



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: 28 out of 50

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]: 9 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?

One of the key fiduciary duties linked to Insolvency Professionals is the duty to act in good faith, which implies honesty and fair dealing. Also, the first principle of the INSOL Principles is integrity which its members must demonstrate high levels of. Integrity implies fair dealing, honesty, and truthfulness.

Fair dealing means treating people fairly. In an insolvency situation, the insolvency practitioner should treat all stakeholders who rank equally in the priority of payments equal. As creditors rank ahead of shareholders for example, it is not possible to treat both these stakeholders equally.

Commented [JL4]: 2

Question 2.2 [maximum 4 marks]

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

INSOL Principle 2 relates to objectivity, independence, and impartiality. This is an important principle to ensure that an insolvency practitioner (IP) avoids conflict of interest situations. IPs should also be aware of the threats to independence and any safeguards to overcome such threats.

The duty to act with independence and impartiality is two-fold in nature. IPs must be independent in fact and also be seen to be independent.

To be independent in fact, IPs must avoid personal/professional relationships and direct/indirect interests that would threaten their independence on an insolvency proceeding. To be perceived as independent means that the IP should avoid circumstances that would lead to a reasonably informed third party to conclude that that IP's independence has been compromised.

One of the fiduciary duties of the IP is to act in the best interest of the beneficiary of the fiduciary duties. If the independence of the IP was compromised, the IP would no longer be able to fulfil this duty as the beneficiary would not believe that the IP is acting in their best interest.

Jurisdictions usually provide a number of examples in guidelines of examples that show when independence is threatened and how to respond to these situations. This ensures that the IP maintains independent before, during and after an insolvency proceeding.

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 is one of the methods of calculating the remuneration for an IP. This works on the basis that the IP receives remuneration based on a specific outcome or condition being met.

It is often the case that the condition is the successful implementation of the rescue plan, which benefits all stakeholders.

However, it could be argued that the completion of a rescue plan for a debtor should be the duty of an IP regardless. Therefore, making this a condition for an IP should always be the case.

If the condition is very specific, the IP may focus all their attention on this goal. This could detriment the debtor and other stakeholders if this negatively effects other areas of the restructuring plan.

Finally, the condition may not be measurable. This could lead to legal issues down the line if the IP and debtor do not agree on whether the outcome was met. Transparency between both parties is essential when deciding on the contingent arrangements between parties.

Commented [JL6]: 3
Any circumstances when this fee could be appropriate?

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

Commented [JL7]: 4 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.

INSOL Principle 3 is professional and technical competence. IPs should be sufficiently and appropriately experienced and have the necessary resources to deal with the insolvency cases they accept. IPs need to maintain an acceptable level of professional competency for each case they accept.

The guidance provides how this level can be obtained. This can be achieved by

- Keeping informed with any changes in legislation.
- Continued professional education
- Taking on sufficient cases to remain experience.

Insolvency proceedings and restructuring can sometimes require a huge number of resources and time. They can also be very complex, and case specific. Also, the IPs are remunerated for their services. The stakeholders and members of the public therefore expect the IP to possess the technical competence to carry out these services.

As each can differ in terms of complexity, jurisdictions, stakeholders, and size. The IP will not have to answer to every issue that arises. The IP will need to understand their limitations and

either educate themselves or seek help from third parties such as legal experts. This is in order to act in the best interest of their beneficiaries.

Given the dire circumstances of an insolvent debtor, the duty to act with care, skill and diligence by the IP is of extreme importance. IPs should only accept cases when they have the necessary skills to carry out the engagement in a professional manner. If the firm currently has too many cases and would not be able to assign sufficient resources to the engagement, the engagement should also not be accepted.

Any practitioner who is in breach of the duty to act with care, skill and diligence can be held personally liable for their actions. This is to protect the interest of the stakeholders.

Commented [JL8]: Your answer does not address the question in full. What about the yardstick and the tests?
2

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?

INSOL Principle 5 covers remuneration and disbursements. Due to the nature of insolvency proceedings, legal costs will always arise. The IP is not a legal expert so must engage a legal expert on a number of matters.

Legal costs are usually the biggest disbursement that the IPs incur while administering an estate. The IP has a fiduciary duty to minimize the extent of these legal costs. The IP must justify these payments and take responsibility in reviewing and scrutinizing these costs.

When the IP engages a legal expert, they should ensure they have an appropriate non-disclosure agreement and engagement letter in place. If there are any independence issues, these need to be disclosed to the stakeholders.

The legal costs can be claimed as part of the IP's disbursements or can be billed separately to the debtor company. It is up to the IP to review the invoices of the legal experts and ensure these are appropriate and warranted. The invoice should be detailed showing what work was completed on the case and how much time was charged to the case. The IP should also ensure that no work has been duplicated between the IP and the legal expert.

There has been a huge increase in cross-border insolvency cases in recent years. It is also very common for a debtor to have assets in a number of jurisdictions. The need for legal experts is essential when dealing with cases like this. The IP therefore needs to rely on the legal expert in order to maintain their duty of care to the stakeholders.

Commented [JL9]: Again, a failure to address the question posed, i.e. very limited discussion of ethical considerations pertaining to legal services.
2

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

Commented [JL10]: 5 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.

There are a number of ethical issues at play here. In order to protect the interest of the stakeholders of WeBuild Ltd. these issues need to be examined.

The **first** ethical dilemma here is around the appointment of Mr Relation as administrator. Mr Relation is one of Mr B Inlaw's (director and shareholder of the company) brother-in-law and godfather to his daughter. There is a clear conflict of interest here. Mr Relation should not accept the appointment as his relationship with the director gives rise to a **perceived** lack of independence.

Commented [JL11]: only a perceived lack?

Although Mr Relation has disclosed this relationship, this does not automatically cure the lack of independence issue. It can easily be argued that Mr Relation will not be able to carry out his duties and obligations in an independent manner and may also be subject to undue influence by the director.

The disclosure of this relationship should have been made to the shareholders before Mr Relation accepted this appointment. This gives the shareholders the opportunity to assess all the facts before deciding on the administrator. As the independence issue cannot be resolved, an appointment of a different IP should be carried out.

The **second** ethical issue at play here relates to the director's personal liability for breach of duty. The directors continued trading when they knew the company was facing insolvency and also paid performance bonuses to themselves.

The directors have fiduciary duties of loyalty and care to the company and its shareholders. The directors will only be found liable if it is determined that the directors were reasonably informed or were not acting in good faith. It is clear here that the directors have not acted in good faith. They have paid themselves large sums at the detriment of the company and its shareholders.

Despite being informed of these bonuses, Mr Relation assures them that his focus will not be on them but on trying to rescue the company. Mr Relation is showing no integrity here. The beneficiaries rely on the IP to protect their interests. By not following up on these transactions, Mr Relation is not protecting their interests. The stakeholders are not being treated equally as he is protecting the directors. If these transactions were investigated, they could be voided on grounds of antecedent transactions.

Fidelity insurance could be considered for the stakeholders as it is clear that Mr Relation is acting dishonestly. If necessary, a forensic expert could also be hired to investigate these transactions.

Commented [JL12]: Your issue and the discussion do not match. Although there is arguably a lack of integrity in his behaviour the main concern actually relates to his professional competence and his duty of care, skill and diligence.

The **final** issue facing this administration relates to the television interview by Mr Relation. Mr Relation needs to maintain confidentiality and be alert to the possibility of inadvertent disclosure. Although Mr Relation has not specified ABC Bank specifically in his interview, he has referred to the fact that "banks should be more accommodating in restructuring proceedings". This is a clear message directed at ABC Bank, the major secured creditor of WeBuild Ltd.

Mr Relation should also be cautious of the fact that WeBuild Ltd is a private company. Information on private companies is not as readily available as those of public companies. Mr Relation has not demonstrated professional behaviour with this television interview. He was not mindful to his confidential obligations to WeBuild Ltd. He should only disclose information when he has been authorized and has a legal and professional right to do so.

Mr Relation's should be communicating with the relevant stakeholders as opposed to participating in television interviews. The administration has failed due to a lack of funding. The interview has done WeBuild Ltd no favours in terms of their relationship with ABC Bank Ltd.

As opposed to the interview, Mr Relation should have provided clear, timely and honest progress reports to ABC Bank Ltd as a major secured creditor. Mr Relation should have ensured this information was balanced between commercial and confidential obligations.

The crux of this case is centred around the lack of independence. This was seen in the case of Commonwealth Bank of Australia v Irving (1996). Despite disclosing the relationship, the IP would have to investigate the conduct of his long-term friend. It was concluded that the IP should not continue as the administrator due to the perceived lack of independence. Similar to this case, Mr Relation should not continue as the liquidator.

Commented [JL13]: Irrelevant

Commented [JL14]: Some evidence of knowledge. However, the answer demonstrates a clear lack of understanding of the issues involved
5

*** End of Assessment ***