



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

Commented [JL1]: TOTAL: 42 out of 50
Well done!

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

Commented [JL2]: 10 out of 10

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

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

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 [JL3]: 10 out of 10

Question 2.1 [maximum 4 marks]

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

Fiduciary duties may vary from each jurisdiction to other. Nonetheless, it is possible to summarise as following:

1. Duty to act in good faith.
2. Duty to act in the best interest in benefit of fiduciary duties.
3. Duty to exercise its functions independently and impartially.
4. Duty to act with care, skill and diligence. This duty is not deemed exclusive for IPs.

Commented [JL4]: 4

Question 2.2 [maximum 4 marks]

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

Independence and impartiality have two-pronged nature. First, the IP has to be independence in fact; it means that IP has to be free from any influence, avoiding all relationships or conflicts of interest that affects its ability to make decisions. To determine this point of view, INSOL International has held in their *"Ethical Principles for Insolvency Professionals"* that *"A Member 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"* (2018).

Second, IP has to be perceived by third as impartial and independent, it means that IP has to avoid any circumstance that allow to third part "reasonable informed" believing that the IP has some personal, direct or indirect interest in the proceeding.

Commented [JL5]: 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.

The preferred method of calculation of IP remuneration is "Time-based fees", and one ethical issue is that, generally, it does not represent the real value of the real time spent by the IP, because they might spent more time that real charged, or in contrary, less than the real time invested it some assignment.

Commented [JL6]: 2

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

Commented [JL7]: 13 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.

The elements of insolvency proceedings that are especially prone to create or give rise to threats to independence and impartiality are following:

1. **Pre-commencement / appointment involvement consultations:** The CIP and the debtor may make certain approaches before its appointment. These circumstances may affect the independence and impartiality of the CIP whether limits are not imposed for advisement. Thus, consultations must be limited to the debtor's financial position, effects of eventual insolvency, and alternatives different from the insolvency. However, any approach should be disclosed for purposes of transparency.
2. **Appointment:** The CIP ought to avoid acting to benefit its nominator, which in many cases, would be the board of directors or any or some shareholders of the debtor. The CIP has to refrain from acting in conflict of interest.
3. **Subsequent appointments:** A CIP may act in different insolvency capacities regarding the same company debtor. Therefore, some financial interests may bias making decisions by CIP, for instance, when the same CIP knows that will be appointed as liquidator in the case of a liquidation proceeding, allowed in jurisdictions like England and Gales, and New Zealand. The CIP would not treat to save the company, because precisely the liquidation will represent more money for the CIP. Some jurisdictions prohibit subsequent appointments, as in South Africa.
4. **Secret monies and personal transactions with the company:** The CIP must not benefit from his trustee position and therefore has to refrain to celebrate acts in its direct or indirect benefit, or at least, the CIP has to disclose an eventual conflict of interest in every transaction. An example of this element is when the CIP is selling assets of the company, but he or a friend want to be the purchaser and celebrate contracts with favorable **clauses**.

Commented [JL8]: 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?

Ethical considerations that borne in mind regarding the fees is that the CIP could overcharge for its services under the pretext that certain services were required, and its decision could be adversary to the benefit of all interested parties. Services of legal professionals represent on many occasions expensive rates for the proceedings.

Nonetheless, to avoid this situation, the CIP should be able to identify that an additional service is necessary, for instance, when the CIP has not legal advisement structure – for example because the CIP is an accountant firm-. In those cases, the ethical issue should be reduced when the CIP may assign a budget according to the cost of the service, the expertise and the experience of the provider.

In any case, the CIP has to verify that the provider holds appropriate regulatory authorization and fulfil the professional and ethical standards applicable to the service **provider**.

Commented [JL9]: A reasonable attempt but missing certain elements.
- Relationships between service providers and IPs
- Duplication of work
5

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.

Commented [JL10]: 9 out of 15

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.

Ethical issue	Ethical principle	Commentaries and possible remedies or safeguarding mechanisms to minimise or remove the ethical threats
Appointment of Mr. Relation as administrator, despite the fact that he is Mr B Inlaw's brother-in-law and godfather to his daughter and that Mr B Inlaw is a director.	Independence and impartiality.	Even though that Mr. some of the shareholders recognised Mr. Relation as Mr B Inlaw's brother-in-law and godfather to his daughter, Mr. Relation had to disclose this issue not just to shareholders, but also to creditors.
Mr. Relation meets with the board of directors without establishing prior limits to their communication.	Objectivity, independence and impartiality.	Mr. Relation had to refrain of meeting with the debtor's members, or at least, established prior to any meeting the formalities to avoid any interest conflicts.
Mr. Relation did not start adequately actions against the board of directors for breaking their duties.	Objectivity, independence and impartiality.	Mr. Relation had to begin actions against the board of directors to protect the best interest not just of the company, but also of its shareholders and creditors, and try to recover money for the restructuration.
Appointment of Mr. Relation as liquidator, despite the fact that he is Mr B Inlaw's brother-in-law and godfather to his daughter; Mr B Inlaw is director and Mr. Relation was the administrative during the voluntary	Independence and impartiality.	Mr. Relation did not refrain to act in his own interest. Mr. Relation had to refrain to accept the subsequent appointment.

	administration procedure.		
Mr	Relation affirmed by television interview 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)	Professional behaviour.	Communications with creditors must be to inform the proceeding advance. Mr. Relation had to refrain to express his personal thoughts about creditors 'treatment. Not doing it involved losing credibility by third parties.

Commented [JL11]: A reasonable attempt but again lacking in detail. I would have liked to see a more direct application of the principles. Due to the way in which you answered the question (by using the table) you missed certain opportunities to make the application clearer. Still a reasonable attempt.
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*** End of Assessment ***