



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 42 out of 50
Well Done!

Commented [JL2]: 10 out of 10

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 [JL3]: 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?

[Type your answer here

INSOL Principle 1 on Integrity provides that Members (ie insolvency practitioners) should endeavour to demonstrate the highest levels of integrity by being straightforward, honest, and truthful; and by adhering to the high moral and ethical principles in all aspect of their professional practice. Briefly, integrity requires the insolvency practitioners to be fair in their dealings, honest and truthful as they carry out their duties.

With regard to fair dealing, it requires treating people fairly and equitably, which may be quite challenging on insolvency matters because different stakeholders may have varying degree of interest in the proceeding. The insolvency practitioner, however, in compliance with the Principle on Integrity the insolvency practitioner shall treat people similarly situated in like manners, and differences may be done on justifiable and reasonable circumstances. For example, certain stakeholders may receive less and/or may receive later than the others in the distribution of assets but the priority of distribution, if done according to acceptable rules, will not breach fair dealing.]

Commented [JL4]: 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

INSOL Principle 2 provides that the insolvency practitioner should exhibit the highest levels of objectivity, independence and impartiality in the exercise of their powers and duties, and this goes with the duty to avoid any circumstances that may result to conflict of interest, both actual or apparent as perceived by any informed third person or observer. Independence and impartiality of the insolvency practitioners are essential elements to a proper functioning insolvency system as these are core foundation of the public's trust. There are certain threats to independence and impartiality, namely: self interest, self review, advocacy, familiarity and intimidation.

Commented [JL5]: This was what you needed to elaborate on!

The insolvency practitioner's duties involve the following: (a) the duty to act in good faith, which implies honesty and fair dealing; (b) the duty to act in the best interest of the beneficiary of the fiduciary duties; (c) the duty to exercise the powers of the office in an independent and impartial manner – this duty includes the duty to avoid a conflict of interest; and (d) the duty to act with care, skill and diligence, which is of extreme importance in insolvency matters given the circumstances of the debtor and the potential vulnerability of the beneficiaries.

While disclosure and declaration may address certain threats, the overall impact, however, of lack of independence may breach Principle/s, such as Principle on Integrity and Principle on Professional and Technical [Competence](#).

Commented [JL6]: 2

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

INSOL Principle 5 of Remuneration provides that Members (ie insolvency practitioners) are entitled to remuneration for their work (necessary or beneficial, and properly performed); should maintain and provide sufficient information to the body approving such remuneration (where applicable) in order to allow and informed decision on whether the remuneration is reasonable or not; remuneration should only be drawn in accordance with the prior approval obtained.

Just like other professionals, the insolvency practitioners also deserved to be remunerated for the services done. There are different methods of calculating remuneration for the insolvency practitioners, which may include (a) fixed fee, (b) percentage of the value of the assets realised and/or the value of distributions made, (c) hourly rate based on the time properly spent on the matter, (d) contingent fee arrangement, and (e) combination of the aforesaid.

The contingent fee or success fee or conditional arrangement is often controversial. While the Principle requires that the terms of any contingent fee arrangement (including remuneration based on realised value) should be transparent, objectively measurable, and if applicable agreed or approved by the proper authority or stakeholders. Being contingent, the arrangement provides that the insolvency practitioner gets remunerated on the basis of specific outcome or condition, which should be favorable outcome to the stakeholders. The risk for contingent fee arrangement, however, is that the insolvency practitioner may be tempted to focus on certain aspect of the proceedings only on areas which provide higher possible return for the insolvency practitioner rather than working on the matter on a holistic approach in compliance with its duty to act in the best interest of the beneficiaries. The contingent fee arrangement, therefore, indirectly creates the threat of self-interest on the part of the insolvency practitioner. On the other hand, the contingent fee arrangement could be beneficial on certain aspects, such as (a) when the surrounding circumstances of the debtor are extremely challenging, (b) the qualification of the insolvency practitioner is highly suitable for the debtor but the cash position of the debtor may not be sufficient to consider other alternative payments of remuneration but the viable option is for a contingent arrangement, or (c) on cases of exemplary outcome of the proceedings that the insolvency practitioner deserves also to be remunerated for such success. To deal with the possible ethical issues, it is imperative to set out at the engagement level the parameters, which should be objectively measured, on how the contingent fee will be given.]

Commented [JL7]: A good answer.

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

Commented [JL8]: 12 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

INSOL Principle 3 provides that Members and their firms (ie insolvency practitioners) should maintain an acceptable level of professional competency, which may be achieved by: (a) keeping current with legislative / regulatory changes, (b) undertaking continuing professional education, and (c) undertaking sufficient case work to remain experienced.

Insolvency practitioners are regarded as experts professionals in dealing with distressed company's situations and highly regarded on turnaround, restructuring and liquidation processes. For this reason, the public in general and the stakeholders in particular expect that the insolvency practitioner have the requisite professional, experience and technical competence to perform the duties associated with their engagement.

While the duty to act with care, skill and diligence are not regarded as fiduciary in nature, the said duty is of extreme importance in insolvency proceedings because of the circumstances of the debtor and the potential vulnerability of the stakeholders. This duty of care, skill and diligence is closely linked to the duty to act in the best interest of the beneficiaries. The outcome of the insolvency proceedings may be materially affected by the lack of the requisite professional and technical competence of the insolvency practitioner. Therefore, part and parcel of the duty of care, is to ensure that the insolvency practitioner carries out engagements only where the insolvency practitioner can perform his/her duties effectively and efficiently taking into consideration the different principles. As discussed in the article "The careful business rescue practitioner: a research for the proper yardstick" by Lezelle Jacobs and Johann Neething, it was stated that the practitioners conduct should be measured against that of a reasonable practitioner. In addition, as enunciated in the case of Re 1 Blackfriars Limited, the insolvency practitioners should not be judged by the standard of the most meticulous and conscientious member of the profession but by those of an ordinary, skilled practitioner.]

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

Engagements of third party professionals or experts may sometimes be necessary in carrying out the duties of the insolvency practitioner as the latter is not expected to know everything, despite the requirement of professional and technical competence. In the engagement of legal professionals, disbursements and third-party costs will be involved, and it is imperative that these will be duly disclosed to the known stakeholders, and the insolvency practitioner has to carefully balance the cost and benefit of such engagement of legal professional to make sure that the engagement will be for the best interest of the stakeholders. In addition, insolvency practitioners usually have prior relations with legal professionals, and sometimes the insolvency practitioner could belong to the same legal firm, in the engagement of legal professional, therefore, there is no threat of conflict of interest and no secret monies / referral fees involved that may potentially breach the INSOL Principle 2 on objectivity, independence and impartiality.

On the cost-benefit consideration on the fees for the legal professionals' engagement, given that the financial position is clearly in distress, there is a higher level of consideration to ensure that the insolvency practitioner acts in the best interest of the beneficiary and should act with care, skill and diligence in the selection and appointment of the legal professionals.]

Commented [JL9]: 7

A good answer, reference to best practice guidance (UNCITRAL Legislative guide) would have ensured full marks.

Commented [JL10]: 5

Reference to scrutiny of their fees and the issue of duplication of work missing.

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

Commented [JL11]: 12 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 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

The following are the ethical issues surrounding the appointment of Mr Relations as lawyer, then administrator then liquidator of WeBuild Ltd:-

(a) Mr Relations potentially breached the Principle 1 on Integrity. His close relationship with Mr B Inlaw, being the latter's brother-in law and godfather to Mr B Inlaw's daughter. This relationship would create doubts in the minds of fair-minded people on whether or not he would be fair in his dealings, and whether he would be honest and truthful to the beneficiaries. The disclosure of interest and declaration of being able to carry out the engagement will not cure all the doubts in the minds of the beneficiaries. In addition, this created a familiarity threat for Mr Relations;

(b) Mr Relations potentially breached the Principle 2 on Objectivity, Independence, & Impartiality. Mr Relations relationship. In the course of his engagement, he will have to look into the conduct of the directors, which involve Mr B Inlaw, and given their close relationship / familiarity with each other, his objectivity, independence and impartiality may likely be compromised. His pronouncements that he would not look into the affairs of the directors, but rather focus on the rescue already indicates a breach of Principle 2;

(c) Threat of self-review is apparent on Mr Relations accepting the appointment as liquidator following the failure of the administration of which he is the administrator. In this scenario, there is no one else to review the actions done by Mr Relations as administrator of the failed administration proceedings; and

(d) Threat on advocacy of Mr Relations given that he made prior media statements on his opinion that banks should be more accommodating in restructuring proceedings and that the interest of lower ranking creditors should sometimes outweigh the "big money" (referring to financial institution), and in fact the lawyer of the secured creditor, Mrs Keeneye already felt uncomfortable with his appointment.

The instant case is highly similar to Commonwealth Bank of Australia v Irving [1996] 65 FCR 291 [Australia].

Just like in the above-mentioned case, while Mr Relations pre-insolvency involvement with the company per se and his subsequent appointment as administrator does not generally breach his independence, given, however, the close relationships between Mr Relations and Mr B Inlaw and the substantial involvement on pre-insolvency discussions, independence is likely breached and no amount of disclosure and declaration could cure such breach. The failure of the administration is indicative that the disclosure and declaration did not remedy the situation.

Mr Relations should have done some self realization and decide to eventually decline the appointment as administrator and as liquidator due to the ethical issues mentioned above.

Commented [JL12]: This is a beautifully succinct identification and explanation of the ethical issues. I would have preferred a little more detail on why these are ethical issues than what you did provide.
Good overall answer though!
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*** End of Assessment ***