



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.**

(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

Commented [LJ3]: c

(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.**
- (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]: 10/10

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 are where a person acts on behalf of another and has power and discretion over the interests of the other person. Where the other person is also vulnerable, this may also indicate a fiduciary relationship.

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.

This requires that the person be independent and impartial in fact, as well being perceived to be independent and impartial. Independence in fact means they must actually free from any conflicts that may impair or compromise their judgment. This typically relates to personal and professional relationships, or interests that may impact judgment. Perceived independence relates to avoid circumstances or relationships which an informed third party might perceive as impairing the person's integrity, independence and impartiality.

Commented [LJ7]: 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 insurance protects the Insolvency Practitioner from claims from other parties around their actions, particularly with regards to claims of negligence. Fidelity insurance protects the stakeholders and the estate in an insolvency from any fraud committed by the Insolvency Practitioner or their staff against the estate.

Given the nature of the work and duties Insolvency Practitioners are subject to, it is important for them to obtain professional indemnity insurance, to protect themselves against claims. Furthermore, taking out Fidelity Insurance is a sensible means to protect the estate for the benefit of stakeholders.

Commented [LJ8]: 3/3

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

Commented [LJ9]: 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.

Morals and ethics are concerned with two different things. Morals relate to a person's personal beliefs around what they consider to be right and wrong, whereas ethics relate to rules and actions that are considered to be appropriate behaviour. Ethics are often derived from a set of commonly understood morals, but because morals are subjective and personal to a person they may differ.

The principles require both, in that an insolvency practitioner needs to act according to their own personal beliefs (morals), but need to ensure that their conduct must

always comply with the ethics demand of by their profession. An example of this might be that the insolvency practitioner wants to be honest and upfront with creditors and the media; however, they also need to ensure they keep certain information confidential and respect privacy rights where necessary.

Another example of this might be in relation to the quality of work or qualifications of competing insolvency practitioners. The insolvency practitioner might consider the competitor to deliver a poor quality of work and consider that they are not appropriately qualified to offer the services, which would be a subjective view bound up in the person's personal beliefs. However, the ethics of the situation require that the insolvency practitioner avoids bringing the profession into disrepute by making and unsubstantiated or disparaging remarks.

Commented [LJ10]: This is more of an opinion than a belief.

Commented [LJ11]: 6/6

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.

There are four elements that are considered especially prone to threats to independence and impartiality:

1. **Pre-appointment engagement:** prior engagements with the company may create a perceived lack of independence and impartiality with the company, its management and board, or key creditors. The nature of the role, advice given and length of the engagement will all be important to assessing whether the independence and impartiality of the Insolvency Practitioner. In *Re Korda, Ten Network Holdings Ltd (Adm Apptd) (Recs and Mgrs Apptd)* [2017] FCA 914 [Australia], the administrators' firm had been engaged by the company for several months prior to their appointment. However, the administrators had implemented certain safeguards (including that the administrators were not involved in any of the pre-appointment work). The Court concluded that there was no actual or perceived conflict, given the nature of the work and the safeguards in place.
2. **Basis of appointment:** appointment by the board, shareholder or certain creditors may give rise to an expectation and perception around prioritising that party's interests. The Insolvency Practitioner will need to ensure no promises are made around their conduct and appropriately review the relationships and circumstances giving rise to the appointment, prior to accepting the appointment.
3. **Subsequent appointments:** some jurisdictions allow for the Insolvency Practitioner to be appointed in direct capacities in relation to the same company (i.e. receiver and then liquidator). This may give rise to potential risks around a perceived self-review threat, as the Insolvency Practitioner is involved in prior decision making but is unable to adequately scrutinise their own conduct or

their remuneration. In some jurisdictions, South Africa for instance, subsequent appointments are prohibited, per the Companies Act 71 of 2008, s 140(4).

- 4. Secret monies and personal transactions with the company: as the Insolvency Practitioner acts in a fiduciary capacity, they are not allow to make a gain at the expense of the estate or have a situation where their interests conflict with their duties. This potentially manifests itself if the Insolvency Practitioner acquires assets from the insolvent company, as the Insolvency Practitioner is both the seller and buyer and can engineer the transaction to benefit themselves.**

Commented [LJ12]: 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 Keeney, 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.

There are three key ethical issues to be considered here, as follows:

- 1. Mr Relation's relationship with the director and shareholder, Mr B In-Law, as his brother in-law and godfather to his daughter.***

Under the INSOL principles, members should exhibit the highest levels of objectivity, independence and impartiality and avoid circumstances that are

likely to result in a conflict of interest. Personal relationships may adversely impact someone's independence and judgment in an insolvency context. In this regard, Mr Relation's relationship could be considered to impair his independence as a matter of fact and from the perspective of a reasonably informed observer. While Mr Relation has disclosed this relationship to creditors, this cannot of itself cure the potential conflict.

In the Australian case of *Commonwealth Bank of Australia v Irving* [1996] 65 FCR 291, the appointed insolvency practitioner (Mr Irving) had known one of the directors (Mr Townsend) for 16 years, had used the legal services of Mr Townsend previously, and participated in various charitable and sporting events together. Additionally, Mr Irving had provided consulting services to the company prior to his appointment. One of the creditors challenged the appointment of Mr Irving and sought his removal. The Court noted that the relationship created a perception of a conflict of interest and raised a familiarity threat. Mr Relation's relationship is materially similar to this case and disclosure of the relationship was not enough to cure the conflict issues.

2. Mr Relation's reassurances to the directors to focus on rescuing the company, rather than any wrongdoing and subsequent failures to undertake any detailed investigations into the conduct of the directors. When questioned about any misconduct by the company's directors, he advises he found no wrongdoing.

The role of an insolvency practitioner often involves investigating the cause of failure of the company, the conduct of the directors and any transactions they have been party to. Directors in many jurisdictions may be held personally liable for any failings in this regard. Creditors may consider that Mr Relation is not independent or impartial due to this agreement, which would be exacerbated by the nature of Mr Relation's relationship with Mr B Inlaw.

Commented [LJ13]: Which ethical duties are affected by this?

Mr Relation also has a duty to be truthful and honest, while he has been truthful with his disclosure to the creditors (he has not found any wrongdoing), it is not honest as he has not undertaken adequate investigation to actually uncover any wrongdoing. Additionally, there is a higher level of dishonesty here, given his reassurances to the directors.

In the case of *Re 1 Blackfriars Limited (in liquidation)* [2021] EWHC 684 (Ch), the Court reviewed a situation where the administrators informed the appointing creditor the administration would be a 'light touch' administration. The Court found no impropriety or evidence of any improper influence. However, this case can be distinguished from the situation with Mr Relation, given his relationship, the lack of investigation, and the prima facie misconduct from the directors which should have been investigated.

3. Mr Relation's secretary and associate have sensitive records in their possession and on their personal computers.

Mr Relation and his staff have a strict duty of confidentiality and need to be alert to the possibility of inadvertent disclosure. The duty requires them to refrain from disclosing confidential information.

In this situation, the staff have confidential records at home and on personal computers, that is at risk of being breached by other people potentially being able to access these records at the homes of the secretary and associate. Regardless of working from arrangements, the duty for maintaining the confidentiality of these records remains. Mr Relation should have strict protocols in place regarding retention of records.

Commented [LJ14]: An good discussion. I would have liked to see more on the discussion and commentary of the duties affected by the behaviour and on the remedies or safeguards overall.

10/15

*** End of Assessment ***