



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: 41 out of 50
Well done!

Commented [JL2]: 9 out of 10

Commented [JL3]: b

Question 1.4

Being truthful and being honest is the same thing.

(a) True

(b) False

Question 1.5

Select the **correct** answer:

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

This situation is an example of a / an _____ threat.

(a) self-review

(b) self-interest

(c) advocacy

(d) intimidation

Question 1.6

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

(a) True

(b) False

Question 1.7

Select the **correct** answer:

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

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

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

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

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

Question 1.8

Select the **correct** answer:

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

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

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

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

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

Question 1.9

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

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

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

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

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

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

Question 1.10

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

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

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

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

QUESTION 2 (direct questions) [10 marks]

Commented [JL4]: 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 means the equitable treatment of all parties. However, within insolvency it is unlikely that all stakeholders will be treated in the same manner since there are inherent and systematic provisions like the ranking of claims and the order of priority that call for differences in how creditors are treated. Division of the stakeholders along the lines like class does for some level equitable treatment for stakeholders of a according to their particular class.

Commented [JL5]: 2

Question 2.2 [maximum 4 marks]

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

The independence of an insolvency practitioner must be a factual matter and a matter of perception. Independence in fact is achieved where the insolvency practitioner avoids accepting an appointment in connection with the estate of debtor with whom there is a personal or professional relationships that could directly or indirectly influence the decision making or can compromise his judgement. In contrast, any situation where an informed observer may reasonably conclude that insolvency practitioner could compromise the integrity, independence and impartiality required to perform his duties should also be avoided.

Commented [JL6]: 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 arrangements are predicated on some specific outcome or condition that would influence an insolvency practitioner's remuneration. Critics of this method of calculation have commented on the possible ethical issues that may arise with the use of this method of calculation. Attaching remuneration to a goal such as the success of a restructuring plan, can influence the decision making of an

insolvency practitioner. In the context of a liquidation the focus of the insolvency practitioner may be geared to realising the best possible price for assets. This is not necessarily be detrimental to the creditor's interest. However, where other available remedies or other duties are ignored in favour of one approach, that is tied to the contingency fees, the insolvency practitioner may be in breach of the duty of care, skill and diligence.

Commented [JL7]: 2
Some elements missing- IP should aspire to efficiency anyway. Are there any circumstances when it might be appropriate to pay these fees?

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.

The principle of professional and technical competence and the duty to act with care, skill and diligence provide guidance to insolvency practitioners in the selection or acceptance of appointments.

In decision whether to accept an appointment, the insolvency practitioner must determine if they have the requisite knowledge, skill, and experience to accept that appointment. Only where the insolvency practitioner is convinced that they possess the required competencies should an acceptance occur. Satisfying an acceptable level of professional competence is attained by consistently reviewing current literature about changes to laws and regulations related to the practice, both locally and internationally. Besides insolvency legislation, where the IP is also lawyer, accountant, auditor or other related professional, it is recommended that continuous education be done as is required by that profession and as may be useful in their role in insolvency proceedings. The experience of the insolvency practitioner must also be considered in relation to the appointment. The time requirement to effectively perform the duties of an appointment is also a matter for consideration and if there is sufficient work experience. Other stakeholders, such as directors and creditors can also rely of this principle in choosing and approving an insolvency practitioner.

The duty to act with care, skill and diligence proposes a further measuring stick that may be used to evaluate the performance of an insolvency practitioner. Evaluation is done by objectively considering what a reasonable person would done in a similar circumstance, pairing this condition with principle of the technical and professional competence provides a reasonable basis for assessment of the insolvency practitioner.

Failure to satisfy these principles can complicate insolvency proceedings. Stakeholders may become frustrated with the process and seek other legal remedy. Re Charnley Davies Ltd 1990 is an example is a situation in which the duty to act with of care, skill and diligence was used to bring an action against an insolvency practitioner. The creditors argued that the administrator they had been unfairly harm by the actions of the administrators using Sect 27 of Insolvency Act 1986 in UK as the basis of their action. However, the court held the administrators had not unfairly prejudiced the creditors interest and that no breach of the duty to care had occurred.

If an insolvency practitioner is found to be in breach of the duty of care, it may be possible in some jurisdictions for the insolvency of assume personal liability for any loss resulting from his actions and for a monetary obligation to be rewarded as a remedy.

Commented [JL9]: To ensure full marks reference should have been made to the UNCITRAL legislative guide.
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?

In decision whether to employ the services of legal professionals, the insolvency practitioner should consider several ethical principles such as whether the scope of the services required is beyond the competencies of the insolvency practitioner, whether the choice of firm or lawyer might compromise his integrity, independence and impartiality and the duty to account for the administrative costs related to an appointment.

The decision to employ the services of legal professionals must only be made if the insolvency practitioner is certain that the duties required are beyond the scope of the professional and technical competencies of the practitioner. At common law is principle is highlighted in the case *Kao Chai Chau Linda v Fong Wai Lyn Carol et.al.* where the of the duplication of work and the unnecessary nature of performed by hired liquidators were at issue.

The choice of legal professionals of firm should be done with objectivity, independence, and impartiality. The insolvency practitioner should review comparative rates for the services required. Additionally, the insolvency practitioner should avoid any self-interest threats or circumstance where his independence could be compromised. The hiring of legal professionals with whom there is a personal relationship or professional should be avoided, less there be any perceived familiarity which can compromise judgment. where possible. A declaration of independence may be necessary if it unavoidable for example where the insolvency practitioner hires a legal professional from the same law firm as his personal attorney or with whom he had prior business relationship.

Insolvency practitioners have a fiduciary duty to minimize the extent of the impact of administrative cost associated with an insolvent's estate. This includes monitoring the disbursements made from an insolvent estate. The fees to be charged made the legal professional is an example of a disbursement. The duty to account requires that the insolvency practitioner keep proper records of and the disbursements. There should no vagueness in the method of calculation and rates would be comparable with standard fees for the services. The *Re Korda, in the matter Stockford Ltd (2004)*, Judge Finkelstein outlined some key factors. Litigation should be avoided where possible and only utilized where it is necessary and the need to examine comparative rates before selecting a law firm.

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

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.

Commented [JL10]: 5

Duplication of work?
Aspects to consider ot take into account/

Commented [JL11]: 12 out of 15

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.

INSOL principles of objectivity, independence and impartiality recommend that an insolvency practitioners carry out their duties and exercise their powers with a high degree of objectivity, independence, and impartiality. Objectivity in this context means Mr. Relation as the administrator appointed by the company, We Build Ltd should ensure that performs his work in a unbiased manner and that he avoids any conflicts of interest or undue influence in his decision making process. Mr. Relation accepted the appointment to serve as an administrator for an insolvent company for which his brother-in-law, Mr. Inlaw was a director

and a shareholder. This detail may suggest that Mr. Relation and Mr. Inlaw had a pre-appointment personal relationship and could potentially result in conflict of interest and ethical dilemma for Mr. Relation. Although, Mr. Relation disclosed the familiar relationship with Mr. Inlaw and stated his belief that could perform his responsibilities with the required independence and impartiality, Mr. Relation's subsequent actions prove that a mere verbal declaration was not sufficient to convince stakeholders.

Commented [JL12]: Type of threat?

According to INSOL principle relating to independence, it is important for the independence of an insolvency practitioner to be a factual matter and a perceived matter by an informed observer. The Harper Report established that, "An insolvency administration should be impartial, expeditious and efficient.". The assurances Mr. Relation provided to the directors that to their actions prior to the insolvency proceeding commencing would be free from scrutiny and that his focus on rescuing the company was a breach of his duty of care, skill and diligence, and was in contravention of the independence and impartiality principle. This was particularly egregious since based on the information provided, the actions of the directors contributed significantly to the failure of the company. The poor conditions endured by the workers which led to the class action lawsuit and the subsequent negative publicity from the lawsuit are some example of management failures.

Moreover, the decision of the directors to continue trading in the face of imminent insolvency and to approve the large payment to themselves as performance bonuses could potentially be breaches which are subject to personal liability for the directors. Yet, Mr. Relation seems unwillingly to investigate the conduct of the directors and to hold them liable where permissible under the relevant provisions of insolvency proceedings. In so doing, Mr. Relation has failed to safeguard the company's assets and the protect the interests of the creditors. The superficial investigation and his reliance on information provided by the brother in-law in drafting the recue plan are violating of the principles of independence, and integrity.

The report presented to the creditors in which he declared that he found no wrongdoing or maladministration by the directors violates the integrity principle. Mr. Relation was not honest, truthful nor transparent in the information gave the creditors.

Mr. Relation also violated the professional behaviour principles. Communication to creditors should serve to inform and educate them. Creditors rely on the information he provides and that he would protect their interest. Honest means to the free from lies and truthful is related to the accuracy of the representations.

The opinion expressed by Mr. Relation regarded the banks and the lower ranking creditors violates the objectivity principle. Given the ethical breaches previously committed by Mr. Relation, his should have been appointment as the liquidator of the company.

Commented [JL13]: Type of threat

Although not a fiduciary duty, it may be possible for the creditors to bring an action against the administrator for violations the duty to act with care, skill and diligence. Some Insolvency proceeding also allows for the actions to brought against directors particularly in relation to their conduct approaching insolvency where the fiduciary duty shifts from the company to the creditors. For example Section 246ZB of the Insolvency Act 198 (England and Wales) authorizes the courts to take action against directors where a company is in administration and wrong trading is found.

Commented [JL14]: A good but incomplete answer.
12

*** End of Assessment ***