



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: 36 out of 50

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

Commented [JL2]: 7 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).

Commented [JL3]: c

Question 1.3

All insolvency professionals are fiduciaries.

- (a) **True**
- (b) **False**

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

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]: 9 out of 10

Question 2.1 [maximum 4 marks]

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

Insolvency Practitioners duties include:

1. To act in good faith.
2. To act in the best interests of the beneficiary of the fiduciary duties.
3. To exercise the powers of the office in an independent and impartial manner.
4. 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.

On one hand this duty requires an insolvency practitioner to be independent and other hand to be seen to be independent.

An insolvency practitioner is independent when he is free from influence whether from personal or professional relationships that would compromise his judgement. To be seen to be independent where a reasonably informed party can arrive at a finding that the insolvency practitioner's independence and impartiality is not compromised.

Commented [JL8]: 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.

Time-based fees.

One ethical issue is the partiality for charging fees 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]: 12 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. Nature of pre-commencement or appointment involvement.

This occurs where the insolvency practitioner has contact with stakeholder parties prior to the appointment of the former, especially where material engagement on the particular assignment occurs.

Commented [JL11]: This is not factually correct. It is actually to be preferred that the only issue discussed before the commencement of proceedings is the appointment.

2. Appointment.

This is where an appointing entity, whether directors or other stakeholders, expect to receive preferential treatment from the insolvency practitioner in prioritization of their

interest or interference with insolvency practitioners mandate by trying to influence his/her decision.

3. Subsequent appointments.

This is where an insolvency practitioner's decision-making is likely to be influenced by previous appointments relating to similar debtors in such a way that some parties are likely to be prejudiced.

4. Secret monies and personal transactions with the company.

This is where an insolvency practitioner's personal interests conflict with his/her role/duty as an insolvency practitioners since he/she may get personal benefit from a particular transaction.

Commented [JL12]: 7

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?

Influencing of an insolvency practitioner's determination in relation to disbursements because of the personal relationship between the practitioner and the legal professional. This issue of familiarity may affect the practitioner's ability to exercise independence in determining the fees. The effect of this is that there may be lack of trust and confidence in the practitioner. A diligent practitioner ought to be able to justify disbursements made to third parties for the provision of services. This can be achieved by providing full disclosure and transparency as to the nature and need of the expenses incurred; whether the service or expenses were reasonably necessary, that the legal professional offered the best value for the assignment.

Among the considerations that should be borne are by the insolvency practitioner are:

- a. The cost of the service, the expertise and experience of the legal professional.
- b. Whether the provider hold appropriate regulatory authorisation.
- c. The professional and ethical standards applicable to the service provider.

Commented [JL13]: Good answer – some elements missing regarding scrutiny and duplication of work.
5

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

WeBuild Ltd is a private company registered in Euraficlia. 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.

Commented [JL14]: 8 out of 15

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.

A fiduciary duty exists when trust, confidence, and reliance is placed on another to exercise discretion or expertise in acting on behalf of the client and thereby, the fiduciary must knowingly accept that trust and confidence. In *Bristol & West Building Society v Mothew* [1998] Ch 1 the Court held that "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A

fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. These are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary”

Upon the appointment of Mr Relation as an administrator of the company, he owed a fiduciary duty of care, skill and diligence to the company, this duty goes hand in hand with the principle of professional/technical competence. This duty requires him to act with professionalism and competence so as to achieve the best possible outcome for both the company and its creditors.

Mrs Keeneye’s discomfort in Mr Relation’s ability to exercise impartiality in dealing with the company’s creditors in light of his view of the ranking of different classes of creditors is a breach.

He was also obligated to act in the best interests of the company and its creditors. This duty required of him to independently, objectively and impartially investigate the affairs of the company. This required him to undertake thorough independent investigations in the affairs of the company as well as the dealings of the directors of the company. He also failed to act impartially when he colluded with the directors by assuring them that his focus will not be on them but on trying to rescue the company. By so doing, the creditors are prejudiced and stand to suffer during the administration.

By conducting a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulty of the company and relying on detailed reports drafted by Mr B In law regarding the company’s business to drafts a strategic plan for recovery based on that investigation and the reports he received, Mr Relation failed in his duties as an administrator.

Another ethical issues arises where despite

In *Brewer & Another v Iqbal* (2019) EWHC 182 (Ch), a suit for breach of duty was filed by the joint administrators of ARY Digital UK Limited against the former administrator of the company. Iqbal had sold the company’s business and assets back to its directors as a pre-pack arrangement at an undervalue. When the company entered into insolvent liquidation, the administrator was discharged from office. It was the joint liquidators’ claim that the sale of the company’s assets shortly after the appointment of the administrator was a negligent act and thus a breach of his duty of his fiduciary duties of care and trust. The court made a finding that ‘I have taken account of Laughton’s report and negligence is manifest in Iqbal’s failure to (i) take specialist advice from a person in the EPG industry; (ii) advertise in publications or websites likely to attract purchasers of EPGs and not plant and machinery; and (iii) expose the assets to a proper market for a reasonable period of time. Iqbal had not so much as undertaken an internet search to ascertain if there was a specialist market, and if there was, the identity of the leading sellers of EPGs.’ The court held that a competent administrator having has time to advise the company prior to administration should have made reasonable investigations as to the market of EPGs. That the breach of fiduciary duty arose through the administrator failing to act with single-minded loyalty to the company.

*** End of Assessment ***

Commented [JL15]: Which part of Mr Relation’s behaviour does not comply?

Commented [JL16]: A little more information regarding advocacy as a threat to independence and why?

Commented [JL17]: Overall a reasonable answer which demonstrates an understanding of the issues and principles. However, the answer fails to show a link between said issues and principles. The answer is also lacking some detail especially the reasoning as to why certain actions would be regarded as ethical issues.

Commented [JL18]: Failed to make a relevance link – although there is one.