



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]

Commented [LJ1]: TOTAL: 40 out of 50
Well Done!

Commented [LJ2]: 9/10

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

Question 1.5

Select the correct answer:

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

This situation is an example of a / an _____ threat.

(a) self-review

(b) self-interest

(c) advocacy

(d) intimidation

Question 1.6

John was appointed as the liquidator of DebtCO. One of DebtCO's suppliers and major unsecured creditors, S. Panesar, is very friendly towards John. Mr Panesar has heard in passing that John enjoys sport and managed to procure tickets to several events in the recent Tokyo 2020 Olympic Games, which John accepted. John realises that this will be deemed questionable behaviour and he fears that Mr Panesar will make the offer and acceptance of the gift public. This would certainly create a threat to his perceived objectivity.

This situation is an example of a / an _____ threat.

- (a) familiarity**
- (b) self-review
- (c) advocacy
- (d) intimidation

Commented [LJ3]: d

Question 1.7

Select the correct answer:

*Thembi is a well-known insolvency practitioner and is often sought out for her knowledge and expertise. She currently has ten ongoing insolvency matters (most of them quite complex) and has been feeling somewhat overwhelmed. Due to her impressive *curriculum vitae* she is contacted by a very large designer company in distress inquiring whether she would be able to take an appointment as an administrator. Thembi should:*

- (a) *Accept the appointment as it will boost her career even further.*
- (b) *Accept the appointment as she can get one of her junior associates to take over all her other cases.*
- (c) *Accept the appointment because as a professional she will have the ability to give all of the cases she is involved in some attention, although some of them will now only be overseen by her.*
- (d) Refuse the appointment as she will not be able to give all of the cases she is involved in the requisite level of attention.**

Question 1.8

Select the correct answer:

Rajesh has been appointed as a new associate at the firm where he is employed. In his new role he has to meet certain targets in relation to the fees he earns for taking appointments. Rajesh is currently appointed as a liquidator for a small company. He realises that he will not meet the firm's target for fees. The most ethical thing for Rajesh to do would be to:

- (a) Call a creditors' meeting requesting an adjustment to his agreed fees due to unforeseen circumstances.**
- (b) Ask his administrative assistant to invoice the estate for the use of the firm's conference venue for meetings held there at a 50% increased fee.**
- (c) Carry out his duties in a timely fashion and complete the appointment efficiently and without undue delay, only invoicing for work properly performed.**
- (d) Ask his administrative assistant to double check all the calculations in the case file and then bill the hours as part of his invoice.**

Question 1.9

Select the most correct answer from the options below.

An insolvency practitioner using a fixed fee calculation method for determining the amount of remuneration owed to him, will receive a fair amount of remuneration.

Please choose the most correct answer.

- (a) This statement is false since the practitioner might have carried out more work and invested more resources than is reflected in the fee.**
- (b) This statement is true since jurisdictions always allows for an adjustment of fees where it is necessary.**
- (c) This statement is false since the practitioner will always receive more remuneration than what is reflected in the work carried out.**
- (d) This statement is false since the only way to receive a fair amount of remuneration is to calculate the remuneration on an hourly rate.**

Question 1.10

Select the most correct answer from the options below.

Timothy has been appointed as the judicial manager of a large public company. As a result of his appointment, he has been privy to confidential information regarding the

company and its stakeholders. Timothy is aware that there is a duty on him to maintain confidential information and is very careful when he speaks to the press and members of the public. However, he often discloses work related information including sensitive information to his brother-in-law when they see one another over weekends and Timothy believes the information will be kept confidential by him.

Please select the statement that best describes Timothy's situation.

- (a) Timothy is not in breach of his duty to confidentiality. He maintains confidentiality when engaging with the press and public. His disclosure to his brother-in-law poses no risk as he trusts him to keep the information to himself.**
- (b) Timothy is in breach of his duty to act in the best interests of the beneficiaries of his duties. Timothy's disclosure of confidential information to his brother-in-law will pose a conflict of interest and create bias in the exercise of his duties.**
- (c) Timothy is in breach of his duty to confidentiality. As an IP he should maintain confidentiality even in a social environment and should be alert to the possibility of inadvertent disclosure to an immediate family member like his brother-in-law.**
- (d) Timothy is not in breach of his duty to act with good faith. He maintains confidentiality when engaging with the press and public. His disclosure to his brother-in-law poses no risk as disclosures to immediate family members are not regarded as threats to compliance.**

QUESTION 2 (direct questions) [10 marks]

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Question 2.1 [maximum 3 marks]

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

A fiduciary relationship is classed as a relationship of trust. As not all insolvency professionals are regarded as fiduciaries it is important to understand the elements that give existence to a fiduciary relationship. The most common elements associated with the existence of a fiduciary relationship is:

- 1. When a fiduciary is largely accepted to be a person who undertakes to act on behalf of another, and who has discretion and power over the interests of the other.**
- 2. Also, vulnerability is sometimes considered as an indicator of the fiduciary relationship.**

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Question 2.2 [maximum 4 marks]

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

The fiduciary duty of acting in an independent and impartial manner seeks to ensure Insolvency Practitioners act solely in the best interest of the beneficiaries as it aims to avoid profiting and any conflicts of interests. The fiduciary should not make secret profits from a position of trust at the expense of beneficiaries nor place himself in a position where personal interests or related/connected parties' conflict with his duties and the interests of beneficiaries. Therefore, it is important for fiduciary to follow the disclosure steps and obtain informed consents, where appropriate, to avoid breaching this duty.

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.

Due to the wide-ranging duties of an Insolvency Practitioner, it is important for them to obtain professional and fidelity insurance to protect themselves and the stakeholders in the estate against risks. Professional indemnity insurance is important as it provides redress to stakeholders in the event of a practitioner's negligent act. Fidelity insurance conversely protects stakeholders in the event a member acts dishonestly or defrauds the estate.

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

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.

While Insolvency Practitioners are required to comply with the applicable law, they are also required by the INSOL principles to demonstrate a high level of integrity. The IP is expected to be fair in their dealing and practice honesty and truthfulness. More importantly the IP is expected to adhere to a high moral and ethical standard in aspects of their practice as beneficiaries are "at the mercy" of their powers.

Upon examination of the high moral and ethical standard principle we understand how closely they are related but also recognize they are not identical which makes the inclusion of both necessary. Morals are subjective and refer to a person's belief of right or wrong and are often influenced by upbringings, education, culture and religious beliefs. Morals provide the foundation for ethics. However, ethics refer to the specific rules and actions that are regarded as correct behaviour and often relate to specific

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0/4

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groups of people that function in similar circumstances. Ethics can be summarized as acceptable standards of conduct.

Despite the similarities, morals and ethics can conflict. Hence, having both high morals and ethical standards are important as having a personal set of beliefs to guide our actions while an ethical value ensures you adhere to the values of the group you belong.

A common example of the difference between morals and ethics is the concept of honesty. Morally or even religious one may be called to be truthful in every situation while ethically you are required to adhere to certain confidentiality requirements in accordance with professional standards. Also, one's culture can support looking out for family or fellow countrymen while treating all creditor equally can be an professional requirement.

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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.

During the conduct of professional engagements, specifically insolvency proceedings, practitioners should consider both independence and impartiality with references to legislative, professional or code-based jurisdictional guidance. Nonetheless, the independence and impartiality principle specifically calls for IPs' conduct to be factually and appear fair and nonbiased toward any party.

Threats to independence and impartiality may include one or more than one of the following: self-interest, self-review, advocacy, familiarity, and intimidations. In order to address threats to independence and impartiality some jurisdictions provide for the disclosure of relationships and a declaration of independence.

There are elements of the insolvency proceedings that are especially prone to create or give rise to threats to independence and impartiality.

*First, pre-commencement/appointment consultations between insolvency practitioners and the stakeholder may create the impression of a lack of independence and impartiality as demonstrated in *Ventra Investments Ltd V Bank of Scotland Plc* case. The scrutiny shown on *Blackfriars limited* liquidator appointment also details how pre-appointment advice can possibly lead to issues. While pre-commencement consultation does not bar appointment it is important to limit material involvement to the company's financial position, the company's solvency, the effects of potential insolvency and alternative to insolvency. Disclosure of the nature of work and review during the pre-commencement consultation would improve the appearance of independence and not bar independence as demonstrated in the Australian case of *Korda, Ten Network Holdings Ltd* administrator appointment.*

Another element of insolvency proceeding that can create a threat to independence and impartiality is the appointment. As IPs can be appointed by board of directors or stakeholders it may lead to the appointee to expect prioritization of their interests. Conflicts should be scrutinized before accepting appointment.

Subsequent appointments also pose threats to independence and impartiality due to a possible self-review and self-interest threat it creates. The insolvency Code of Ethics of the Institute of Chartered Accountants of England and Wales example scenario of "sequential insolvency appointments" highlights circumstances that lead to a self-review threat being created. Additionally, the South African Companies Act of 2008 recognizes the self-interest threat (continued remuneration) with subsequent appointment and bans a business rescue practitioner from serving as liquidator of the debtor in subsequent liquidation.

Finally, similar to the Corporate Law the IPs owe undivided loyalty to the beneficiaries and should not seek unjust enrichment nor engage in conflicting transactions with debtor through their position of trust.

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One aspect missing in secret moneys or kickbacks.

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.

The INSOL principles set out the best practice ethical behaviours that should be followed. After reviewing the facts of the case in consideration of the principles, I have identified the following major ethical issues identified in this scenario are as detailed below:

1. The appointment of Mr Relation (impairment in fact)

Mr. Relation and Mr. B's relationship as brother-in-law and godfather to his child threatens the required level of objectivity, independence, and impartiality. Mr. Relation is potentially conflicted in his role due to the familiarity threat that arises as well as Mr. B's expectation to prioritize his/directors' interests as the appointee creating threat of influence. Mr. Relations assurance to the board not to focus on their questionable actions, conducting superficial investigations, and his reliance on Mr. B reports demonstrates bias and that Mr. Relations is being too sympathetic due to the appointee's relationship and was unable to perform a duty of care to beneficiaries. Disclosure can reduce the threats; however, it does not guarantee a remedy. While Mr. Relation does disclose relationship to reduce the possible threat, as demonstrated in Commonwealth Bank of Australia V Irving, disclosure did not remedy the situation. Hence, Mr. Relation should not have accepted the appointment as just in Ventra Investments Ltd v Bank of Scotland Plc great care should have been taken to avoid taken appointment where actual or perceived conflict of interest arise.

2. Professional behaviour and the public appearance of Mr. Relation (impairment in appearance)

Upon appointment, Mr. Relation owed stakeholders a duty of fair dealing, honesty, and truthfulness. Mr. Relation is also expected to provide the appearance of a transparent approach. Instead, Mr. Relation casted doubt to stakeholders as they identified Mr Relation as Mr B Inlaw's brother-in-law and godfather to his daughter, saw him meet privately with select shareholders, and Mr. Relation's comments regarding his preference for unequal treatment of creditors made stakeholder feel uncomfortable. Furthermore, Mr. Relation violated the principle of integrity as he concealed and misrepresented facts to parties with an interest in the outcome of the administration as he did not investigate the dealings of shareholders and did not present accurate information which ultimately mislead shareholders. Without this trust and reliance, the stakeholders and beneficiaries will no longer believe that he is bound to act in their best interest. As a safe-guard Mr. Relation should be subject to the test of a reasonable expert to ensure that there were no breaches in his duty of care.

3. Subsequent appointment of Mr Relation as the liquidator

Mr. Relations subsequent appointment as liquidator present a major ethical issue as it creates the threat of advocacy and self-review. The issue with Mr. Relation's subsequent appointment may lead to his objectivity being compromised to favour previous positions taken during the voluntary appointment. To safeguard any risks associated with the subsequent appointment, Mr. Relation should have appointment confirmed by the court whom will review the facts and determine that he is able to perform duties in an independent matter and the appointment is in best interest of the estate as demonstrated in Commonwealth Bank of Australia V Irving [1996].

Commented [LJ11]: A good overall discussion. I would have liked to see a little more discussion on the ethical principles breached and why they are important.
12/15

*** End of Assessment ***