



**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: 44 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]: 10 out of 10

**Question 2.1 [maximum 2 marks]**

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

The principle of "fair dealing" requires people to be treated fairly or equitably. However, in insolvency context this means that all members within a specific stakeholder such as creditors must be treated in the same way.

Commented [JL4]: What about different creditors?  
2

**Question 2.2 [maximum 4 marks]**

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

(i) Objectively independent

Insolvency practitioners are requested to act with independence and impartiality. Due to their fiduciary relationship between creditors and debtors, they have to carry out their activity in a way that avoiding circumstances that could lead to a conflict of interest.

(ii) Perception of independence at all time

The perceptions of the different stakeholders of the insolvency practitioner's capacity to administrate the proceedings is essential. The insolvency practitioner must demonstrate that he is *free from any influences that could compromise his judgement*. Independence in fact requires that the insolvency practitioner is factually free from any influences that could compromise his judgement. This means that having superficial personal and professional relationships with the debtor or a creditor may not impact his capacity to act as insolvency practitioner without being influenced, but may under certain circumstances influence the way the stakeholders evaluate his work and thus threaten his integrity.

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**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.

- (i) Questionable outcomes: An insolvency practitioner may enter into a contingency fee arrangements with creditors according to which he is entitled to a certain fees upon

achievement of a certain outcome, e.g. with regard to the realized value at liquidation of remaining assets of the debtor. However, the outcomes may be unfounded and are thus arguable.

- (ii) Further, entering into such arrangements may put the focus of the insolvency practitioner on reaching the agreed outcomes and his own economic interest, and less on the holistic approach to the whole proceedings. Contingency fee arrangements do not raise substantial ethical issues in case that these are paid for extraordinary performance of the insolvency practitioner, however, only to the extent that such remarkable achievements are measurable on objective terms.

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

Commented [JL7]: 9 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.

- (i) Professional competence

The principle of due care requires that the insolvency practitioner must ensure that he is competent to carry out the case for which he has been appointed. He is required to only accept an appointment if he has sufficient expertise. He must ensure that his action and decisions are in compliance with up-to-date knowledge, legislation and market practice and the applicable professional standards.

- (ii) Identification of the threat

The insolvency practitioner should at any time identify any events or situation that may lead to a violation of the duty of care during the course of his appointment and once identified, he should make the appropriate decision, which may also be the refusal of an appointment.

- (iii) Determination of the violation of the principle

In order to determine whether the principle of due care has been violated, it should be assessed whether the insolvency practitioner *acted with the same degree of care, skill and diligence that may reasonably be expected of a reasonable practitioner in the same circumstances, having regard also to his personal attributes and qualifications.*

It should be analyzed whether a reasonably skilled and careful insolvency practitioner would not have made the same error (Re Charnley Davies Ltd 1990 BCC 605 at 618).

Commented [JL8]: This question required you to elaborate on the point you are making here.  
3

#### 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?

- (i) Fair and reasonable

insolvency practitioner must make sure that any payments and expenses arising out of the insolvency proceedings are fair and reasonable and reflect the workload that was necessary to perform his work. No unjustified and disproportionate costs should arise.

(II) Legal costs

Depending on his level of legal knowledge, the insolvency practitioner may be in a situation where working together with a legal professionals (lawyers and counsel) is necessary. In this case, the legal costs arising out of this collaboration can be considered as disbursements or third-party costs.

- (a) If the costs are qualified as disbursements, they will be paid by the insolvency practitioner for expenses who will then seek reimbursement.
- (b) If the costs are not qualified as disbursements and thus invoices directly to the company, they will be more scrutinized and will required a more founded justification. Indeed, the question will be raised whether these costs were necessary and whether the work rendered by the insolvency practitioner is merely a duplication of work done by the legal professional (or vice versa).

In order to bring more clarity in this matter, the new Insolvency Code of Ethics by the Institute for Chartered Accountants of England and Wales (ICAEW) requires that the insolvency practitioner takes the following measures if he intends to work with a legal professional:

- (a) evaluate the necessity to work with a legal professional;
- (b) document the reasons for working with a legal professional; and
- (c) disclose any relationship with the legal professional.

**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.

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

Commented [JL9]: Some elements missing like the issue of duplication of work.

6

Commented [JL10]: 15 out of 15



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.**

- (i) Objectivity, independence and impartiality

Objectivity: An Insolvency Practitioner<sup>3)</sup> should not allow bias, conflict of interest or undue influence of others to override professional or business judgements.

Before agreeing to accept any appointment, the insolvency practitioner should consider whether acceptance would create any threats to compliance with fundamental principles. In particular the threat related to the principle of objectivity or the duty of independence and impartiality which may be violated due to personal and/or professional relationship with certain stakeholders.

\*) <https://www.icaew.com/-/media/corporate/files/members/regulations-standards-and-guidance/ethics/code-of-ethics-part-d-insolvency-practitioners-1-jan-2011.ashx>

(a) Relationship with Mr Inlaw / Disclosure:

According to the information provided, the shareholders recognised Mr Relation as Mr B Inlaw's brother-in-law and godfather to his daughter. Mr Relation disclosed his relationship with Mr B Inlaw and ensured the shareholders that he believes to be in the capacity to perform his work in an independent and impartial way.

Mr Relation has a strong and close relationship with Mr Inlaw and his appointment as insolvency practitioner has been suggested by Mr Inlaw. Even though this relationship has been disclosed to the other shareholders, it has not been disclosed to all stakeholders involved in these proceedings, in particular the creditors, who may perceive a certain impartiality and bias in the course of the proceedings, which will impact his integrity.

Further, while disclosing his relationship with Mr. Inlaw, Mr Relation declared that "he believes that he will still be able to act with the required independence and impartiality". This statement is not sufficient, clear and precise to assert that while making this statement, Mr Relation was in fact determined to act in accordance with the required level of independence and impartiality.

(b) Request of the directors / familiarity threat:

According to the facts Mr Relation assured the directors that he will put the focus on their interests while trying to rescue the company. Based on this situation, it can be asserted that the close relationship between Mr Relation and Mr Inlaw has created a familiarity threat. The Insolvency Code of Ethics of the Institute of Chartered Accountants of England and Wales (ICAEW) defined a familiarity threat as a threat which occurs when, due to a long or close relationship, an individual within the firm will be too sympathetic or antagonistic to the interests of others or too accepting of their work. It is obvious in the case at hand that nature of this relationship has led to familiarity issues between Mr. Relation and the directors. This familiarity issue caused Mr Relation to explicitly agree to act in violation of his duties as insolvency practitioner, instead of refusing the proposal and resign from his position of insolvency practitioner.

(c) The television interview

Due to the statements of Mr Relation, Mrs Keeneye has perceived Mr Relation as being partial and biased. This situation could have been avoided if Mr Relation would have disclosed these statements and explicitly guaranteed his independence and impartiality towards ABC Bank. It can be assumed that the communication between Mr Relation and ABC Bank was more or less very limited.

This case is a perfect illustration of a violation of the duty of independence and impartiality and, due to the reckless actions of Mr Relation, no remedies for this violation is possible. Mr Relation should have been removed from his position as insolvency practitioner.

(d) Subsequent appointments

The appointment of Mr Relation as liquidator of the same company for which he acted as insolvency practitioner is problematic. In fact, this is a case of subsequent appointment, which also raises questions with regard to the independence and impartiality of Mr Relation and particularly the self-review and self-interest threat. Due to the actions of Mr Relation during the rescue proceedings, it may be

assumed that he may not be in the capacity to appropriately evaluate the results of a rescue proceedings or the service performed. In fact, he cannot even rely on the produced documents since those documents contain false information about the company. Mr Relation should have resigned from his position as liquidator.

(i) Duty to act in good faith

This duty requires the insolvency practitioner to be honest and truthful and act with integrity. It foresees that the insolvency practitioner should be transparent with the information and decision-making process. He should refrain conceal or misrepresent any information. In this case, Mr Relation conducted a superficial investigation and used documents issued by one of the debtor's director basis for his restructuring plan. These actions represent a clear violation of applicable technical and professional standards. It can be assumed that actions would have not been taken by a reasonably skilled and careful insolvency practitioner.

(ii) Duty of care

The duty of care does not only require the insolvency practitioner to have a certain professional competence, but it also requires the insolvency practitioner to act diligently. It can be assumed that no reasonably skilled and careful insolvency practitioner would have conducted supervision investigation and used false information to draft a restructuring plan. These actions represent a clear violation of applicable technical and professional standards and thus a violation of the duty of care, which cannot be disregarded.

**Commented [JL11]:** An excellent answer!!! Well-structured and reasoned!  
15

**\* End of Assessment \***