



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: 39 out of 50
Where a student copied and pasted from the guidance text only half of the possible marks were awarded.

Note from Course Leader: Both the Course Handbook and instruction 5 of the assessment warn against copying and pasting from the guidance text. Since marks have been deducted, there will be no further sanction in this regard.

Commented [JL2]: 7 out of 10

Commented [JL3]: b Although most IPs are regarded as fiduciaries not all are e.g. Supervisors in a CVA. See section 3.2 of the GT.

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 [JL4]: 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

Commented [JL5]: b

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]: 7 out of 10

Question 2.1 [maximum 4 marks]

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

- The duty to act in good faith, this duty implies honesty and fair dealings.
- The duty to act in the best interest of the beneficiary of the fiduciary duties.
- The duty to exercise the powers of the office in an independent and impartial manner, this duty includes the duty to avoid a conflict of interest.
- A duty which is usually not regarded as being fiduciary in nature, the duty to act with care, skill and diligence.

Commented [JL7]: 4

Question 2.2 [maximum 4 marks]

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

IP must be independent and be seen or perceived to be independent. Independence requires the IP to be factually free from any influences that could compromise his judgement. He must avoid all personal and professional relationships and direct or indirect interests that will negatively influence, impair, or threaten their integrity and ability to make decisions. Independence in perception includes the avoidance of circumstances that would lead a reasonably informed third party to conclude that the IP's integrity, independence, and impartiality have been compromised.

Jurisdictions identify certain personal and professional relationships or situations that might give rise to a lack of independence. These might include any professional or personal association with the company or a company director, a company shareholder, a company employee, a company business partners, other firms or entities controlled by the company, either secured or unsecured company creditors, company debtors, or even the relatives of company officials.

Some jurisdictions make provisions for the disclosure of the relationship and declaration of independence to address threats to independence and impartiality. The IP would be expected to state that despite the existence of a relationship with a stakeholder he would still be able to perform his duties independently and impartially.

Commented [JL8]: Your answer was mostly copied and pasted from the guidance text.
2

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 preferred method for calculating the remuneration of Insolvency Practitioners in many jurisdictions, as it is believed to provide for a fair compensation for work done.

The most contentious ethical issues in relation to the remuneration of Insolvency Practitioners is the profession's partiality for charging on the basis of time.

Commented [JL9]: 1
I am unconvinced of how this method of calculation could cause partiality and you have not really explained how you see this being an issue.

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

Commented [JL10]: 15 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.

First element of insolvency proceedings which is prone to create or give rise to threats to independence and impartiality is the nature of pre-commencement/appointment involvement - This insolvency proceeding element occurs before the CIP is appointed. In practice there, are prior consultations that happens between the CIP and the company or stakeholders. In some instances, these consultations may create the impression of a lack of independence and impartiality on the part of the CIP. The prior consultations should not result in the disqualification of that person as practitioner, instead it should constitute a crucial part of the insolvency process. However, the engagement before appointment should be limited to the company's financial position, the company's solvency, the effects of potential insolvency, and any alternatives to insolvency. It would be sensible for the CIP to disclose the nature and extent of prior consultations to improve transparency and assist in preventing accusations of a lack of independence.

Second element is the appointment – The board of directors or a stakeholder, usually a shareholder or creditor in many jurisdictions appoints the CIP, which may lead the appointee to expect that the practitioner would prioritise their interests. In some instances, those who appointed the CIP believe that they have power to influence the CIP. The CIP should be conscious of his responsibilities and should not make any promises to those who appointed him and should clarify his role to be acting in the interest of all stakeholders. It is the duty of the CIP to scrutinise every given situation before accepting an appointment by taking reasonable steps to determine any possible association or conflict of interest with any stakeholder.

Third element is the subsequent appointments – This is a scenario where the same CIP is permitted to act in different insolvency capacities in relation to the same debtor company. Subsequent appointments compromise independence and impartiality due to the self-review and self-interest it creates. A self-review threat refers to a situation where a CIP will not be able to correctly evaluate the results of previous judgements made or services rendered because of being involved in prior decision-making. The self interest threat related to the issue of remuneration of the CIP. The reason subsequent appointments might pose an issue in relation to the remuneration of the CIP, is that the CIP could be remunerated twice for work done in relation to the same company. A self-interest threat refers to a situation where the interests including financial interests of the CIP might inappropriately influence his judgement or behaviour.

Fourth element is the secret monies and personal transactions with the company – The CIP is always expected to act in the best interests of the beneficiaries of his duties and in all transactions. A CIP is not permitted to make secret profit at the expense of the beneficiaries, or his personal interests' conflict with his duties. The judgement of the CIP should not be influenced by personal interests. The CIP should disclose his interests.

Commented [JL11]: 8

There was some copying and pasting...

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 professional fees can be paid as disbursements or third-party costs. When costs are claimed as disbursements, the onus is on the IP, since he is the party responsible for the payment, to evaluate if the bill is reasonable and appropriate to the situation.

When the costs of legal professionals are not claimed as disbursements, billed to the company, there must be monitoring of the fees and scrutiny of the bill. A new issue in relation to this type of administrative costs is the one of duplication of work done by the legal professional. In such a situation the burden rests on the CIP to justify claims for work performed when there are other professionals instructed on the same matter. In the Dovechem case, the court was confronted with a complaint by the majority shareholders of the company that the liquidators had charged four times more than the solicitors that were instructed to institute action on behalf of the company. On the face it would seem that the liquidators had duplicated the work done by legal professionals, but liquidators successfully proved that the work done by them in relation to the case was very different from that of the solicitors.

Some jurisdictions such as South Africa, England and Wales, the rescue practitioner might not be trained in law or have specialised legal knowledge and would at times have to rely on expert advice at a cost.

- The new Insolvency Code of Ethics by Institute for Chartered Accountants of England and Wales (ICAEW) addresses this issue with remarkable clarity and sensible advice. In a section dealing with specialist advice and services, the ICAEW code requires that when an IP intends to rely on the advice or work of a third party the IP should evaluate such advice or work is warranted. The Code also requires an IP to document the reasons for choosing a specific service provider. Additionally, where a professional or personal relationship exists between the IP and service provider, the Code suggests full disclosure of the relevant relationship and the process be undertaken to evaluate whether the service will be the best value for the creditors. The IP would have to consider the following in order to establish whether the service provider will be offering best value and service:
 - The cost of the service, the expertise and experience of the provider
 - Whether the provider holds appropriate regulatory authorisation; and
 - The professional and ethical standards applicable to the service provider.

The requirements and guidance set out in the Code could be applied effectively to the use of legal professionals. Where an IP requires the advice and services of a legal professional, he should be able to show that it is necessary and justify the choice of the specific legal professional. The relationship that could create the perception that he is not independent from the legal professional, he should disclose the relationship to the stakeholders. He should provide the details of the process followed to make satisfy himself that the service provider would offer the best value for the **beneficiaries**.

Commented [JL12]: 7

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

Commented [JL13]: 10 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.

The ethical principles that will be referred to are

- Principle 1 - Integrity, and
- Principle 2 - Objectivity, independence, and impartiality

In terms of principle 1, practitioners should demonstrate the highest levels of integrity by being straightforward, honest, and truthful; and by adhering to high moral and ethical principles in all aspects of their professional practice. Integrity implies fair dealing, honesty and truthfulness.

According to principle 2, practitioners should exhibit the highest levels of objectivity, independence and impartiality while exercising their powers and duties. Practitioners should avoid situations likely that will result in a conflict of interest. Practitioners who are appointed over an estate should not acquire or remove any assets or cash from the estate except as prescribed or as properly authorised remuneration. Practitioners should not be unjustly enriched, for example by receiving kickbacks or commissions.

Independence should be viewed both as a matter of fact and from the perspective of an informed observer. It should be reviewed with reference to jurisdictional guidance, legislative, professional, or code based. But the underlying principle of independence is to ensure that a Practitioner's behaviour is not unfairly or improperly biased towards any party. The recommendation is that a Practitioner should not accept an appointment in connection with the estate if his relationship with the directors of the company or any of the stakeholders would compromise his independence.

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

- Self-interest
- Self-review
- Advocacy
- Familiarity; and
- Intimidation.

Disclosure, or appointment of an independent joint practitioner or officeholder cannot cure lack of independence, although both options may be considered and may be appropriate in certain circumstances.

If a practitioner purchases or removes assets or cash from the estate excluding appropriately approved remuneration and disbursement payments, it is likely that there will be a perception that independence, objectivity and/or impartiality has been breached, even if it has not. Such action may erode trust in the integrity of such practitioner and the process.

Lets' deal with the Webuild Ltd situation.

The company called a shareholder's meeting to discuss the company options to pursue after receiving a letter of demand from the company's major secured creditor, ABC Bank. The company was in financial stress.

The first conduct by Mr Relation that raises ethical issues unfolded as follows: Mr Relation is a lawyer, who was invited to the shareholder's meeting to provide the shareholders with information and advice in relation to their options. Mr Relation advised the shareholders to enter the company into voluntary administration procedure. After Mr Relation has given an advice, Mr Inlaw, who is one of the directors of the company and a relative to Mr Relation, suggested that Mr Relation be appointed as an administrator.

The fact that Mr Relation provided **advice to the company** before his appointment as a CIP is of serious concern. This consultation creates an impression that Mr Relation would lack independence and impartiality.

Commented [JL14]: He is allowed to give advice – what is more important is what the nature of the advice is.

Second conduct that is unethical unfolds as follows: After Mr Relation's appointment has been confirmed, Mr B Inlaw called another meeting with the directors and Mr Relation to discuss their concerns 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 stress. Mr Relation assured them that his focus will not be on them but on trying to rescue the company.

The fact that Mr B Inlaw appointed Mr Relation, this creates expectations that the practitioner would prioritise their interest and, in some instances, the directors of the company may even believe that it is within their power to influence the CIP. Mr Relation made promise that he will not focus on them, but he will focus in rescuing the company. This conduct is unethical.

The third conduct that raises unethical matter is the subsequent appointment of Mr Relation as a CIP after he was appointed as an advisor. Subsequent appointments pose problems in relation to independence and impartiality. These may lead to self-review threat being created. A self-review threat refers to a scenario where a CIP, due to being involved in prior decision-making, will not be able to appropriately evaluate the results of previous judgements made or services rendered.

The other threat could be self-interest which relates to the issue of remuneration of the CIP. The reason subsequent appointments might pose an issue in relation to the remuneration of the CIP, is that the CIP could be remunerated twice for the work done in relation to the same company. This threat refers to a situation where the interests including financial interests of the CIP might inappropriately influence his judgement or behaviour.

The fact that Mr Relation provided advice to the company before his appointment as a CIP is of serious concern. This consultation may create the impression of a lack of independence and impartiality on the part of Mr Relation. Besides, Mr relation also has a relationship with Mr Inlaw, one of the directors of Webuild company. This relationship also compromises Mr Relation's independence and impartiality.

Possible remedies are:

There should be limits to what would be deemed acceptable engagement by any stakeholder parties. Should the consultation between the CIP and the any stakeholder parties involve material engagement, the CIP would no longer be independent and should not be appointed as practitioner. The advice provided by the practitioner before he is appointed should be limited to the company's financial position, the company's solvency, the effects of potential insolvency, and any alternatives to insolvency. It would also make sense for the CIP to set out the nature and extent of prior consultations in a disclosure statement to improve transparency and assist to prevent accusations of a lack of independence.

The practitioner should not make any promises to those who appointed him and should make it clear that he is expected to act in the interests of all the beneficiaries. There is also an obligation on the CIP to scrutinise each given scenario prior to accepting an appointment, which include reasonable steps to determine any possible association or conflict of interest with any stakeholder.

In certain jurisdiction subsequent appointments in relation to the same debtor company are prohibited due to threats expressed above. The south African Companies Act of 2008 provides that a business rescue practitioner may not be appointed as the liquidator of the debtor in subsequent liquidation **proceedings**.

Commented [JL15]: A reasonable attempt. The application of the theory/ principles to the facts is limited and as such the answer is lacking in detail and is somewhat disjointed. There is not always enough information provided to link the behavior with the issues.
10

*** End of Assessment ***