



**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 39 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).

Commented [JL3]: c

**Question 1.3**

All insolvency professionals are fiduciaries.

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

**Question 1.4**

Being truthful and being honest is the same thing.

(a) True

**(b) False**

**Question 1.5**

Select the **correct** answer:

Tony has been appointed as a liquidator of Company X. Company X has several major creditors, including ABC Supplies. Tony owns 30% of the shares in ABC supplies.

This situation is an example of a / an \_\_\_\_\_ threat.

(a) self-review

**(b) self-interest**

(c) advocacy

(d) intimidation

**Question 1.6**

A lack of independence and impartiality due to a prohibited relationship with a stakeholder can always be remedied by disclosing the relevant relationship to the relevant parties and issuing a declaration of independence.

(a) True

**(b) False**

**Question 1.7**

Select the **correct** answer:

Thembi is a well-known insolvency practitioner and is often sought out for her knowledge and expertise. She currently has ten ongoing insolvency matters (most of them quite complex) and has been feeling somewhat overwhelmed. Due to her impressive *curriculum vitae* she is contacted by a very large designer company in distress inquiring whether she would be able to take an appointment as an administrator. Thembi should:

(a) Accept the appointment as it will boost her career even further.

(b) Accept the appointment as she can get one of her junior associates to take over all her other cases.

(c) Accept the appointment because as a professional she will have the ability to give all of the cases she is involved in some attention, although some of them will now only be overseen by her.

(d) Refuse the appointment as she will not be able to give all of the cases she is involved in the requisite level of attention.

#### Question 1.8

Select the **correct** answer:

Rajesh has been appointed as a new associate at the firm where he is employed. In his new role he has to meet certain targets in relation to the fees he earns for taking appointments. Rajesh is currently appointed as a liquidator for a small company. He realises that he will not meet the firm's target for fees. The most ethical thing for Rajesh to do would be to:

(a) Call a creditors' meeting requesting an adjustment to his agreed fees due to unforeseen circumstances.

(b) Ask his administrative assistant to invoice the estate for the use of the firm's conference venue for meetings held there at a 50% increased fee.

(c) Carry out his duties in a timely fashion and complete the appointment efficiently and without undue delay, only invoicing for work properly performed.

(d) Ask his administrative assistant to double check all the calculations in the case file and then bill the hours as part of his invoice.

#### Question 1.9

Select the **most correct answer** from the options below.

An insolvency practitioner using a percentage-based fee calculation method for determining the amount of remuneration owed to him, will receive a fair amount of remuneration.

(a) This statement is true since jurisdictions always allow for an adjustment of fees where it is necessary.

(b) This statement is false since the practitioner might have carried out more work and invested more resources than the value of the realisable or distributable assets.

(c) This statement is false since the practitioner will always receive more remuneration than what is reflected in the work carried out.

(d) This statement is false since the only way to receive a fair amount of remuneration is to calculate the remuneration on an hourly rate.

#### Question 1.10

Select the **most correct answer** from the options below.

Fathima has just completed Module 9 of INSOL International's Foundation Certificate. She works as a junior insolvency practitioner at a large firm. Her firm is contemplating the acquisition of a new information technology system to help ease the administrative burdens of the practitioners at the firm. This new system will digitise all of the documents in relation to

insolvency appointments. All the practitioners and administrative personnel employed by the firm will have access to these files as long as they have access to an internet connection. Fathima should advise someone in the office to implement procedures and policies on \_\_\_\_\_ in relation to this proposed new system.

- (a) Quality control
- (b) Risk management**
- (c) Compliance management
- (d) Fidelity insurance

**QUESTION 2 (direct questions) [10 marks]**

Commented [JL4]: 4 out of 10

**Question 2.1 [maximum 2 marks]**

The ethical principle of integrity implies “fair dealing”. How would this apply in an insolvency context?

*Fair dealing is the concept of treating persons fairly and equitably. As it relates to insolvency, it is not possible for an Insolvency Practitioner to treat all stakeholders equally as there is normally a system that must be followed which would favour certain stakeholders. (i.e. secured and unsecured creditors). The IP ensure that alike stakeholder receive equitable treatment.*

Commented [JL5]: 2

**Question 2.2 [maximum 4 marks]**

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

*Duty to act with independence and impartiality possesses the two-prongs of “no-profit” and “no-conflict” rules.  
The “no-profit” rule regulates that a fiduciary may not profit from his or hers position as CIP (a position of trust). He or She cannot be unreasonably receiving riches (i.e. kickbacks or any form of commission).  
The “no-conflict” rule regulates that a fiduciary may not allow a conflict to arise between his duty as CIP and the interests of the beneficiaries.*

Commented [JL6]: This question relates to Independence in fact and mind/perception.  
0

**Question 2.3 [maximum 4 marks]**

Contingency fee arrangements have been a controversial issue in relation to insolvency practitioners and their remuneration. Briefly reflect on this practice and the possible ethical issues in relation to this method of calculation.

*Contingency fee arrangements is an fee arrangement which outlines that an Insolvency Practitioner will receive compensation based on a specific outcome or if a specific condition is met. The practice of contingency fee arrangement has been somewhat a bone of contention in the Insolvency industry. It is controversial since the conditions and/or outcomes for which the fee is being offered are conditions and outcomes that the Ips, as fiduciaries, should aspire to meet as part of their responsibilities regardless of receiving this contingency fee. Another concern is that this may cause the IP to become focus on one outcome instead of his approach being inclusive of all factors.*

Commented [JL7]: When would a contingency fee be ok?  
2

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

Commented [JL8]: 11 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.

*CIPs in numerous jurisdictions are held to a duty to act with care, skill and diligence, along with other duties.*

*Due to the sensitive nature of a company being in financial distress it is of high importance for an CIPs to exercise a duty of care, skill and diligence. It is important for him/her to act responsibly when handling the company's affairs and assets. It is necessary for the CIP to perform his/her duties accurately and precisely. It is also important for IPs to not undertake too many case appointments and take on an unrealistic workload. If an CIPs fail to do perform in such a manner, they may be in breach of the duty to act with care, skill and diligence. This may cause them to be held liable for any losses suffered due to their actions or omissions.*

*There is a two-fold test that can be useful in relations duty of care, skill and diligence. The CIPs conduct should be compared to the conduct of a "reasonable" CIP. In other words, it should be established whether he acted with the same degree of duty of care, skill and diligence in which a reasonable CIP would have under the same circumstances. However, a CIP can be considered an expert in the insolvency industry based on their level of experience and would then be regarded at a higher standard based on the subjective test. A CIP which would be regarded as an expert should be subjected to be measured against a reasonable expert.*

Commented [JL9]: A complete answer would have made reference to the guidance in the UNCITRAL legislative guide as well as some case law.  
6

**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?

*IPs often rely on the legal advice and services of legal professionals to progress a liquidator or other services offered by the IP. There are instances where the hiring of legal professionals has become an administrative cost that is combated by the debtor.*

*The newly established Insolvency Code of Ethics by ICAEW addresses this issue. There are number of main requirements outlined by the Code in relations to the use of legal professionals. The Code requires the IP to evaluate where the advice or the work of the third-party legal professional is necessary. Another requirement is that the IP should be able to give a reason or reasons for choosing a specific legal services provider.*

*The Code requires the full disclosure of any professional or personal relationship between a legal service provider and the IP. Lastly, requires that a process be undertaken to evaluate whether the service will be the best value for the creditors.*

*There are a few considerations that the IP can consider when determining if a legal service provider will offer the best value and service; these are 1) the cost of the service, the expertise, and the experience of the provider; 2) whether or not the provider holds*

appropriate regulatory authorisation and (3) the professional and ethical standards applicable to the service provider.

**Commented [JL10]:** A complete answer would have referenced the obligation of scrutiny as well as the issue with duplication of work.  
5

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

**Commented [JL11]:** 15 out of 15

WeBuild Ltd is a private company registered in Eurafriolia. The company specialises in construction and property development and is well known in the area where it conducts its business. Mr B Inlaw, Dr I Dontcare and Mrs I Relevant are the directors of the company. The company has ten shareholders, with Mr B Inlaw and Dr I Dontcare also holding shares in the company.

The company traded profitably for the last 10 years but recently started to experience financial difficulties. One of the main reasons for the financial decline is the fact that several of the company's employees have instituted a class action claim against WeBuild for workplace-related injuries due to faulty machinery. This also resulted in bad publicity that led to a decline in contracts. The directors of the company were made aware of the issues relating to the machinery but chose not to take any action to remedy the situation. When the company's financial position started to decline the directors continued to trade as if nothing was amiss and even made several large payments to themselves by way of performance bonuses. When they received a letter of demand from the company's major secured creditor, ABC Bank, the directors decided to call a shareholders' meeting to discuss the company's options.

Present at this meeting were the shareholders, the directors and Mr Relation, a lawyer, to provide them with information and advice in relation to their options. Some of the shareholders recognised Mr Relation as Mr B Inlaw's brother-in-law and godfather to his daughter. During the meeting, Mr Relation suggests that the company enter into a voluntary administration procedure. Mr B Inlaw suggests that the company appoint Mr Relation as administrator. He accepts the appointment, ensuring that he discloses his relationship with Mr B Inlaw and says that he will declare that he believes that he will still be able to act with the required independence and impartiality.

After the meeting adjourns, Mr B Inlaw requests the other directors and Mr Relation to stay behind for a brief "planning" meeting. During this subsequent meeting the directors inform Mr Relation that they are concerned about their personal liability for breach of duty. Moreover, they are worried that they might land in hot water due to their decision to continue trading when the company was clearly in dire financial straits. Mr Relation assures them that his focus will not be on them but on trying to rescue the company.

In the weeks that follow, Mr Relation conducts a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulties of the company. He relies on detailed reports drafted by Mr B Inlaw regarding the company's business and drafts a strategic plan for recovery based on his investigation and the reports he received.

At a meeting of creditors to consider the plan, Mr Relation states that he has found no evidence of any wrongdoing or maladministration by the company's directors. Mrs Keeneye, a lawyer attending the meeting on behalf of ABC Bank, the major secured creditor, recognises Mr Relation from a television interview where Mr Relation expressed the opinion that banks should be more accommodating in restructuring proceedings and that he thinks that the interests of lower ranking creditors should sometimes outweigh "big money" (referring to financial institutions). She immediately feels uncomfortable with his appointment as administrator.



Several months later the administration fails due to a "lack of funding" to finance the rescue. The administration is subsequently converted to liquidation proceedings and Mr Relations 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.**

*Mr. Relations has been appointed by the Board of Directors as the Company's Administrator. There are several ethical issues that were identified during his appointment. These will be discussed below.*

#### ***Principle 1 – Objectivity, Independence and Impartibility.***

*As the appointed Administrator should display the highest level of objectivity, independence, and impartiality.*

*The relationship between Mr. Relations and Mr. B In Law was discussed in the case study. Mr. Relations was stated to be the Brother-In-Law of Mr. B Inlaw and the Godfather to Mr. B Inlaws daughter. Mr. B Inlaw is a director of the company. Mr. Relations and Mr. B-Law would be considered Family by way of marriage. This relation may create a "Familiarity threat" for the Administrator.*

*A familiarity threat is "a situation in which a member's relationship to a stakeholder impairs such Member's impartiality and objectivity owing to the Member being too sympathetic or antagonistic to the interest of certain others." as stated by the INSOL text.*

*Mr. Relations promised that he would disclose this relationship and he stated that he believes that he will still be able to act with the required independence and impartiality. It is important for the relationship to be disclosed but the issue of lack of independence is not always remedied by disclosure.*

*Are we sure that Mr. Relations can act with total independence and impartiality despite his close relationship with Mr. B Law? Let's look at some of Mr. Relations actions as an administrator during his appointment.*

*Here is a list of Mr. Relations actions that clearly breaches his duty to act with independence and impartiality:*

- *Mr Relations conducted a Superficial investigation into the affairs of the company. He relied on reports drafted by Mr. B Inlaw. He uses the superficial investigation and the reports by B Inlaw. Mr. Relations did not conduct his investigation with any impartiality or independence. It was a fake investigation which eventual "found no fault" of the directors. He used the report of Mr. B Law which once again is not his independent work, and this report would favour the directors of the company.*

- *Mr. Relations were invited to stay for the brief “planning” meeting. During this meeting he was privy to information that clear implicated the Company’s directors. These types of prior consultations/ meetings may also be perceived as a lack of independence and impartiality on the part of Mr. Relations. Any prior meeting discussions should stay within the remits of the company’s financial position, the company’s solvency, the effects of potential solvency and any alternatives to insolvency.*
- *Mr. Relations stated in a media interview “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”. ABC Bank is a major secured creditor of WeBuild Ltd. This public statement shows bias towards ABC Bank. The principle of Independence speaks to showing any bias and there must not be any appearance or perception of bias. Most jurisdictions have creditor ranking which would determine the priority of each creditor (secured or unsecured). This is not determined by the CIP. He is not dealing fairly with the creditor and giving them equitable treatment*

**Principle 2: Integrity – honesty, straightforwardness and truthfulness.**

*Mr. Relations, as the company’s administrator; at a meeting of creditors to consider the plan, he states that he has found no evidence of any wrongdoing or maladministration by the company’s directors.*

*Mr. Relations is not acting in good-faith and he is not being honest or truthful in his findings. He conducted a fake investigation, therefore did not look entirely into the affairs and actions of the company and its directors. His investigation and finding are not to the standards of a regular competent CIP.*

*Also Mr. Relations knows of the wrongdoing of the directors. He was made aware of the act of wrongful or fraudulent trading. He was privy to this information in the “planning meeting”. Therefore Mr. Relations were outright dishonest in his findings.*

*Mr. Relations has a duty to act in the best interest of the beneficiaries, which in this case would be the creditors. In all the actions stated below Mr. Relations is showing a clear bias and is acting in the best interest of the Director’s all while being Dishonest, untruthful, partial and showing a lack of Independence.*

**Subsequent Appointment**

*Mr. Relations was subsequently appointed as the liquidator of the company. According to the text, subsequent appointments are referred to as “a scenario where the same CIP is allowed to Act in different insolvency capacities in relations to the same debtor company” In certain jurisdictions, such as England and Wales subsequent appointments are permitted and jurisdiction’s such as South Africa it is not permitted for the Administrator to be the liquidator of the debtor in a liquidation proceeding.*

*Subsequent appointments pose in relations to self-review. Mr. Relations as the liquidator will not be able to appropriately evaluate his prior decision-making and the results of his previous judgements. As listed and discussed above. Mr. Relations has practice and displayed gross misconduct and breach several Principles during his time as the Administrator of the company.*

**Commented [JL12]:** An excellent answer with good application.  
15

**\* End of Assessment \***