



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: 46 out of 50
Well done!

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

Commented [JL2]: 10 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

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]: 10 out of 10

Question 2.1 [maximum 2 marks]

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

The principle of “fair dealing” requires all stakeholders to be treated equally. In an insolvency context, it will be unlikely that an insolvency practitioner will be in a position to treat all stakeholder equally since a stakeholder hierarchy exists which favours some categories of stakeholders over other (for example, creditors generally will be treated more favourably than shareholders, and secured creditors will be treated more favourably than unsecured creditors). As a result, to comply with the principle of “fair dealing”, the insolvency practitioner should treat all stakeholders within each category equally.

Commented [JL4]: 2

Question 2.2 [maximum 4 marks]

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

An insolvency practitioner must both *be* and *be perceived to be* independent and impartial.

In order to be independent and impartial, insolvency practitioners should decline to act in situations where there is a risk of conflict of interest (which includes circumstances where the practitioner is also a stakeholder, or where the practitioner has a relationship with the debtor) and should not allow undue influence of third parties or bias to cloud their professional judgement in the exercise of their function.

In order to be perceived to be independent and impartial, insolvency practitioners should remember that there may be situations (such as the ones listed above) in which an informed observer may believe that the duty to be independent and impartial is breached, even if no breach has in fact occurred. Where this is the case, practitioners should not act since even the perception of breach is likely to diminish the trust in the integrity of the entire insolvency process.

Commented [JL5]: 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.

Under a contingency fee arrangement, insolvency practitioners are remunerated on the condition that specified outcomes are met. This is similar to the “no win, no fee” arrangement sometimes seen in litigation.

Ethical issues may arise from the outcome(s) required under the contingency fee arrangement. If there is nothing truly extraordinary being achieved by the relevant outcome, and if this is in fact an outcome which the insolvency practitioner should have been aiming for in any event, then it is questionable whether the insolvency practitioner should be awarded a “success fee” for something which they should have been doing to start with.

A contingency fee arrangement may also result in the insolvency practitioner not exploring all possible avenues and outcomes, instead focusing solely on the outcome mandated by the contingency fee arrangement. This, in turn, may cast doubt over the practitioner’s independence and integrity.

Finally, it may be the case that the outcome required under a contingency fee arrangement is not objectively measurable. In such circumstances, it may be difficult to justify the level of associated fees, which may breach the ethical principle that insolvency practitioners’ fees should reflect the work carried out in the performance of their duties.

In order to overcome these potential ethical issues, it is advisable for the terms of any contingent fee arrangement to be as transparent as possible, objectively measurable and, where possible, approved by the relevant stakeholders.

Commented [JL6]: 4

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

Commented [JL7]: 14 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.

Similar to the duty of care owed by company directors, the duty of care which is placed on insolvency practitioners has two elements: an objective one and a subjective one.

The objective element of the test requires the relevant insolvency practitioner’s actions to be measured against those of a reasonable insolvency practitioner. As such, whether or not an insolvency practitioner acted with the required care, skill and diligence would depend on whether an ordinary, reasonably skilled and careful insolvency practitioner would have acted similarly in the same circumstances. *Re Chanley Davies Ltd* emphasised that the objective test does not require the insolvency practitioner to be judged against the “most meticulous and conscientious member of the profession”, therefore they would not need to go over and beyond what is required from the ordinary professional in this field.

In addition to the objective element of the test, the subjective element can bring more stringent requirements and a higher standard when scrutinising the actions of an insolvency practitioner. This is because it takes into account the individual practitioners’ qualifications and experience to create the standard which needs to be met. For example, the standard which an insolvency practitioner with 20 years’ experience must meet will be close to that of an expert whilst the standard applying to junior member of the profession will considerably lower due to their comparative inexperience.

As a result of both tests having to be applied, an insolvency practitioner will act with the necessary care, skill and diligence if they can show that both i) an ordinary, reasonable insolvency practitioner *and* ii) an insolvency practitioner with a similar level of training and experience, would have acted in a similar way.

Commented [JL8]: 7

An almost perfect answer – reference to the UNCITRAL legislative guide would have ensured full marks.

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?

The fees of legal professionals engaged by insolvency practitioners to advise on the legal aspects of insolvency proceedings have to be paid by the insolvent estate in addition to the fees of the insolvency practitioner and, as a result, it is often the case that being presented with two sets of fees to pay is often met with, at best, annoyance. This is, however, often unavoidable as insolvency practitioners are not necessarily legally trained and, in accordance with their ethical duty to maintain adequate professional and technical competence, it would not be appropriate for them to undertake legal work for which they lack the qualification.

The choice of which legal professional to engage is the first ethical consideration which needs to be borne in mind. Although it may be tempting to appoint the most experienced experts in the relevant field, a fine balance has to be struck between the quality of the legal advice which will be obtained and the level of fees which will be incurred.

As insolvency practitioners are likely to engage legal professionals on a regular basis, they may develop a personal or professional relationship with certain lawyers or legal firms. Although this will be difficult to completely avoid, the insolvency practitioner must remember that this may cause a lack of independence (real or perceived) which would conflict with their ethical duty to act with integrity and independence.

The Institute for Chartered Accountants of England and Wales' Insolvency Code of Ethics provides guidelines which can help in such situations, and suggests that insolvency practitioners should carefully consider whether engaging legal professionals is, in fact, necessary, whether the level of fees to be incurred justifies the level of expertise required in the circumstances, and whether any existing relationship needs to be disclosed to stakeholders. Overall, the insolvency practitioner's overarching consideration should be whether the legal advisers offer the best value for the stakeholders.

If the legal fees are paid as disbursements, then the insolvency practitioner will be responsible for paying them but will be reimbursed by the estate to the extent that they are reasonably incurred in the discharge of the insolvency practitioner's duties. Careful consideration of which legal advisers to engage (as set out above) and regular monitoring of the fees level will assist the insolvency practitioner in that respect.

If the legal fees are to be paid as third-party costs, then the estate will pay them directly. Again, similar consideration will apply in connection with the choice of advisers and the level of fees, however since the insolvency practitioner will have to justify the work done both on the insolvency and the legal sides, this will be particularly important in cases where the type of work undertaken by both teams may be perceived to be too similar to justify two sets of fees.

Commented [JL9]: 7

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

Commented [JL10]: 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.

Mr Relation appears to be a lawyer, not an insolvency practitioner. Ethical principle 3 (professional/technical competence) is therefore likely to have been breached, as Mr Relation is probably not appropriately qualified to conduct an administration. It is likely that he does not have the required technical expertise or experience, and this may bring the profession into disrepute. Here, although it would be open to Mr Relation to attend training courses, this probably would not provide him with the necessary level of qualification for this role in the required timeframe. The best remedy in this situation would have been to remove Mr Relation and replace him with a qualified insolvency practitioner, although of course Mr Relation's legal expertise may still have been of use as part of the administration.

Mr Relation appears to have a personal relationship with one of the directors/shareholders. Although he disclosed this relationship and stated his belief that he would still be capable of acting with sufficient independence, this on its own was not enough as even if Mr Relation did in fact have the required level of impartiality, it is likely that the majority of the stakeholders nevertheless perceived him to lack independence. This may constitute a breach of principle 2 (objectivity, independence and impartiality), according to which Mr relation should have avoided circumstances likely to result in a conflict of interest and must demonstrate objectivity, independence and impartiality in the exercise of his duties as administrator. While the disclosure and statement of independence were good first steps, perhaps Mr Relation could also have asked the company to appoint a joint administrator – but the fact remains that even such a step may not have been sufficient to convince stakeholders of his objectivity. The ideal situation would have been for Mr Relation not to have been appointed at all in circumstances where stakeholders could doubt his independence.

Mr Relation assured the board that his investigation would not focus on their actions but on trying to rescue the company, and it appears his investigation into the affairs of the company was only superficial. The reports relied on as part of this investigation were prepared by a director of the company and not by an independent adviser. While one of the purpose of administration is to try and rescue the company as a going concern, this does not mean that administrators can disregard the directors' actions (in particular in situations where the directors may have been guilty of wrongful trading or where transactions can be challenged and monies recovered), as to do so would not be acting in the creditors' best interest. Mr relation's duty of care to the creditors may therefore have been breached, as well as ethical principle 1 (integrity). Mr Relation ought not to have promised to the directors that he would not focus on their actions, he should have conducted a thorough and comprehensive investigation into all of the company's affairs (including the directors' conduct prior to the start of the administration) and he should have made sure that any evidence or reports relied on as part of the investigation were prepared by independent experts or advisers.

Commented [JL11]: Being a lawyer does not mean that you cannot be appointed as an office holder. In fact, in several countries it is an office mostly held by lawyers. In England and Wales lawyers rarely take appointments as IPs, it is however, not uncommon.

Commented [JL12]: A good answer. I have awarded a discretionary marks for a well-argued first point although it does not constitute a breach of ethical duty.
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*** End of Assessment ***