



**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: 43 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]: 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?

In an insolvency context, fair dealing relates to the equitable and fair treatment of all stakeholders involved in the insolvency process.

Commented [JL4]: 2

**Question 2.2 [maximum 4 marks]**

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

IP must be independent in fact and must also be seen or perceived to be independent and impartial. To be independent in fact means that there is a duty to be factually free from any influences that could compromise one’s judgment. It accords therefore that an IP has a duty to avoid all personal and professional relationships and direct or indirect interests that will adversely influence, impair or threaten their integrity and ability to make decisions. As it relates to independence by perception, the IP is required to avoid all circumstances that will lead to a reasonable informed third party to conclude that the IP’s integrity, impartiality have been compromised. This is important as the stakeholders involved in the proceedings preserve the IP to be biased etc., it would negate their trust and reliance which can lead to a dis-continuance of their co-operation which can undermine the success of the insolvency proceedings.

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 fee arrangements also known as “success fees” or “conditional fees” are fee arrangements which determine that the IP would be entitled to receive remuneration based on a specific outcome (usually favourable) or a condition being met. For example, the successful implementation of a rescue plan. This has been a controversial issue and one bone of contention is that the arrangement for a fee is based on a condition or outcome that IP’s should aspire to meet and would therefore be a part of their remit. In essence, given that IP’s are obligated to meet a certain standard, their fee i.e. payment should not be contingent on an outcome they are obligated to meet. Another reason for the controversy is that it is often said that arrangement encourages an IP diverting one singular task that will benefit his arrangement instead of a holistic approach to insolvency proceedings.

Commented [JL6]: Some elements missing – are there circumstances when it might be permitted to pay such fees?  
2

### 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.

It is an accepted fact that the principles of ethics require IPs to act with and maintain professional and technical competence which is often linked to the duty of care. This principle includes a duty to educate oneself and to keep abreast to the changes to the law or practice in order to act in the best interest of beneficiaries, a duty to only accept insolvency appointments where one has or can acquire sufficient expertise and to only accept appointments where one has the capacity to do so. Accordingly, the duty to act with care, skill and diligences requires an IP to act carefully and with competence when carrying out its functions with regards to the insolvency proceedings such as realizing the affairs and property of the company.

This duty of care, skill and diligence has a two-fold test that is used to determine whether a practitioner acted with the necessary care, skill and diligence. The first fold is (1) whether a reasonable practitioner in the same position (attributes and qualifications) would have done the same thing i.e., the same degree care, skill and diligence.

It is important to note that an insolvency practitioner can be an expert in insolvency practice due to experience and training and a higher standard will be required and so the duty of care will be determined on a case-by-case basis. In the case of *Re Chamley Davies Ltd 1990 BCC 605 at 618*, it was held that in order to succeed the claimant must establish that the administrator has made an error which reasonably skilled and careful insolvency practitioner would not have made. They are not be judged by the standard of the "most meticulous and conscientious member of the profession".

Insolvency practitioners also have a duty to act with the necessary care, skill and diligence includes a duty to obtain adequate degree of understanding of the nature of the company's business in order to understand the business and what is expected of him/her and a duty to acquire knowledge of the industry in which the company operates.

Commented [JL8]: A very good answer. Reference to the UNCITRAL legislative guide would have ensured full marks.  
7

#### Question 3.2 [maximum 7 marks]

As insolvency appointments often involve complex legal issues, it is common practice for insolvency practitioners to rely on the advice and services of legal professionals. What ethical considerations should be borne in mind, especially regarding the fees of these legal professionals?

It has been established in the Singaporean case of *Kao* that legal professionals are often required to assist with insolvency proceedings and that their services can be paid as disbursements or as third-party costs which can be billed separately and directly to the debtor company. The IP must therefore consider whether the bill is reasonable and appropriate under the given circumstances whenever claiming costs. This principle was opined by Finkelstein J in the case of *Korda*. Other considerations to bear in mind when costs by legal practitioners are not claimed as disbursements is whether the work is already work done by legal professionals. Further considerations provided by the new Insolvency Code of Ethics by the Institute for Chartered Accountants of England and Wales (ICAEW) requires the IP to:

1. Evaluate whether the advice or work by the legal practitioner is warranted;

2. Document the reasons for choosing a specific legal professional;
3. Provide full disclosure of any professional or personal relationship that exists between him/her and the legal professional and the process to be undertaken to evaluate whether the service will be the best value for the creditors.
4. To assess whether the legal professional will be offering the service for the best value, the insolvency practitioners would be required to consider the following:
  - a. The cost of the service, the expertise and experience of the provider;
  - b. Whether the provider holds appropriate regulatory authorisation; and
  - c. The professional and ethical standards applicable to the service provider.

Commented [JL9]: 7

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

Commented [JL10]: 11 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.

One of the main ethical issues, is lack of independence. The facts of the case provides that prior to the insolvency process Mr Relation, provided information and advice to shareholders in relation to their options. This prior involvement of Mr Relation may create the impression of lack of impression and independence. He should therefore set out the nature of the consultation in a disclosure statement. However, it appears that the consultation was limited to the financial state of the company and the company's options for insolvency. However, of utmost importance is the fact that Mr Relation is personally connected to a director, Mr B Inlaw's as he is his brother-in-law and the godfather to his daughter. Although Mr Relation has disclosed this relationship and declared that he will still be able to act with the required independence and impartiality, lack of independence cannot necessarily be cured by disclosure. The relationship is substantial and is not superficial. There is a personal relationship between Mr Relations and a director and mere disclosure does not guarantee impartial and objective conduct.

**Commented [JL11]:** Was it? What about when the directors told him about their conduct in the “planning” meeting?

**Commented [JL12]:** Which threats to independence and impartiality are created by these facts?

In the case of *Commonwealth Bank of Australia v Irving [1996] 65 FCR 291* – personal relationships with stakeholders can result in a lack of independence due to the perception created. In this case the administrator was appointed two weeks prior to the resignation of a director with whom he maintained a longstanding friendly and professional relationship had disclosed his pr and had stated that he believed that he would still be able to act in an independent manner. The administrator also provided consultation services to the company prior to the commencement of insolvency proceedings and had engaged in discussions with one of the company's major secured creditors (a bank). Two creditors sought the administrators removal due to his lack of the independence. Although there were no factual impropriety by the admin and no party suggested anything to the contrary, the court noted that he would have to investigate the affairs of the company and the conduct of the directors to determine whether any action should be taken against them and held that in those circumstances a that reasonable person would have trouble believing that he would be able to conduct the investigations without any bias and that it would not be appropriate for him to continue as admin of the company. Pre-commencement business of the company was also noted by the court. Given the similarities, between the facts of this case and the present case, it is likely that the court will rule that there is a lack of independence.

Mr Relation also has a duty of independence upon his appointment and as such he should not make any promises to those who appointed him and should make it very clear that he is expected to act in the best interest of all the beneficiaries. The facts provides that 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. At this meeting, Mr Relation assures them that his focus will not be on them but on trying to rescue the company. This shows that he had breached his duty to be independent.

**Commented [JL13]:** Contradicts your earlier statement.

It is also worthy to note that Mr Relation has a duty prior to his appointment, to scrutinize each situation prior to accepting an appointment. Professional ethics provide that Mr Relation is to be objective, independence and impartial and should avoid circumstances likely to result in conflict of interest. He is therefore to be independent both a matter of fact and from the perspective observer and should not be biased towards any party or their associates. A member should not therefore not accept an appointment in connection with the company if his (or a related party's relationships with the directors of the company or any stakeholders would give rise to a possible or perceived lack of independence.

Mr Relation has duty to act as a an ordinarily, reasonably skilled and careful insolvency practitioner and his relationship should not influence his actions nor should they override his professional and/or business judgments in execution of his duties and obligations. The facts shows that Mr Relations has breached this duty. The facts tells that Mr Relation conducted a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulties of the company and that he relied on the 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. This shows that he has failed to carry out a detailed investigation into the affairs of the company and that he failed to act independently of Mr B by relying on documents previously prepared by him.

Further to the abovementioned, Mr Relation has breach of fiduciary duties. He has a duty to act in good faith, to act honestly and fair dealing and a duty to act in the best interest of the beneficiary of the fiduciary duties. This duty is also to exercise powers of the office in an independent and impartial manner which includes a duty to avoid conflict of interest. Further, this fiduciary duty to not allow conflict to arise between his duty and the interests of the beneficiaries and to act without bias. The facts state that, at a meeting of creditors to consider the plan, Mr Relation stated that he has found no evidence of any wrongdoing or maladministration by the company's directors and that Mrs Keeneye, a lawyer attending the meeting on behalf of ABC Bank, the major secured creditor, recognised 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. Mr Relation has a duty to provide balanced comments and to be independent both a matter of fact and from the perspective observer. Importantly, also provides that several months later the administration fails due to a "lack of funding" to finance the rescue and was subsequently converted to liquidation proceedings for which Mr Relation is appointed as the liquidator.

Prior to the appointment of IP's there is also a duty prior to appointing the IP to evaluate, the cost of the service, the expertise and experience of the provider; whether the provider holds appropriate regulatory authorisation; and the professional and ethical standards applicable to the service provider. The facts do not suggest that this was done.

**Commented [JL14]:** An overall good attempt with some apparent confusion.

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**\* End of Assessment \***