



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: 42 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]: 9 out of 10

Question 2.1 [maximum 4 marks]

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

Main fiduciary duties usually associated with insolvency professionals are:

Duty to act in good faith which states that IP should handle the cases they are appointed to with honesty and fair dealing.

Duty to act in best interest of the beneficiary of fiduciary duties, as per his role of person being entitled with "other people's" interests he has obligation to act and make decisions in their best interest.

Duty to exercise the powers of the office in a independent and impartial manner. As a matter of condition necessary fulfilled in order to comply with two above mentioned duties, IP must on his behalf take actions to ensure that he is under no other influence that could influence his work.

Commented [JL4]: 3
And other duties – care.

Question 2.2 [maximum 4 marks]

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

In complying with and fulfilling his duty to act with independence and impartiality IP, besides being independent and impartial in fact, must also be seen or perceived as independent by informed observer. This enables him to perform his duties with the expected outcomes which are to act in best interest of the beneficiaries.

To act with this duty is not exclusive to IP's, other professions also have this requirements for conduct, but it comes even more important in insolvency proceedings. That is because in insolvency cases there are a lot of different interested parties, not all having the same "power" (by provisions of the code or financial means) so the acts of IP should not be in their perception even in the slightest part be seen as possibly undertaken in manner that would unfairly benefit single party or be bias to them.

Threats to independence and impartiality of IP are (and not limited to): self-interest, self-review, advocacy, familiarity, intimidation. If the situation in particular case raises concern about these matters, a full disclosure of the previous relations with interested parties might be beneficial, but cannot be "cured" in all cases and relies heavily on the circumstances. Secret commissions, receipts and bribery are of course unacceptable.

Commented [JL5]: 4

Question 2.3 [maximum 2 marks]

What is the preferred method of calculation of insolvency practitioner remuneration? Name one ethical issue in relation to this method of calculation.

Method of calculation of insolvency practitioner's remuneration based on time spent in work on the case is preferred method. This method should in theory guarantee that remuneration received by IP for his work would be in exact relation with needed professional knowledge, effort and risk he invested in working on particular case. In ideal scenario, it will also reflect the value his work brought to the case/beneficiaries. That will be in a case where IP is remunerated only "for their work (necessary or beneficial, and properly performed)" - INSOL Principles, Principle 5

At least one ethical issue can be found in question whether or not does this method of calculating the remuneration reflect the actual work done by the IP. On this issue, UNCITRAL Legislative Guide on Insolvency Law (The UNCITRAL Guide) states that this method of calculating might not be reflective of the actual work done. "A disadvantage is that, although it may encourage a very thorough administration, a time-based system may also operate in some cases as an incentive to maximize the time spent on administration without necessarily achieving a proportional return of value to the estate" - The UNCITRAL Guide, 54 (i)

Commented [JL6]: 2

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

Commented [JL7]: 11 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.

Previous involvement of IP and/or his company or his/her's close associates with company management is of course prone to create or give rise to threats of impartiality. It is not uncommon, rather it can be considered business decision wise prudent for company management in case of financial difficulties to seek and hire professional assistance of insolvency professionals and/or lawyers skilled and experienced in that area. During course of action since it is usually included in scope of their activities, they will answer questions (by management) and provide advice on potential scenarios in case of insolvency proceedings. Inherent necessity for insolvency proceedings is that they should be handled efficiently, especially time-wise for the estate to retain its commercial value and therefore provide best return to the creditors. Having in mind that, it can be argued that previous appointment is something that enables IP to "hit the ground running" and immediately start his work since he is acquainted himself already with state of affairs of debtor and his business process.

This issue raised in a case *Korda, Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* - [2017] FCA 914 where question of appointment of former consultants which had "long-term, substantial and remunerative involvement" was considered. Upon review which looked into nature of the involvement and concluded that no tasks were performed in relation to possible insolvency, no potential conflict of interest was found. Review included Australian Securities and Investment Commission (in role of amicus curiae) making their statement in which they stated that former involvement shouldn't automatically disqualify Korda as potential administrators, as long as the consultants are taking measures, and implementing safeguards in their appointment with goal to avoid conflict of interest. Court held that the safeguards could include that potential administrator informs management that he or she could be appointed as administrator, and that proper record keeping of meetings held and tasks performed is kept.

In last developments in UK insolvency practice, KPGM, member of "big 4" consultancy firms sold their insolvency department due to increased number of issues raised from their former involvement with (potential) debtors which filed petition for some sort insolvency proceedings. Other member of "big 4" are currently assessing their options.

(<https://home.kpmg/uk/en/home/media/press-releases/2021/03/kpmg-uk-signs-agreement-with-hig-europe-to-sell-its-uk-restructuring-practice.html>)

From my experience, sale of assets of debtor are also part of insolvency proceedings in which significant number of “questions” tends to be raised. From assessments and sometimes re-assessments of the property, nature of sale procedure that usually has impact on number of potential buyers, event to the changes in owners happening soon after sale is done. To address that issue, transparent procedures should be established so that all interested parties are sufficiently informed which helps build trust in actions of IP.

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?

Matter is almost universal. Lawyers and other legal professionals have a certain reputation of being “sometimes necessary, but always costly”. In that respect, questions that naturally have sources in possible ethical considerations are following.

When it comes to services of legal professionals, most of the time, questions raised include amount of their fees for services rendered. In direct relation to this, next question comes which is, were those services really necessary for the management of the case/was this work beneficial.

Amounts paid to legal professionals can be divided into disbursements for the expenses IP incurred in his work, and direct payments made from the estate to the legal professionals.

When the expenses are paid by the IP, he should “consider whether the bill is reasonable and appropriate given the circumstances” in case *Kao Chiai-Chau Linda v Fong Wai Lyn Carolyn* (2015) SGHC 260 (216) SLR,44 (59) (Singapore).

Another guidance is provided in *Re Korda*: in the matter of *Stockford Ltd* (2004) 140 FCR 424,0443 (51) Australia where it was stated that “the IP should exercise his commercial judgement when hiring legal professionals and that a prudent IP would monitor the fees claimed by these professionals”. This falls under IP’s fiduciary duty to act in the best interest of the beneficiary of fiduciary duties. The estate is of course diminished by these (as with other) expenses and therefore they have to be justified.

When the expenses are paid directly by company/debtor, IP should act as with all other expenses, to monitor the fees and sufficient attention to the bill should be made with special consideration that the work is not duplicated and thus being unnecessary. IP should always be able to provide explanation why the services were needed, and why he chose specific legal professional for required services. ICAEW Code of Ethics requires that where professional or personal relationships exist between IP and service providers, full disclosure of relevant relationship should be made to ensure that the service provided should be best value for the creditors. Additionally, as per ICAEW Code of Ethics, R2320.4 A “IP would have to consider: (a) the cost of the service, the expertise and experience of provider; (b) whether the provider holds appropriate regulatory authorization, and (c) the professional and ethical standards applicable to the service provider.

Commented [JL8]: 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 some of the elements of the process. However, the question was not answered. I have awarded discretionary marks.
4

Commented [JL9]: 7

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

Commented [JL10]: 12 out of 15

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 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.

Major ethical issues in this factual scenario are:

The first major ethical issue is Mr Relation's possible inability to act as IP (administrator in this case with independent and impartial manner. It comes from fact of his close relation with director and shareholder of company Mr B Inlaw. The issue is in threat that in course of actions in his appointment he won't be able to act independently and be impartial because he might possibly put interest of a person close to him (brother in law and godfather to daughter of director of company). When the question was raised by one of shareholders Mr. Relation said that he will approach this matter with statement and disclosing his relationship, but it is not later stated in tekst that he did it.

Insol International's Ethical Principles for Insolvency Professionals address this issue in principle 2 "A Member should not accept an appointment in connection with the estate if his (or a related party's) relationship with the directors of the company or any of the stakeholders would give rise to a possible or perceived lack of independence."

Sometimes this issue can be remedied by disclosure made by IP (Mr Relation) but it is not always the case/possible. This was stated in case Commonwealth Bank of Australia v Irwing (1996) 65 FCR 291 (Australia).

This obvious ethical issue "progresses" to further misconduct where during his meeting with directors he "announced" the of "nature" of his appointment as he states/assures them that his focus won't be on actions of directors, but on saving the company. It is true that administrator's duties are to propose a plan of reorganization (if realistically possible and feasible) which is intended to be for best interest and rescue of the company, but there are also his duties to creditors.

"Said-done", in weeks to follow, as already he conducts superficial investigation on matters that should be carefully investigated, since stated actions of directors (besides ignoring previous information on faulty machinery, and subsequent class action claim) include large payments in to directors themselves in times where company's financial position declined, and company was to be considered insolvent, or at least distressed. This type of actions are usually ones that are matter of avoidance actions that sometimes/usually follow petitions for insolvency/bankruptcy (liquidation in UK). There is no mentioning of such actions made by administrator Mr Relation.

Making conclusions and plans for recovery based on report by his close family member who is party in interest and superficial investigation leads to conclusion, is (besides an obvious ethical issue) an example of IP not acting with care, skill and diligence which by itself is not fiduciary in nature, but is of course one of duties inherent to the appointment of IPs.

Above stated ethical issue in this case obviously resulted in IP not doing properly the work he was appointed to. Perceived or not as independent (which is questionable), Mr Relation wasn't acting as one in this case.

In further course of his appointment, an ethical issue of advocacy arises because Mr Relation in one of his previous television interviews represented a point that "in restructuring proceedings interest of lower ranking creditors should sometimes outweigh "big money" ". This made one of major creditors, a bank, uncomfortable with their position in this proceedings where Mr Relation is administrator since they aren't sure if his objectivity in this case may be compromised and that he will act in impartial manner.

In the last paragraph, there is an issue of self review as an ethical issue since Mr Relation's previous actions as administrator will be reviewed by himself as liquidator. This is considered as a possible ethical issue and a threat to Principle 2 - Objectivity, Independence and Impartiality by Insol International's Ethical Principles for Insolvency Professionals. His subsequent appointment can raise questions whether or not he will be able to "appropriately evaluate results of previous judgements made or services rendered" as stated in ICAEW Insolvency Code of Ethics 2114.1 A4(b)

Commented [JL11]: A very good answer. I would have liked to see a little bit more detail and discussion.
12

*** End of Assessment ***