



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: 31 out of 50

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

Commented [JL2]: 9 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

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]: 8 out of 10

Question 2.1 [maximum 4 marks]

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

Answer 2.1: When an insolvency practitioner gets an appointment as IP, it implies that he/she would be undertaking to comply with the roles and responsibilities of being an IP to fulfil fiduciary duties of the appointment. First and foremost, important is that the IP has trust of all the stakeholders. Further, although different jurisdiction may have certain specific duties, in general below are the main fiduciary duties IP needs to take care of:

1. Duty to act in good faith, that is the IP must be honest and fair in dealings
2. Duty to act in the best interest of the stakeholders
3. Duty to exercise the powers of the office in an independent and impartial manner and avoid any conflict of interest
4. Duty to act with utmost care, skill and diligence

All these duties are very important for an IP as the corporate debtor is already in a bad shape and any negligence on part of the IP would be fatal for the corporate debtor and all the stakeholders.

Commented [JL5]: 4

Question 2.2 [maximum 4 marks]

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

Answer 2.2: For guiding IPs in taking up the assignments and executing them, there are Code of Conduct/s specified in different jurisdictions. These can be rule based or principle based. In principle-based approach after integrity, principle of Objectivity, independence and impartiality are most important.

Independence and impartiality are two-fold, that is, an IP should not only act independent and impartial he should also be seen or perceived as such. This requires that the IP be factually free from any influences that could compromise his judgement. This is particularly important that IPs should not be biased or lack independence as otherwise it would negate the trust and reliance that the stakeholders place in him and that he would act in their best interest which would lead to their non-cooperation with the IP in the insolvency process.

To curtail these biases and ensure independence of IPs, jurisdictions usually identify certain personal and professional relationships or situations that might give rise to lack of independence. These may include any personal or professional association with the company or its directors or shareholders and even key managerial personnel's. Further it may extend to other firms or entities controlled by the company or management and secured or unsecured creditors of the company.

Some jurisdictions also provide for disclosures of the relationships and declaration of independence to curtail the threats to independence and impartiality.

Commented [JL6]: 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 2.3: For fixing the remuneration of IPs below are the acceptable methods:

- Fixed fees
- Percentage of the value of the assets realised and/or distributed
- Hourly
- Contingent fee arrangement
- Combination of any two or more above methods

All the methods of calculating the remuneration have some or the other ethical issues attached to it. Although the basis of calculating the fees should be based upon:

- Complexity of the case
- Degree of responsibility
- Effectiveness of IPs carrying out their duties
- Value and nature of corporate debtor
- Benefits accruing to the assets of corporate debtor

In my views, to protect the assets of the estate and to give enough motivation to IPs to work diligently and independently, combination of fixed fees and some percentage of realised value of assets should be the best. The ethical issue in this would be in calculating the fixed part as it could be less or more in relation to the work done and could result into elongating the process. Although the percentage part of remuneration would act as motivator to finish the process sooner.

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

Question 3.1 [maximum 8 marks]

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

Answer 3.1: Threats to independence and impartiality may include any of the following, singly or in combination:

- Self-interest
- Self-review
- Advocacy
- Familiarity
- Intimidation

Independence and impartiality are a two-pronged approach for the conduct of IPs, i.e., the IPs should not only be independent and impartial but also should be perceived as such by the stakeholders. Lack of independence cannot be always cured by the disclosures as well. So, one need to understand that how above stated threats impact independence and impartiality of the professionals.

Generally, IPs should refrain from selling the assets or taking out cash from the estate for their own purposes other than the pre-decided fees. They should not indulge in the business

Commented [JL7]: Unfortunately, you did not answer the question. This question relates to time-based fees and the ethical issues in relation thereto.
0

Commented [JL8]: 7 out of 15

activities other than the normal course of the business and should not do anything without considering the arm length principle. They should not involve in bribery or secret commissions for giving any favors or receiving any favors as well. While selling the assets, acquisitions by close connections should not be entertained unless purchase of the assets was permitted by the stakeholders to connected parties was permitted in advance.

So, in nutshell, any act of IPs which is either in fact lacks independence or perceived as not being independent, it would threaten the relationship of IP with the stakeholders and would not be good for IP for present and future assignments.

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 3.2: In order to run the insolvency process effectively most of the IPs hire legal professionals as third-party advisors in the process, costs for which are borne by the corporate debtor under the supervision or authority of the IP as part of his fees or billed separately to the debtor company.

Now, the responsibility rests on the IP that the cost incurred by the legal professionals are reasonable and true reflection of their work. And, that it does not impair independence of the IP.

In some jurisdictions, to deal with the ethical issues of hiring the legal professionals by the IPs are dealt with in the code of conduct itself. For example, Institute for Chartered Accountants of England and Wales (ICAEW) has come out with new Insolvency Code of Ethics which addresses the issue with remarkable clarity and sensible advice. It suggests for IPs to consider below points while appointing legal professional:

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

So, if an IP requires to hire a professional, he need to explain to the stakeholders that why he is choosing a specific legal professional and where he has a relationship that could create the perception of not being independent, he would disclose the relationship to the stakeholders. He should also be able to provide details of the process he followed to make sure the service provider would offer the best value for the beneficiaries.

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

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

The company traded profitably for the last 10 years but recently started to experience financial difficulties. One of the main reasons for the decline is the fact that several of the company's employees have instituted a class action claim against WeBuild for workplace related injuries

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. I have awarded discretionary marks.

3

Commented [JL10]: This answer addresses only some of the ethical issues in relation to the services of legal professionals. Duplication of work as an issue is missing for example. I would also have liked to see reference being made to the scrutiny the IP should apply to the bills of legal professionals.

4

Commented [JL11]: 7 out of 15

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 4: Major ethical issues in the above case study are:

1. Appointment of Mr Relation as the administrator of WeBuild Ltd which relates to Integrity
2. Reliance on the information provided by Mr Inlaw by Mr Relation which relates to Objectivity, independence and impartiality
3. Appointment of Mr Relation as liquidator of WeBuild Ltd which relates to subsequent appointment of the same insolvency professional

Ethical issue of Integrity:

As per the principle of Integrity one must be fair in its dealings, honest and truthful. It is said that in insolvency proceedings the beneficiaries are at the mercy of IPs and its discretionary powers so they need to trust that the IP will protect their interests. This reliance and trust in the practitioner demand honesty, truthfulness and transparency.

In the case of WeBuild Mr Relation was brother-in-law of Mr B Inlaw and while he did not disclose his relationship with the director and shareholder of the company, he misleads the creditors by relying on the information provided by the directors and misrepresented the companies' facts and financial position and concealed the fact that directors took out the money from the company while it was already showing signs of stress.

Commented [JL12]: It is implied in the facts that he did.

Ethical issue of Objectivity, Independence and Impartiality:

As per this principle, IPs should be independent and impartial in their work and should also be perceived as such by the stakeholders and more so to creditors. There are threats of not being independent, in this case the threat of familiarity with the directors of the administrator may result into that IP not being impartial.

Which is the case, in reality Mr Relation being brother-in-law of Mr B Inlaw, has been resulted into hiding the actual situation of the company and eventually administration fails due to 'lack of funding'.

Ethical issue in Subsequent Appointments:

This refers to a circumstance where the same IP is allowed to be appointed in different insolvency capacities in relation to the same debtor company. Subsequent appointments pose problems in relation to independence and impartiality due to the self-review and self-interest threat it creates. Some jurisdictions allow subsequent appointment of the same IP, and some do not allow this. Generally, it is debatable that subsequent appointments may be good for the company as the IP would be familiar with the company and will take less time and effort to conclude the process.

Although in this case, as IP has not been independent and impartial in the first place and having appointed him for liquidation would not result into a better outcome for the creditors/lenders of the company. More so lawyer, Mrs Keeneye, of the lenders who had attended the meeting while resolution plan was discussed, remembered the IP being on television and expressing his views which are not in sync with the interest of the lenders.

Commented [JL13]: The answer correctly identifies 3 ethical issues. However the discussion of the principles and the reasons as to why the issues are issues is not detailed enough.
7

*** End of Assessment ***