



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: **[studentID.assessment9]**. An example would be something along the following lines: 202122-336.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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

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

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Please choose the **most correct answer** from the options below.

INSOL International's *Ethical Principles for Insolvency Professionals* –

- (a) are mandatory and apply to all its members.
- (b) creates a set of rules which all jurisdictions have to incorporate into their insolvency frameworks.**
- (c) creates a set of rules by which stakeholders and the public in most jurisdictions would be able to determine whether insolvency practitioners are acting in accordance with ethical principles.
- (d) creates a set of best practice principles to inform and educate insolvency practitioners and stakeholders by providing ethical and professional guidance on issues of importance.

Question 1.2

The “Enlightened Creditor Value” approach to insolvency proposes the following with regard to the protection of competing interests in insolvency proceedings:

- (a) Creditors' interests are of paramount importance and as such only these interests should be protected in insolvency.
- (b) The interests of stakeholders should be regarded in the same manner as those of creditors.
- (c) Creditors' interests are of paramount importance, however, the interests of other stakeholders should also be considered where this would be in the creditors' interests.**
- (d) Only the shareholders of the company and the creditors of the company should be protected by the insolvency law (and in that order).

Question 1.3

All insolvency professionals are fiduciaries.

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

Commented [JL1]: TOTAL 47 out of 50
Well done.

Commented [JL2]: 7 out of 10

Commented [JL3]: d

Question 1.4

Being truthful and being honest is the same thing.

(a) True

(b) False

Commented [JL4]: b

Question 1.5

Select the **correct** answer:

Tony has been appointed as a liquidator of Company X. Company X has several major creditors, including ABC Supplies. Tony owns 30% of the shares in ABC supplies.

This situation is an example of a/an _____ threat.

(a) self-review

(b) self-interest

Commented [JL5]: b

(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

Select the **correct** answer:

Thembi 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. Thembi 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

Select the **correct** answer:

Rajesh 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. Rajesh 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 Rajesh 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

Select the **most correct answer** from the options below.

An insolvency practitioner using a percentage-based 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 the value of the realisable or distributable assets.

(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

Select 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]: 10 out of 10

Question 2.1 [maximum 2 marks]

The ethical principle of integrity implies “fair dealing”. How would this apply in an insolvency context?

[Answer:

Integrity envisages being straight forward and honest in all professional and business relationships. It implies honesty, fair dealing, and truthfulness.

Fair dealing relates to treating people fairly or equitably. In an insolvency context, IP could not treat all the stakeholders equally as the framework is designed in such a manner that one stakeholder has an upper status as compared to others. However, fair dealing does not mean treating all stakeholders equally, but it is treating equals equally. That means secured creditors should be treated at par with other secured creditors and unsecured with other unsecured **creditors.**]

Commented [JL7]: 2

Question 2.2 [maximum 4 marks]

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

[Answer:

Independence and impartiality are the two most important principles in performing a duty. These two principles ensure an unbiased approach and protects from undue influence on professional and business judgements in the execution of duties as insolvency professional. An Insolvency Professional should maintain the highest level of objectivity, independence and impartiality while performing his duties. If any IP is not independent then there is a high chance that due to his connection either with the stakeholder or with the debtor, he may take biased decisions which in turn would take wrong the other stakeholders. There are various other threats that may come viz. like self-interest, self-review, advocacy, familiarity, and intimidation. These threats restrict CIP to take any unbiased decisions. However, the IP should exercise his discretion and power in the best interest of beneficiaries involved in the insolvency process. And to ensure this the IP should be always act in an independent and impartial manner.

The IP should not only be aware or conscious of independence, however, that independence should be visible to others. And the independence would be visible from the

decisions that the IP is making. Having said this, the IP should be free from any influences that compromise his judgement.

On the other hand, IP should avoid any act or circumstances which lead a reasonably informed third party to conclude that the IP's integrity and impartiality have been compromised. Because without independence, trust and reliance, stakeholders and beneficiaries stop believing that IP would work for their best interest. And eventually, the entire rescue proceedings would get [compromised.]

Commented [JL8]: 4

Question 2.3 [maximum 4 marks]

Contingency fee arrangements have been a controversial issue in relation to insolvency practitioners and their remuneration. Briefly reflect on this practice and the possible ethical issues in relation to this method of calculation.

[Answer:

Contingency fees also commonly known as 'Success Fees' or 'Conditional Fees'. Success fees essentially is a fee arrangement of an insolvency professional wherein remuneration is dependent when a specific outcome or condition is achieved. In most of the situations, success fee is dependent on either the successful implementation of resolution plan or when certain percentage of recovery to the stakeholders gets achieved. However, there are few controversial issues attached to the contingency fees.

There are two important issues which becomes a possible ethical issue in contingency fee arrangement.

Firstly, it is the duty of the Insolvency Professional to run the whole corporate resolution process within a definite period ensuring that stakeholders are also benefited. The duty culminates into ensuring that rescue plan is implemented or that there is maximisation of recovery for creditors. The moot question is that it is the Insolvency Professional's primary duty to run the corporate resolution process and thrive for an effective implementation of the plan. Any how the insolvency professional is getting paid for the process then why the IP should be entitled for Contingency Fees.

Secondly, the Insolvency Professional is entitled for the contingency fees only in case of that certain event becomes a success. This influences the Insolvency Professional to shift his focus from the prime objective which is to make endeavours to successfully implement the resolution plan. The shift from a holistic approach to events based on outcomes creates a negative objective. However, there would not be an ethical issue in a condition where the achievement of an Insolvency Professional is truly remarkable, and he achieves an outcome which is in the interest of the debtor and the stakeholders. However, outcome like these should always be objectively measured. It should not merely portray an achievement in the eyes of the Insolvency [Professional.]

Commented [JL9]: 4

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

Commented [JL10]: 15 out of 15

Question 3.1 [maximum 8 marks]

The ethical principle that requires insolvency practitioners to act with and maintain professional and technical competence is often linked to the duty of care. Elaborate on this duty and on the yardstick that would be used when determining whether a practitioner acted with the necessary care, skill and diligence.

[Answer:

Insolvency Professionals shall act and maintain professional and technical competency which is also linked to the duty of care. The same can be achieved by various methods which are mentioned below:

1. Sectoral and Business Expertise:

Insolvency Professionals are often regarded as experts in turnaround, restructuring and liquidation. IPs are responsible for all the stakeholders in an insolvency process. IPs are expected to have the requisite experience and technical competence to perform the duties associated with their appointments.

Before taking an assignment, an IP should ensure that they have the requisite experience and know how. An IP should have sufficient resources at his disposal for every accepted engagement. The above-mentioned factors are critical as there could be situations where a particular business/ assignment require a particular set of expertise or sectoral knowledge. In such cases if an IP are not experienced or is not technical incompetent then it would in all likelihood cause disrepute to the profession.

Notwithstanding, the insolvency professional may not be an expert in all the sectors, but he/she or the firm should be resourceful enough to appoint a specialist to assist him in the subject matter. A professionally competent Insolvency Professional will act with the necessary care and perform his duties with an adequate degree of understanding of the nature of the company's business in order to understand how the business functions. In case where the IP are not a subject matter expert, he/she should also acquire knowledge of the industry in which the company operates in order to enable him/her to act in the best interest of his stakeholders/creditors.

2. Continuing professional education:

It is pertinent to note that the laws are dynamic in nature and accommodates various changes on day-to-day basis. Insolvency Professionals should endeavour to be well informed of changes to the law or practice in their field. To deal with these issues, almost every jurisdiction provides short-term continuing professional education/ courses/ conferences for Insolvency Professionals or Practitioners to brush up on the latest developments, amendments, changes, in law or practices. Even where there may not be continuing education or qualification requirements, IPs should endeavour to maintain a high level of competency by educating themselves in their field in order to deliver the services they are engaged to perform and in accordance with any statutory duties.

3. Accepting adequate number of assignments:

Insolvency Professionals should accept only limited or adequate number of assignments where they can give utmost level of attention in the case. The IPs should self-realise or introspect the limitations of their own knowledge, skills, and experience before taking any assignment. Insolvency Professionals should not accept appointments when they are already under a heavy case load and would not be able to provide the level of attention that is required in the matter. It is possible that the objective to protect the interests of stakeholders during the insolvency proceedings can be frustrated through the incompetence and carelessness of the practitioner. There can be a situation where IPs undertake too many cases and later fails to meticulously perform his duties. This will be considered as a breach of the

duty to act with care, skill and diligence and in some cases, they can be held personally liable for any loss due to his actions or omissions.

4. Reasonable Care:

The expectation of reasonable care is emphasised by the fact that IPs are remunerated as skilled professionals and it is also closely related to the duty of care, skill, and diligence. Every company under distress situation needs an special attention of the Insolvency Profession and it is extremely important that the Insolvency Professional does not act recklessly with regard to the affairs and property of the company. Insolvency Professional should act with the same degree of care, skill and diligence that may reasonably be expected of a reasonable practitioner in the same circumstances, considering his personal attributes and qualifications. Moreover, an Insolvency Professional was always considered as an expert in insolvency practice as a result of his experience and training and hence an even higher standard is to be met with regard to the duty to care. The reasonable care will be judged on case-to-case basis. Also, as per the guidance provided by UNCITRAL- The care required from an individual in an ordinary business activity, in case of solvent company is very different from the insolvent company. An Insolvent or stressed company required a higher standard of prudence because the Insolvency professional is not dealing with its own assets but dealing with the assets belonging to another person.

Commented [JL11]: Point 4 is the only one relevant to the question.

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?

[Answer:

Fees to legal professionals can be paid as disbursements or third-party costs. The onus of deciding reasonableness of the fees or amount charged by professional is on an IP. In the matter of *Stockford Ltd (2004)* in Australia, it was held that the IP should exercise his commercial judgement when hiring legal professionals and that a prudent IP would monitor the fees claimed by these (legal) professionals. There are few ethical issues which should be considered:

1. Duplication of work

In case the amount or fees of legal professional was not raised as disbursement instead the same was billed to the company, then the issue relating to monitoring of the fees and scrutiny of the bill comes into picture. In these situations, it is the responsibility of CIP to justify the amount billed for work performed by the legal professionals. In the *Dovechem* case, the stakeholders filed a complaint stating that the liquidator charged four times than the solicitors. Initially it looked like liquidator duplicated the work but later the liquidator successfully satisfied the court that the work done by liquidator is different from the solicitors.

2. Necessity of Advisory

Turnaround, rescue mechanisms involve various legal issues and sometimes the CIP or office holder might not be trained in law or have specialised legal knowledge. Hence, CIP must rely upon the expert advice. The new Insolvency Code of Ethics by the Institute for

Chartered Accountants of England and Wales (ICAEW) has given clarity on appointment of advisors. It states that whenever IP intends to rely on the advice of work of any third party the IP should evaluate whether such advice or work is required or not. Also, IP requires to document the reason for choosing a specific service.

3. Disclosures

When any personal and professional relationship exists between the IP and the service provider, the same must be disclosed completely with all the relevant details. This will help the creditors to understand and evaluate whether the services will be in the best interest of creditors or not. There are few grounds for consideration in case creditors wanted to evaluate the services offered and amount charged:

- a. Cost of services, expertise, and experience of the service provider.
- b. Whether provider holds appropriate regulatory authorisations/ approvals.
- c. Whether the service provider is ethically competent and compliant with standards.

Commented [JL12]: 7

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

Commented [JL13]: 15 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 its 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 financial 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 difficulties 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.

You are required to 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.

[Answer:

There are multiple ethical issues involved in this factual scenario, but the three major ethical issues are mentioned below:

1. Objectivity, Independence, and Impartiality

The principle of objectivity, independence and impartiality ensures the office holder takes all unbiased decisions. In the given factual situation, appointment of Mr. Relation (*who is Mr. B Inlaw's Brother-in-law*) indicates conflict of interest. An Individual/ CIP should not accept an appointment in connection with the estate if his relationship with the directors of the company or any directors of the company or any stakeholder would give rise to a possible or perceived lack of independence. In the given factual situation, the appointment itself lacks independence and it is prima facie visible that the appointment of Mr. Relation will not be the best interest of other stakeholders and beneficiaries.

Independence is two-fold. IPs must be independent in fact and also be seen or perceived to be independent. Independence in fact requires that the IP should be free from any influences that could compromise his judgement. IPs must, therefore, avoid all personal and professional relationships and any direct or indirect interests that will adversely influence, impair, or threaten their integrity and ability to make decisions. Independence in perception, on the other hand, includes the avoidance of

circumstances that would lead a reasonably informed third party to conclude that the IP's integrity, independence, and impartiality have been compromised.

To avoid various threats to objectivity, independence and impartiality, the restriction should be imposed that related parties cannot be appointed as the officeholders. Secondly, tribunals or the regulatory authorities could appoint the officeholders after understanding all the aspects. In another case, to appoint any administrator/ CIP/ Liquidator, approval from regulation authority should be required.

2. Integrity

Mr. Relation must comply with the applicable laws and maintain the highest level of integrity by being straightforward, honest, and truthful. However, in the given factual situation, even when Mr. Relation was aware of the financial transactions which was performed at the time of distress that performance bonuses were given to the directors, he should have informed the same to the creditors. His duty as an administrator must be performed with utmost good faith and honesty. An IP should not conceal any facts and at all times maintain the transparency to ensure that a favourable outcome is achieved which is in the interest of all the stakeholders.

In the given factual situation, directors informed the Administrator, i.e., Mr. Relation that they are concerned about their personal liability for breach of duty. Also, they informed that they are worried because of the wrongful trading even when the company was in financial distress. Moreover, even after the investigation report Mr. Relation concealed the fact that he found no discrepancies and no evidence of any wrongdoing or maladministration by the company's director. This proves the administrator had showed partiality and was biased in his conduct.

To avoid these practices, jurisdictions can order investigation through unrelated third party without the intervention of director and administrator. Investigation by director's or evaluation of the report by related administrator leads to dishonesty and concealment of important facts. Hence, it is advisable to undergo transactional audit or financial investigation by a third party outside of organisational structure for unbiased and honest report.

3. Professional Behaviour and Subsequent appointment

As per the facts of the case, it is pertinent to note that the administrator failed due to lack of funding after several months and subsequently insolvency proceeding converted to liquidation and Mr. Relation was appointed as the liquidator.

In this regard it may be observed that for subsequent appointment and subsequent remuneration, influenced the decision and behaviour of the CIP. Administrator who gets engaged in subsequent appointment often holds the view that the previous does hold benefits and advantages and such benefits also carried to the subsequent appointment.

On the other hand, communication with stakeholder makes the proceeding smooth and easy along with the support of the creditors. Hence, the principle of professional behaviour states that members should inform the stakeholders with all the details and educate them on the progress of the case. In the given factual situation, when Lawyer who was representing ABC Bank identified Mr. Relation through an interview, it creates a doubt in her head. However, Mr. Relation could have filled the void by properly disclosing and informing all the relevant details of the company to its

stakeholder in a timely manner. As this maintains the trust between the administrator and creditors.

To avoid threats that could compromise the state of affairs of the distressed company, authorities should maintain a progress tracker and disclosure mechanism to treat these issues. In various jurisdictions, administrator or the office holders must submit monthly progress report which will keep authorities and regulators informed. Also, creditors have all the rights to ask officer holder with any kind of information.

With respect to the subsequent appointment, certain jurisdictions do not allow the same insolvency professional who has acted as resolution professional to also act as a Liquidator for the same corporate debtor in order to avoid complacency and also dilutes the malicious intent of the insolvency professional to earn benefits without exercising any responsibility. However, this is not the case in all the subsequent appointment. It would be prudent should some checks, and balance exercise is performed to evaluate an insolvency professional for subsequent [appointments.](#)

Commented [JL14]: 3 ethical issues were identified and discussed satisfactorily.

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End of Assessment