



**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**.

**Commented [DB1]:** You did not do this – I had to do it for you?

**ANSWER ALL THE QUESTIONS**

Commented [JL2]: TOTAL 33 out of 50

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

Commented [JL3]: 10 out of 10

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

**Question 1.1**

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

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

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

**Question 1.2**

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

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

**Question 1.3**

All insolvency professionals are fiduciaries.

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

**Question 1.4**

Being truthful and being honest is 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]: 4 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?

[Type your answer here]

In an insolvency context it is not possible for an insolvency practitioner to treat all stakeholders equally as usually insolvency systems are set up in favour of certain stakeholders (especially creditors). However, it is possible to ensure equitable treatment for all stakeholders of the same or a similar kind.

Commented [JL5]: 2

#### Question 2.2 [maximum 4 marks]

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

[Type your answer here]

The duty of a Corporate Insolvency Practitioner ("CIP") to act with independence and impartially encapsulates the same values as the 'non-profit' and 'no-conflict' rules in Corporate Law and underpins the CIPs undivided loyalty to the beneficiaries.

The no-profit rule determines that a fiduciary may not profit from their position (i.e. their position as a CIP) and thereby be unjustly enriched. An example would be receiving secret commissions.

The no-conflict rule determines that a fiduciary may not allow a conflict to arise between his / her duty and the interests of the beneficiaries. For example, if a CIP were to complete a transaction with a debtor company in his/her personal capacity.

Commented [JL6]: This question required a discussion of independence in fact and perception/appearance.  
0

#### 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.

[Type your answer here]

A contingency fee arrangement is a fee arrangement that determines that the Insolvency Practitioner ("IP") is entitled to receive remuneration based on a specific outcome or condition being met. The outcome or condition usually pertains to a favourable outcome for stakeholders, for example the successful implementation of a rescue plan.

One of the major controversies of contingency fee arrangements is that the specific outcome or condition on which a fee may be payable are arguable conditions or outcomes that Ips, as fiduciaries, should aspire to anyway.

Another issue is potentially diverting an IPs focus to one task that will benefit his/her fee arrangement, instead of allowing the IPs approach to be holistic.

Commented [JL7]: 2  
When could it be allowed?

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

Commented [JL8]: 12 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.

[Type your answer here]

The ethical principle that requires insolvency practitioners to act and maintain professional and technical competence can be achieved by:

- (i) keeping current with legislative / regulatory changes;
- (ii) undertaking continuing professional education; and
- (iii) undertaking sufficient case work to remain experienced.

Ips and their firms should be sufficiently and appropriately experienced and resourced to deal with the engagements and cases that they accept or call upon specialists or further resources as required.

A 'yardstick' is a reference to a standard used for comparison. An article by L Jacobs and J Neethling titled "*The careful business rescue practitioner: a search for the proper yardstick*" (2016) looks at the yardstick that should be used in a corporate rescue scenario in South Africa.

The article discusses the, at the time 'new', Business Rescue Scheme ("the scheme") and the extensive powers and rights afforded to the IP under the scheme. The relevant legislation in South Africa states that the IP has the responsibilities, duties and liabilities of a director of the company for the duration of the rescue proceedings / scheme.

The essence of the article is that at common law it is generally acceptable that a director of a company needs know specific qualifications to be appointed. The degree of care skill and diligence of an ordinary director is based on a 'reasonable person test'. However, an IP appointed under the scheme is appointed because of his/her knowledge and experience in the field of business turnaround and therefore should be held to a higher standard and the 'reasonable person test' should not be used.

The article suggests the application of a 'reasonable expert test' and more specifically discusses the potential criteria of a new 'reasonable practitioner yardstick'.

Commented [JL9]: 5  
Some elements missing – the two-fold test and International guidance?

#### 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?

[Type your answer here]

In practice, the services of a legal professional can be paid as either: (i) part of the IPs disbursements; or (ii) can be billed separately directly to the debtor company. This was carefully considered in the Singaporean case of *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn*.

When the legal costs are claimed as the IPs disbursements, the onus is on the IP to consider whether the bill is reasonable and appropriate. The Australian case of *Korda, in the matter of Stockford Ltd*, where it was stated that the IP should exercise his commercial judgement when hiring legal professionals and that a prudent IP would monitor the fees claimed by these professionals.

When the costs of legal professionals are billed to the company, the issues relating to monitoring of the fees and scrutiny of the bill prevail. As illustrated in *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn*, the burden rests on the IP to justify the claims for work performed.

With regard to the ethical principle of integrity, the IP should be straightforward and honest with stakeholders. By explaining and justifying the third part fees to the relevant stakeholders, the IP demonstrates this ethical principle.

The new Insolvency Code of Ethics but the Institute for Chartered Accountants of England and Wales ("the code of ethics") provides clear guidance on engaging legal professionals. The code of ethics provides that if an IP intends to rely on work completed by a third party, the IP should evaluate whether such advice or work is warranted. The code of ethics also requires an IP to document the reasons for choosing a specific service provider. Where there is an existing professional or personal relationship between the IP and service provider, the code of ethics requires the IP to disclose the relationship and the process which has been undertaken to evaluate whether the service will be honest and the best value for relevant stakeholders (primarily creditors).

The IP should act with objectivity, independence and impartiality. When seeking professional or third party advice, the IP should avoid conflicts of interest or disclose any conflicts of interest to the relevant stakeholders and seek the relevant approval to enter the relationship (if applicable).

Commented [JL10]: 7

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

Commented [JL11]: 7 out of 15

WeBuild Ltd is a private company registered in Eurafriolia. The company specialises in construction and property development and is well known in the area where it conducts 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.**

[Type your answer here]

Appointing Mr Relation as the administrator of WeBuild Ltd ("WeBuild") is an objectivity, independence and impartiality ethical issue. One of the key fiduciary duties of IPs is the duty to exercise the powers of the office in an independent and impartial manner (including the duty to avoid conflicts of interest. The fact that Mr Relation is the brother in law of a director of WeBuild is a conflict of interest. Mr Relation should not accept the appointment as he has a personal relationship with a director of WeBuild. The relationship creates a self-interest threat that the close relationship between Mr Relation and Mr B Inlaw may influence the judgement or behaviour of Mr Relation as the administrator of WeBuild.

In some instances, lack of independence can be cured by disclosure or by appointment of an independent joint practitioner. Given the relationship in this circumstance, it is unlikely that disclosure or the appointment of a joint practitioner would mitigate the ethical issue.

By Mr Relation assuring the directors of WeBuild not to worry about their concern for personal liability as they continued to trade WeBuild whilst insolvent, because the focus of the investigations will not be on the directors but trying to rescue the company is an integrity ethical issue. Rules in the insolvency system are provided to prevent the abuse of the insolvency system. By not properly focusing on the potential insolvent trading of the directors, Mr Relation is not acting with integrity by not being honest in his investigations. An advocacy threat is prevalent as by focusing on the restructuring, Mr Relation is promoting a position which is compromising his objectivity. Mr Relation will have an obligation to honestly report his findings in the administration to the relevant stakeholders. The stakeholders are therefore able to hold Mr Relation accountable to properly conduct the administration, and if he does not, the stakeholders have various options to appoint a new or difference administrator.

By Mr Relation only conducting a superficial investigation into the affairs of WeBuild is a professional and technical competence ethical issue. The fact that Mr Relation has only conducted a superficial investigations may mean that he does not have sufficient resources to give the level of attention to the administration that is required. In order to remedy this ethical issue, Mr Relation can choose to not take the appointment.

**\* End of Assessment \***

**Commented [JL12]:** Not a bad answer although a little light touch.  
I would have loved to see some more detail and perhaps another issue as you raise the same one twice.

7