



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^[U1]

QUESTION 1 (multiple-choice questions) [10 marks in total]^[U2]

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 [U3]

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 [L4]

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] [L5]

Question 2.1 [maximum 3 marks]

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

The most common elements associated with the existence of fiduciary relationship includes:

- 1. The ability to commence action on behalf of another party*
- 2. The ability to exercise the rights of another party and decide on their behalf*

3. *The reliance of party B on party A to decide and exercise party B's powers, giving rise to the vulnerability of party B to party A* [LJ6].

Question 2.2 [maximum 4 marks]

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

Independence and impartiality are assessed in 2 ways. Factual independence and perceived independence. An insolvency practitioner ("IP") should not be in conflicting positions or interests that may affect their ability to decide independently and impartially. These conflicting positions and interests can arise from personal and work relationships eg. Having ownership in a creditor's business that they are being appointed liquidator to, being appointed as a liquidator to a company with directors that you work with in a professional capacity like for legal advice if the director is a lawyer, etc. Perceived independence would be whether a reasonable unrelated person trusts that the IP is able to act independently and impartially considering the situation on hand. If the IP is deemed to be too closely related to a stakeholder with considerable interests, it can be perceived by the third party that the IP is not independent and not impartial [LJ7].

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 provides protection for stakeholders of the estate should the IP perform their duties carelessly.

Fidelity insurance provide protection to stakeholders of the estate should the IP engages in fraudulent behaviour.

As the estate is vulnerable to the actions of the IP where they act on behalf of and exercise rights on behalf of the estate, it is prudent for IP to obtain the relevant professional and fidelity insurance to protect stakeholders of the estate and the IP themselves of any potential liabilities. IP is also often involved in contentious matters and will require protection from potential claims [LJ8].

QUESTION 3 (essay-type questions) [15 marks in total] [LJ9]

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.

Morals is what an individual believes is right or wrong, which is subjective and dependent on each individual's perception. These are affected by the environment they are in, the values they hold, which forms the basis of ethical standards.

Ethical standards are a set of rules or principles for an organisation which members adhere to. In this case for an IP who is a member of INSOL International, it will be the INSOL International's Ethical Principles for Insolvency Professionals. Ethical standards set out the principles to abide by and determine what is the expectation for professional behaviour within the member body.

There would be instances where the ethical standards and moral standards are in conflict and in such instances, the ethical standards of the member body that the individual belong to should prevail, as moral standards are subjective and may not necessarily abide by ethical standards. This is why both high moral and ethical standards should be adhered to for the IP to act with integrity^[L10].

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.

1. Pre-appointment discussions

As it is natural and encouraged for directors and stakeholders to seek professional advice when dealing with potential financial issues of the company, the discussions between the insolvency practitioner ("IP") and the directors and other stakeholders may lead to the perception of lack of independence and impartiality, which could affect the ability of the IP to eventually take on the appointment. Such pre-appointment discussions should be restricted to issues surrounding financial options for the company, the liquidity, solvency of the company and the impact of insolvency. IP should also make proper record of the nature of discussions being held and make such disclosures as appropriate. This will ensure that there is honest communication and reduce likelihood on questions surrounding the perceived lack of independence.

This is similarly noted and highlighted in the case of Commonwealth Bank of Australia v Irving. The case on hand is one that could give rise to lack of

independence. A person that has been significantly involved in the company's affairs prior to appointment of an officeholder, will be deemed not independent and not impartial and hence unable to take on such appointment. This creates opportunities for advocacy and self-review threats. In Re 1 Blackfriars Limited (in liquidation), it is noted that the administrators appointed have met with the company pre-appointment to discuss options for the company. It was held that there is no impropriety but the case demonstrates how pre-appointment discussions can give rise to threats to independence and impartiality.

In another case, Re Korda, Ten Network Holdings Ltd (Admn Apptd) (Recs and Mgrs Apptd), the courts highlighted that while directors should consult professionals when company encounters financial difficulties, appropriate safeguards mechanisms and remedies should be in place to ensure independence and impartiality is maintained. Potential officeholder needs to communicate to the management of the company that they could be appointed should measures to turn around the company be ineffective. The potential officeholder is required to maintain detailed minutes of meetings and work done.

2. Appointment

The IP will have to typically be appointed by the directors, shareholders, creditors or other stakeholders and by virtue of such appointment being made by the relevant stakeholder, the stakeholder may take the position that they should be preferred over other parties. The IP should not make such suggestions to indicate that certain stakeholder is preferred and should communicate that the IP's duty is to all stakeholders and each stakeholder is to be dealt with fairly and equitably.

3. Subsequent appointments

In certain countries, the same IP is allowed to undertake other subsequent appointments for the same company such as being appointed as liquidator after being the administrator of the same company, which will give rise to self-review threats and threaten independence and impartiality. Another possible threat is in relation to remuneration, where the IP may be paid multiple times for the same work done. The IP that is appointed as the restructuring officer / administrator may not be incentivized to turn the company around as it is in their interest to take on the role of liquidator subsequently where they can earn additional fees in a liquidation. The reason for the same IP being retained is usually due to there being pre-requisite knowledge and background on the operations of the company that will be of the interests of the stakeholders to appoint the same IP as liquidator for expediency's sake.

For other countries, there may be mandated law (eg. South African Companies Act of 2008) that does not allow for subsequent appointments due to such potential conflicts of interests and threats to independence and impartiality.

4. Secret monies and personal transactions with the company

The IP should not be profiting personally or be in a position of conflict that will result in the lack of factual independence, causing the IP to not act in the best interests of the stakeholders of the estate. If it is allowed for IP to carry out business dealings with the company, the required regulations should be duly followed and necessary disclosures to made where appropriate^[U11].

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.

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.

In this case, there are many instances where the principle of integrity, principle of objectivity, independence and impartiality, principle of professional behaviour and

principle of practice management which are not upheld. These are illustrated in the following paragraphs.

- 1. Mr Relation is Mr B Inlaw's brother-in-law and god father to his daughter. Given this relationship, it can be said that Mr Relation can no longer be independent and impartial. Taking the appointment will include undertaking the duty to investigate into the actions of directors, which would entail Mr Relation investigating into the actions of Mr B Inlaw. A reasonable third-party would draw the conclusion that Mr Relation would not be able to conduct an independent and impartial investigation against Mr B Inlaw, amongst the other directors.*

*This is demonstrated in the case of **Commonwealth Bank of Australia v Irving**, where the appointment holder is friendly with the director and had professional and personal relationship with said director. It was noted by the court that the relationship created a perceived lack of independence.*

Despite there being relevant disclosure of the relationship between Mr Relation and Mr B Inlaw, this is not sufficient to mitigate the factual influence and lack of factual independence between the two as a result of their personal relationship. Mr Relation should not have taken the appointment as administrator or liquidator.

- 2. During the brief planning meeting, Mr Relation provided advice to directors that may affect the "independence" of Mr Relation and may disqualify him from taking on the appointment due to the lack of independence. The actions by Mr Relation, assuring the directors that the work that he will be conducting will not focus on investigations against directors suggests lack of independence and this potentially constitutes advice to the directors.*

*This is similarly noted and highlighted in the case of **Commonwealth Bank of Australia v Irving**. The case on hand is one that could give rise to lack of independence. A person that has been significantly involved in the company's affairs prior to appointment of an officeholder, will be deemed not independent and not impartial and hence unable to take on such appointment. This creates opportunities for advocacy and self-review threats.*

*In another case, **Re Korda, Ten Network Holdings Ltd (Admn Apptd) (Recs and Mgrs Apptd)**, the courts highlighted that while directors should consult professionals when company encounters financial difficulties, appropriate safeguards mechanisms and remedies should be in place to ensure independence and impartiality is maintained. Potential officeholder needs to communicate to the management of the company that they could be appointed should measures to turn around the company be ineffective. The*

potential officeholder is required to maintain detailed minutes of meetings and work done.

- 4. Mr Relation conducts a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulties of the company. By conducting superficial investigations, Mr Relation is not fulfilling his duty as administrator, and he had not acted in the best interests of the creditors and other stakeholders of the estate. Mr Relation should have conducted thorough review of the affairs of the company.*

- 5. Mr Relation openly suggests that certain groups of creditors should be more accommodating, this creates a situation of advocacy, where Mr Relation's future objectivity becomes in question. Further, as a result of his comments, Mrs Keeneye who represents a lender to the company, does not feel comfortable with Mr Relation's appointment. By his comments, he is suggesting that he may not adhere to the fair-dealing principal and may not treat bank creditors fairly and equitably. Mr Relation should avoid making such public comments that promotes certain interests that will suggest that he is not objective.*

- 6. Director making payments to themselves and trading insolvent. Directors were aware of issues with machinery and did not take actions to remedy the issues. There exists a breach of duty of care by directors and potential claims for insolvent trading and undue preference.*

As there are potential claims and causes of actions to be undertaken against the directors, it is crucial that the appointment holder be independent and impartial and does not have any relations or perceived relationships that will influence their objectivity in decision making. In this case, given the relationship of Mr Relation with Mr B Inlaw, Mr Relation should not be taking on the appointment and another officeholder should be appointed instead. The directors did not act in the best interests of the company and the relevant stakeholders when they chose to appoint Mr Relation as administrator. Mr Relation should have similarly highlighted this and refused the appointment. Mere disclosure of the relationship in this case would not be sufficient to remedy the issue.

- 7. Mr Relation being appointed as liquidator gives rise to self-review threat, where he may be required to review his own work as administrator. In this case, a separate independent liquidator should be appointed instead, to review the work done by Mr Relation during the administration, such that if*

there are any impropriety during administration, the liquidator may take necessary actions against Mr Relation for such wrongdoings.

- 8. 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. There may be concerns that the principle of professional behaviour may not be adequately upheld as sensitive documents are not properly kept securely. Mr Relation would not have been able to meet his confidentiality obligations. Sensitive documents should not be removed from the premises of the company and should be adequately protected by passwords or physical lock where necessary. There is a lack of adequate risk and compliance management and therefore poor practice management^[U12].*

*** End of Assessment ***