



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: 40 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?

The main fiduciary duties of an insolvency professional are: (i) the duty to act in good faith which implies acting with honesty and fair dealing; (ii) the duty to act in the best interests of the beneficiary of the fiduciary duties; and (iii) the duty to exercise the powers of the office in an independent and impartial manner. This duty includes avoiding conflicts of interest. The other duty, which is not fiduciary related but is associated with the insolvency practitioner is the duty act with care, skill and diligence.

Commented [JL4]: 4

Question 2.2 [maximum 4 marks]

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

The duty to act with independence and impartiality means that the insolvency practitioner exhibits these traits when he exercises his powers and duties. The practitioner is required to avoid circumstances likely to result in a conflict of interest. Independence by the practitioner needs to be as of fact and from the perspective of an informed observer and practitioners can be guided by legislative or professional guidance given on the subject. The objective of the practitioner in being independent is to ensure that his conduct is and is seen to be not unfairly or improperly biased towards any party or associates. An insolvency practitioner for example should not accept an appointment to an estate if his relationship with the directors of the company or any stakeholders would give rise to a possible or perceived lack of independence.

This leads into the duty to act impartially. Perceived lack of independence will lead to a threat to impartiality. Threats to independence and impartiality includes self-interest, self-review, advocacy; familiarity and intimidation. The two-pronged nature of independence and impartiality therefore means that the insolvency practitioner does not allow bias, a conflicting interest or the undue influence of others to override his professional or business judgment in the execution of his duties. Where there is a preexisting relationship with stakeholders or directors of a company by the insolvency practitioner, he should not accept the appointment so that he avoids his independence and impartiality being called into question.

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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 for insolvency practitioner remuneration is time-based fees where fees are incurred according to the time spent on attending to the case. The main ethical issue is the fact that the insolvency practitioner spend time on the

administration of the estate without achieving any outcome. The task is generally to assess the value of the practitioner's work not the cost.

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

Commented [JL7]: 10 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 especially prone to creating or giving rise to threats to independence and impartiality are in relation to appointment, pre-commencement appointment and involvement which affects the practitioner's ability to carry out investigations objectively. There are likely to be threats to independence at the remuneration stage of the insolvency proceedings. For the appointment stage, the duty of independence requires that the practitioner scrutinise the situation before he accepts the appointment to ensure he has no association or conflict of interest with any stakeholder. In subsequent appointments, an insolvency practitioner may act in a different insolvency capacity in relation to the same debtor. The threat to independence and impartiality in this situation arises due to the self-review and self-interest threat created. The self-review threat occurs where the practitioner, due to being involved in prior decision making will not be able to appropriately evaluate results or previous judgments made or services rendered. For example, a company may engage an insolvency practitioner prior to any insolvency to provide consultancy advice. These prior appointments may create the impression of lack of independence and impartiality. There should therefore be limits to what is deemed acceptable engagement during such consultations. The advice provided in the prior consultation should be limited to the company's financial position, the company's solvency, the effects of the potential insolvency and any alternatives to insolvency. If a practitioner has a prior involvement with a company and is subsequently appointed under insolvency, to assist with transparency, he should disclose the nature and extent of prior consultations in a disclosure statement.

The self-interest threat relates to the issue of remuneration of the practitioner. The subsequent appointment of a practitioner means he will be remunerated twice for work done in relation to the same company at the pre-commencement appointment stage and then as an insolvency practitioner. For example where a practitioner is recruited pre insolvency to work on a restructuring, he may not be incentivised to work towards successful turnaround since an insolvency would result in his appointment and therefore remuneration for his consultancy role and for his liquidation role. Substantial involvement with a company prior to its insolvency can detract from a person's ability to act fairly and impartially during liquidation and create the advocacy and self review threats. There are circumstances based on the facts where a full disclosure will be sufficient but there are circumstances where it will not cure any threats to impartiality and independence. In those circumstances, the practitioner should decline appointment.

Commented [JL8]: 6

The issues in dealing with the assets of the debtor or dealing with the debtor has been left out of the discussion.

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?

The insolvency practitioner has an ethical obligation to ensure that before incurring the fees of legal professionals, he applies any considerations outlined in his code of ethics. The new insolvency Code of Ethics by the Institute for Chartered Accountants of England and Wales has

provided guidance where a practitioner intends to recruit legal services. He is firstly required to assess whether legal advice is warranted. The practitioner will then be required to consider the cost of the service, the expertise and experience of the provider, whether the provider holds the appropriate regulatory authorisation and the professional and ethical standards applicable to the service provider. The practitioner should document the reasons for choosing a specific provider and be able to justify why a specific provider is chosen. He should ensure that he follows an objective process that results in choosing the best service provider who will offer the best value to beneficiaries. Where there is a relationship between the practitioner and the service provider, that relationship should be disclosed.

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

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

The company traded profitably for the last 10 years but recently started to experience financial difficulties. One of the main reasons for the decline is the fact that several of the company's employees have instituted a class action claim against WeBuild for workplace related injuries due to faulty machinery. This also resulted in bad publicity that led to a decline in contracts. The directors of the company were made aware of the issues relating to the machinery but chose not to take any action to remedy the situation. When the company's financial position started to decline the directors continued to trade as if nothing was amiss and even made several large payments to themselves by way of performance bonuses. When they received a letter of demand from the company's major secured creditor, ABC Bank, the directors decided to call a shareholders' meeting to discuss the company's options.

Present at this meeting were the shareholders, the directors and Mr Relation, a lawyer, to provide them with information and advice in relation to their options. Some of the shareholders recognised Mr Relation as Mr B Inlaw's brother-in-law and godfather to his daughter. During the meeting, Mr Relation suggests that the company enter into a voluntary administration procedure. Mr B Inlaw suggests that the company appoint Mr Relation as administrator. He accepts the appointment, ensuring that he discloses his relationship with Mr B Inlaw and says that he will declare that he believes that he will still be able to act with the required independence and impartiality.

After the meeting adjourns, Mr B Inlaw requests the other directors and Mr Relation to stay behind for a brief "planning" meeting. During this subsequent meeting the directors inform Mr Relation that they are concerned about their personal liability for breach of duty. Moreover, they are worried that they might land in hot water due to their decision to continue trading when the company was clearly in dire financial straits. Mr Relation assures them that his focus will not be on them but on trying to rescue the company.

In the weeks that follow, Mr Relation conducts a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulty of the company. He relies on detailed reports drafted by Mr B Inlaw regarding the company's business and drafts a strategic plan for recovery based on his investigation and the reports he received.

At a meeting of creditors to consider the plan, Mr Relation states that he has found no evidence of any wrongdoing or maladministration by the company's directors. Mrs Keeneye, a lawyer attending the meeting on behalf of ABC Bank, the major secured creditor, recognises Mr Relation from a television interview where Mr Relation expressed the opinion

Commented [JL9]: This answer only deals with the guidance provided by the ICAEW code for IPs and not with the broader scope of issues discussed and highlighted in the GT. Examples of elements missing from the answer – duplication of work, scrutiny etc.

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Commented [JL10]: 10 out of 15

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.

At least three ethical issues arising from the factual scenario are the lack of objectivity, independence and impartiality for Mr Relation to be involved in the affairs of the company prior to administration, his personal relationship with a director and shareholder of the company which gives rise to the familiarity threat created by the longstanding relationship with Mr Inlaw and his awareness that the directors are concerned about their personal liability for trading while the company was known to be in financial trouble.

In relation to Mr Relation assuring directors that he will not investigate their conduct but focus on restructuring the company, this challenges his fiduciary duty to act in good faith and in the best interest of the beneficiary of the fiduciary duty. The issue of whether he will act with integrity is now open to challenge.

There is the advocacy threat arising from Mr Relations expressed views about creditors. There is the threat of self-review if Mr Relation were to now act as liquidator when he previously acted as administrator where the administration failed due to "lack of funding".

In relation to the duty to act with integrity overall, it means that Mr Relation appreciates that he must endeavour to be truthful, honest and deal fairly in carrying out his duties as administrator and as insolvency practitioner. Truthfulness means that he will not conceal facts, it means you are open and transparent in decision making and you will not conceal or misrepresent facts. When Mr Relation is said to conduct a superficial investigation when he is aware of the concerns of the directors that they are in possible breach of their duties and he further relies on information provided by Mr Inlaw, this is not discharging the duty not to conceal or misrepresent facts.

In relation to the ethical principle that the insolvency practitioner should act with objectivity, independence and impartiality from the outset, this means that Mr Relation is aware that his conduct must be, and be seen to be unfairly or improperly biased to any party. Practitioners should not take appointments where their independence and impartiality will be called into question by the existence of a relationship with a stakeholder. The insolvency practitioner must not allow bias, a conflicting interest or the undue influence of others to override his professional or business judgments in the execution of his duties and obligations. Mr Relation would have breached the independence principle when he assured directors he would not concentrate on their confessed breach of duty, when he actually produced a report confirming no mismanagement and he relied on information produced by Mr Inlaw. He would have failed to conduct independent investigation, he would have been required to set up a

complaints management process allowing stakeholders to lodge complaints. This would especially be relevant where employees brought claims against the company for faulty machinery. The other aspect of independence is the perception. An insolvency practitioner must be seen to be independent ie be factually free from any influences that could compromise his judgment. He would be required to avoid all personal and professional relationships that could directly or indirectly adversely influence, impair or threaten their integrity and ability to make decisions. Mr Relation being a brother in law to Mr Inlaw and the godfather to Mr Inlaw's daughter creates a perception of bias and lack of independence and creates a conflict of interest on Mr Relation's part to carry out his investigations impartially. He will be affected by the fact that the objective performance of his investigations will mean that if he has to commence proceedings against Mr Inlaw, he will be able to do so. The conflict however arises from the fact that he has close family ties with Mr Inlaw. This creates the familiarity threat. The case study Commonwealth Bank of Australia v Irving illustrates how personal relationships with stakeholders can result in lack of independence due to the perception created by the relationship. Mr Irving was appointed to act as administrator of a company who had one director, Mr Townsend, resign two weeks before administration. MR Townsend knew Mr Irving for over 16 years, they participated in the same widely publicised charity events and sports activities and Mr Townsend acted as Mr Irving's legal practitioner. Also Mr Irving had acted as consultant to the company concerning its financial position. Two creditors therefore applied for Mr Irving to be removed for lack of independence. It did not matter that Mr Irving disclosed his relationship with Mr Townsend. The court noted that as administrator of the company, Mr Irving would be required to investigate the affairs of the company and the conduct of the directors which would include Mr Townsend to determine whether he was required to take any action. Irving's relationship with Mr Townsend created the perception that Mr Irving held Mr Townsend's judgment in high regard and relied on his professional advice and judgment. The reasonable person would therefore have trouble to believe that he would be able to investigate without any bias. The same arises on the facts between Mr Relation and Mr Inlaw. The Court in Commonwealth Bank of Australia v Irving also noted that while no allegations of impropriety were made, the long standing friendly and professional relationship between Mr Irving and Mr Relation would create doubt in a fair minded person that he would be able to perform his duties in an independent manner. The relationship created the familiarity threat for Mr Irving. That threat arises on the facts of the present case and it does not matter that the relationship between Mr Relation and Mr Inlaw is disclosed. It may not assist with clearing bias for another person to be appointed with Mr Relation. The court in Commonwealth Bank of Australia v Irving also looked at the prior of Mr Irving in the pre-commencement business and its impact on independence. The Court noted that substantial involvement with a company prior to its administration will be seen to detract from the ability of that person to act fairly and impartially as it could create the advocacy and self-review threats. Mr Relation's involvement in the company prior to the company being placed in administration, his involvement in a private strategy meeting with directors and his personal relationship with Mr Inlaw were all factors that should have barred him from acting as administrator. Now that he acted as administrator and the process failed due to lack of funding, Mr Relation has a responsibility not to also act as liquidator due to the threat of self review arising from having to examine his own actions and that of the directors. Due to being involved in prior decision making, he would not be able to appropriately evaluate results of previous judgments made.

The advocacy threat arises where Mr Relation publicly promoted a position and opinion about banks as creditors that would subsequently cause his objectivity to be compromised. This was the case where the bank representative remembered Mr Relations' expressed position and was concerned that he would not be able to objectively carry out the role of liquidator. A possible remedy to this threat is that Mr Relation should refrain from acting as liquidator of the company.

Commented [JL11]: This answer addresses most of the issues identified to a satisfactory degree. However, it would have benefited from a better structure as the link between the theory and the facts were not always as clear as it could have been. The answer seems disjointed in certain places and not all of the elements to the question were addressed – i.e. the reason why the issues were ethical issues.

A reasonable attempt overall.

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*** End of Assessment ***