



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: 39 out of 50

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

Commented [JL2]: 8 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

Commented [JL3]: b

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.

Commented [JL4]: c

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 [JL5]: 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?

Fair dealing relates to treating people fairly or equitably.

In insolvency, it will not be possible for an IP to treat all stakeholders equally as the IP must put certain stakeholders (i.e. the creditors) first. Interests of other stakeholders should be considered especially in cases where they benefit the interests of the creditors, known as “enlightened creditor value”. It is possible to treat stakeholders alike to ensure equitable treatment of all **involved**.

Commented [JL6]: 2

Question 2.2 [maximum 4 marks]

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

Independence must be (1) in fact and (2) also be seen or perceived to be independent.

Independence in fact must be factually free from any influences that would affect decision making and judgment of an IP. The IP must avoid all personal and business relationships whether direct or indirect interests that will adversely influenced, impair or threaten their integrity and decision-making process.

Perceived independence, on the other hand, includes avoiding circumstances which would lead to a reasonably informed third party to conclude the IP to be biased and lack of independence. This would affect stakeholders' trust and reliance on the IP leading to discontinuance of their cooperation with the IP and the insolvency **process**.

Commented [JL7]: 4

Question 2.3 [maximum 4 marks]

Contingency fee arrangements have been a controversial issue in relation to insolvency practitioners and their remuneration. Briefly reflect on this practice and the possible ethical issues in relation to this method of calculation.

Contingency fee arrangements, also known as “conditional fees” or “success fees”, are remuneration arrangements in which the insolvency practitioner (the “IP”) is entitled to

receive based on specific outcome or condition being met; usually pertaining to a favourable outcome for stakeholders.

This approach has been criticized as the conditions and outcomes on which the fee is payable are conditions that IPs should meet as part of their fiduciary duties and should act as such anyway.

This type of fee arrangement has been questioned as it may result in the IP focusing its energy on a single task rather looking at the situation in a more holistic manner in order for the IP to maximize its remuneration causing a self-interest threat.

Conditions and measure of “successful” outcomes should be objectively measurable, rather than measurable by solely the IP, in order to eliminate the issues mentioned **above**.

Commented [JL8]: 3
Any circumstances when the fee would be appropriate?

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

Commented [JL9]: 7 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.

Prior to assuming the role of an insolvency practitioner (“IP”), the IP must ensure that they are free from conflicts so they can be independent and impartial (*Principle 2 – Objectivity, Independence and Impartiality*).

Once the IP accepts an appointment, they assume responsibilities of the debtor and those that are affected by the decisions and outcome of the insolvency procedure. As such, they voluntarily assume to abide by the rules and ensure that they act upon their fiduciary duties towards those stakeholders (act in the best interests) which includes the following:

- Duty to act in good faith: to act with honesty and fair dealing;
- Duty to act with care, skill and diligence.

Principle 1 – Integrity states that IPs must demonstrate the highest levels of integrity by being straightforward, honest, and truthful by adhering to the ethical principles in performing their duties as IPs.

Honesty requires the IP to refrain from lying while truthfulness requires the IP to be transparent and not conceal or misrepresent any information. Fair dealing requires the IP to ensure equitable treatment of all stakeholders.

Commented [JL10]: Relevance?

Principle 3 – Professional / Technical Competence states that IP should maintain acceptable level of professional competency.

The notion of an IP’s ability to act with care, skill and duty can be assessed by the degree in which any reasonable practitioners would demonstrate in the same circumstances. UNCITRAL Guide states that an IP must act in the “standard no more stringent than would be expected to apply to the debtor in undertaking its normal business activities in a state of solvency, that of a prudent person in that position.” Other times, the IP is expected with a higher standard of prudence as the IP will be responsible of assets belonging to those who suffered losses as a result of the company being placed into an insolvency process.

To demonstrate the level of care given by the IP on any appointment, they must ensure that they are aware of their limitation.

Incompetence is one way in which an IP can act recklessly and fail to demonstrate the level of care, therefore the IP must ensure that they have the necessary resources and expertise to be able to take on appointments and perform the necessary tasks and actions as part of those appointments.

At first instance, IP must ensure that they have the knowledge and qualification to take on the appointment. This can be done through the following:

- Ensuring that they are kept up to date with new and amendments to legislation and regulatory requirements;
- Understand the nature of the business that the debtor operates in by acquiring knowledge in that industry;
- Actively participate in any professional development that is relevant to their work both current and prospects (through short courses and conferences); and
- Take on sufficient work to remain skilled and experienced.

If there are areas that the IP does not have expertise in, they must ensure that they can find a subject-matter expert i.e. actuaries, valuers, tax consultants, etc.

On a holistic basis, the IP must ensure that they give necessary level of attention to all the appointments they take on. This is done through the following:

- Ensuring that they have enough resource at their disposal to deal with issues;
- If above cannot be satisfied then the IPA must ensure that they do not take on too many appointments.

If the IP fails to demonstrate and perform their duties, they might be in breach of duty to act with care, skill and diligence and will be held personally liable for losses suffered by the debtor.

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 – Remuneration covers the IP's fees and expenses for the work they perform. This includes cost incurred with the assistance of vendors and third-party companies charged as either disbursements or third party costs.

There were a number of cases in Singapore that dealt with how fees from legal professionals assisting IPs should be dealt with. In *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 44 [57] the court held that where the IP required assistance from legal professionals (set up a contract) to satisfy the work from their appointment, the IP must be compensated the work done by them. In *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn* [2015] SGHC 260, [2016] 1 SLR 21, 44 [59] the court held that cost can be billed as if they were hired by the debtor company. These two cases concluded that professional fees from legal advisers can be classified as

Commented [JL11]: Some elements missing:
Two-fold test and yardstick
Case law reference?
4

1. IP's disbursement; or
2. Third-party cost.

Legal costs that are claimed as disbursement, the IP must review the invoices issued by the legal professionals to them and assess whether the amount charged is appropriate for the work performed by them. In *Re Korda: in the matter of Stockford Ltd (2004) 140 FCR 424, 443 [51]* held that the IP must exercise their commercial judgment in assessing the reasonability of the legal cost and must monitor these costs that a prudent IP would do in the same circumstance.

In cases where the legal fees are billed straight to the debtor, the issue that must be dealt with is one of scrutinizing the type of work being performed by one legal professional and whether it is duplicated by the IP or another legal professional. Justification also lies on the IP whether the work being performed, and the invoices being raised is reasonable. In *Liquidators of Dovechem Holdings Pte Ltd v Dovechem Holdings Pte Ltd [2015] 4 SLR 955*, the IP was successful in proving to the court that the work done by them was different to the work performed by their legal advisers.

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 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.

Commented [JL12]: Some elements missing:
Duplication of work
Aspects to consider in relation to the Lawyers like cost, experience and expertise.

3

Commented [JL13]: 15 out of 15

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.

WeBuild Ltd. ("WeBuild" or the "Company") entered into a voluntary administration and appointed Mr Relation as the administrator. Mr. Relation, as the appointed IP must exercise its powers in order to develop and encourage trust of the stakeholders involved.

The stakeholders of WeBuild include, but not limited to the following:

- The directors of the Company i.e. Mr B Inlaw, Dr I Dontcare and Mrs I Relevant;
- All ten shareholders of the Company, which includes Mr B Inlaw and Dr I Dontcare;
- The employees of the Company; and
- All creditors of the Company i.e. ABC Bank as the major secured creditor and all other "minor" creditors.

The main duties of an IP includes:

- The duty to exercise the powers of the office in an independent and impartial manner which includes the duty to avoid a conflict of interest;
- The duty to act in good faith, which implies honesty and fair dealing;
- The duty to act in the best interest of the beneficiary of the fiduciary duties; and
- The duty to act with care, skill and diligence.

It is unclear what the code of ethics and conduct is in Euraficilia, where WeBuild is registered therefore in reviewing, assessing and solving the ethical issues provided in this

case study, the Ethical Principles for Insolvency Professionals (the “principles”) issued by INSOL International was used as guidelines.

Conflict of Interest and Lack of Integrity

Mr Relation is Mr B InLaw’s brother-in-law and godfather to his daughter. This poses threat to *Principle 2 – Objectivity, Independence and Impartiality* (“P2”). The IP should avoid circumstances likely to result in a conflict of interest, in particular, familiarity and advocacy threat. Independence is a matter of both fact and the perspective of an informed observer (i.e. other stakeholders of the Company) i.e. “reasonable and informed third party test” (Paragraph 2115. A1 of the ICAEW Insolvency Code of Ethics). Mr Relation will only be able to exercise his discretion and powers in the best interest of the beneficiaries if he is independent and impartial especially when he has to consider and deal with competing interest of the stakeholders listed above.

In order to address the threat to independence, Mr Relation disclosed his relationship with Mr B Inlaw and provide declaration to act independent and impartial. However, lack of independence cannot be cured by mere disclosure of relationship.

After the member’s meeting, there was a subsequent meeting between the directors and Mr Relation which was a “planning” meeting. The directors raised concerns to Mr Relation regarding the possible personal liability for breach of duty and decisions to continue trading when the Company was in financial distress in which Mr Relation assured the directors that work will not be focus on them. In these two examples, Mr Relation appears to favour the directors of the Company rather than looking after the interest of the wider stakeholders i.e. the employees in terms of their injury claim or the shareholders and creditors of the Company in terms of continuation of trades under financial distress. One may question whether Mr Relation was or acted as independent or impartial to the situation. This may be to protect his brother-in-law as well as protecting the other directors who appointed Mr Relation as the administrator, advocating for them as Mr Relation reassured them that investigation will not be on them (and their actions). One may also question whether Mr Relation can satisfy the “no-profit” or “no-conflict” test given that his Mr B Inlaw has interest in those actions and decisions mentioned above.

Furthermore, IPs should endeavour to demonstrate the highest levels of integrity by being straightforward, honest, and truthful. This is in accordance with *Principle 1 – Integrity* (“P1”). The IP must refrain from misleading a creditor, employee or shareholder of the company through any act or omission. As mentioned above, Mr Relation assured directors that he will not focus on employee claims or the trading issue. These omissions pose issues as Mr Relation was not truthful and only looking after the interest of certain stakeholders i.e. the directors of the Company. P1 further discuss that the IP must treat stakeholders fairly and equitably. Mr. Relation should have reviewed all matters including the personal liability and continuance of trading when the company is in financial distress. This would have shown that Mr Relation also looked after the interest of the employees and other creditors of WeBuild.

Months later, the administration was converted to liquidation proceedings and Mr Relation was appointed as the liquidator. This appointment posed for further threats to independence, this time, self-review and self-interest.

Firstly, Mr Relation has already been involved with prior decisions during the administration (which had failed). This may affect his assessment of why his prior decisions were incorrect and how his actions were unsuccessful. Secondly, the reason the administration failed due to “lack of funding” to finance the rescue. It may be an issue to pay any remuneration due to Mr Relation from the administration as well as any future remuneration due to him during the

liquidation. These threats to independence may cloud his judgment and influence his behaviour.

To address the threats of independence mentioned above, Mr Relation should consider resigning from his appointment.

Fees

If Mr Relation is to continue to act as the liquidator of WeBuild, remuneration arrangement plan must be agreed upon with the creditors of the Company. *Principle 5 – Remuneration* (“P5”) provides guidelines on remunerations for IPs.

P5 states that IPs are entitled to remuneration for their work. The IP must be able to provide sufficient information to the body approving remuneration i.e. the creditors to allow them to make an informed decision that such remuneration is reasonable. If Mr Relation was to get paid for any outstanding fees from administration, he must present information of work performed to the creditors and obtain approval from them.

If Mr Relation was to continue to act as liquidator, he should agree how he will get compensated. To address the independence issues, percentage-based fee arrangement, remuneration as a percentage of returns to creditors might be the best solution as this will ensure the interests of all types of creditors will be looked after and gain their trust; the employees (who are making claim against the Company), ABC Bank (major secured creditor – who feels uncomfortable with Mr Relation being involved due to a statement he made on television) and all other “minor” creditors.

Commented [JL14]: A good and well-structured answer.
15

*** End of Assessment ***