



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 assessmentsubmission 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 33 out of 50

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

Commented [JL2]: 8 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

Commented [JL3]: b

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.

Commented [JL4]: b

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 [JL5]: 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?

[Type your answer here]

Answer:

Fair dealing refers to treating individuals equally or fairly. An IP will not be able to serve all stakeholders equally in an insolvency situation since systems are typically set up to favour particular interests (especially creditors). Nevertheless, by keeping this in mind, it is feasible to assure the fair treatment of all parties and to treat like stakeholders similarly.

Commented [JL6]: 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]

Answer:

Independence should be considered both as a matter of fact and from the perspective of an informed observer. The principle of independence should be considered in all matters relating to the role of a Member of the Royal Society for the Protection of Scotland's estates. A Member should not accept an appointment if his relationship with the directors of the company or any of the stakeholders would give rise to a possible or perceived lack of independence.

Threats to objectivity, independence and impartiality may include any of the following, singly or in combination:

- Self-interest,
- Self-review;
- Advocacy;
- Familiarity; and
- Intimidation.

The key tenet underlying the principle of independence should be ensuring that a Member's conduct is not unfairly or improperly biased towards any party, including Members themselves or their associates. A Member should not accept an appointment if his (or a related party's) relationship with the directors of the company or any of the stakeholders would give rise to a possible or perceived lack of independence.

Where a Member appointed over the estate of a commercial retailer is purchasing goods or services from that retailer, it should generally be permissible for such Member to purchase such items from the retailer in the ordinary course of business. Members should not take advantage of staff discounts or special payment terms, as doing so may impair, or be perceived to impair, independence.

Bribery or payment or receipt of secret commissions in order to receive work or provide work to others should be unacceptable. Acquisitions by close connections, for example family, connected related parties, will generally give rise to the same concerns as acquisitions by Members themselves. Jurisdictions may wish to permit a Member (or relative or connection) to purchase assets where stakeholders have given explicit permission in advance.

IPs shouldn't accept positions where the presence of a link with a stakeholder would cast doubt on their independence and impartiality. A joint appointment may not always be a suitable protection if such a connection prevents an IP from accepting an insolvency appointment. IPs must be autonomous both in reality and in how they are seen or perceived.

IPs must be independent in fact and also seen or perceived to be independent. Independence in fact requires that the IP be factually free from any influences that could compromise his judgement. IPs must, therefore, avoid all personal and professional relationships and direct or indirect interests that will adversely influence, impair or threaten their integrity and ability to make decisions.

Without confidence and reliability, stakeholders and beneficiaries will no longer think that the IP is required to act in their best interests, which may result in a cessation of their cooperation with the IP and the bankruptcy process. A whole rescue effort might be unsuccessful if it is thought to lack independence. Jurisdictions often designate specific interpersonal or occupational ties or circumstances that might result in a loss of independence in the pursuit of protecting intellectual property. Any relationship, whether personal or professional, a shareholder, an employee, a business partner, or even a family of a corporate executive may fall under this category.

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This is a bit much for a 4 mark question.

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]

Answer:

In the field of insolvency, contingent fee agreements have long been a source of controversy.

These agreements are sometimes referred to as "success fees" or "conditional fees" in some jurisdictions. As the name implies, these are fee agreements that specify that the IP would be eligible to earn compensation based on the achievement of a particular goal or

condition. The result or need typically relates to a favourable outcome for stakeholders, such as the effective execution of a rescue plan. Contingency fee agreements are controversial in part because it is debatable whether or not IPs should strive for the circumstances and results on which the fee is due since they fall under the purview of their duties as fiduciaries.

Another problem is when an IP is prevented from taking a comprehensive strategy and instead is forced to concentrate on a single activity that will benefit his fee arrangement. If a contingency fee was paid for achieving a really spectacular outcome, and these outcomes should always be objectively measured, there would not be an ethical problem. It shouldn't just be viewed as a success by the IP.

As the name implies, these are fee agreements that specify that the IP would be eligible to earn compensation based on the achievement of a particular goal or condition. A favourable outcome for stakeholders is typically the focus of the outcome or condition. Contingency fee agreements are controversial in part because it is debatable whether or not IPs should strive for the circumstances and results on which the fee is due since they fall under the purview of their duties as fiduciaries.

Another problem is when an IP's attention is diverted from a holistic approach to a single job that will enhance his fee arrangement. If a contingency fee was paid for achieving a really spectacular outcome, and these outcomes should always be objectively measured, there would not be an ethical problem.

Commented [JL8]: 4

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

Commented [JL9]: 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.

[Type your answer here]

Answer:

Experts in turnaround, restructuring, and liquidation are frequently seen as being IPs. As a result, the general public, and particularly stakeholders in an insolvency, expect IPs to possess the necessary expertise and experience to carry out the tasks connected with their appointments. The fact that IPs are paid like qualified professionals emphasizes this assumption even further.

This ethical rule calls for an exceptionally high level of self-awareness and reflection on the part of the IP. Professionals should be aware of their own knowledge, ability, and experience limitations (and diaries). As a result, it is crucial that the IP, in his capacity as a fiduciary, make sure that he educates himself when a defect is found in order to be able to act in the beneficiaries' best interests. An IP should only undertake insolvency assignments when they possess or are able to get the necessary skills, in accordance with the concept of professional and technical competence and the responsibility of care imposed on the IP. Additionally, IPs ought to decline appointments if they already have a large caseload and would be unable to give the appointment the degree of attention it requires.

The Law is dynamic and frequently modified to account for adjustments in practise, politics, culture, and the environment is also cliché. IPs should make an effort to stay current on

Commented [JL10]: It would be much better for you to say things in your own words than using synonyms which are awkward in the sentence.

changes to the law or industry practise. Many countries provide short courses and conferences for IPs to brush up on the most recent advances and offer chances for ongoing professional development.

The obligations of care, skill, and diligence are all strongly tied to this ethical ideal. It is crucial that the CIP does not act carelessly with regard to the business affairs and property of the firm while the company is experiencing financial difficulties. It is conceivable for the practitioner's ineptitude and negligence to frustrate the goals of the bankruptcy procedures. These statements make it clear that a practitioner may violate the obligation to act with care, skill, and diligence by accepting too many case appointments or by performing his duties carelessly. He or she may also be held personally responsible for any losses caused by his or her actions or omissions.

As for example in the case of *Re Charley Davies Ltd 1990 BCC 605* where it was held that a professional insolvency practitioner must be an administrator. It is therefore a complaint of professional negligence because he failed to exercise reasonable care while selling the company's assets, and in my opinion, the established guidelines that apply to cases of professional negligence apply equally in this situation. As a result, the administrator should be evaluated using criteria that are more in line with those of an average, skilled practitioner rather than those of the most careful and diligent member of his field. The claimant must prove that the administrator committed a mistake that a reasonably experienced and cautious insolvency practitioner would not have made in order to prevail. They are not to be evaluated by the criteria of the *"most exacting and diligent member of the profession."*

However, because to his training and experience, a CIP can be considered an expert in insolvency practices, and as a consequence, the subjective test has an even higher threshold that must be reached. A CIP should, to some extent, be able to pass the standard of a reasonable expert since they are experts. The subjective components of the test are significant and should be used on a case-by-case basis to decide if there was any duty violation because CIPs would have varied levels of expertise and training.

This approach seems to be in line with the recommendations made by UNCITRAL Guide. As per which one strategy would be to demand that the insolvency representative adhere to a standard that is no stricter than what would be anticipated to be applied to the debtor when conducting its regular business operations in a condition of solvency. Because the insolvency representative is dealing with another person's assets rather than its own, several States may, in this circumstance, demand a greater degree of caution.

A professionally qualified CIP will exercise the appropriate caution, should get a sufficient awareness of the nature of the company's operation in order to comprehend how the firm operates and precisely what is expected of him or her. The CIP should educate themselves on the company's sector of the market.

Commented [JL11]: 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?

[Type your answer here]

Answer:

Paying lawyers is one of the most difficult administrative expenses. This is because having numerous professional sets (such as IPs and legal experts) entails paying various professional fees and disbursements.

Legal professionals' (attorneys and counsel's) services may be reimbursed through disbursements or third-party charges. Chong J.125 thoroughly showed this in the Singaporean Kao case. The court outlined two options for claiming legal expenses:

- i. as part of the IP's disbursements or
- ii. by billing the debtor firm directly and independently.

According to Ferris J, where the solicitors were engaged to provide legal services in connection with the CIP's appointment, there is a contract between the parties and CIPs will be personally obligated to pay solicitors for work completed in accordance with that contract. This was the case in *Mirror Group Newspapers plc v Maxwell (No 2) [1998] BCLC 638, 660 [England]*.

The burden of determining whether the bill is reasonable and suitable given the circumstances is on the IP, the person accountable for the payment, when the costs are claimed as disbursements. This justification is similar to that made in Australia by Finkelstein Jin Korda, who suggested that an IP should use his business judgement when employing legal counsel and that an intelligent IP would keep an eye on the costs these individuals demand.

When the fees for legal counsel are charged directly to the business rather than claimed as disbursements, problems with fee tracking and bill scrutiny arise. The duplication of labour done by the legal professional is a new problem in respect to this sort of administrative expenditures. When other experts have been trained on the same subject, the onus is on the CIP to support claims for work completed. The majority owners of the corporation in the Dovechem case complained to the court that the liquidators had charged four times as much as the attorneys hired to file a lawsuit on the company's behalf. At first look, it could seem as though the case's liquidators had copied the work of the legal experts, but they were able to demonstrate that their work was significantly distinct from that of the lawyers.

The CIP designated to undertake a rescue or turnaround of a debtor may not be trained in law or have specialised legal expertise in some countries, such as South Africa and England and Wales, and as a result, may occasionally need to depend on professional assistance at a certain expense. It seems sense to include instructions on include legal experts in standards of conduct because of this.

The Institute for Chartered Accountants of England and Wales's Insolvency Code of Ethics tackles this subject with exceptional clarity and sound guidance. When a third party's work or advice is intended to be relied upon, the IP should determine if such work or advice is warranted. The Code also mandates that an IP offer justifications for selecting a certain service provider. The Code advises full disclosure of the pertinent relationship where there is a business or personal connection between the IP and the service provider.

The following factors would be taken into account by the IP in determining if the service provider will give the greatest value and service:

- i. the price of the service, the provider's knowledge and experience;
- ii. if the supplier has the necessary regulatory authorization;
- iii. The moral and professional standards that the service provider is expected to uphold.

The Code's standards and recommendations might be successfully applied when using legal experts. When an IP needs the counsel and assistance of a legal expert, he or she should be able to demonstrate that it is truly required and should be able to articulate why he or she selected a particular legal expert. When he has a connection that can give the impression that he is not impartial toward the legal expert, he should tell the stakeholders about it. He ought to be able to describe in detail the steps he took to ensure that the service provider will give the beneficiaries with the greatest value.

Commented [JL12]: 7

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, 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](#)]

Commented [JL13]: 0

No attempt made to answer the question.

*** End of Assessment ***