



## **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

### 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

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

Commented [JL2]: 7 out of 10

Commented [JL3]: c

Commented [JL4]: b  
Although most IPs are regarded as fiduciaries not all are e.g. Supervisors in a CVA. See section 3.2 of the GT.

#### 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 [JL5]: 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 [JL6]:** 8 out of 10

**Question 2.1 [maximum 4 marks]**

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

[The fiduciary duties of an Insolvency Professional ("IP") are as follows:

- An IP should act on behalf of others i.e corporate debtor and its stakeholders.
- An IP has power and decision making ability over the interest of others.
- An IP acts as a trustee for the assets of the corporate debtor undergoing insolvency/liquidation process.

Apart from the above, other duties of IP are as follows:

- To act in good faith during his entire assignment.
- To act in the best interest of the stakeholders of corporate debtor in order to safeguard their interest.
- To act in independent manner.
- To act with integrity, care, skill, expertise and diligence.
- To administer the assets of the corporate debtor undergoing insolvency/liquidation, to preserve their value and to keep the corporate debtor as a going concern to the extent possible.]

**Commented [JL7]:** 4

You did not get this from the GT and as such some of the answer is factually wrong. It is best to answer the questions with information provided from the GT.

**Question 2.2 [maximum 4 marks]**

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

- [An IP should maintain complete independence in his professional relationships and should conduct the insolvency/liquidation process, independent of external influences.
- Where IP is dealing with assets of corporate debtor insolvency/liquidation process, should ensure that he or his relatives do not knowingly acquire any such assets, whether directly or indirectly unless it is shown that there was no impairment of objectivity, independence or impartiality in the insolvency/liquidation process.
- An IP should refrain from accepting an assignment where any of his relative has vested interest.
- IP should on its own disclose the existence of any pecuniary or personal relationship with any of the stakeholders of the corporate debtor undergoing insolvency/liquidation process.
- An IP should not get influenced in his decision making and also should not influence the decision taken by the creditors, so as to make any undue or unlawful gains for himself or his related parties or cause any undue preference for any other persons for undue or unlawful gains and shall not adopt any illegal or improper means to achieve any mala fide objectives.]

**Commented [JL8]:** 2

This question relates to independence in fact and perception. Your answer is an explanation of independence in fact. I have awarded discretionary marks.

### 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.

["Time-Based Fees" is the most preferred method of calculating an insolvency practitioner's remuneration. However, one ethical issue involved with respect to this method is that, this method provides an IP to charge fees for the actual time/man-hour devoted in respect of the particular assignment that he/she has undertaken as an IP/Liquidator. However, it is a common practise that IP charge their fees for entire fixed period let's say month/quarter.]

Commented [JL9]: 2

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

Commented [JL10]: 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 of the insolvency proceedings are prone to create or give rise to the threats to independence and impartiality:

##### 1) Nature of pre-commencement/appointment involvement

- Before commencement of an insolvency proceeding, generally the IP carries out discussion with the corporate debtor undergoing insolvency or with the creditors (as the case may be).
- Such discussions are normally acceptable till the extent they pertains to the understanding of the financial position of the company, what make company land in default, the consequences of insolvency and strategies to be developed to keep the company undergoing insolvency as a going concern.
- The elements of independence and impartiality will be getting hit in the events where the IP will act either under the influence of corporate debtor or any of its stakeholders for their personal gains or IP is biased towards a particular class of creditors.
- Till the stage pre involvement is concerned with running the insolvency process effectively, efficiently and in transparent manner, the elements of independence and impartiality won't be getting hampered.

##### 2) Appointment

- In general situation, an IP is appointed either by the Board of Director of Corporate Debtor or by the creditors. Post appointment, IP should not act only for the body appointing him rather should act on behalf of all the stakeholders.
- IP should not influence any of his decision in accordance with the party who has appointed him to carry out the insolvency process.
- IP should take every decision wisely and should carry out due diligence for every transaction being entered into during his appointment.
- IP should also carry out an scrutiny to ensure that no conflict of interest should arise even at later stage in context of his appointment.

### 3) Subsequent Appointment

- Insolvency law across the countries allow IP to appoint various professionals like accountants, valuers, auditors etc. for his assistance while carrying out the insolvency process.
- While making any such appointments, IP should ensure that the appointed professional is completely independent to the IP as well as the corporate debtor for which his services will be availed and should be appointed at arms length price.
- IP should seek Declaration of Independence from the professional proposed to be appointed by him.
- Also the services to be offered by the appointed professionals should be free from any undue influence and to be independent in nature.

### 4) Secret money and personal transaction with the company]

- An IP should act in interest of all the stakeholders and should not be indulge in any activity/transaction that renders him any personal gain.
- IP should refrain from making any under table money from any class of beneficiary involved in the insolvency process of the company.
- IP should not manipulate any transaction of the corporate debtor in order to achieve any personal gain out of it.

Commented [JL11]: 8

### Question 3.2 [maximum 7 marks]

As insolvency appointments often involve complex legal issues, it is common practice for insolvency practitioners to rely on the advice and services of legal professionals. What ethical considerations should be borne in mind, especially regarding the fees of these legal professionals?

[While taking the services of legal professionals in respect of an insolvency/liquidation process, an IP appointing such legal professionals should ensure that they are independent to the corporate debtor as well as to the IP and offer their advice free from all biasness and influence. IP should make such appointment at arm's length price and should ensure that such appointment is not in conflict of interest. IP should also ensure that such professionals hold valid license of registration with their respective professional bodies at the time of rendering their services.

While making appointment of legal professional, an IP should consider following ethical elements with regard to the fee to be paid to such professionals:

- The fees offered to the legal professional are reasonable reflection of the scope of work for which he is appointed.
- IP should not make any secret money from the fees offered to the legal professional.
- The fees should be decided in accordance with the complexity of case, asset base and debt size of the case and man-hours to be involved in studying that case and forming opinion.
- The invoice should reflect clear bifurcation towards the professional fees, taxes and out of pocket expense/any reimbursement been given to the legal professional.
- IP to keep clear record of all documents including engagement letter and further bills and supporting documents in readily accessible [format.]

Commented [JL12]: A good answer. Duplication of work and fees as an issue is missing from this discussion.  
6



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

Commented [JL13]: 15 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.

[Following are the ethical issues reflecting from the above stated case study:

1) Personal gains to the directors at the cost of interest of the stakeholders

- Even when the company was facing financial crunches in that situation also directors of the company announced their personal performance bonus without considering the interest of creditors, shareholders and other stakeholders. This reflects lack of integrity on part of the directors who are casted with fiduciary responsibility to carry out the business of the company while catering the interest of all beneficiaries.
- Rather in the situation of financial difficulties, directors of the company should have taken the major fund contributors in confidence and should have devised strategies to minimise the unnecessary cost and expenses and should have worked out ways to maximise the value to its stakeholders.

**Commented [JL14]:** This is unrelated to the IPs ethical duties and were placed in the facts as a distraction.

2) Intention of defrauding the creditors

- Every debt provided to a company is backed with a responsibility of its timely repayment. By making performance bonuses and delaying repayment of loan to creditors, the directors company has acted to further defraud their creditors and causing harm to the company's goodwill and shareholder equity.

**Commented [JL15]:** See comment above.

3) Appointment of a related party individual as administrator

- Director should have taken an independent and influence free advice from a legal professional in this moment of crisis. But what make situation more worse is appointment of a related party lawyer (Mr. Relation) initially as a legal advisor and subsequently as an Administrator.
- This reflects lack of independence, integrity and impartiality on part of Mr. Relation.
- Even disclosure of such related party appointment to the company and its stakeholders would have prevented company from collapsing further.
- Consideration of individual interest over the overall interest worsen the situation more.
- For the fate of the company and its stakeholders, Mr. Relation should have refrain himself form getting appointed as an Administrator.

4) Lack of independent decision making ability on part of Mr. Relation

- The integrity and independence on part of Mr. Relation would not have been doubted much if even though being related to the director he would have

exercised his independent skills and decision making ability while analysing the financial position of the company and transactions undertaken by the director.

- Rather he relied on the financial report provided by the director with whom he is related and gave his judgement on the financial viability of the company on that basis only.
- It reflects Mr. Relation lacks professional competence and also lacks in reflecting professional behaviour towards his duties and responsibilities.

5) **Appointment of Mr. Relation as liquidator even after objection by the largest secured creditor**

- ABC Bank being the largest secured creditor objected the appointment of Mr. Relation as liquidator post his appointment as administrator but director of the company paid no heed to their consideration.
- If administrator of the company would have been independent and impartial throughout its conduct and would have possessed technical and professional skill, in that circumstances the company may not have been landed into liquidation.
- Such conduct of administrator not have only hampered the public image of the company, but also created fear in the mind of employees of the company regarding their employment, loss of wealth of the company and its creditors, eroding net worth and multiplying economic and financial losses to company in short as well as long run.
- Consideration to the ethics both by director and administration of the company wouldn't have landed the company into liquidation rather could have restored it on the path of reconstruction and revival.

Commented [JL16]: 15

**\* End of Assessment \***