with integrity and seek not to bring the profession into disrepute when promoting themselves, their firms or in competing for work. In providing such information IPs should balance this with maintaining commercial and other confidentiality obligations. In the interview referred to in this case study, Mr Relation should have ensured that the information given was balanced with maintaining commercial interest and other confidential obligations. In conducting the television interview Mr Relation should have weighed the advantages of providing such information against the associated cost and possibly disruption to the company or the estate. It seems as if Mr Relation was not mindful in disclosing confidential information he has acquired as a result of professional and business relationships. He should not have expressed his opinion as to how banks should approach restructuring proceedings.

It should be noted that the above principles are not to be treated in isolation, it is often possible for there to be multiple breaches. An IP should therefore be guided by all six principles in the conduct of his or her duties. Stakeholders need to have confidence in the system. Things should not only get done properly but must also be so **perceived**.

Commented [JL14]: Your answer correctly identifies 3 ethical issues and you do include thorough discussions of the principles applicable to each issue. However, the application is somewhat disjointed and fails to show the link between the behaviour and the applicable principle in certain parts. That being said, it is nonetheless a very reasonable attempt.

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*** End of Assessment ***