



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: 202223-336.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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. 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 [LJ1]: TOTAL: 31 out of 50

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

Commented [LJ2]: 8/10

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

Unethical behaviour by insolvency practitioners can undermine the entire insolvency framework of a country due to a lack of trust and confidence in the insolvency profession.

(a) True

(b) False

Question 1.4

Being an officer of the court requires a person to act with integrity and to not mislead the court in acting on behalf of a client. An officer of the court recognises the importance of dishonesty in the justice system and as such would act in a manner which would further the administration of justice to the best of their ability.

(a) True

(b) False

Commented [LJ3]: b

Question 1.5

Select the correct answer:

Ho has been appointed as a liquidator of Company X. Company X has several major creditors, including ABC Bank. A year prior to the liquidation of the Company, Ho was acting in an advisory capacity for ABC Bank in litigation against Company X where he attempted to advance ABC's position as a creditor.

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

(a) self-review

(b) self-interest

(c) advocacy

(d) intimidation

Question 1.6

John was appointed as the liquidator of DebtCO. One of DebtCO's suppliers and major unsecured creditors, S. Panesar, is very friendly towards John. Mr Panesar has heard in passing that John enjoys sport and managed to procure tickets to several events in the recent Tokyo 2020 Olympic Games, which John accepted. John realises that this will be deemed questionable behaviour and he fears that Mr Panesar will make the offer and acceptance of the gift public. This would certainly create a threat to his perceived objectivity.

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

- (a) familiarity**
- (b) self-review
- (c) advocacy
- (d) intimidation

Commented [LJ4]: d

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 fixed fee calculation method for determining the amount of remuneration owed to him, will receive a fair amount of remuneration.

Please choose the most correct answer.

- (a) This statement is false since the practitioner might have carried out more work and invested more resources than is reflected in the fee.** *Student Note: This seems like the most correct answer choice, but in the same vein, I would also say that the petitioner may have carried out less work than is reflected in the fee.
- (b) This statement is true since jurisdictions always allows for an adjustment of fees where it is necessary.
- (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.

Timothy has been appointed as the judicial manager of a large public company. As a result of his appointment, he has been privy to confidential information regarding the company and its stakeholders. Timothy is aware that there is a duty on him to maintain confidential information and is very careful when he speaks to the press and members of the public. However, he often discloses work related information including sensitive information to his brother-in-law when they see one another over weekends and Timothy believes the information will be kept confidential by him.

Please select the statement that best describes Timothy's situation.

- (a) Timothy is not in breach of his duty to confidentiality. He maintains confidentiality when engaging with the press and public. His disclosure to his brother-in-law poses no risk as he trusts him to keep the information to himself.**
- (b) Timothy is in breach of his duty to act in the best interests of the beneficiaries of his duties. Timothy's disclosure of confidential information to his brother-in-law will pose a conflict of interest and create bias in the exercise of his duties.**
- (c) Timothy is in breach of his duty to confidentiality. As an IP he should maintain confidentiality even in a social environment and should be alert to the possibility of inadvertent disclosure to an immediate family member like his brother-in-law.**
- (d) Timothy is not in breach of his duty to act with good faith. He maintains confidentiality when engaging with the press and public. His disclosure to his brother-in-law poses no risk as disclosures to immediate family members are not regarded as threats to compliance.**

QUESTION 2 (direct questions) [10 marks]

Commented [LJ5]: 6/10

Question 2.1 [maximum 3 marks]

What are the most common elements associated with the existence of a fiduciary relationship generally?

A fiduciary is largely accepted to be a person who undertakes to act on behalf of another and has discretion and power over the interests of the other. Elements such as vulnerability, power, trust, from one party to another may be indicators of the existence of a fiduciary relationship between the parties. A fiduciary could have implied and express duties, such as 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 such fiduciary duties; the duty to exercise the powers of the office in an independent and impartial manner, which includes a duty to avoid conflict of interest; and the duty to act with care, skill and diligence (though this may not be a fiduciary duty in the traditional sense).

Commented [LJ6]: 3/3

Question 2.2 [maximum 4 marks]

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

An insolvency professional's duty to act with independence and impartiality of the IP aims to broadly ensure the IP won't permit bias or a conflicted interest or undue influence to override their professional or business judgments in execution of their duties. Tracking the "no profit" and "no conflict" principles of corporate law, a fiduciary may not: (1) profit from his position of trust and be unjustly – the "no profit" rule OR; (2) allow a conflict to arise between his duty to act impartially and the beneficiaries' interests – the "no-conflict" rule. Transacting with the debtor company in his personal capacity is one such example.

Commented [LJ7]: 0/4

This question required a discussion of independence in fact and independence in mind - that is factual independence and perceived independence.

Question 2.3 [maximum 3 marks]

Explain the difference between professional and fidelity insurance and elaborate on why it is of particular importance for Insolvency Practitioners to obtain this type of insurance.

Where appropriate, insolvency practitioners should obtain professional and/or fidelity insurance, as doing so tracks the best interests of stakeholders. While professional indemnity insurance enables stakeholders to cover the costs of initiating an action against a negligently acting insolvency professional – where, for example, the duty of care is breached. In contrast, fidelity insurance protects the insolvency professional or his employees and agents from acting in a fraudulent manner (criminal or estate) or from acting in a way that would defraud the bankruptcy estate. Insolvency professionals may use such insurance to protect themselves and stakeholders to cover the costs of such actions. It is important for IPs to be able to protect the interest of stakeholders based on potential misconduct or fraudulent acts.

Commented [LJ8]: 3/3

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

Commented [LJ9]: 7/15

Question 3.1 [maximum 6 marks]

The ethical principle that requires insolvency practitioners to act with integrity also states that he should adhere to high moral and ethical standards. Explain what is meant by this and provide examples to illustrate the difference between these concepts.

The principal of high moral and ethical standards, within the broad principle of integrity, requires an insolvency professional conduct themselves with both, morality – that is, what they personally believe might be right or wrong – AND ethics – which in turn imposes a less subjective and more objective personal layer of how an insolvency professional should act. Both "morals" and "ethics" cover two different areas of integrity in an IP's practice. What one person considers to be correct or right

based on their personal set of beliefs may not, actually be ethical from a professional point of view.

One such example is that of the duty of loyalty, which prohibits insolvency professions from effectively engaging in a manner that could benefit them in place of the corporation. An insolvency professional may believe it is *moral* to act in a manner that may breach this duty by loaning personal funds to the debtor or insolvent company in order to save jobs or protect stakeholders. However, while this may be a moral act in the subjective insolvency professional, doing so would actually be a breach of the ethical requirements of an insolvency professional as it would violate their duty not to engage in any self-dealing transactions. Since one act may be moral to one person but not necessarily moral to the industry as a whole, it is important to separate both concepts – and include both concepts – in the ethical principles that govern how insolvency professionals should act.

Question 3.2 [maximum 9 marks]

Which elements of insolvency proceedings are especially prone to create or give rise to threats to independence and impartiality? Please elaborate with reference to primary and secondary sources of law.

Insolvency professionals often run the risk of being perceived or seen as biased or partial, with a lack of independence, especially where they begin working on an insolvency matter with some degree of familiarity with the company. Inevitably, given that **appointments** of insolvency professionals are not always – in and of themselves – impartial or independent, parties could question a pre-existing relationship the professional may share with other stakeholders, given the risk that the IP would act on behalf of those individuals or in a personal manner, and not pursuant to their own duties to be uninfluenced and impartial. In an insolvency context, it is often the case that prior to acting as an insolvency professional, the IP was associated with (either professional or personally) a company shareholder, employee, business partner, creditor, or even the relatives of officials.

One such example can be found in the case, *Royal Bank of Scotland v TT International Ltd*. In that matter, the court held that the insolvency professional not acting impartially or independently when his own personal “interests aligned with those of the company” when he was appointed by two shareholders who constituted the company’s management, as opposed to being appointed by creditors, and more critically, he acted as a nominee on behalf of the two shareholders who appointed him. This conflict of interest, the court found, would have threatened the insolvency professional from acting in a presumptively impartial and independent manner.¹

In another example, in its 1988 General Insolvency Inquiry, the Australian Law Reform Commission highlighted that some contributors opposed the selection of an

¹ Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd

Commented [LJ10]: Your example is quite interesting in that you choose a fraudulent act to be something the IP believes to be morally correct. I am unsure that it qualifies completely, but I will exercise my discretion in your favour.

4/6

I would have liked to see some elaboration on the link between morals and ethics.

Commented [LJ11]: Your summary misses the nuances of the issues in this case.

*insolvency professional by a company director because there is a risk the IP will not act impartially, or on behalf of directors whose mismanagement resulted in the insolvency, or where a person who has already been appointed in a different capacity by creditors would not be able to detach from that prior role entirely.*²

Commented [LJ12]: 3/9

This answer only identifies one element of insolvency proceedings that could give rise to independence issues. There are 3 others.

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

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 and licensed insolvency practitioner, 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. An undertaking that he complies with by subsequently issuing a written declaration of independence.

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.

² General Insolvency Inquiry (ALRC Report 45).

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.

Mr Relation's firm has been implementing a work-from-home arrangement for employees, and his secretary and associate have several sensitive documents pertaining to WeBuild Ltd in their possession and on their personal computers at home.

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.

Issue: Mr. Relation's Appointment

- ***Impartial and Independent: At issue is whether Mr. Relation's conduct and appointment could be seen as unfair or improperly biased towards his appointers. Under Principle 2 (Objectivity, Independence and Impartiality), an insolvency professional should not be seen to be unfairly or improperly biased towards any party, and more appropriately, should not accept an appointment in connection with any estate if his relationship with the interested parties or stakeholders in the company could give a rise to any possible, or even perceived, lack of independence. Under the principles of independence and impartiality, an insolvency professional must take care not to be seen or***

perceived in a non-independent way and avoid any kind of personal or professional connection that could adversely influence or impede their ability to act in an impartial manner.

In Royal Bank of Scotland v. TT International, the Singapore Court found that a scheme manager's personal "interests aligned with those of the company" when he was appointed by two shareholders who constituted the company's management. This fact pattern also applies under our facts: Mr. Relation was ultimately appointed by a shareholder who brought him in to provide information and advice about WeBuild's financial distress. His appointment was proposed by B InLaw. Moreover, there is little possibility that Mr. Relation could have avoided any appearance of impartiality or impropriety: shareholders knew that he was related to B InLaw, and as the godfather of Mr. B InLaw's daughter, Mr. Relation would conceivably put his family member's interests above those of the company – even though he proclaimed to act with independence and impartiality. Even if Mr. Relation's 13 declaration was sufficient, he still privately consulted with Mr. B InLaw and other directors after the shareholder meeting to discuss the directors' personal liability for breach of duty and concerns that they might be found liable. Instead of making a statement to the effect of him not being able to discuss this because it would be a conflict of interest – which Mr. Relation should have done, Mr. Relation instead assures the directors not to worry because he won't focus on their potential wrongdoing. All these facts show that Mr. Relation was not only both, actually unable to act impartially or independently, but he was not perceived to be independent by any stakeholder either.

Commented [LJ13]: The focus of your argument is slightly askew. It is not the fact that shareholders appointed an IP which is problematic but rather that there was a personal relationship.

- Nature of Pre-Commencement/Appointment Involved: ***At issue is whether Mr. Relation's appointment was permissible based on the requirements to remain objective and impartial. In many cases, pre-commencement appointments prior to insolvency could result in the disqualification of a practitioner under Principle 1 in order to not be found biased. In this case, Mr. Relation was brought in as a consultant before his formal appointment, which could have created a perception of a lack of impartiality. Indeed, safeguards could have been implemented: for example, in Re Korda, Ten Network Holdings, the Australian Court found that procedural safeguards could be used where a potential administrator's pre-insolvency appointment could impact their ability to take a formal appointment in a non-biased way. Such safeguards include a potential administrator making it clear to executives at the offset that they plan to become the administrator if pre-insolvency measures to save a company fail. In this case, Mr. Relation made no such declaration: he was involved in providing shareholders practical advice, but did not provide any kind of hedged statement that he might also be appointed as an insolvency professional.***

Issue: Mr. Relation's Professional/Technical Competence

- Expertise and Competence: ***At issue is whether Mr. Relation acted with the knowledge, skills, and experience that is required of him as a fiduciary.***

*Insolvency professionals must act with a duty of care, which can be objectively measured by looking at what a reasonable practitioner under similar circumstances would do. Moreover, a professionally competent insolvency professional based on guidance by UNCITRAL would act either with that of a prudent person in the same position, or with an even higher standard, given their role as a fiduciary. Part of this responsibility mandates a competent insolvency professional to understand the business and its functions, as well as understand the industry that the company is in. Under these facts, Mr. Relation relied entirely on knowledge passed on by Mr. B InLaw: his own investigation into the affairs of the company was only “superficial.” Moreover, Mr. B InLaw, as the shareholder who is related to Mr. Relation and the shareholder who appointed him, picked Mr. Relation after his suggestion to initiate a voluntary administration procedure. Mr. Relation used the reports drafted by Mr. B InLaw to create a strategic plan for recovery. In total, Mr. Relation did little work of his own to make a good faith investigation into the company’s situation, thus breaching the duty of care. It is unlikely that any other reasonably prudent insolvency professional would also act in this manner and fail to conduct their own investigation. For example, the standard from *Re Chamley Davies* would likely be one that Mr. Relation could not live up to, since it requires an insolvency professional making an error (for example, one that leads to a failed administration proceeding because of lack of funding, in this case) to be judged based on whether a “reasonably skilled and careful insolvency professional “ would also have made this error. It is unlikely that a reasonably careful insolvency professional would have failed to conduct his own investigation when attempting to run a restructuring proceeding. Therefore, Mr. Relation likely breached this ethical principle.*

- Integrity and fair dealing: ***At issue is whether Mr. Relation breached the Principle 1 “Integrity” requirement in believing, in an insolvency scenario, that that banks should be more accommodating in restructuring proceedings and that the interests of lower ranking creditors should sometimes outweigh “big money.” The principle of integrity has a “fair dealing” requirement, which requires that a liquidator must “hold an even hand in his dealing with the often competing interests of creditors, contributories, and his appointers.” See *Fustar Chemicals v. Liquidator of Fustar Chemicals*. This belief, if true, may hinder Mr. Relation’s ability to act as an insolvency professional with proper fair dealing, given an inherent bias against banks in favour of lower-ranked creditors.***

Issue: Mr. Relation’s Practice Management Issues During Liquidation

- Risk Management: ***At issue is whether Mr. Relation’s firm implementing a work-from-home arrangement that includes his secretary and associate keeping several sensitive documents on their personal computers. As a general rule, part of an insolvency professional’s duty to conduct their practice in a reasonable and proper manner includes proper record-keeping and risk management. Proper risk management requires the prevention and control of threats. These threats include, among other things, data-related breaches and similar legal liabilities. Here, Mr. Relation’s work-from-home practices for his firm may risk***

WeBuild's confidential data, given the secretary and associate accessing these highly confidential documents at home on their personal devices. A failure to conduct the company's business in a manner that complies with proper data protection measures, especially given how much sensitive information insolvency professionals have access to, could be incredibly detrimental and a breach of the ethical regulations insolvency professionals should abide by.

Commented [LJ14]: Good identification of ethical issues. Some issues not elaborated on as extensively as required - did not disclose why it is important or provide safeguards or remedies for all issues.

Good overall discussion.

10/15

*** End of Assessment ***