



**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**

Commented [JL1]: TOTAL 40 out of 50  
Well done!

Commented [JL2]: 10 out of 10

**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]: 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?

Fair dealing relates to the equitable treatment of people. In insolvency this can be difficult to achieve across the board, though efforts can be made to treat people fairly within their group. For example, the fair treatment of creditors can be shown through the practical application of fair treatment for unsecured non-preferential creditors on a parri-passu basis. This ensures all creditors receive an equal prorated dividend in a distribution, no one person in this class is treated less fairly than another.

Commented [JL4]: 2

**Question 2.2 [maximum 4 marks]**

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

The two-pronged duty to be independent and impartial can be best described as being both independent in fact and in appearance/perception.

Independence in fact requires that the IP be free from any outside influences that could pose a threat to the IPs judgement. The IP must be free from both direct and indirect threats to their independence. This could best be characterized by an IP ensuring that they do not have a direct benefit or interest in taking an appointment that could compromise their judgement such as being an investor in a creditor of the debtor. An indirect threat might be a prior engagement conducted by a colleague such as an auditor, the issue "self" review here would be considered an indirect factual independence issue as the IP would be reviewing his company's own work product as part of his scope as IP.

Independence by appearance or perception set out that an IP should appear to be free from circumstances that may lead to a reasonably informed third party to conclude that the Ips integrity or impartiality are in question. An example of this may be that an IP of an entity is also offered to take a role as an IP of a debtor of the entity to which they are already appointed. There are no factual independence issues as the IP is not directly or indirectly connected to this debtor, however, a third party might conclude that the IP is unable to act impartially when conducting the affairs of both insolvent estates that are directly link via a debtor creditor relationship.

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.

Contingency fees have been the subject of controversy due to the mindset it may create in an IP.

Contingency fees are usually payable when a favourable outcome is met that is beneficial to stakeholders, and in particular creditors. Examples of contingency fees might be taking an appointment as an IP over an entity that does not have chattel assets though does have several causes for action that have a good chance of success and if won would deliver realizations into the estate. An IP may be compensated by a percentage of the realizations that are delivered into the estate as a fee arrangement.

The controversy arises from the fact that many would argue that this should be the aspiration of the IP anyway as part of his fiduciary remit and that by accepting to take this on contingency rather than by billing on a more standard time costs basis that the IP will focus on the results of the driver of the contingency agreement rather than manage the estate in an orderly manner and attend to all relevant matters not just those that would deliver a payment to the IP.

A potentially fairer way to deal with such an example would be a standard billing arrangement for time costs in dealing with the estate and in a case where delivering a litigation result would be considered a truly remarkable achievement by creditors then an additional contingency fee could be discussed for such a hypothetical.

**Commented [JL6]:** 2  
Are there any circumstances where a contingency fee could be paid?

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

**Commented [JL7]:** 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.

IPs have a duty to maintain an ongoing level of requisite knowledge, experience and skills in order to perform their duties as practitioners. Where an IP may have a hole in their knowledge the IP should take steps to educate themselves on the subject matter to ensure they have sufficient knowledge to provide advice on that topic.

It is also an IP's duty to continue to regularly update their learnings through professional development such as study, conferences or educational courses.

Where an IP is lacking in the required skill, experience or knowledge to manage an appointment, they should consider recusing themselves from taking the role if that lack of knowledge might lead to a frustrated process through poor decision making. Additionally, if the IP were to continue to accept the engagement without having the requisite skillsets to perform the role diligently and skilfully, they could also be personally liable for any loss due to their actions or omissions.

When determining if an IP has acted with the necessary skill and care, there are two tests that can be performed. The first is the reasonableness test that looks to establish if the IP acted with the same level of care and diligence that a reasonable practitioner in the same circumstances would have also done.

The second which is more applicable to IP's given their role as experts in their fields is the subjective test. This involves the IP being subjected to the test of a reasonable expert rather than a reasonable practitioner. This test sets the standards bar at acting as an IP with the same level of care as would be expected of the company's management were they continuing to operate day to day and not be in an insolvency proceeding.

### 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?

Whether the engagement of legal professionals and their subsequent costs are paid as disbursements or whether the costs are borne by the company, the same commercial scrutiny would apply, that being that a prudent IP would monitor the fees as they arose and continue to scrutinize the bills to ensure they presented a reasonable and appropriate level of fees for the circumstances of the appointment.

Where the costs are billed to the company there is also the question of duplication of work effort. IP's should be careful to ensure that there is a clear division of duties between the IP and the legal professionals to ensure that work is not being duplicated. As set seen in the Dovechem case, the IP had to prove to the satisfaction of the court that the fees incurred by the chosen legal professionals was separate and distinct from that of the liquidator and that no duplication of effort was billed for.

In some jurisdictions, the role of an IP is not performed by a legal professional and is instead performed by a turnaround or insolvency professional who may not have the same level legal expertise as that of a solicitor. In this instance the IP would need to rely on the legal professionals for their expertise which comes at a cost. The incurrence of these costs, whilst necessary, should be properly and fully consider prior to being incurred to ensure that the IP is able to make full representations as to the reasonableness of the cost being incurred.

Elements that should be considered and documented prior to a legal professional being engaged would include documenting the specific reasons for the choice of that particular professional, including their expertise, their experience in matters of the type they will be advising on, that they are regulated and the likely cost of the service. Additionally, the IP should comment on whether there is a pre-existing relationship between the IP and the professional and make reasonable disclosures to stakeholders of this fact together with representations as to why they are still the most applicable choice including whether they offer best value to the stakeholders.

**Commented [JL8]:** Some elements missing. Reference to the UNCITRAL legislative guide and case law would have ensured full marks for this question.  
6

**Commented [JL9]:** Some elements missing. Reference should have been made to scrutiny and monitoring of the fees.  
6



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

Commented [JL10]: 10 out of 15

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

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

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

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

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

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.**

There are several ethical issues of concern in the case study presented above. Set out below are those ethical principles that appear to have been breached by Mr. Relation, an assessment of how they were breached and how they should be remedied or safeguarded against.

The first ethical principle which appears to be in breach is that of integrity, and in particular truthfulness. Mr Relation has failed to a full and frank disclosure to the creditors of WeBuild around the fullness of his investigations, he has also failed to disclose that the directors have of Webuild disclosed to him that they are concerned about personal liability due to their actions being specific drivers for the deterioration of the Company's finances leading to its insolvency. By failing to disclose these material facts to the creditors Mr Relation has potentially put the creditors in worse position than WeBuild's members as the creditors will now not see the benefit of any action against the directors who have withdrawn bonuses whilst insolvent and should be asked to return them. In order to remedy this situation Mr Relation should have made a full disclosure of all material facts that he was aware of to the creditors so that they might make an informed decision on the restructuring proposal. Additionally, if they were aware of actions against the directors, they may have chosen to fund such actions as well as the restructuring which could have avoided liquidation and bought WeBuild back to solvency.

This leads into the next breached principle of fair dealings discussed below.

Mr Relation breached the fair dealing principle by placing the interests of the directors and in the case of Mr Inlaw and Dr Dontcare the shareholders interests above those of the creditors. by failing to fully investigate the nature of the bonuses paid and the decision to continue to trade whilst insolvent, Mr Relation has failed to identify possible causes for action which might result in realizations for the estate. This failure means that creditors have been treated less fairly as this decision is for the benefit of those directors and shareholders and not in the interests of the creditors and other stakeholders. Mr Relation may not be able to always treat all parties fairly at all times, though, he should be taking steps to be full and frank in his disclosures and should be acting in the best interests of creditors not directors or shareholders.

Mr Relation above breaches likely stem from his lack of independence and objectivity. Mr Relation is not independent by fact or by perception. Mr Relation clearly has a deep personal relationship with Mr Inlaw given they are brothers in law and he is also godfather to Mr Inlaw's child. This clearly a threat to his objectivity and independence as Mr Relation cannot act impartially when dealing with Mr Inlaw and his potential misconduct. Any reasonable third party would consider this to be a breach of the independence principal, despite the disclosure noted in the case study. Mr Relation should look to remedy this issue by recusing himself from the appointment altogether or at an absolute minimum an additional independent appointee should take a joint appointment with Mr Relation with a clear division

of duties and ringfencing of those duties, whereby the independent appointee takes ownership of any and all investigations into the conduct of the directors and shareholders and in particular Mr Inlaw. This remedy is not ideal, and a recusal would be preferable.

A further issue, along the same lines as independence is Mr Relations appointment as liquidator following the failure of the restructuring plan. Whilst some jurisdictions do allow persons to be appointed in follow on procedures, such as Administration to Liquidation in the UK, in this scenario Mr Relation should not have accepted this secondary appointment. In the UK, follow on appointments tend to take place once the goals of the first have been achieved or in order to achieve the goals of the first appointment. For example an IP might be appointed as a CVA supervisor following or concurrently with his appointment as an Administrator in order to affect a plan to bring the company back to solvency, or where they are appointed as Liquidator following an Administration it may be to make a dividend distribution following the successful realization of assets in the Administration. That said in this case, the restructuring plan failed and now Mr Relation's appointment as Liquidator means that he is unlikely to perform any self review to assess whether his actions, including his breach of the principles above has lead to the failure. Mr Relation should have recused himself so that an independent IP could take the Liquidator appointment and properly assess the work of Mr Relation in his appointment.

**\* End of Assessment \***

**Commented [JL11]:** A good answer overall. There is however, some evidence of confusion as the right facts are not always perfectly aligned or linked with the ethical duties.  
10