



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: 40 out of 50
Well Done!

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

Commented [JL2]: 9 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

Commented [JL3]: b

QUESTION 2 (direct questions) [10 marks]

Commented [JL4]: 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 Commentary to Principle 1 of the INSOL Principles states that integrity implies fair dealing, honesty and truthfulness. In the insolvency context, it is impossible for an Insolvency Practitioner (“IP”) to treat all stakeholders equally as the system is set up to favour certain stakeholders. Therefore, what is required is for the IP to treat like stakeholders alike and to ensure equitable treatment of all involved.]

Commented [JL5]: 2

Question 2.2 [maximum 4 marks]

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

[Duty to act with independence is two-fold: independence in fact and independence in perception. Independence in fact which requires the Insolvency Practitioners to be factually free from any personal and professional relationships that might adversely influence, impair or threaten their ability to make sound decisions. Independence in perception on the other hand is the avoidance of circumstances by the Insolvency Practitioners that would lead a reasonably informed third party to conclude that the IP’s integrity, independence and impartiality have been compromised. The duty of independence is aimed at ensuring that the conduct of the IPs is and is seen not to be unfairly improperly biased.

IPs would only be able to exercise his discretion and powers in the best interest of the beneficiaries if he is independent and impartial, given the balancing acts he has to deal with managing the competing interests of various stakeholders. Therefore, independence and impartiality aims to ensure that the IP does not allow bias, a conflicting interest, or the undue influence of others to override his professional and/or business judgments in the execution of his duties and obligations...]

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 fee arrangements are success fees or as referred to in some jurisdictions are conditional fees, that are paid to insolvency practitioners hinged on them achieving a

specific outcome or condition. These outcomes or conditions usually pertain to favourable outcomes for stakeholders. These arrangements have been controversial for various reasons.

One of these reasons is that the conditions and outcomes on which the fees are payable are arguably conditions and outcomes that IPs, as fiduciaries, should normally strive to abide by and would therefore, form part of the remit.

Another issue that can arise from changing the focus on an IP to a singular task that will benefit his fee arrangement, instead of adopting a holistic approach.

There would, however, not be an ethical issue if the contingency fee is paid because of a truly remarkable and objectively measurable **outcomes**.

Commented [JL7]: 4

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

Commented [JL8]: 13 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.

[Principle 3 of the INSOL Principles provides for professional/ technical principle. It is a principle that encourages Insolvency Practitioners to be appropriately experienced and resourced to deal with all engagements accepted, and in the event that they determine that they are not knowledgeable about an issue, in the immediate they can refer to other specialist or further resources. Therefore, the Insolvency Professional must be self-aware and introspective to make an assessment from time to time of their skills and experience limitation, knowledge gaps, and availability to take additional instructions from clients.]

Given the nature of ethical conduct required here, this principle is closely related to the duty of care. It is important that the person appointed as the CIP for a company in distress does not act recklessly with regards to the affairs and property of the company. The objectives of the insolvency proceedings can be frustrated through the incompetence and carelessness of the insolvency practitioner. A practitioner who undertakes too many appointments, or who fails to meticulously perform his duties, might be in breach of the duty of care, skills and diligence and could be liable personally for his actions or omissions.

In determining whether a practitioner acted with the necessary care, skill and diligence, the actions of the practitioner may be subject to either of two-tests, the reasonable CIPs test, or to the test of a reasonable expert. In the case of a reasonable CIPs test, the conduct of the practitioner is measured to establish whether he acted with the same degree of care, skill and diligence that may be reasonably expected by a practitioner in similar circumstances with regards to the personal attributes and qualifications.

For the test of a reasonable expert, due to the experience and training of such practitioner may be subjected to a higher subjective standard test. Subjective elements of the tests are considered, because CIPs are varying degrees of experience and training, and ought to be applied on a case-by-case basis to determine whether there has been any breach. This test seems aligned with the guidance provided by UNCITRAL **p184 para** 61 (see page 29 footnote 80) that requires "the insolvency representative to observe a standard no more stringent than would be expected to apply to the debtor in undertaking its normal business activities in a state of insolvency, that of a prudent person in that **position**".

Commented [JL9]: A really good answer. Reference to case law would have ensured full marks for the question.
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?

[Principle 5 of the INSOL Principles provides for that members are entitled to remuneration for their work necessarily, and beneficially and properly performed. The commentary to Principle 5 states that disbursements are direct recovery of costs paid by Members or their firms and should be approved where applicable in the same manner, as the remuneration. Third party costs are not considered as remuneration or disbursement and, accordingly should be disclosed in accordance with local laws and regulations.

Fees for legal professionals may be categorized under either as third-party costs or disbursements. In the Singaporean case, *Kao Chai-Chau Linda v. Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21,23 the courts explained that legal professional costs may be claimed as part of the disbursements of the IP, or the costs can be billed separately and directly to the debtor company.

Where the fees are claimed as disbursements, the IP has the responsibility to consider whether the bill is reasonable and appropriate considering circumstances. In *Re Korda, in the matter of the Stockford Ltd* (2004) 140 FCR 424, 443 [51] Australia, Finkelstein J stated the IP should exercise his commercial judgment when hiring legal professionals and should monitor the fees claimed by these professionals.

In situation, where the fees are not claimed as disbursements, but billed to the company, the issues relating to the monitoring of fees and scrutiny of the bill prevail. ethical consideration that arises is that the Insolvency Practitioner needs to act duty with care in relation to fees of the legal practitioner, by avoiding duplicative works. The burden of justification for alleged duplicative works by different professional rests on the Insolvency Practitioner, as shown in the case of Liquidators of *Dovechem Holdings Pte Ltd v. Dovechem Holdings Pte Ltd* [2015] 4 SLR 955 [Singapore]

Another ethical consideration for fees of a legal practitioner, by an Insolvency Practitioner which relates to a duty of care is overservicing. The Insolvency Practitioners should ensure that legal practitioners are not paid for unnecessary services.

A prudent Insolvency Practitioner would always shop around to ensure that the best legal advice at the best rates by negotiating for the best fees and monitoring the fees incurred. He should be able to demonstrate why the engagement was necessary and why he choose a specific legal professional.

Commented [JL10]: 6
What should be taken into account about the lawyers? See ICAEW code of conduct rules.

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.

Commented [JL11]: 8 out of 15

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.

[the ethical issue that arises here is integrity. Principle 1 the INSOL Principle provides “that IP should endeavour to demonstrate the highest levels of being straightforward, honest and truthful; and by adhering to high moral and ethical principles in all aspects of their professional practice”. Honesty prescribes that the IP refrains from lying, while truthfulness means that the IP should not conceal any facts from parties with an interest in the outcome of the insolvency. Honesty also requires that the IP is open and transparent in his decision-making and should not conceal or misrepresent any information. Where an IP complies with Principle 1, he would neutralize any negative emotions during insolvency proceedings; instil confidence amongst stakeholders, beneficiaries and the public; as well as facilitate better co-operation.

In this scenario Mr Relation acted in an honest and truthful manner by disclosing his relationship with Mr B Inlaw. However, Mr Relation failed to act with integrity by “stating that he has found no evidence of any wrongdoing or maladministration by the company’s directors, when in fact the directors failed to rectify the faulty machineries and continued to trade as if nothing was amiss when WeBuild Ltd was experiencing financial difficulties, but rather paid out performance bonuses to themselves in clear breach of the directors’ fiduciaries duties to the shareholders .Mr Relation has therefore breached the Principle of Integrity.

Secondly the ethical issue of independence and impartiality arises in this scenario. Principle 2 of the INSOL Principles stipulates that “Members should exhibit the highest levels of objectivity, independence, and impartiality in the exercise of their powers and duties. Members should avoid circumstances likely to result in a conflict of interest”. The Commentary to Principle 2, also states that the independence of the Member’s “conduct is, and is seen to be, not unfairly or improperly biased towards any party”. The independence should be as a matter of fact, and from the perspective of an informed observer. The Commentary further states that a “Member should not accept an appointment in connection with the estate if his (or a related party’s) relationship with the directors of the company or any stakeholders would give rise to a possible lack of independence”.

In the facts provided, Mr Relation who appointed as an administrator and subsequently as liquidator has a relationship with one of the directors, Mr B Inlaw. Mr Relations is Mr B Inlaw’s brother-in-law and godfather to his daughter. In **Commonwealth Bank of Australia v. Irving [1996] 65 FCR 291 [Australia]**, the court noted that the *longstanding friendly and professional relationship between the administrator and director would create doubt with a fair-minded person that he would be able to perform his duties in an independent manner, and therefore it would be inappropriate for him to continue as an administrator of the company.* With Mr Relation’s relationship with the director, there is clearly a conflict of interest, and an informed observer is likely to form the opinion that there is a possibility of lack of independence. It is inappropriate for Mr Relation to act as either the administrator or liquidator of the company.

To remedy the possibility of lack of independence, an Insolvency Practitioner should disclose the relationship and make a declaration of independence. From the facts above, Mr Relation disclosed his relationship to one of the directors, and but failed to make a written declaration of independence. Mr Relation could, therefore, make a declaration of independence to the effect that despite the disclosed relationship, he would be able to render his duties in an independent and impartial manner.

Nevertheless, it is pertinent doing the disclosure and declaration of independence does not necessarily render the relationship harmless. Moreso that in this situation Mr Relation relationship to the director is substantial and not merely superficial.]

Commented [JL12]: Does this disclosure cure the familiarity threat that arises?

Commented [JL13]: See comment above. Even a written declaration would not cure or solve his level of lack of independence.

Commented [JL14]: Why then suggest a written declaration?

Commented [JL15]: You have only identified two major issues: His relationship with the director and his lack of integrity. The discussion is light touch and lacking critical analysis and application. 8

*** End of Assessment ***