



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.**

Commented [LJ1]: Take note!



**ANSWER ALL THE QUESTIONS**

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

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

Question 1.1

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

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

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

Question 1.2

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

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

Commented [LJ2]: TOTAL 39 out of 50

A good effort with a stark warning that your answers need to be paraphrased. Your answers to Q2 was copied in significant part and marks were deducted for this. Q3 was border-line.

Commented [LJ3]: 9/10

**(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 [LJ4]: d

Question 1.7

**Select the correct answer:**

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

**(a) Accept the appointment as it will boost her career even further.**

**(b) Accept the appointment as she can get one of her junior associates to take over all her other cases.**

**(c) Accept the appointment because as a professional she will have the ability to give all of the cases she is involved in some attention, although some of them will now only be overseen by her.**

**(d) Refuse the appointment as she will not be able to give all of the cases she is involved in the requisite level of attention.**

Question 1.8

Select the correct answer:

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

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

Question 1.9

Select the most correct answer from the options below.

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

Please choose the most correct answer.

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

Question 1.10

Select the most correct answer from the options below.

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

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

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

QUESTION 2 (direct questions) [10 marks]

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:*

- (i) A person undertakes to act on behalf of another; and*
- (ii) A person has discretion and power over the interest of the other.*



*Vulnerability is sometimes added as an indicator for the existence of a fiduciary relationship.*

Commented [LJ6]: 3/3

Question 2.2 [maximum 4 marks]

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

*IPs must be independent in fact and also be seen or perceived to be independent and impartial. Independence in fact requires that the IP be factually free from any influences that could compromise his judgment. As such IPs must avoid all personal and professional relationships and direct or indirect interests that will adversely affect, impair or threaten their integrity and ability to make decisions. On the other hand, independence in perception includes the avoidance of circumstances that would lead a reasonable informed third party to conclude that the IP's integrity, independence and impartiality have been compromised. It is important to be seen or perceived as independent and impartial in the context of insolvency. In this regard, in the event stakeholders that are involved in the proceedings do perceive the IP as biased, or to lack independence, it would negate the trust and reliance that has been placed in him.*

Commented [LJ7]: 4/4

This is 99% verbatim what the Guidance Text provides. You are requested to put information into your own words.

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.**

*Indemnity or professional insurance covers against the risk of stakeholders instituting action against the IP for acting negligently without reasonable care. On the other hand, fidelity insurance protects stakeholders in the event of the IP, or someone who works for him, acted dishonestly or defrauded the estate. Due to the extensive duties owed by IPs, it would be sensible for IPs to obtain professional fidelity insurance to protect themselves as well as the stakeholders of the estate.*

Commented [LJ8]: 3/3

This too is copied without much alteration.

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

Commented [LJ9]: 15/15

Question 3.1 [maximum 6 marks]

**The ethical principle that requires insolvency practitioners to act with integrity also states that he should adhere to high moral and ethical standards. Explain what is meant by this and provide examples to illustrate the difference between these concepts.**

*While morality and ethics are closely related, they are not the same. In this regard, morality refers to a person's personal beliefs vis-à-vis what is right or wrong and as*

such, is usually influenced by one's upbringing, education, culture as well as religious beliefs. Essentially, moral values tend to be subjective. However, morals also form the foundation of ethics. Ethics refer to the specific rules and actions that are regarded as correct behaviours and often relate to a specific group of people whose function in similar circumstances. As such, even though morals form the basis of ethics, ethics do not concern a set of beliefs regarding what is right or wrong, but rather what would be the acceptable standards of conduct. This is the reason why INSOL Principle requires both principles - morality and ethics. IPs should have personal sets of beliefs to guide their actions but should also comply with the ethical values of the group they belong to. In the event of conflict between their personal beliefs and that of the profession, the professional standards should trump personal opinions. The reason for this is because a moral action can still be unethical. An example is where an IP, due to his personal beliefs and a moral desire to be open and honest with the stakeholders, divulges information which should have been kept confidential in accordance with ethical guidance.

Commented [LJ10]: 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.**

Elements of insolvency proceedings that are prone to create or give rise to threats to independence and impartiality are as follows:

(i) Pre-commencement/appointment involvement

Prior consultations often takes place between the CIP and the company or stakeholders. Prior consultations often create the impression of a lack of independence and impartiality on the part of the CIP. Be that as it may, pre-commencement/appointment involvement need not always result in the disqualification of the said person as practitioners. In fact, prior consultation may constitute a crucial part of the insolvency process. However, there should be limits to what would be deemed acceptable engagement during such consultations. For example, if the consultation involve material engagement by any of the stakeholder parties, the CIP would no longer be considered independent and should not be appointed as practitioner. Advice rendered by practitioners in the pre-commencement/appointment stage should be limited to the company's financial position, the company's solvency, the effects of potential insolvency and any alternatives to insolvency.

In the case of *Re Korda, Ten Network Holdings Ltd (Admn Apptd) (Recs and Mgrs Apptd)* [2017] FCA 914, the administrators' firm had been involved in reviewing the company's financial position for several months prior to their

*appointment. The issue fore the court was whether they should still be allowed to continue to act as administrators given their “long-term”, substantial and remunerative involvement” with the company.*

*The court accepted that the administrators’ firm did not provide advice to the board of directors, the creditors or any other stakeholders. The nature of the work done by the firm was limited to deposing the management in order to understand the company’s operations, financial position, legal and contractual obligation and cash flow. The Court was of the view there was no actual or apprehended bias or conflict as the administrators work was limited to certain aspects and the engagement did not involve any advice to the company or its directors.*

**(ii) Appointment**

*In many jurisdictions, the CIP can be appointed by either the board of directors or a stakeholder. This often leads the appointee to expect that the practitioner appointed by them would prioritise their interests, or that they could influence the practitioner. Practitioners should be aware of his responsibilities. The practitioner should not make any promises to the person appointing him and should make it clear that he will act in the interests of all the beneficiaries. The practitioner should also scrutinise each given situation before accepting an appointment.*

**(iii) Subsequent appointments**

*This is a scenario where the same practitioner is allowed to act in different insolvency capacities vis-à-vis the same debtor company. In jurisdictions such as England and Wales as well as Singapore, such appointments are allowed. Subsequent appointments give rise to problems relating to independence and impartiality due to the self-review and self-interest threat it creates. The Insolvency Code of Ethics of the Institute of Chartered Accountants of England and Wales recognises the potential conflict of interests in such situations and utilised the scenario “sequential insolvency appointments” as an example of circumstances that might lead to a self-review threat being created.*

*A self-review threat refers to a situation where because a practitioner was previously involved in a decision making, and is therefore unable to appropriately evaluate the results of previous judgments made or services rendered.*

*As for self-interest threat, it relates to the issue of remuneration of the practitioner. It refers to a situation where the interests (including financial interests) of the practitioner might inappropriately influence his judgment*

or behaviour. An example is where a rescue or turnaround practitioner might not put his best effort into saving the debtor company from liquidation due to the fact that he knows he would subsequently be appointed as the liquidator and be paid again.

(iv) Secret monies and personal transactions with the company

A CIP stands as a fiduciary and as a fiduciary, he is not allowed to make a secret profit at the expenses of the beneficiaries, or place himself in a position where his personal interest or that of parties related to him, conflict with his duties. Such situations may arise for example in cases where the CIP or a friend or family wish to purchase assets belonging to the company. This would place the CIP on both sides of the contract, which may in return cause a strong suspicion that the practitioner is serving his own interests as opposed to that of the beneficiaries. As such, it is important for the practitioner to follow the procedural steps in respect of disclose and obtain the necessary informed consent where a jurisdiction allows transactions between the practitioner and the company.

The case of *Commonwealth Bank of Australia v Irving* [1996] 65 FCR 291, illustrates that even without actual bias, the existence of personal relationships with stakeholders can result in a perception of lack of independence. In this case the CIP (Mr Irving) who was appointed as the administrator of the debtor company had known one of the former directors (Mr Townsend) of the debtor company for 16 years. Mr Townsend who is also a legal practitioner, had at numerous times acted as legal adviser to Mr Irving in his practice as a chartered accountant. Two of the company's creditors sought to remove Mr Irving as administrator due to lack of independence. This is despite the fact that Mr Irving had disclosed his relationship with the directors and the company before taking the appointment and had stated that he believed that he would still be able to act in an independent manner.

The court noted that even though nobody had made any allegations against the propriety of Mr Irving's conduct, the mere fact that he had a longstanding friendly relationship and professional relationship with Mr Townsend would create doubt with a fair-minded person that he would be able to perform his duties in an independent manner. As such, the Court was of the view that Mr Irving should not continue to act as the administrator of the company.

Commented [LJ11]: 9/9

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

**WeBuild Ltd is a private company registered in Eurafriclia. The company specialises in construction and property development and is well known in the area where it conducts its business. Mr B Inlaw, Dr I Dontcare and Mrs I Relevant are the directors of**

**the company. The company has ten shareholders, with Mr B Inlaw and Dr I Dontcare also holding shares in the company.**

**The company traded profitably for the last 10 years but recently started to experience financial difficulties. One of the main reasons for the financial decline is the fact that several of the company's employees have instituted a class action claim against WeBuild for workplace-related injuries due to faulty machinery. This also resulted in bad publicity that led to a decline in contracts. The directors of the company were made aware of the issues relating to the machinery, but chose not to take any action to remedy the situation. When the company's financial position started to decline the directors continued to trade as if nothing was amiss and even made several large payments to themselves by way of performance bonuses. When they received a letter of demand from the company's major secured creditor, ABC Bank, the directors decided to call a shareholders' meeting to discuss the company's options.**

**Present at this meeting were the shareholders, the directors and Mr Relation, a lawyer and licensed insolvency practitioner, to provide them with information and advice in relation to their options. Some of the shareholders recognised Mr Relation as Mr B Inlaw's brother-in-law and godfather to his daughter. During the meeting, Mr Relation suggests that the company enter into a voluntary administration procedure. Mr B Inlaw suggests that the company appoint Mr Relation as administrator. He accepts the appointment, ensuring that he discloses his relationship with Mr B Inlaw and says that he will declare that he believes that he will still be able to act with the required independence and impartiality. An undertaking that he complies with by subsequently issuing a written declaration of independence.**

**After the meeting adjourns, Mr B Inlaw requests the other directors and Mr Relation to stay behind for a brief "planning" meeting. During this subsequent meeting the directors inform Mr Relation that they are concerned about their personal liability for breach of duty. Moreover, they are worried that they might land in hot water due to their decision to continue trading when the company was clearly in dire financial straits. Mr Relation assures them that his focus will not be on them but on trying to rescue the company.**

**In the weeks that follow, Mr Relation conducts a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulties of the company. He relies on detailed reports drafted by Mr B Inlaw regarding the company's business and drafts a strategic plan for recovery based on his investigation and the reports he received.**

**At a meeting of creditors to consider the plan, Mr Relation states that he has found no evidence of any wrongdoing or maladministration by the company's directors. Mrs 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.

***Firstly, there is a familiarity threat due to the relationship between Mr Relation and MrB in Law. As the administrator Mr Relation should not allow himself to be placed in a position where the interest of parties related to him, here, Mr B in Law, conflict with his duties. This is similar to the case of Commonwealth Bank of Australia v Irving [1996] 65 FCR 291 which illustrates that even without any actual bias shown, personal relationships with stakeholders can result in a lack of independence due to the perception created thereby. In this case the CIP (Mr Irving) who was appointed as the administrator of the debtor company had known one of the former directors (Mr Townsend) of the debtor company for 16 years. Mr Tonwsend who is also a legal practitioner, had at numerous times acted as legal adviser to Mr Irving in his practice as a chartered accountant. Two of the company’s creditors sought to remove Mr Irving as administrator due to lack of independence. This is notwithstanding the following facts:***

- (i) Mr Irving had disclosed his relationship with the directors and the company before taking the appointment and had stated that he believed that he would still be able to act in an independent manner; and***
- (ii) There was no factual evidence of any impropriety by Mr Irving as administrator and no party had suggested anything to the contrary.***

***The court noted that even though nobody had made any allegations against the propriety of Mr Irving’s conduct, the mere fact that he had a longstanding friendly***

*relationship and professional relationship with Mr Townsend would create doubt with a fair-minded person that he would be able to perform his duties in an independent manner. As such, the Court was of the view that Mr Irving should not continue to act as the administrator of the company.*

*It is worse in the present case as there is factual biasness due to the following:*

- (i) Mr Relation had Mr Relation assured the directors, including Mr B in Law, that his focus will not be on the directors, but on trying to rescue the company.*
- (ii) In order to protect Mr B in Law, Mr Relation conducted 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, without exercising any independence.*

*Based on the case of Commonwealth Bank of Australia v Irving [1996] 65 FCR 291, it would appear that the fact that Mr Relation will disclose 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 would not be sufficient. He is not fit to be an administrator of the company.*

*Secondly, there is the ethical issue of threat of advocacy. Threat of advocacy occurs in a situation in which a practitioner promotes a position or opinion to the point that subsequent objectivity may be compromised. For example, when the practitioner has acted on behalf of a significant creditor to advance such creditor's position. In the present case, Mr Relation had previously 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" such as financial institutions, in a television interview. Mr Relation has in fact promoted the interests of financial institutions and this suggests that his objectivity may be compromised.*

*Third, there is also the issue of confidentiality. An insolvency practitioner must maintain confidentiality, including in a social environment, being alert to the possibility of inadvertent disclosure, particularly to a close business associate or a close or immediate family member. In this case, 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. It is imperative that Mr Relation and/or his firm take steps to ensure that their compliance with the duty in relation to confidentiality remains intact and that their risk management procedures in this regard remain robust.*

*The issues highlighted above are all ethical issues as they relate to rules that are regarded as correct behaviours of all insolvency practitioners as opposed to subjective moral values.*

**Commented [LJ12]:** A reasonable discussion. I would have liked to see more depth of discussion on the specific ethical principles breach and the importance thereof, e.g for 1 and 2 independence.

12/15

**\* End of Assessment \***