



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**

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.***

Commented [LJ1]: TOTAL: 46 out of 50

Excellent work!

Commented [LJ2]: 9/10

**(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**

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 [LJ3]: 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.**
- (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] 1

Question 2.1 [maximum 3 marks]

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

**In general, a fiduciary is someone who has undertaken to act on behalf of another person and has obtained discretion and power over interests of such person. In certain situation, vulnerability may be viewed as an element indicating presence of fiduciary relationship.**

Commented [LJ4]: 10/10

Commented [LJ5]: 3/3



Question 2.2 [maximum 4 marks]

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

**To fulfil the duty to act with independence and impartiality, insolvency practitioners should in fact be independent and be seen or perceived as independent.**

**To act with independence and impartiality in fact requires insolvency practitioners to be factually free from any kind of influence that would compromise their judgment. In making decisions, insolvency practitioners must avoid all personal and professional relationships and direct/indirect interests adversely influence or threaten their integrity and ability.**

**To act with independence and impartiality in perception, insolvency practitioners must avoid circumstances that would make a reasonably informed third party formulating the view that their integrity, independence and impartiality are compromised, even it might not be the fact.**

Commented [LJ6]: 4/4

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.**

**Professional indemnity insurance covers insolvency practitioners against the risk of legal action taken against them by stakeholders for acting negligently (i.e. not with reasonable care). On the other hand, fidelity insurance protects stakeholders in cases where the insolvency practitioners (or others working for them) acting dishonestly and fraudulently (not by criminal standard) and causing harm to the estate.**

**With the extensive duties owed by insolvency practitioners, in addition to the power they own in handling the cases, obtaining the two types of insurance would help to protect themselves (professional indemnity insurance) and stakeholders in the estate (fidelity insurance).**

Commented [LJ7]: 3/3

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

Commented [LJ8]: 15/15

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.**

**Insolvency practitioners must adhere to high moral and ethical standards in their professional practice, which are closely related but not in fact the same.**

**Morals focus on a person's personal beliefs regarding the rights and wrongs which is usually influenced by his/her own upbringing, education, culture and sometimes religious beliefs. It tends to be a more subjective trait and provides ones' foundation for ethics.**

**Ethics are specific rules and actions which are generally viewed as correct behavior and often shared by a specific group of people performing and functioning in similar circumstances, e.g. the insolvency practitioner profession.**

**Despite having morals as foundation, ethics focus on the acceptable standards of conduct by that specific group of people rather than a set of beliefs on what is right or wrong. Insolvency practitioners are required to possess both sets of value, i.e. formulating personal set of beliefs which guide their actions while such actions are adhering to the ethical values of the specific group.**

**In case of conflict, the professional ethical standards should prevail over personal moral standards as a moral action may be unethical for the specific group. For example, an insolvency practitioner's moral standard may tell him/her to be more lenient in accessing the work of subordinates. However, it may not be ethical as having proper quality control is important to practice **management**.**

Commented [LJ9]: 6/6  
Nice example!

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.**

Pre-commencement/appointment involvement

**It is not uncommon that there would be prior consultation between insolvency practitioners and the companies/stakeholders which may create impression that there would be a lack of independence or impartiality in case there is any appointment. Although not all forms of such contact would lead to lack of independence, insolvency practitioner would not be able to perform independently in case such consultation is material engagement. In prior consultation, advice should be limited to the company's financial position, solvency, effect of potential insolvency and alternatives thereof. Insolvency practitioners should also include extent of prior consultation in disclosure statement to enhance transparency and avoid accusation of lack of independence.**

***In the case of Re Korda, Ten Network Holdings Ltd (Admn Apptd) (Recs and Mgrs Apptd), the court had to consider whether the administrators' firm should be allowed to act given they had been involved in reviewing the company's financial position for several months prior to appointment. It was held that should appropriate safeguards are put in place, such prior consultation should not preclude the insolvency practitioner from taking appointment and such safeguards include informing board of directors that the advisor may later become actual appointment taker and proper record keeping of all dealings between the parties.***

***In the case of Re 1 Blackfrairs Limited (in liquidation), the independence and impartiality of the administrators were under scrutiny due to their prior "agreement" on the "light touch" approach with appointing creditor, whom may believe that they would be able to guide the administration. Although it was held that there was no evidence of improper influence, we can see that insolvency practitioner's pre-appointment conduct could adversely affect people's view on whether they are acting with independence and impartiality.***

#### Appointment

***By appointing the insolvency practitioner, the stakeholder may expect that the practitioner would give priority to their interests and they may influence the work of the practitioner to a certain extent. Accordingly, the practitioner should be aware of his/her responsibilities and not to make any promise to the appointing stakeholder and act in the interests of all relevant beneficiaries.***

#### Subsequent Appointments

***It refers to situation where an insolvency practitioner is appointed to act in different insolvency capacities in relation to the same debtor company. Such appointment create problem to independence and impartiality of the insolvency practitioner due to the threats of self-review and self-interest.***

***Self-review threat could be created by "sequential insolvency appointments" according to *The Insolvency Code of Ethics of the Institute of Chartered Accountants of England and Wales* (2114.1 A5(b)(ii)). It refers to a situation where the practitioner being unable to properly evaluate the results of previous judgements due to his/her involvement therein.***

***Self-interest threat refers to a financial or other interest will inappropriately influence judgment or behavior of a practitioner. For example, a practitioner may not try his/her best to carry out the rescue plan as he/she believes that further remuneration could be received if being appointed as liquidator of the company.***

**While such appointment is permitted in England and Wales, etc., the *South African Companies Act of 2008* explicitly prohibited a business rescue practitioner to be appointed as liquidator.**

**In the case of *Commonwealth Bank of Australia v Irving*, it was illustrated that personal relationships with stakeholders would lead to a lack of independence due to perception created, even there was no actual bias (familiarity threat). In addition, substantial prior involvement could create advocacy and self-review threats for the practitioner.**

**As shown in the case of *Ventra Investments Ltd v Bank of Scotland Plc*, the perception of lack of independence and impartiality could be created (no matter it existed actually or not) in the eyes of observer should there be very close relationship with a stakeholder.**

Secret monies and personal transactions with the company

**An insolvency practitioner, as fiduciary, should not make secret profit at the expense of the beneficiaries or place himself in a position where his duties conflict with personal interest. The practitioner is in effect at both ends of a contract if he (or related person) purchases assets from the company and people may view that he is acting for his own interest. Insolvency practitioner must act with independence and impartiality in order to conform with the “no-profit” and “no-conflict” rules in Corporate Law.**

Commented [LJ10]: 9/9

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 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.***

***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.

Ethical Issue No.1 : Objectivity, independence and impartiality

**Relevant facts in the case :**

- **Mr Relation is Mr B Inlaw's brother-in-law and godfather to his daughter**
- **Mr Relation assured directors that his focus would not be on their behaviour**
- **Mr Relation appointed as liquidator of WeBuild Ltd following failure of rescue**

**Mr Relation has clearly violated Principle 2 of the INSOL Principles which requires insolvency practitioner to, inter alia, exhibit the highest levels of objectivity, independence and impartiality while carrying out his/her duty. Independence should not only be a matter of fact but also accepted in the perception of others.**

**Among the threats against independence and impartiality, we can note the threats of familiarity, self-interest and self-review in the conduct of Mr Relation.**

**Upon accepting the appointment, Mr Relation promised to the directors that their potential misconduct would not be focus of the rescue procedure. His close relation with Mr B Inlaw would inevitably create the impression that there would be bias to directors due to the threat of familiarity.**

**For subsequent appointment as liquidator, threat of self-interest could be created by expectation of Mr Relation to be remunerated twice for the same work done for WeBuild Ltd and this would badly influence his judgement while pursuing the rescue plan. In addition, self-review threat would be created as he might not be able to impartially assess his previous judgments made while working on the rescue plan thus affecting his effectiveness in liquidation procedure.**

**In the case of *Commonwealth Bank of Australia v Irving*, similar personal relationship with stakeholder was viewed in the eyes of third party that there was a lack of independence even there was no actual bias.**

**The problem may not be cured by simply disclosing such relationship as it is difficult to convince stakeholders given their long term and special relationship. Mr Relation should consider to cease acting as liquidator for the best interest of stakeholders.**

Ethical Issue No.2 : Integrity

**Relevant facts in the case :**

- **Mr Relation conducted superficial investigation into affairs of the company and circumstances leading to its financial difficulties**
- **Mr Relation relied on reports drafted by Mr B Inlaw regarding the company's business**
- **Mr Relation based his strategic plan for recovery on his superficial investigation and reports from Mr B Inlaw**
- **Mr Relation stated that he had not found any evidence of wrongdoing or maladministration by the company's directors**

**Insolvency practitioner should demonstrate the highest levels of integrity by being honest, truthful while adhering to moral and ethical principles in carrying out the duty.**

**Interest of stakeholders, in fiduciary relationship, is at the mercy of the practitioner's discretionary powers therefore they have to believe that he would protect their interest. It is important for the practitioner to be honest and truthful at all times while working with integrity.**

**In the "planning" meeting, Mr Relation was informed of the directors' breach of duty and potential fraudulent trading behaviour. However, he did not go into the fault of directors in reviewing of the company's affairs and it is inevitable that the rescue plan put forward by him would not be in the best interest of the beneficiaries.**

**Accordingly, Mr Relation failed to be honest and truthful as he helped to concealed the fault of directors and misrepresented the shareholders in the meeting. In addition, his ill-informed rescue plan (which failed ultimately) was also misleading to the shareholders.**

**Furthermore, Mr Relation's "agreement" with directors also breached the required moral and ethical standards expected of him as insolvency practitioner. No matter from his personal perspective or his role in the profession, it is unethical for him to help concealing the directors' fault and to mislead shareholders.**

**In addition to "integrity", the facts above may also suggest that Mr Relation was not working with the required "professional/technical competence". Such ethical principle requires practitioner's duty of care, skill and diligence. By ignoring the directors' fault and providing the ill-informed rescue plan, Mr Relation failed to fulfil the duty of care, skill and diligence as required by the profession. Although he may have the required knowledge, his relationship with the director somehow made him failed to meticulously perform his duties. Potentially, Mr Relation would be personally liable for any loss due to his actions or omissions (e.g. failure of the rescue plan which led to liquidation of WeBuild Ltd).**

Ethical Issue No.3 : Professional Behaviour

**Commented [LJ11]:** This relates more to care skill and diligence, i.e. professional and technical competence.

**Commented [LJ12R11]:** I see now that you do mention it below although grouped here with integrity.

**Relevant facts in the case :**

- **Mr Relation's firm implemented work-from-home arrangement and sensitive documents of WeBuild Ltd kept with his secretary and associate as well as their personal computers at home**

**Insolvency practitioner must communicate with all stakeholders in professional manner and must not divulge any confidential information as confidentiality forms part of fiduciary duty to act in good faith.**

**While it is of higher risk to make improper disclosure of confidential information in situation like social environment, insolvency practitioners should also beware of the risk as shown in this case. While it is inevitable to adopt work-from-home arrangement in COVIC-19 pandemic, practitioner must be extremely careful in handling sensitive materials which are kept at home or personal computer.**

**A safer environment is usually provided by an office but not available at employees' home. Insolvency should figure out rules and regulations on what information can be taken away from office and kept in personal computers. Furthermore, if confidential information or communication is to be handled by personal computers, proper procedure and security software should be made available to ensure there would not be any disclosure. To conclude, insolvency practitioner must always comply with the duty of confidentiality and have proper risk management policy.**

\* End of Assessment \*

**Commented [LJ13]:** An excellent discussion. I would have liked to see more on the remedies or safeguards.

12/15