



## **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**.

**Commented [DB1]:** Please read and comply with the instructions.

**ANSWER ALL THE QUESTIONS**

Commented [JL2]: TOTAL: 41 out of 50  
Well done!

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

Commented [JL3]: 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 [JL4]: 10 out of 10

**Question 2.1 [maximum 4 marks]**

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

- *IPs are subject to the duty to act in good faith, which implies honesty and fair dealing.*
- *IPs are subject to the duty to act in the best interest of the beneficiary of the fiduciary duties.*
- *IPs are subject to the duty to exercise the powers of the office in an independent and impartial manner. This duty includes a duty on the IPs to avoid a conflict of interest.*
- *IPs are subject to another duty usually not regarded as being fiduciary in nature – the duty to act with care, skill and diligence. This duty is extremely important in insolvency situations due to the circumstances of the debtor in insolvency. This duty is also important in the context of the qualifications and skills of IPs which render them experts, which results in the IPs being held to a higher duty of care than an individual who would not be considered as an expert.*

Commented [JL5]: 4

**Question 2.2 [maximum 4 marks]**

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

*The two pronged nature of the duty to act with independence and impartiality is based on the fact that the principle of independence is two-fold for IPs. IPs must be both independent in fact and independent in perception.*

*In order to be independent in fact, an IP must be factually free from any influences that could compromise his or her judgment. This means that IPs must avoid all personal and professional relationships and director or indirect interests that may cause any adverse influence or any threat to the IPs ability to make decisions and to the IPs ability to act with integrity.*

*In order to be independent in perception, an IP must avoid any circumstances that would lead to a reasonably informed third party to conclude or believe that the IPs integrity, independence and impartiality have been compromised. This is imperative to the success of the outcome of the insolvency and/or rescue proceedings in which the IP is involved. Even if factually untrue, if stakeholders involved in the proceedings believed that the IP was biased or lacked independence, the trust in the IP to act in the best interests of the stakeholders and beneficiaries would be diminished. This could lead to a breakdown in communication and relationships between the IP and the parties involved in the insolvency process, and may result in the failure of ongoing rescue proceedings, where the co-operation between the IP and certain parties such as the management of a Company subject to the rescue proceedings is paramount to achieving the best result for creditors.*

Commented [JL6]: 4

**Question 2.3 [maximum 2 marks]**

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

*The preferred method of calculation of insolvency practitioner remuneration is time-based fees. One ethical issue in relation to this method of calculation relates to proportionality and whether or not the amount of work done by the IP involved is in proportion to the value of the distributable assets available to creditors in the particular insolvency process. It could be the case that the IP could do more work than what he or she would be paid for.*

Commented [JL7]: 2

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

Commented [JL8]: 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.

*1. Removal or purchase of company assets/cash*

*Where assets are removed or purchased from the estate subject to insolvency proceedings or where cash is removed from the estate, independence and impartiality can be threatened as it is likely there will be a perception that independence and impartiality have been breached, even if this is not factually true. The removal or purchase of such assets or cash may result in a lack of trust in the appointed insolvency practitioner carrying out these actions. In addition, an IP is not allowed to make a secret profit at the expense of the beneficiaries or place him/herself in a position where personal interests may conflict with the fiduciary duties of an IP. Where connected individuals to the IP wish to purchase assets from the Company, the full procedural steps such as disclosure should be followed and the necessary informed consent should be obtained where the IP is permitted in a particular jurisdiction to enter into a transaction with the Company.*

*2. Commercial retailer appointments*

*Where an IP is appointed over a commercial retailer and is involved in purchasing goods or services from a commercial retailer that sells to the general public, the IP should not take advantage of any staff discounts or special payment terms. Taking advantage of such discounts or terms may impair or result in the IP being perceived as having a lack of independence and impartiality.*

*3. Relationships and associations of the IP*

*Certain relationships or situations may give rise to a lack of independence. Such relationship may include an association with the appointed insolvency practitioner and the company, company director, company shareholder, company employee, company business partners, other firms or entities controlled by the company, secured or unsecured creditors of the company, company debtors or even relative of company officials. Where acquisitions are made in the course of the insolvency process to close connections (e.g. family, connected or related parties), it is usual that concerns will be raised as to whether the IP involved in the sale is acting independently. The appropriate restrictions should be applied to immediate relatives and close business connections where they are a party to any acquisition in the insolvency process.*

*4. Pre-appointment involvement*

Prior consultations between the IP and the insolvent company or its stakeholders may also create the impression of a lack of independence and impartiality of the proposed IP. However, not all contact between the stakeholder parties and the IP would result in a lack of independence so long as the consultation does not involve material engagement by any of the stakeholder parties (if engagement did occur, the proposed IP would no longer be independent and would not be able to be appointed). In order to maintain independence, the advice provided by the IP should be limited to the company's financial position, solvency position, effects of potential insolvency and any relevant alternatives to insolvency. In order to show transparency and prevent accusations of a lack of independence, in advance of their appointment, an IP should set out in a statement the nature and extent of all prior consultations that have taken place with the company and/or stakeholder parties.

#### 5. Appointment

As directors and certain stakeholders (creditors/shareholders) are able to appoint IPs in certain jurisdictions, this can lead to certain stakeholders believing that they can. On appointment the IP must make it clear to those that appointed him (either the board of directors or stakeholder in certain jurisdictions) that he/she is expected to act in the best interests of all of the creditors of the company over which he/she is appointed. The IP should make sure not to make any promises to any director or stakeholder and the situation of the insolvency process must be scrutinized fully before accepting an appointment – the IP should take steps to determine any possible conflicts of interest in order to remain independent and impartial.

#### 6. Subsequent Appointments

In certain jurisdictions, such as England and Wales, for example, the same insolvency practitioner is allowed to act in different insolvency capacities (e.g. administrator and then liquidator) in relation to the same debtor company. Such subsequent appointments may threaten the independence and impartiality of an IP due to the potential for a conflict of interest, particularly as it may be perceived that following a subsequent appointment, the IP may not be able to appropriately evaluate previous decisions effectively, because he or she had made those decisions.

Commented [JL9]: 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?

IPs are subject to a duty to account, which means that IPs should be able to justify payments to legal professionals (and any other third parties) and should take responsibility for subjecting the bills of legal professionals to scrutiny. Services of legal professionals can be paid as disbursements (as part of the IPs disbursements in the insolvency process) or third party costs billed separately and directly to the debtor company.

When legal costs are claimed as disbursements, as the party responsible for the payment, the IP must consider whether the invoice provided by the legal professionals for their costs whether or not the invoice is reasonable and appropriate in the circumstances of the particular insolvency process for which the advice has been obtained. In the case of Korda, it was stated that where an IP instructs legal professionals, the IP's commercial judgment should be exercised in relation to the fees claimed by the legal professionals. In addition, it was stated that a prudent IP would monitor the fees as they are calculated.



When legal costs are claimed as third party costs billed separately to the debtor company, issues can arise relating to the duplication of work done by the legal professional. The burden is on the IP to justify claims for work performed where additional legal professionals have been instructed on the same insolvency process which the IP is managing – it must be shown that the work done by the legal professionals is very different to that carried out by the IP.

In England and Wales, IPs must ensure they comply with the Insolvency Code of Ethics of the Institute for Chartered Accountants of England and Wales. The Code requires an IP to fully evaluate whether advice or work is truly warranted where they intend to rely on the work of a third party, such as solicitors. The Code also requires IPs to record the reasons for choosing a particular firm.

Where a professional relationship already exists between an IP and service provider, the Code suggests that full disclosures of the relevant relationship should be made, including disclosure of the process undertaken to evaluate whether the service of the particular third party/legal firm will be the best value for creditors. In order to evaluate and establish whether the legal services provided by a particular firm offer the best value and service to creditors, the Code sets out that the IP should consider:

- the cost of the service, the expertise and experience of the provider;
- whether the provider has authorization from the relevant regulator; and
- the professional and ethical standards applicable to the service provider.

In summary, where an IP instructs a firm of solicitors for advice on a particular insolvency process, the IP should be able to show that the instruction is necessary and an explanation should be provided as to why the particular firm instructed was chosen to carry out the work. Where there is an existing relationship with the firm that may create the perception that the IP is not independent from the legal professional instructed, this relationship should be disclosed to the stakeholders in the insolvency process. In addition, the IP should be able to provide information and details relating to the process followed to ensure that the legal services provided offer the best value for creditors and other beneficiaries.

Commented [JL10]: 7

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

Commented [JL11]: 9 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 Keeney, 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.**

- Mr Relation's connection to Mr B Inlaw and Mr B Inlaw's recommendation for Mr Relation to take appointment as Administrator

*Mr Relation is the brother in law of Mr B Inlaw, a director and shareholder of We Build (the "Company"). Mr Relation is considered as an associate of Mr B Inlaw, which means that on his appointment as Administrator and subsequent Liquidator of the Company, Mr Relation is likely to be perceived to have a self-interest in the insolvency processes of the Company and*

*a familiarity threat by virtue of being related to a shareholder/director of the Company (see Commonwealth Bank of Australia v Irving). The appointment and pre-appointment advice provided by Mr Relation to the Company may also be perceived as a conflict of interest as per the case of Ventra Investments v Bank of Scotland PLC.*

- Mr Relation's investigation

*Further to the points made above, Mr Relation is unable to conduct a fair investigation into the Company's affairs as he would also have to investigate the affairs of his brother in law (as per Ventra Investments v Bank of Scotland PLC). In addition, the fact the investigation is noted as a 'superficial' investigation shows that the interests of the beneficiaries/creditors of the Company have not been considered during this time. It is clear that the lack of a thorough investigation would undermine the independence and impartiality of Mr Relation and an independent investigation at the minimum should have been carried out by an independent body or even better, a different administrator should have been appointed in order to remove the ethical threats surrounding this matter.*

- Mr Relation's TV appearance

*Mr Relation's comments in his television interview create an advocacy threat for him in relation to the administration and liquidation of the Company. It is unlikely that ABC, as the major secured creditor, and any other creditors would consider him to be impartial. Mr Relation should not have given a television interview expressing such views which hinder his ability to take an appointment as an insolvency practitioner independently or impartially. It is also likely that other stakeholders of the Company may form the view that Mr Relation's opinions are shared by the entire insolvency profession which may result in a future lack of trust of the administrators of the insolvency system.*

- Mr Relation's pre-appointment involvement

*Following the case of Commonwealth Bank of Australia v Irving [1996], it was held that no bias or conflict of interest was found where the engagement of an administrator did not involve any advice to the company or its directors. By analogy, it can be said that the directors of the Company in this matter and Mr Relation have acted to the contrary and as such it is likely that bias and conflict of interest would be found by a court. It is clear that bespoke advice was provided to the Company's directors in relation to their personal liability for breach of duty. It is clear that no 'general' advice relating to the Company was provided by Mr Relation such as an assessment of the Company's financial positions and insolvency position. Instead, a private meeting was held to discuss the 'planning' for the Company. This is not in line with the duties to which Mr Relation was obliged to comply with.*

- Mr Relation's subsequent appointment

*By virtue of being an associate of Mr B Inlaw, Mr Relation would not be an appropriate choice as administrator as it is unlikely he will be able to undertake any investigation without bias. Further, by taking the subsequent appointment, Mr Relation may be perceived as not putting his best efforts into the rescue of the Company or the avoidance of liquidation for the Company because he knows he will be subsequently appointed as liquidator and continue to receive remuneration.*

- Mr Relation's profession

*Mr Relation is a lawyer. It is not stated whether he has the requisite experience and technical competence to perform the duties associated with his appointment as administrator*

*and subsequent liquidator of the Company. It is therefore likely that the principle of professional and technical competence and the duty of care owed by Mr Relation as administrator of the Company has been breached. Mr Relation may have knowledge of the legal changes relating to administration and/or liquidation but it is not clear that he has educated himself appropriately in order to be able to act in the best interests of the beneficiaries and creditors.*

*IN Re Chamley Davies Ltd, it was held that an “administrator must be a professional insolvency practitioner”. It is not noted that Mr Relation is an insolvency practitioner, and he will not be held to the standard of an insolvency practitioner but does need to show that he has acted with the same degree of care, skill and diligence that may reasonably be expected of a reasonable practitioner in the same circumstances – this approach is aligned with the guidance provided by UNCITRAL at page 184 (para 61) of the UNCITRAL Guide – however, based on the assessments outlined above, this does not appear to be the case.*

**\* End of Assessment \***

**Commented [JL12]:** This answer correctly identifies the ethical issues and demonstrate an understanding of the expected standards of behavior. However, there is limited discussion of the principles and their application to the facts- see question above. Also lacking detail as to why the issues are in fact ethical issues.

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