



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**^[L4]

(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**^[L5]

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] [L6]

Question 2.1 [maximum 3 marks]

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

[The succeeding are the common elements associated with the existence of a fiduciary relationship;

- 1. In a fiduciary relationship, a fiduciary undertakes to act on behalf of another**
- 2. The fiduciary has discretion and power over the interests of the others.**

3. The element of vulnerability is sometimes regarded one of the elements associated with the existence of a fiduciary relationship [L7].

Question 2.2 [maximum 4 marks]

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

[The nature of the duty to act with independence and impartiality is primarily aimed at ensuring that the CIP or IP does not allow bias, a conflicting interest or the undue influence of others to take precedence over his professional or business judgment in the execution of his duties and obligations. Therefore, it is important for the IPs not to take appointments where their independence and impartiality will be questioned by the existence of a relationship with a stakeholder. The independence of the practitioner must be in fact and must also be seen or perceived to be independent. The said independence requires that the practitioner must be free from any influence that could impair his judgment. In other words, the Practitioner must attain both factual and perception independence [L8].]

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.

[The difference between professional and fidelity insurance is that professional insurance is taken out by the Insolvency Practitioner to cover against the risk of stakeholders commencing action against the Insolvency Practitioner for acting negligently whereas fidelity insurance is taken out for purposes of protecting the stakeholders in the event that the Insolvency Practitioner or someone working under him acting dishonestly defrauds the estate [L9].]

QUESTION 3 (essay-type questions) [15 marks in total] [L10]

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.

[It is beyond question that the Insolvency Practitioner must always adhere to high moral and ethical standards. It is important to note that though morality and ethics are closely related the two are distinct. Thus, morals refer to or are anchored on a person's beliefs regarding what is right or wrong and is often influenced by a person's upbringing, education, culture and to some extent religious beliefs. In light of the foregoing, it is safe to say that morals are subjective on the ground that there is standard moral code. On the other hand ethics refer to some defined rules and actions that are regarded as correct or acceptable behaviour and relate to a specific group of people who operate in similar circumstances such as Lawyers or Insolvency Practitioners. It is worth of note that ethics does not concern with what is right or wrong but with the acceptable standards of conduct of a particular profession. Though morals are a fulcrum of ethics, the ethics take precedence over morals on the ground that moral conduct can be unethical. For example, it is morally right for an Insolvency Practitioner to be open and honest with the interested parties in the insolvency proceedings and that moral demand may require the IP to disclose information which from the ethical point of view must be kept confidential. Though disclosure of such information is morally correct, it is ethically wrong for the IP to disclose confidential information. The preceding clearly shows that there is a distinction between morality and ethics^{[U11].}]

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.

[The following elements of insolvency proceedings are prone to create or give rise to threats to independence and impartiality of the Insolvency Practitioner;

1. Pre- commencement and appointment involvement.

This element poses a threat to the independence and impartiality of the Insolvency Practitioner on the ground that prior to commencement of the insolvency proceedings the CIP or IP would have consulted by the company or other stakeholders. However, these consultations need not to lead to disqualification of the CIP or IP unless there is proof that such consultations involved material engagement by any stakeholder and the Practitioner such that the independence of the Practitioner can be questioned. It is important to state that the advice rendered by the Practitioner in the prior consultation should be limited to the company's financial position, the solvency of the company, the effects of potential insolvency and any other alternatives to the insolvency therefore, anything beyond the preceding will pose a threat to the independence and impartiality of the CIP or IP. Thus, in the case of *Re Korde, Ten Network Holdings Limited (Admn Apptd) (Recs and Mgrs Apptd) [2017] FCA 914* the facts were that the Administrator's Firm had been involved in the reviewing the company's financial position for several months prior to their appointment. The question that confronted the Court was whether they

should be allowed to continue to act as Administrators given their long term, substantial and remunerative involvement with the company. The illuminating submissions by the Australian Securities and Investments Commission in the same case in which it appeared as amicus curia which the Court concurred with was that,

“Directors contemplating potential insolvency should be encouraged to engage with appropriately qualified professionals early to develop restructuring plans which will maximise the chance of rescuing a viable business or returning as much value as possible to the relevant stakeholders should a later appointment prove necessary. A reasonable fair minded observer would appreciate that as a common characteristic of large and complex corporate distress situations. Provided that appropriate safeguards are put in place to avoid the existence or appearance of conflict should an appointment subsequently prove necessary, significant, long term and consequently remunerative work undertaken for such purposes should not of itself preclude the practitioner from taking a formal appointment (subject of course to consideration of the facts and circumstances of each particular case.”)

The Court authoritatively held that “these safeguards could include; that the potential administrator makes it clear to the board of directors and executive that she or he is in the person who might become the actual administrator if other measures to fix the company’s finances do not succeed as well as proper record keeping of all the meetings held and tasks performed.”

2. Appointment.

It is trite that the CIP or IP in a number of jurisdictions may be appointed either by the Board of Directors or a stakeholder either the shareholder or Creditor. Such appointment may give birth to expectations that the Practitioner would prioritise the interest of the board or person who sought the appointment of the Insolvency Practitioner thereby raising issues of functional independence and impartiality of the Practitioner. In light of the foregoing, it is absolutely important for the Insolvency Practitioner to be aware of his responsibilities in this regard. Thus, the Insolvency Practitioner must never make any promises to those who appointed him and must state clearly that is professionally expected to act in the best interest of all the beneficiaries.

3. Subsequent Appointments.

This element of the insolvency proceedings is prone to create or give rise to threats to independence and impartiality of the practitioner on the ground that the CIP or IP is allowed to act in different insolvency capacities in relation to the same debtor. The subsequent appointments brings into question the functional independence and impartiality of the Practitioner due to the self-view and self-interest threat it creates. Thus, a self-review threat refers to a situation where the Insolvency Practitioner, due to being involved in prior decision making risks failing to properly evaluate the outcome of previous judgments made or services rendered. On the other hand, self-interest threat relates to the issue of remuneration of the Practitioner and the risk it poses is that the Practitioner will be remunerated twice for the work done in respect to

the same company. In jurisdictions where such appointments are permitted, the held view is that previous appointment does hold some benefits and advantages in the subsequent appointment and that such professionals have the opinion that they are able to act with independence and impartiality^[U12].]

QUESTION 4 (fact-based application-type question) [15 marks in total]^[U13]

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.

[It is very clear from the facts of the question that Mr. Relation is Mr. B Inlaw's brother in law and godfather to his daughter. This close relationship raises a familiarity risk on the ground that Mr. Relations with a close relation to one of the Directors and Shareholders affected his professional obligations to all the beneficiaries which require the Insolvency Practitioner to act in good faith, with honesty, integrity and confidentiality in order to protect the interest of all the beneficiaries in the insolvency proceedings. It is very clear that Mr. Relation's professional sense of objectivity was seriously impaired and that he failed to act with integrity and requisite honesty when he wantonly failed to investigate fully in the circumstances leading to the insolvency of the company. He concealed the material

facts from the stakeholders that the Directors continued to trade when the financial position of the company was on a clear decline. Mr. Relation failed to act with integrity when he conducted a superficial investigation into the affairs of the company and circumstances thereof for purposes of protecting the Directors thereby breaching his ethical obligation of being fair to all the Stakeholders in the Insolvency Proceedings. Mr. Relation also breached his duty of confidentiality by allowing employees to have several sensitive documents pertaining to WeBuild Limited in their possession and personal computers at home.

In light of the preceding narrative and based on the facts of the question it is clear that Mr. Relation breached the following ethical principles;

1. Objectivity
2. Independence and
3. Impartiality

Thus, in the case of *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and Others v TT International Limited and Another Appeal [2012] SGCA 9, [2012] 2 SLR 213 [SINGAPORE]* The court stated as follows;

"The conduct of the Scheme Manager goes "too far" when he begins to align his interest with those of the company." The court noted further that, "the temptation to do this is especially critical when his appointers are not creditors but company's management. In our view this additional relationship with Mr Sng and Ms Tong key personnel of the Respondent, was inappropriate because it put the proposed scheme Manager in an acceptable position of unavoidable conflict of interest. Therefore, we ordered the proposed Scheme Manager to elect either to continue as such only or as nominee for Mr Sng and Ms Tong in their proposed IVAs only"

On the strength of the preceding case and applying the principles set out by the court, it is my considered view that Mr. Relation was conflicted and ought not to have accepted the appointment as Administrator and subsequently as Liquidator. Furthermore, the Commentary on page 17 in the Module applies with the full force to Mr. Relation and the Commentary states as follows in relation to independence, "...the key tenet underlying the principle of independence should be ensuring that a Member's conduct is, and is seen to be, not unfairly or improperly biased towards any party, including Members themselves or their associates. A Member should not accept an appointment in connection with the estate if his (or a related party's) relationship with the directors of the company or any of the stakeholders would give rise to a possible or perceived lack of independence.

Furthermore, in the case of *Commonwealth Bank of Australia v Irving [1996] 65 FCR 291 [AUSTRALIA]* the Court made the following comment on the issue of conducting an investigations into the affairs of the company where the Administrator was a close to one of the parties as the case is with Mr. Relation in the question at hand;

"As the administrator of the company, Mr. Irving would have had to investigate the affairs of the company and also the conduct of the directors, including that of Mr. Townsend, to determine whether or not any action should be taken against them or any of them. His relationship with Mr. Townsend created the perception that Mr. Irving held Mr Townsend's judgment in high regard and relied on his professional advice and judgment. In the court's view a reasonable person would have trouble believing that (despite Mr Irving's assertions to the contrary) he would be able to

conduct said investigation without any bias” The Court went further to state that “although nobody had made any allegations against the propriety of Mr Irving’s conduct, the mere fact that he had a longstanding friendly and professional relationship with Mr Townsend would create a doubt with a fair minded person that he would be able to perform his duties in an independent manner and therefore it would not be appropriate for Mr Irving to continue as the administrator of the company. There must not be any bias and there must not be any appearance or perception of bias. This relationship created a familiarity threat to the CIP” [U14]

In light of the foregoing this was a proper case for Mr. Relation to decline his appointment as Administrator even without any complaint from the stakeholders on the ground that there was breach of the ethical principles and his appointment was not in the best interest of all the beneficiaries of the estate.] [U14]

*** End of Assessment ***