



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

Commented [JL1]: TOTAL 36 out of 50

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

Commented [JL2]: 9 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.

Commented [JL3]: d

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 the same thing.

(a) True

(b) False

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

(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 [JL4]: 7 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?

In an insolvency context, the ethical principle of integrity means that an insolvency practitioner should in discharging his/her duties, always act in a straightforward, honest and truthful manner.

Commented [JL5]: This question required a brief explanation of the principle of fair dealing in an insolvency context.
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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 an IP's duty to act with independence and impartiality essentially requires not only factual independence and impartiality but also perceived independence and impartiality. An IP's role requires a great deal of trust being placed in him/her by stakeholders in the insolvency proceedings over which he/she has charge. If the IP's independence is compromised or appears to have been compromised, there could likely be a breakdown in the trust and reliance that the stakeholder placed in him/her.

Commented [JL6]: 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.

The nature of a contingency fee requires the IP to agree the basis on which he will be remunerated. Typically, a target would be set which if achieved would trigger the remuneration payment obligation. The possible ethical issues with this method of calculation are:

- (1) whereas an IP is duty-bound to first act in the best interests of the creditors and then other stakeholders from the time of his/her appointment, a contingency fee provides the likelihood of a greater windfall to the IP if the target set is achieved. The possible result of this could be that there is more of an incentive for the IP to secure a

favourable result which he/she should have been striving to achieve without the contingency fee arrangement;

- (2) because of the windfall opportunity, an IP would likely focus a great deal on this aspect rather than the overall proceedings; and
- (3) the outcome may not be objectively commensurate to the time and effort dedicated by the IP to the task and as a result the benefit to the IP could be greater than the benefit of the beneficiaries.

Commented [JL7]: 3
Further point to note – Contingency Fees only to be paid in truly remarkable circumstances

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

Commented [JL8]: 10 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.

The cornerstone to an IP acting with and maintaining professional and technical competence is first a recognition by that IP of what his/her abilities and limitations are. IPs should, in order to discharge their duties under this principle, are required to keep abreast of legislative and regulatory changes in their field; continue undertaking professional education and continue working in their field to remain experienced.

In addition to an IP's individual professional competency requirements as above, the firms in which IPs are employed should also be appropriately staffed to be able to deal with cases and to the extent that a particular instruction requires additional expertise, the IPs concerned should have an awareness of this fact and be able to retain the talent that is required to enable them to properly discharge their duties.

Even where an IP has the required skill and expertise, if that IP is exceptionally busy or that IP's caseload is sufficiently heavy that to accept another appointment will either compromise his existing commitments, compromise his new instruction or both, then that IP should not accept that appointment. To accept an appointment in these circumstances will mean that the IP in question will not be able to give the instruction the required attention, technical and professional attention and expertise. In addition to possibly tarnishing the reputation of the IP and the firm for which he/she works, this may have the knock-on effect of putting the entire profession into disrepute.

Lastly, because IPs are from within the professional rank, they are expected to have a certain level of competency. If there are deficiencies in their knowledge and/or technical skills, those deficiencies should be worked out quickly to avoid detrimental consequences to those whose interests the IP has been appointed to serve. IPs often have access to and should take advantage, to the extent deemed necessary, of attending conferences and short courses which will enable them to keep abreast of developments in the insolvency world.

Commented [JL9]: 3
This question required a reflection on the duty of care and the yardstick for this duty. Your answer should have included reference to the two-fold test, experience and skill as well as the expert nature of an IP appointment.

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?

Key considerations in this respect will include whether the legal professional identified are the best fit for the job. In this regard, an IP who wishes to instruct legal professionals will need to satisfy himself that:

- (1) the cost for the service, and the expertise and experience of the legal professional in question are appropriate in the circumstances;
- (2) the legal professional holds appropriate regulatory authorisation;
- (3) the professional and ethical standards applicable to the legal professional are in keeping with the profession.

Once legal professionals are engaged the IP will also need to scrutinize bills to ensure that there has been no duplication of work – either as between legal professionals on the same team or as between the legal professionals and the liquidator; and to ensure that the service proposed will yield the best value for the creditors.

The overall consideration must be to determine whether the service provided and the fees charged by the legal professional are reasonable and appropriate in the circumstances, and are not detrimental to the creditors' interests.

Commented [JL10]: 7

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

Commented [JL11]: 10 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.

In this scenario, WeBuild Ltd's financial position started declining and the directors continued trading in the ordinary "business as usual" manner and making large performance bonuses to themselves.

Following this course of events, Mr Relation is invited to a meeting of the shareholders and directors of WeBuild Ltd, acting in his capacity as a lawyer, to advise on the company's options following the receipt by the directors of a demand letter from the company's major secured creditor.

Although Mr Relation is identified as having a close relationship with one of the board members (**first issue**), he provides advice on the company's best course of action, agrees to take up the appointment as administrator of the company (**second issue**) and has confirmed to the directors of the company that his focus will be on trying to rescue the company and not to pursue them (the directors) for any identified breach of their duties (**third issue**).

In addition, following the meeting and his appointment, Mr Relation conducts a superficial investigation into the affairs of the company which led to it being in financial difficulties and in this instance he relied primarily and possibly solely on reports prepared by Mr B Inlaw, one of the directors and shareholders of WeBuild and Mr Relation's brother-in-law (**fourth issue**).

Following his appointment, and at a meeting of creditors, Mr Relation is recognised by the lawyer representing the majority secured creditor (a bank), as the person who made statements on a television programme in which he made clear his thoughts that the interests of lower ranking creditors should sometimes outweigh “big money” – by which he was referring to financial institutions (**fifth issue**).

The administration subsequently fails and Mr Relation, the former administrator, is now appointed liquidator of the WeBuild Ltd (**sixth issue**).

First, Second Third and Fourth issues

Mr Relation has a duty to demonstrate the utmost levels of integrity by being honest, truthful and straightforward in his dealings with the insolvent estate. In his pursuance of integrity, there must be, in addition to honesty and truthfulness, the fair dealing by Mr Relation of the affairs of WeBuild Ltd.

As the primary beneficiary in WeBuild Ltd’s estate, ABC Bank will be “at the mercy” of Mr Relation when he is appointed administrator. Once appointed, ABC Bank will have no option but to trust and rely on Mr Relation to protect its interests. This reliance and trust in Mr Relation will require his honesty, truthfulness and transparency in dealing with the affairs of WeBuild.

The fact that Mr Relation could give assurances that he will focus on rescuing WeBuild instead of recovering money for the estate from directors who breached their duties to the company and its creditors after attending a meeting of the shareholders and directors of the company, and being made aware of the demand against the directors by ABC Bank and being told of the directors’ concerns that they could be personally liable as a result of their breaches of duties, are all clear indications that Mr Relation lacks objectivity, independence, impartiality, professionalism and integrity.

In addition to the issues of objectivity, independence and impartiality being called into question in the issues above, the second issue also highlights a flouting by Mr Relation of the principles of integrity and his disqualification as a candidate for appointment as administrator given the extent of his involvement with the company and its stakeholders at the pre-commencement stage.

Although not all contact between a IP and the target company and/or its stakeholders would disqualify the IP from taking up an appointment at the commencement of an insolvency procedure, an IP should be mindful of what contact is considered inappropriate and/or unacceptable. Where any pre-appointment consultation involves significant engagement of the stakeholder parties, then the IP should not take an appointment in the insolvency proceedings. In this case, Mr Relation gave legal advice to the directors and shareholders on their options in the insolvency space as well as to inform them at a subsequent pre-commencement meeting that his focus would not be on the breaches of the directors but rather on the recovery of the company. Here the pre-appointment consultation as well as his lack of integrity in the process are two ethical issues which arise in respect of the second issue.

Further, Mr Relation has not carried out his duties independently. While IP may rely on the advice of other professionals (i.e. lawyers) in conducting their duties, they are required to conduct independent investigations into the affairs of the company. The fact that Mr Relation was willing to rely primarily on the report of his brother-in-law, Mr B Inlaw, is a failure to discharge his duty of independence and objectivity. In fact, Mr B Inlaw and Mr Relation’s relationship also infringes on his duty of impartiality. As an IP, Mr Relation must not only be independent but must appear to be independent. The fact that Mr Relation is the brother-in-

law of one of the directors and shareholders of the company puts him in a position of conflict with the company's creditors. His duty is not to act in the interest of the company but rather in the interest of the company's creditors and given his previous comments, his relationship with Mr B Inlaw – he falls foul of his duties of independence, integrity and impartiality.

Fifth issue

The comments that were made by Mr Relation on the television programme fall foul of the high moral and ethical standards that an IP is required to have as well as the professional behaviour which an IP is required to display, in matters of his field.

In relation to the high moral and ethical standards, Mr Relations views are likely not to be the shared views of persons in his profession as secured creditors always take priority over unsecured creditors. To make a statement which suggests that a secured creditor should in any circumstance be prejudiced because of its financial standing or otherwise, is to present a view which is contra the view of the profession and is a rejection of the high moral and ethical standards that an IP is required to display.

The public mention of such a contrary position as an IP who is expected to act in the best interest of creditors (the secured being in the primary spot) in a liquidation, also falls foul of the threshold of professional behaviour.

Sixth issue

In accepting this subsequent appointment, there is a self-interest threat here which primarily focuses on the remuneration of Mr Relation. In this scenario, having already been paid for acting as administrator, Mr Relation is once again being paid for his appointment as liquidator. Mr Relation will not be able to argue that he is impartial and is able to act independently in circumstances where he made clear in the pre-administration meeting with the board and members of WeBuild, that the breaches of directors' duties was not his concern.

*** End of Assessment ***

Commented [JL12]: You have identified the facts that would give rise to the ethical issues but do not always link the facts to the ethical mischief. For example a close relationship gives rise to a familiarity threat as part of the ethical norm to remain independent and impartial. The same with the 5th issue you identify – this is an example of an advocacy threat. Overall it is a solid answer but lacking in some detail and structure.

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