



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: 43 out of 50
Well done!

Commented [JL2]: 10 out of 10

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?

The fiduciary and other duties of an IP differ from jurisdiction to jurisdiction. The following are the main fiduciary duties:

- (a) All duties should be dealt with honesty and fair dealing i.e., the duty to act in good faith.
- (b) To act in the best interest of the beneficiaries.
- (c) Avoid conflict of interest.
- (d) Exercise the powers of the office with impartiality and independence.

Other duties, which are not fiduciary but duties per se are to act with care, skill, and diligence. Duty to act with care is an important duty as the corporate debtor is in dire situation already.

Commented [JL4]: 4

Question 2.2 [maximum 4 marks]

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

IP will be able to exercise his power and discretion in the best interest of the beneficiaries if he is independent and impartial. Independence and impartiality are an important aspect given that he represents all the stakeholders and must balance the interest of all the stakeholders. Further, it will also stop him from being impartial, biased, and coming under undue influence from any stakeholder. To exhibit independence and impartiality, IP can adopt the following aspects:

- (a) He or she should avoid all personal and professional relationships and direct or indirect interests that will adversely influence, impair, or threaten their integrity and ability to make decisions. For example: any relationship with stakeholders such as shareholders, creditors or the company needs thorough investigation and compliance. This aspect can be built in code or regulations such that IPs are mandated to follow and comply with the regulations.
- (b) He or she should avoid circumstances that would lead a reasonably informed third party to conclude that IPs integrity, independence and impartiality have been compromised.

It is also pertinent to highlight that some regulations provide for disclosures which will result in negating any perception of lack of independence or impartiality. However, if such disclosures result in establishing that the IP indeed had a substantial relationship as against a superficial relationship then it may become harder for the stakeholders to believe that IPs exhibit impartiality and independence.

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.

Preferred method for calculating the remuneration of insolvency practitioner is charging of professional fees based on the time spent. This method results in remunerating the IPs based

on hours spent on the work done. This rate can be hourly or daily and agreed with the stakeholders or the regulations may prescribe.

The ethical issue in this method is whether the remuneration based on the time spent reflects the value of the service rendered and whether it is reflective of the actual work undertaken. Further, it also remunerates IP without considering the fact whether such time spent has resulted in favourable **outcome**.

Commented [JL6]: 2

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

Commented [JL7]: 14 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 following elements give rise to threats to independence and impartiality:

- (a) Nature of pre commencement / appointment involvement.
- (b) Appointment
- (c) Subsequent Appointments
- (d) Secret Monies and personal transactions with the company.

Nature of Pre commencement / Appointment involvement

Corporate insolvency professionals (CIP) may engage with certain stakeholders prior to the initiation of the corporate debtor insolvency. Such engagement may result in creating perception with other stakeholders that CIP's independence and impartiality has been compromised. However, not all engagements can be considered as jeopardizing the independence and impartiality of the CIP. If the engagement is a material engagement but not an engagement such as analysis of the corporate debtor's financial statements, analysis of effects of potential insolvency and the company's insolvency then CPs should avoid engagement. One way to negate this aspect by giving full disclosure on this aspect. But disclosure is not an effective method if the engagement is substantial in nature.

Appointment

CIPs are appointed by stakeholders such as board of directors, shareholders, or directors in many jurisdictions. This results in the appointing stakeholders to believe that they can control or influence the CIPs. In this situation, the CIP should ensure that he does not make any promises to any stakeholders and make it clear to everyone that he is acting in the interest of all the beneficiaries. CIPs should also determine the possible conflict of interest situations with any stakeholder.

Subsequent Appointments

Subsequently appointments situation is a situation where same CIP is appointed for different insolvency capacities for the same corporate debtor. For example, in India, an insolvency professional during the resolution stage, is also appointed as a liquidator if the corporate debtor enters liquidation. This is a self-review threat, where the CIP because of being involved in prior decision making, will not be able to appropriately review the results of previous judgments or services rendered.

Secret Monies and personal transactions with the company

CIPs are not allowed to benefit at the expense of the beneficiaries or put themselves in a position where his personal interest will conflict with his duties. For example, if CIP or a company where he is interested, is buying the property of the corporate debtor then he should ensure that he avoids such a situation or follow all procedural steps and take informed consent from all the stakeholders for undertaking such a **transaction**.

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?

Legal costs are contentious in nature. Any legal costs paid to legal professionals may result in being in disbursement or third-party costs. This was illustrated in *Singapore Kao* case by Chong Justice. The court explained that costs of the legal can be claims as part of the disbursement to IPs or as third-party costs billed separately and directly to the debtor.

In the event, the legal costs become part of IP disbursements then onus of proving that the costs of legal professional appointed is reasonable is on the IP. For example, the IP should monitor the costs incurred by him on a regular basis such that payments to be made by IP is reasonable and appropriate to the circumstances.

In the event, the legal costs become third party costs, then the costs and bills will be monitored and scrutinized to ensure that the work done is not duplicative in nature. It is common to rely on legal professional as in jurisdictions such as England and Wales and South Africa, the IPs are not generally trained in law, and they must rely on specialised knowledge. Consequently, it is imperative to ensure that appointment of legal professional guidance is included in code of conduct. For example: the IPs should evaluate the aspect whether the advice or work to be undertaken by the legal professional is required or not. This is part of the new insolvency code of ethics by the Institute of Chartered Accountants of England and Wales. IPs should consider documenting why the IPs are requesting for services of the legal professionals. If there is a conflict interest between IP and the service provider, then there should be a full disclosure with relevant details such that the stakeholders can consider and approve or object to it. Consequently, by keeping the above considerations in mind, the IP can mitigate any issues in connection with the fees to legal service provider.

- Prior to appointment of a legal service provider, the IPs should consider the following:
- (a) Cost and service of the service provider and experience of the service provider.
 - (b) Regulatory authorisations
 - (c) Professional and ethical **standards**.

Commented [JL9]: A very good answer. However, the duplication of work as an issue is missing from the discussion.
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QUESTION 4 (fact-based application-type question) [15 marks in total]

Commented [JL10]: 9 out of 15

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.

Mr. Relation is violating one of the fundamental ethical principles i.e., independent and impartiality. Independence and impartiality results in IP ensuring that there is no bias, conflict of interest or the undue influence. IP is required to ensure two aspects: (a) He or she is free from any influences that may compromise his judgment. He will be required to avoid all personal and professional relationships; and (b) He should avoid any circumstances that may lead to any third party concluding that IP's integrity, independence and impartiality has been compromised. However, in this case, Mr. Relation, the IP, who has been appointed fails to present any such independence and impartiality. To start with, Mr. Relation is Mr. B Inlaw's brother-in-law, who happens to be a shareholder and director of the corporate debtor and godfather of Mr. B Inlaw's daughter. However, to negate any kind of perception of Mr. Relation not being independent, Mr. Relation has disclosed his relationship, which in certain jurisdiction acts as a mitigation.

In this case, the disclosure may not be an ideal solution as the relationship is substantial in nature as against being superficial. It is also pertinent to highlight that he was appointed to give advice with few options. Mr. Relation has all the information and advised the company to enter into voluntary administration.

The next big ethical principle he has compromised is "integrity". Mr. Relation, by assuring the shareholders that he will not focus on the directors for wrongful trading but only try to rescue the company, has compromised his integrity. He has failed deal with the affairs of the corporate debtor in fair, honesty, and truthfulness.

Further, he has conducted a superficial investigation by relying on reports drafted by Mr. B Inlaw, who is one of the director and shareholder responsible for the current situation of the company. Consequently, he found no evidence of any wrongdoing or maladministration by the company's directors. Hence, Mr. Relation has failed to exercise reasonable skill and diligence, which is another major ethical principle.

*** End of Assessment ***

Commented [JL11]: This answer clearly identified 3 ethical issues what is however missing from the answer is a more elaborate explanation as to why the issues are in fact ethical issues. For 15 marks you should have gathered that your answer needed to be as detailed as possible and address all aspects of the question. The application in the answer is also limited.
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