



## **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: 32 out of 50

**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]: 10 out of 10

**Question 2.1 [maximum 4 marks]**

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

1. [The duty to act in good faith
2. The duty to act in the best interest of the beneficiaries of the fiduciary duty
3. The duty of independence and impartiality
4. The duty to act with care]

Commented [JL4]: 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 of independence and impartiality warrants the IP not only to be independent and impartial but to be seen as such by any objective observer. In this way, the IP should be free from any influences and constraints that may hamper his independence. On the other hand, even he is not being influenced or constrained, he should keep away from acts that may make him to be seen as being influenced and constrained due to whatever affiliations.]

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.

[Time-based fee is the preferred method for calculating the IP'S fee however it may still pose the ethical problem of determining effectively the time spent on the work and the quantum of work done.]

Commented [JL6]: 2

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

Commented [JL7]: 7 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. Self-interest may inappropriately influence the behaviour of Ips in that, in a bid to benefit from a subsequent appointment, he may wilfully not do his best in rescuing a company in order to eventually be appointed liquidator.
2. Self-review refers to a situation wherein the CIP having served in a previous position with the debtor may find it difficult to produce unbiased appraisals of previous decisions in which he was involved
3. Advocacy can equally hamper independence and this could be easily perceived in a situation wherein a member has had to defend a previous position by virtue of his

appointment and later on it becomes difficult for him to make reasoned and objective appraisals of such previous positions

4. Familiarity can equally give rise to independence threat. A longstanding relationship between an insolvency practitioner and a stakeholder in an insolvency proceeding may be perceived as grounds for partiality.
5. Intimidation can substantially affect the independence of an IP. This intimidation maybe in form of threatened litigation or even physical [threat.]

### 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?

[The disbursements made to third parties and especially fees paid to other legal professionals could be a major concern as it always raises a lot of eyebrows. For this reason, the IP has to endeavour to be very minding of stakeholders' perception of his choices especially when it comes to the amount of fees paid.

He should always consider if the fee to be paid is reasonable and appropriate given the particular circumstances. In the Australian case of Re Korda, Finkelstein J stated that, the IP has to exercise his commercial judgement when negotiating such judgement and he should equally monitor the fees claimed by such professionals.

The IP equally has to judge for himself whether any such legal service is warranted and how pertinent is it to the effective running of the insolvency process.

In a case where a relationship exists between the service provider and the IP, he should make adequate disclosure of such relationship and specify why that particular provider has been [retained.]

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

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

**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 the elements of the process. However, the question was not answered. I have awarded discretionary marks.  
3

**Commented [JL9]:** 4  
Some elements missing – scrutiny and duplication of work as well as the factors to consider.

**Commented [JL10]:** 5 out of 15

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.**

Mr. Relation's declaration of non-existence of wrongdoing and maladministration is a glaring example of lack of integrity. Concealing the true nature of the administration of the company is a lack of honesty. From the facts of the case, the directors were aware of the faulty machinery that led to the demise of the company but the IP fails to make this revelation because of promises he has made to the directors. IPs should refrain from such practices because they erode the confidence of the stakeholders and public at large in the profession of insolvency practice.

Another ethical issue arises from the affiliation that exist between the IP and one of the directors. Such a situation would seriously compromise the objectivity and independence of



the IP. For the image of the profession, an IP should not accept appointments in connection with an estate if he is in relation with any stakeholder concerned with the estate. The IP should ensure that his conduct is not only fair but be seen to be fair by any objective observer.

The subsequent appointment of Mr Relation as the liquidator is an issue of ethics that should be seriously frowned at. In this scenario one would not expect Mr. Relation to effectively review past operations in which he himself was involved as restructuring officer.]

**\* End of Assessment \***

**Commented [JL11]:** Your answer identifies 3 ethical issues correctly. However, it is very descriptive and do not provide detail or address all of the elements of the question. No link is made to the Principles or their commentary. Limited application as the theory was not sufficiently dealt with.  
5