



**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**

**Question 1.4**

Commented [JL1]: TOTAL 44 out of 50  
Well done!

Commented [JL2]: 9 out of 10

Commented [JL3]: d

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]: 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?

[Insolvency matters involve various interests including the debtor, shareholders of the debtor, various categories of creditors such as unsecured, secured and preferential creditors. The manner in which the various parties are treated is often determined by law, such as the treatment of general unsecured and preferential creditors. The Insolvency practitioner is not expected to treat them in a similar or fair manner but to act in a fair and equitable manner towards the parties. Fair dealing is an element of the principle of integrity. The principle requires insolvency practitioners to demonstrate the highest levels of integrity by being honest, truthful and straightforward.]

Commented [JL5]: 2

**Question 2.2 [maximum 4 marks]**

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

[Then duty to act independently is subject to a factual assessment of independence as well as an assessment of perceptions that may lead a third party to question the independence of the Insolvency Practitioner. The former relates to relationships and interests of the Insolvency Practitioner that may impair his or her objectivity. This includes family, professional and social relationships as well as any other relationships that a person appointed to act as insolvency practitioner may have with the debtor company of key persons in the debtor company such as the directors or shareholders.

The perception test ensures that there are no factors that undermine the trust and confidence in the practitioner. For example, an insolvency practitioner who may have expressed views about the debtor or some categories of creditors, may not be considered impartial.]

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**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.

[Contingency or success fees are a method of remuneration of the insolvency practitioner based on certain outcomes. Ethics principles such as INSOL’s Ethical Principles for Insolvency Professionals recognise that insolvency practitioners need to be remunerated for the services

they provide. However, Ethics principles do not prescribe the method of remuneration. Therefore, success or contingency fee arrangements are one of the various ways an insolvency practitioner may be remunerated. This method of payment ensures desired outcomes are achieved but it is controversial because it may incentivise the insolvency practitioner to focus on only outcomes related to the success/contingency fee rather than a holistic approach to resolving insolvency.

Insolvency frameworks have over the years broadened the approach to resolving insolvency beyond the narrow focus on creditor collection. Contingency or success fees may undermine this approach particularly where the outcomes are creditor driven/ determined. A success fee is also likely to create a self-interest threat as a result of the insolvency practitioner being incentivised by the upside of certain **outcomes**.

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

#### 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.

[Insolvency Practitioners are appointed on the basis of their technical expertise and competence. In addition, insolvency matters involve exercise of wide-ranging powers and discretion. In order to safeguard the interests of the various parties (creditors, debtors and other stakeholders), insolvency practitioners are subject to ethical principles that are largely similar to principles governing other professionals such as lawyers and accountants. These include the integrity; objectivity, independence and impartiality; professional/technical competence; professional behaviour; remuneration; and practice management.

Insolvency practitioners should ensure that they have the technical expertise and experience to effectively execute their responsibilities when appointed. This involves keeping up to date with legal and regulatory developments and continuous professional development.

The principle of professional and technical competence is linked to the duty of care skill. Therefore, persons appointed should act competently and diligently. They are not expected to act recklessly or in a manner that puts their competence into question. A two-pronged test is used to in relation to this principle. The first is that an insolvency practitioner is expected to act in a manner as is reasonably expected of an insolvency practitioner in similar circumstances. However, insolvency practitioners considered experts are subject to a higher duty of care and skill taking into account their expertise and **skill**.

#### 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?

[Insolvency Practitioners may need the services of other professionals. This leads to costs that are over and above the fees of the insolvency practitioner. These types of costs are generally considered as disbursements. The INSOL Principles define disbursements as sums

**Commented [JL7]:** 3

A complete answer would have referenced the fact that positive outcomes should be aspired to by CIPs regardless of whether they are incentivized or not.

**Commented [JL8]:** 11 out of 15

**Commented [JL9]:** 6

Reference to the UNCITRAL Legislative guide and case law would have ensured full marks for this question.

paid by a member of firm to third parties or a recharge or allocation of costs incurred by members or their firms which is charged to the estate.

Disbursements have cost implications as all expenses related to insolvency have an impact on the value of the estate. Various ethical principles provide guidance on disbursements and the responsibility of the insolvency practitioner. The following is expected of an insolvency practitioner:]

- a) To exercise prudence and business judgement in determining what services are required;
- b) To minimise costs;
- c) To keep records; and
- d) To account for disbursements made.]

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

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.

**Commented [JL10]:** A complete answer would have referenced duplication of work and the need for scrutiny and fee monitoring.  
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**Commented [JL11]:** 15 out of 15



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.**

[The facts above reveal the following ethical issues:

Firstly, a threat to the principle of objectivity, independence and impartiality resulting from the factual and perceived lack of independence of the appointed insolvency practitioner, Mr. Relation who is an in-law and godfather to one of the directors of the Company (Mr. B Inlaw). Principle 2 of INSOL's Principles for Insolvency Professionals requires insolvency practitioners to exhibit the highest levels of objectivity, independence and impartiality. The relationship between the insolvency practitioner and one of the directors is likely to lead to a conflict of interest as well as to impair his objectivity and independence. This is especially in relation to investigation of the conduct of and potential liability of directors.

The issue of relationships and potential impairment of the objectivity of the insolvency practitioner was decided in the case of **Commonwealth Bank of Australia v Irving [1996] 65 FCR 291** where the insolvency practitioner who was appointed had a long standing professional and social relationship with one of the former directors. When two of the company's creditors challenged the appointment, the court noted that the fact that the insolvency practitioner and one of the former directors had a longstanding friendly and professional relationship would create doubt with a fair-minded person that he would be able to perform his duties in an independent manner.

The Insolvency Practitioners appointment was proposed by the director with whom he had a relationship and although it was suggested that he disclose the relationship, this would not serve as a cure to the perceived lack of independence. The principle requires insolvency practitioners not to accept an appointment in situations where his or her relationship with the directors of the company or any of the stakeholders would give rise to a possible or perceived lack of independence.

The manner in which MR. Relation carried out the assignment, ie conducting a superficial investigation into the affairs of the company and relying on reports produced by one of the directors (Mr. B. Inlaw) amounts to a breach of the ethical principle of professional/ technical

competence. Insolvency practitioners are expected to be sufficiently and appropriately experienced to undertake engagements. Relying on the reports of one of the directors was an indicator of either inability to undertake the assignment or that he did not have time to undertake the assignment. Failure to give or provide the level of attention and technical expertise required may negatively impact outcomes and bring the practitioner and profession into disrepute.

Mr. Relation's conduct also amounts to a breach of the principle of Integrity. The principle encompasses fair dealing, honesty and truthfulness. When he reported that he had found no evidence of wrongdoing or mal administration by the directors, he was either deliberately concealing the wrongful actions of the directors including Mr. Binlaw, with whom he had a close relationship or he had provided an inaccurate report because of failure to properly investigate the affairs of the company. Reliance on reports of one of the directors' points to a deliberate effort to mislead stakeholders on the position of the company, an indicator of dishonesty and untruthfulness. Insolvency practitioners are required to adhere to high moral and ethical values. As a lawyer, he is bound by the ethical standards of the profession as well as the ethical principles applicable to insolvency [practitioners.]

**Commented [JL12]:** An excellent answer with good application.  
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**\* End of Assessment \***