



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: 30 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.**

Commented [LJ3]: d

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 [LJ4]: 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**

**(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]: 6/10

Question 2.1 [maximum 3 marks]

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

*In order to maintain the IPs best practices, many jurisdictions have listed some criteria to ensure the fiduciary relationship, such as (i) undertakes to act on behalf of another and (ii) has discretion and power over the interests of the other. Some jurisdictions also include the element of vulnerability.*

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 duty to act with independence and impartiality are the pillars that should guide the actions of insolvency practitioners.*

*The principle of independence aims to enshrine fair and proper action towards any of the parties involved in the existing procedure, avoiding conflict of interests that could compromise his ability to be objective on his acts and decisions and not be affected by external features.*

*On the other hand, the impartiality is another skill required for the IPs best practicing, meaning the IPs need to treat equally and impartially all parties involved in the process, providing fair and equitable information and resolutions.*

*The objectivity of both principals can be deviated over some threats, such as: (i) self-interest; (ii) self-review; (iii) advocacy; (iv) familiarity and (v) Intimidation.*

*Finally, the main purpose of the principles mentioned here is to ensure that the insolvency practitioner can exercise his discretion and powers in the best interests of the beneficiaries, the parties involved must perceive the independency and impartiality of the IPs in order to keep the good professional behavior and trust between the parties and the IP.*

*.Those principals are mentioned in Principle 35 of The World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems.*

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, also known as professional indemnity insurance, provides coverage against the risk of stakeholders claims arising from negligence (without the reasonable care), errors or omissions on his duty.*

*Fidelity Insurance, known as Crime Insurance, is an instrument to protect the business/ stakeholders from any dishonest actions by the IP - or someone working on his behalf), covering losses caused by any form of defrauding the estate.*

*It is important for the insolvency practitioner to avail of both insurances to protect himself from possible claims due to his vast duties and obligations - which could be considered confusing and subjective - as well as the stakeholders in 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.**

Commented [LJ8]: This question required a discussion of independence in fact and independence in mind - that is factual independence and perceived independence.

0/4

Commented [LJ9]: 3/3

Commented [LJ10]: 9/15

*Acting with Integrity means the IP must be honest, truthful and being straightforward. On acting based on those elements, the IPs is deemed to act in good faith. High moral is related to personal beliefs (Morality) regarding what is right or wrong, influenced by personal experiences, culture and education, being a subjective element, while ethical standards refers to acting correctly on specific rules, which does not concern the personal beliefs of the IP.*

*The two elements described here are aligned but have slightly divergences in practice. The IP should demonstrates integrity by making ethical decisions that support with the principles of transparency, equality and neutrality. However, adherence to high moral and ethical standards goes beyond specific instances of integrity.*

*An example of adhere to moral standards would be in the case that the IP is offered another position by a creditor of the company he is currently working with and declines it. On the other hand, the IP is acting with integrity when he is transparent with stakeholders about some errors in companies accountability that could affect the outcome of the insolvency proceeding.*

**Commented [LJ11]:** Some confusion of concepts here.  
4/6

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.***

*As seen before, there are some threats that can deviate the ability of acting independent, impartial and objective, such as: (i) self-interest; (ii) self-review; (iii) advocacy; (iv) familiarity and (v) Intimidation.*

*Such threats can be corroborated through some elements of the insolvency procedure.*

- *In the consultations occurred pre-commencement of the insolvency proceeding, between the CIP and the company or stakeholders, it may create the impression of lack of independence and impartiality on the part of the CIP, since it favours broad communication between the parties mentioned herein.*
- *Another point that could prone and give rise to threats is the appointment of the IP, since in several jurisdictions the IP may be appointed by the company and/or its stakeholders.*
- *Maintenance of communication/ relationship with stakeholders, directors or interested parties may rise the perception of possible bias over lack of independence and impartiality.*
- *Secret monies and personal transactions with the company, meaning that the IP cannot be a part interested in specific results in the insolvency proceeding which would represents his own benefit, for example, fixing an advantageous price on assets and drafting a contract with favourable clauses.*

- *Pressure from external parties: Stakeholders and creditors may exert pressure on the insolvency practitioner, seeking to fulfil their wishes to the detriment of the estate.*

*The IP must comply with the provisions of insolvency law, codes of ethics and professional standard in order to address, effectively, those threads. There are also guidelines providing the best practicing that must be followed.*

*Also, Codes of professional conduct could be helpful to remedy any threats herein related, providing guidance to IP in what is expected from him and to be properly informed about what can be done with a potential problem arises.*

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*

**Commented [LJ12]:** Your answer correctly identifies the elements of the process that could lead to stumbling blocks, however, your discussion is very superficial.

5/9

**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.

***It is clear that Mr Relation has conflict of interest and lack of independency and impartiality as an IP, due to its close (and familiar) relationship with Mr B Inlaw - Director of the company. The indication promoted by Mr B Inlaw can be perceived as a threat to his fiduciary duties, violating the principle of act with independence and impartiality in his role as administrator and liquidator. Even if there is no solid proof that the indication of Mr Relation to IP is an intend of fraud, the mere perception***

created by the relationship herein described could lead to a non objective performance of his duties.

This scenario was also seen in *commonwealth Bank of Australia vs. Irving* case (1996, 65 FCR 291 Australia) and *Ventra Investments Ltd vs. Bank of Scotland Plc* (2019 EWHC 2058. England and Wales)

Mr Relation should have declined the appointment due to his relationship with Mr. B Inlaw or disclosure the conflict to all parties involved, especially the stakeholders.

Another ethical issue perceived was the lack of proper investigation and compliance regarding the company's affairs. Mr Relation based his decision on reports provided by Mr B Inlaw, which can indicate that he did not comply with his duties, raising concern on bias towards the future of the company. It is to be noticed that Mr Relation was briefed that the Directors were afraid of eventual liability for breach of duty and be aware of the position of MR Relation in the company.

Commented [LJ13]: Which ethical duty is breached herein?

Mr Relation should have relied on a proper and independent investigation into the company's affairs.

The planning meeting suggested by Mr B Inlaw also represents an apparent lack of disclosure of their relationship, compromising the transparency and honesty about potential conflict of interests and the IP's decisions.

Finally, it is also concerning the fact that Mr Relation was recognized by ABC Bank's lawyer, Mrs Keeney.

Mrs Keeney recognized the IP 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". This opinion could affect Mr Relation objectiveness and impartiality on conducting the liquidation proceeding, and may represent an offence to high moral and ethical standards.

It is important to register that the manner in which an IP manages his practice will reflect his commitment to performing his fiduciary duties and his concern for the interests of the beneficiaries of those duties.

From the narrative of the issue, Mr Relation's position appears controversial and may be disingenuous and contrary to the best interests of the beneficiaries of these duties.

Commented [LJ14]: Might it bring the profession into disrepute?

Commented [LJ15]: A satisfactory discussion but incomplete. More on the ethical principles would have been good. No safeguards or remedies really highlighted.  
8/15

\* End of Assessment \*