



**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 43 out of 50  
Well done!

Commented [JL2]: 9 out of 10

**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.

Commented [JL3]: d

#### 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]: 9 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?

Fair dealing in the insolvency context involves treating stakeholders of like stakeholders alike and ensuring the equal and fair treatment of all.

Commented [JL5]: 2

**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 is that to effectively exercise his/her discretion and powers in the best interests of all stakeholders, the IP has to be both independent and impartial. The IP must not allow him/herself to be influenced by external pressures such as those caused by undue influence to arrive at a decision affecting his/her duties.

It is therefore important that the IP is not only independent and impartial in fact but must also be seen to be independent and impartial. This implies that it is not just about knowing that the IP is not related in any way, whether directly or indirectly, to the stakeholders involved in the proceedings, but he/she must demonstrate impartiality in making decisions that affect the general interests of the creditors and stakeholders. The IP must not act in a way that would cause the stakeholders or creditors to think or suspect that he/she leans towards a particular party.

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.

To begin with, these kinds of fee arrangement are dependent on the occurrence of events, for example, the implementation of a rescue plan. One of the issues surrounding this kind of arrangement is that the conditions and outcomes (the contingencies) on which the fee is computed should be contingencies that the IP should undertake anyway by virtue of his/her office and fiduciary duty to the stakeholders and creditors.

The second criticism is that this kind of arrangement causes the IP to focus all his/her energies on the contingency that benefits his/her fee arrangement instead of presenting a

wholistic approach to the various events that could achieve a more favourable outcome for the creditors. However, this does not become an ethical issue if the IP is able to achieve a truly remarkable and unlikely outcome thanks to the contingency's occurrence.

Commented [JL7]: Should it be objectively measurable if allowed?  
3

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

Commented [JL8]: 14 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.

This is the principle of professional and technical competence and it requires that an IP should only accept assignments that he or she can or has acquired sufficient expertise. It is important that as IPs, we are aware of our limitations in skill and knowledge and take reasonable care in ensuring that we acquaint ourselves with the necessary knowledge and information key to the relevant industry. It would therefore be professionally negligent of an IP to mishandle an assignment by failing to take the necessary precautions such as self-educating to ensure that the methods and practices being applied to the assignment as those from a well-informed and updated view and considered appropriate to achieve the best result.

In assessing whether an IP has acted with the necessary care, skill and diligence, the case of *Re Charley Davies Ltd* 1990 BCC 605 at 618 advises that a claimant alleging breach of this duty must show that the IP has committed an error which a reasonably skilled and competent IP would not have committed in the circumstances. The IP is not to be judged by the standard of a highly meticulous and conscientious IP but at the standard of what would be considered as reasonable care and diligence expected of an ordinary IP.

Commented [JL9]: 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?

Fees fall under the category of things that the IP owes a fiduciary duty to account for. As such, disbursements or fees paid to legal professionals must be disclosed and properly explained to minimise the likelihood of a court seeking better particulars to the bills drawn as it was in the case of *Mirror Group Newspapers plc vs Maxwell* where the court asked the IPs to provide a proper explanation of the fees that were paid to a firm of public relations consultants.

In assessing these fees, an IP should be able to analyse the disbursements and confirm whether they were reasonable and necessary. In *Re Korda*, In the matter of *Stockford Limited* (2004) 140 FCR 424, Finkelstein J stated that a practitioner should act with the same diligence and care as a prudent businessman/businesswoman would in his/her affairs when dealing with disbursements. The court then went on to give examples of how reasonable such a businessman or businesswoman would rationalise disbursements to give scope to the character of reasonableness required in such a scenario.

In the case of *Kao Chai-Chau Linda vs. Fong Wai Lyn Carolyn* [2015] SGHC 260, the court identified two additional issues relating to disbursements namely:

- a) Allegations of over-servicing in which unnecessary work was performed and
- b) Allegations that work was duplicative particularly where other professionals were engaged for the same work.

In both issues, and generally speaking, the IP must ably defend the disbursements and to do this, he/she must ensure that he/she acts diligently to ensure that there is not leakage of money or particular activities are not undertaken within the insolvency proceeding that could otherwise be replaced by a cheaper and more effective alternative or avoided entirely especially where there is no additional value.

**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 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,

Commented [JL10]: Any independence issues?  
Good overall answer  
6

Commented [JL11]: 11 out of 15



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.**

From the facts, the following issues are identified:

- a) Mr. Relation is closely linked and related to Mr. B Inlaw which affected his judgment throughout the administration.
- b) Mr. Relation withheld vital information from the creditors regarding the illegal conduct of the directors in trading while insolvent. Further, he was not truthful and honest when he resolved that from his investigation, he had found no evidence of wrong doing or maladministration by the company’s directors.
- c) Mr. Relation failed to act with skill in conducting a superficial investigation, instead of a detailed diagnostic study and assessment of the company and relied on information prepared by B Inlaw with whom he has a declared relationship and who also participated in running the company into the ground.
- d) Mr Relation failed to act with care and diligence in advising

#### **A) Independence and Impartiality:**

IPs are called upon to exhibit the highest levels of objectivity, independence and impartiality in the exercise of their powers and duties. This they do by avoiding instances of conflict of interest. Independence is considered as both of matter of fact and perception of an informed observer. An IP is called upon not to accept appointment in connection with the estate if he or she or a related party, has a relationship with the directors of the company or any of the stakeholders and where such a relationship is likely to give rise to a possible or perceived lack of independence. The threats to objectivity must be identified and dealt with. These threats include self-interest, self-review, advocacy, familiarity and intimidation.

Mr. Relation may have disclosed the relationship with B Inlaw and assured the shareholders that his relationship will not affect his professional judgment, but he failed to show it. The duty of independence and impartiality is two-pronged in that on the one hand, the Member is required to disclose the relations that he or she may have with the company, its

shareholders, or its directors. The second arm which is the most important is that the Member must act impartial. It is therefore not enough to declare that the relationship will not affect the judgement of Member but the Member must also show that his/her judgement will not be affected. This was not the case here because Mr. Relation withheld vital information relating to the conduct of the directors and how they mismanaged the company and traded while insolvent that would have informed the creditors' views on the how to go about the administration and the directors.

#### **B) Integrity:**

The duty to act with integrity requires that Members demonstrate the highest levels of integrity by being straightforward, honest and truthful and by adhering to high moral and ethical principles in all aspects of the Member's professional practice. These are facets of the larger duty to act in good faith. As such, Ips must refrain from misleading creditors, shareholders and others through acts of omission or action. By acting honestly and frankly, an IP is able to neutralise any feelings of bias and an honest transparent approach to the procedure instils confidence among the beneficiaries and the public and facilitates better corporation.

Mr. Relation failed to act with integrity when he lied about the findings of his review. The directors, to the exclusion of the shareholders, who are key stakeholders in the insolvency process, told him that they were responsible for the company's financial woes and hoped that they would not be discovered. Mr. Relation assured them that he is mainly interested in enabling the company to recover and not in pursuing them and indeed, when the time came to explain what his discoveries were regarding the company's failures, he neglected to mention that the directors were involved. This neglect was with a view to conceal the truth and therefore was dishonest on his part.

#### **c) Self-review and self-interest as a possibility resulting from the sequential appointment of Mr. Relation as liquidator:**

A self-review threat relates to a situation where the IP, due to being involved in prior decision making, will not be able to appropriately evaluate the results of previous judgments made or services rendered. Self-interest considers the issue of remuneration of the IP as, in such a case, the IP will be remunerated for work done twice in relation to the same company, the administration and the liquidation.

**Commented [JL12]:** A good answer both in structure and content.  
I would have liked to see more links to the ethical norms and terminology and more on possible safeguards.  
But good overall  
11

**\* End of Assessment \***