



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 9

ETHICS AND PROFESSIONAL PRACTICE

***This is the*** summative (formal) assessment ***for*** Module 9 ***of this course and is compulsory for all candidates who*** selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for Module 9. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment9]. An example would be something along the following lines: 202223-336.assessment9. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentnumber" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 8 pages.**



**ANSWER ALL THE QUESTIONS**

Commented [LJ1]: TOTAL: 39 out of 50

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

Commented [LJ2]: 7/10

**Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.**

Question 1.1

**Please choose the most correct answer from the options below.**

***INSOL International's Ethical Principles for Insolvency Professionals -***

- (a) are mandatory and apply to all its members.***
- (b) creates a set of rules which all jurisdictions have to incorporate into their insolvency frameworks.***
- (c) creates a set of rules by which stakeholders and the public in most jurisdictions would be able to determine whether insolvency practitioners are acting in accordance with ethical principles.***
- (d) creates a set of best practice principles to inform and educate insolvency practitioners and stakeholders by providing ethical and professional guidance on issues of importance.***

Question 1.2

**The "Enlightened Creditor Value" approach to insolvency proposes the following with regard to the protection of competing interests in insolvency proceedings:**

- (a) Creditors' interests are of paramount importance and as such only these interests should be protected in insolvency.***
- (b) The interests of stakeholders should be regarded in the same manner as those of creditors.***

**(c) Creditors' interests are of paramount importance, however, the interests of other stakeholders should also be considered where this would be in the creditors' interests.**

**(d) Only the shareholders of the company and the creditors of the company should be protected by the insolvency law (and in that order).**

Question 1.3

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

(a) **True**

(b) **False**

Question 1.4

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

(a) **True**

(b) **False**

Commented [LJ3]: b

Question 1.5

**Select the correct answer:**

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

**This situation is an example of a / an \_\_\_\_\_ threat.**

**(a) self-review**

**(b) self-interest**

(c) advocacy

Commented [LJ4]: 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 [LJ5]: 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 [LJ6]: 10/10

Question 2.1 [maximum 3 marks]

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

- A fiduciary relationship exists where one person who undertakes to act on behalf of another,
- Who has the discretion and power over the interests of another,
- And there is an element of vulnerability in the relationship.

Commented [LJ7]: 3/3



Question 2.2 [maximum 4 marks]

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

The two-pronged nature of the duty to act with independence and impartiality entails that independence must be in-fact and be seen or perceived to be seen.

Independence in-fact means that an Insolvency Practitioner must be free from anything that may compromise his/her judgement.

Independence that is seen or perceived to be seen means stakeholders must see that the Insolvency Practitioner is independent or by his/ actions a reasonable conclusion can be drawn that s/he is independent.

Commented [LJ8]: 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 covers the insolvency practitioner from the risk of stakeholders instituting action against him/her for acting negligently. Fidelity insurance on the other-hand protects stakeholders in the event an insolvency practitioner acts fraudulently against the estate. The importance of obtaining both insurances is that because of the nature of an insolvency practitioner's work exposing him to the risk of suits for negligence, it is in his/her best interest to obtain both covers to protect him and his staff from suits as well as some assurance to stakeholders that their interests in the estate are reasonably protected.

Commented [LJ9]: 3/3

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

Commented [LJ10]: 11/15

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.**

Integrity entails honesty and transparency. Morals refers to a person's personal beliefs, influenced by education, upbringing, culture and religious beliefs for example. Ethics on the other-hand refer to specific rules and actions regarded as correct behavior with reference to a specific group usually a professional group of people like lawyers or accountants. The

difference between the two is that morals are subjective, and ethics on the other-hand do not concern a set of beliefs on right or wrong but acceptable standards of conduct. Morals may form the foundation of ethics, but where there is a conflict between the two, ethics prevail. An example is that an insolvency practitioner may wish to be disclose information to all stakeholders because of his beliefs, but the ethics code may prevent him from disclosing all information to all stakeholders because it is confidential or privileged information.

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.**

Threats to the independence and impartiality of an insolvency practitioner maybe evident in the following scenarios,

1. In the case of the appointment of an insolvency practitioner, **subsequent appointments** may give rise to the “self-review” and “self-interest” threat. An insolvency practitioner may act in different capacities with respect to the same debtor. His/her independence and impartiality is compromised by the self-review or self-interest threat. A self-review threat refers to a situation where, because of an Insolvency Practitioner’s previous involvement with the company, s/he may not be able to be objective in evaluating previous judgments made. The Insolvency Code of Ethics of the Institute of Chartered Accountants of England and Wales (ICAEW) identifies “sequential insolvency appointments” as examples of circumstances that might lead to a “self-review threat” affecting the independence and impartiality of an insolvency practitioner.<sup>1</sup>

The “self-interest threat” refers to remuneration, where an insolvency practitioner may not apply him/herself fully to business rescue proceedings knowing that s/he will be appointed as the liquidator of the company. INSOL Principles defines “self-interest” as “A situation in which a member has, or is perceived to have, a direct interest in obtaining a particular outcome: for example, where such Member (or a close associate) is also a creditor or shareholder of the insolvent estate.”<sup>2</sup>

A self-interest threat may also arise in cases of remuneration of the insolvency practitioner where there is a contingency fee arrangement. This entails that the insolvency practitioner’s remuneration is dependent on the outcome of the matter for example a successful business rescue plan. The argument being that insolvency practitioners should aspire in their ordinary course of their duties for a favourable result for the stakeholders and their fees should not be determined by the successful outcome of a restructuring. A conflict of interest may arise due to an insolvency practitioner’s financial interests being directly associated to certain outcomes, which would compromise his/her judgement and independence. The Insolvency Practitioner Association’s Code of Singapore states that an insolvency practitioner entering into a contingency fee arrangement is an example of an instance creating a self-interest threat.<sup>3</sup>

<sup>1</sup> ICAEW Insolvency Code of Ethics, 2114.1 A5(b)(ii), see <https://www.icaew.com/-/media/corporate/files/technical/ethics/insolvency-code-of-ethics.ashx?la=en>.

<sup>2</sup> INSOL Principles p 10 definition of “self-interest”.

<sup>3</sup> IPAS Code of Professional Conduct and Ethics.

2. **Personal relationships** with stakeholders can result in the perception of bias and lack of independence. Such relationships give rise to the threat of familiarity for the insolvency practitioner. In the case of *Commonwealth Bank of Australia v Irving*<sup>4</sup>, the court held that the substantial involvement of a person as advisor to a company **pre-commencement of business rescue proceedings**, is perceived as interfering with a person's ability to act fairly and impartially during the course of an administration. Such substantial involvement created the threat of advocacy and self-review.
3. While administering the estate, the insolvency practitioner will incur certain **expenses**. S/he may also need to seek professional advice. The use of service providers in running the estate, familiar to the insolvency practitioner may lead to familiarity threats, which could threaten the insolvency practitioner's independence. This threat should be avoided to maintain the trust between the practitioner and **stakeholders**.

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

***WeBuild Ltd is a private company registered in Eurafriicia. 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.***

<sup>4</sup> [1996] 65 FCR 291 [Australia].

**Commented [LJ12]:** The discussion did not focus on the elements of the insolvency process. However, you did mention it so I have awarded some discretionary marks for what is there. Some elements still missing though.

5/9

***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.

The UNCITRAL legislative Guide on Insolvency Law mentions that an insolvency practitioner should possess the important qualities of integrity, impartiality, independence and good management skills.<sup>5</sup> The three major ethical issues in the scenario above Integrity, Independence and confidentiality.

**Integrity** entails honesty meaning the Insolvency practitioner should not hide facts from the parties with an interest in the outcome of the insolvency. He should be transparent and should not misrepresent any information. He must not favour the interests of his appointees over the legitimate claims of creditors over the company's assets. In the case of *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd*<sup>6</sup>, the court held that an insolvency practitioner should at all times be independent and fair especially when dealing with competing interests of creditors, contributories and appointers. Mr Relation acted unethically in that he was dishonest in the manner in which he administered the company. Despite knowledge that the directors were acting to the detriment of the company and its creditors by trading insolvent and paying themselves bonuses that were not due, he proceeded to carry out superficial investigations and did not recommend legal action against the directors. His reliance on the report from a director who was compromised was unethical as such conduct was dishonest.

**Independence** is a quality which entails *inter alia* avoiding situations where a conflict of interest may arise. An insolvency practitioner should not accept an appointment to administer an estate if his/her relationship with any of the directors or stake holders would give rise to a possible or perceived lack of independence. Lack of independence is not cured by disclosure. Independence in fact entails being free from any influences that could compromise one's judgement. Such influences could arise from personal or professional relationships. In this particular instance Mr Relation, the insolvency practitioner, has a personal relationship with a director of the company being a brother in-law as well as a godfather. In the case of *The Royal Bank of Scotland NV (formerly known as ABN Amor Bank NV) & ORS V TT International Ltd and another appeal*,<sup>7</sup> a case where the objectivity of the Scheme Manager was questioned, the court found that the relationship between the scheme manager and personnel of the company was too close putting him in a position where the conflict of interest could not be avoided.

Prior consultations involving material engagement by any of the stakeholder parties compromise the independence of the insolvency practitioner. It would be advisable for Mr. Relation before accepting the appointment as liquidator, to set out the nature and extent of prior consultations with the company in a disclosure statement.

The courts have however not expressly forbidden large companies from engaging qualified insolvency practitioners where there is distress and/or a potential for insolvency. The recommended safe-guards of such appointments when the company goes into distress and the advisor is recommended as the liquidator are;

- a. The potential administrator should make it clear to the board of directors and executives that s/he might become administrator if the rescue plan does not succeed and,
- b. There should be a proper record keeping of all meetings held and tasks performed.<sup>8</sup>

Although Mr. Relation did disclose his relationship with the Director Mr. B Inlaw, it was not enough to satisfy the ethical issue surrounding his independence because of the relationship.

<sup>5</sup> UNCITRAL Legislative Guide on Insolvency Law, 2004, see [http://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebooks.pdf](http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebooks.pdf), p 174-175, para 41.

<sup>6</sup> [2009] SGCA 35, [2009] 4 SLR ( R ) 458, AT [18] [Singapore].

<sup>7</sup> [2012] SGCA 9, [2012] 2 SLR 213 [SINGAPORE]

<sup>8</sup> Re Korda, Ten Network Holdings Ltd (Admn Apptd) (Recs and Mgrs Apptd) [2017] FCA 914 [AUSTRALIA].

Further, he should have kept a proper record of his meetings and tasks and not just have conducted superficial investigations, protecting the directors from legal suits. This conduct compromised his integrity, his independence and he did not act fairly towards all stake holders.

An insolvency practitioner is not expected to make any promises to his/her appointee in keeping with the ethical obligation to remain independent. Mr. Relation fell short in that he protected the directors by assuring them his focus would not be on them. Further he relied on a report prepared by one of the Director's which was not very objective.

The appointment from administrator to liquidator creates a self-review interest threat to Mr Relation's independence. It could not be concluded that having been previously involved with the company he would be able to appropriately evaluate the results of previous judgements made or services rendered. Besides the self-review there is also the possibility of a self-interest threat affecting Mr. relation's independence. Self-interest is manifested in his superficial effort in turning the company around, so it goes into liquidation in the belief that he would be appointed as the liquidator. He acted unethically from a financial perspective in that he would be remunerated twice for the same work done in the company.

One safe-guard would be to prohibit the appointment of a liquidator who previously acted as an administrator in the same company. This is prescribed under the South African Companies Act, where a business rescue practitioner may not take on a subsequent appointment as a liquidator in the same company.<sup>9</sup>

Mr. Relation's interactions with the company also expose him to ethical threats of familiarity and advocacy because of his family ties with the Director, Mr B Inlaw. In the decision of *Commonwealth Bank of Australia v Irving*<sup>10</sup> the court stated that as administrator the insolvency practitioner would have to investigate the affairs of the company and the conduct of the directors, to determine whether or not any action should be taken against them. Further, substantial involvement prior to commencement of the administration would create both advocacy and self-review threats for the insolvency practitioner.

From the facts the advocacy threat is evident in that at the media interview, it appeared he held strong views against the interests of financial institutions over lower ranking creditors. It could be concluded that his statements were unethical in that he did not appear to be acting in the best interests of all the stakeholders.

**Confidentiality:** Mr Relation as an insolvency practitioner is under an obligation to maintain confidentiality because the nature of his work puts him in a fiduciary relationship with the company. He therefore has access to confidential and sensitive material of the company, including trade secrets. He must put in place robust risk management procedures. The ethical duty to ensure confidentiality is maintained extends to his staff, who although working from home, must ensure company documents remain confidential and are not disclosed even to family members.

**Commented [LJ13]:** Good overall discussion. I would have liked to see a little more depth on the discussion of the principles themselves. Good effort.  
11/15

**\* End of Assessment \***

<sup>9</sup> Companies Act 71 of 2008, s 140(4).

<sup>10</sup> See footnote 4.

