



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 9

ETHICS AND PROFESSIONAL PRACTICE

This is the **summative (formal) assessment** for **Module 9** of this course and is compulsory for all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 9. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment9]**. An example would be something along the following lines: 202122-336.assessment9. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentnumber" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

Commented [JL1]: TOTAL 38 out of 50

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

Commented [JL2]: 9 out of 10

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

Question 1.1

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

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

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

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

Commented [JL3]: b

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]: 8 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?

ANS: There are five basic principles that an Insolvency professional must adhere to in their career. One of such basic principles is "Integrity". Integrity inculcates the quality of being straightforward and honest in all professional and business relationships and imbibes the essence of "fair dealing".

Another pertinent essential of "fair dealing" is not engaging knowingly with reports, returns, communications, or other information, if it is believed that the information contains false or misleading statements or information is provided recklessly, or it omits or obscures required information where such omission or obscurity would be misleading. However, the Insolvency Professional ("IP") is not in violation of the requirement, if it delivers a modified version of any such report, information or communication. This curtails the importance of "fair dealing" within the ambit of insolvency.

Commented [JL5]: Fair dealing refers to equitable treatment. It would be better if you relied on the information provided in the study material.
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Question 2.2 [maximum 4 marks]

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

ANS: The duty to act with independence and impartiality has mandated the IP to ensure that there is absence of any biasness, conflicting interest, or the undue influence of others, so to override his professional and/or business judgement in the execution of their duties and obligations. Being independent requires that the IP must be factually free from any influences that could compromise his judgement and being impartial requires no indifference in the mind of the IP while acting in his authority. The IP must declare any current or potential conflicts of interest, as well as the implications of such a conflict or lack of independence. If the relationship isn't serious or is only superficial, revealing it and declaring independence may help to resolve the situation. The simple admission of a relationship as a solution, however, is flawed. There is no guarantee of fair and objective behaviour if information is disclosed. Instead, the IP's declaration must be interpreted as a declaration of those relationships that do not jeopardise the practitioner's independence. IPs should not accept positions where their independence and impartiality will be brought into question because of a stakeholder relationship.

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.

ANS: Contingency fee arrangements, alternatively known as "success fees", are fee arrangements in which the IP is entitled to a remuneration if a specified outcome or condition is reached. In most cases, the outcome or condition refers to a positive outcome for the stakeholders. One of the reasons that this type of fee is controversial is because the IP is getting compensated for work that they are otherwise obliged to perform as part of their job. Another problem is that this type of compensation drives the IP to concentrate on a single task rather than taking a comprehensive approach. However, the courts in India have provided a perspective on the impugned issue, wherein the National Company Law Appellate Tribunal through a recent ruling opined that such fee is contingent and speculative in nature and not part of the Insolvency and Bankruptcy Code of India and its regulations. Moreover, Insolvency and Bankruptcy Board of India, the apex-regulator for insolvency related matters in the nation, via., its circular stated that success or contingency fee may be charged only to the extent which is consistent with the requirements of integrity and independence of insolvency professionals.

Commented [JL7]: 4

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

Commented [JL8]: 13 out of 15

Question 3.1 [maximum 8 marks]

ANS: The ethical principle that requires insolvency practitioners to act with and maintain professional and technical competence is often linked to the duty of care. Elaborate on this duty and on the yardstick that would be used when determining whether a practitioner acted with the necessary care, skill and diligence.

The duty of care on the part of the IPs is of utmost importance for a company in financial stress to avoid reckless actions regarding the affairs and property of the company. The lack of care and competence on the part of the IPs, can cause frustration of the insolvency proceedings which ultimately might lead to the failure in achieving the objective of the proceedings. The fundamental principle of professional competence and due care requires that an Insolvency Professionals only accepts an insolvency appointment when the insolvency practitioner has or can acquire sufficient expertise, or when the insolvency practitioner knows that he can meticulously perform his duties and will not act in breach of the duty to act with care, skill and competence.

In terms of the responsibility of care, skill, and diligence, there is a two-fold test. The IP's behaviour should be compared to that of a reasonable IP. This means determining whether he operated with the same level of care, competence, and diligence as a reasonable practitioner under the same circumstances, while also taking into account his own characteristics and qualifications. However, because of his expertise and training, an IP can be considered an expert in insolvency practise, and hence, the subjective test must be met to a higher degree. As an expert, an IP should be able to withstand the scrutiny of a reasonable expert to some extent. It is pertinent to note that the IPs will have varied levels of experience and training, and consequently, the subjective aspects of the test are critical and should be implemented on a case-by-case basis to establish whether a breach of duty occurred.

A professionally competent IP will act with the utmost caution and should gain sufficient awareness of the nature of the company's business in order to comprehend how it operates and what is expected of him/her. The IP should also learn about the industry in which the business operates. Post the adherence of such principles and standards, the IP shall be construed as a practitioner acting within the contours of necessary care, skill and diligence.

Commented [JL9]: A complete answer would have made reference to some case law on the topic.
7

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?

ANS: An IP appointed for rescue or turnaround of the debtor might not be trained in law or have specialised legal knowledge and as such would at times have to rely on expert advice at a certain cost. Paying legal professionals is one of the most problematic administrative charges. As there are various sets of experts, there exists multiple sets of professional fees and disbursements. Legal fees can be claimed as part of IP's disbursement or separately paid to the debtor company. When costs are claimed as disbursements, the IP shall be considered as the entity responsible for payment and is responsible for determining whether the bill is reasonable and suitable in light of the circumstances.

The IPs must exercise their commercial judgement at the time of engaging legal professionals and further keep a check on the fees claimed by these professionals. There may be times when fee is charged by legal professionals for duplication of works done which accounts for most of the administrative costs. The burden lies on the IP to justify the cost borne for the legal services and the corresponding works done by them. Before engaging a legal professional, the IPs must consider the cost of their service and their expertise and experience. The IPs would further have to consider whether the professional appropriate regulatory authority, and applicability of any professional and ethical standards on the service provider. IP must also evaluate whether such work or advice is warranted. Such ethical considerations have to be inferred before participating in any advisory and services from legal professionals.

Commented [JL10]: A complete answer would have included reference to scrutiny and the problem with duplication of work.
6

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.

Commented [JL11]: 8 out of 15

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.

ANS: Three major ethical issues along with reasoning, in the provided factual matrix, are listed in the following manner:

- i. When the company’s financial situation 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. Principle of integrity is involved in this situation, wherein the directors were required to adhere to high moral and ethical principles in all aspects of their professional behaviour. Endeavours should have been made to demonstrate high level of integrity by being honest to themselves, the company and the stakeholders. It was unethical on the part of the directors to continue withdrawing money even after knowledge of financial dearth being faced by the company. The act of making several large payments by the directors to themselves by way of performance bonuses clearly shows malicious intention on the part of the directors to benefit themselves at the expense of the company and stakeholders.

This situation could have been remedied, if the directors had taken timely consideration of the financial situation of the company and had put the interests of all the stakeholders into considerations rather than relying only on the personal interest of directors of such company.

Commented [JL12]: This is irrelevant to the question

- ii. Principle of impartiality and independence of Mr. Relation are involved in the appointment of Mr. Relation, while dealing with the company and its stakeholders in a fair and equitable manner. It is pertinent to note that Mr. Relation was appointed as the administrator, and the parties were aware of Mr. Relation being the brother-in-law of Mr. B Inlaw and a Godfather to his daughter. It will be unreasonable to expect an unbiased outcome on the part of Mr. Relation while performing his duties as an administrator.

This situation could have been remedied by appointing an administrator who was not related to any of the parties whose interests were involved in the company. Either, Mr. B Inlaw or Mr. Relation, should have objected to the appointment of Mr. Relation as the administrator, by disclosing the personal relationship existing between Mr. B Inlaw and Mr. Relation. However, mere disclosure of the relationship in itself would not make them harmless in the given circumstances.

- iii. The act committed by Mr. Relation, wherein he, in collusion with Mr. B Inlaw, is not portraying the true image of the company and stating that, there are no wrongdoings or mal-administration by the company's directors in order to safeguard the directors of the company, highlights another ethical issue. Such act disables the administrator, Mr. Relation to conduct with integrity and honesty while performing his duties. He possesses personal relations with Mr. B Inlaw, who directs him as to what should be the outcome of the administration process. Herein, the principle of truthfulness is further involved as Mr. Relation concealed material facts from the parties, and stated incorrect decisions which were only favourable to the directors of the company. Principle of honesty is also involved in this situation, as Mr. Relation was required to be open and transparent in his decision making and should not have concealed or misrepresented information.

This situation could have been corrected, if Mr. Relation was not biased or was involved in protecting the interests of the directors only. He has to consider the interest of the relevant parties, including the stakeholders and the company. He should have been doing his duties diligently and honestly within the given principles for minimal ethical threats.

Commented [JL13]: Only two ethical issues highlighted. More information as to the nature of the ethical norms breached would have been ideal. Overall not a bad attempt.
8

*** End of Assessment ***