INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

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: **[studentnumber.assessment9]**. An example would be something along the following lines: 202021IFU-314.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 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. 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]

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

All insolvency professionals are fiduciaries.

(a) True

(b) False

Commented [JL1]: TOTAL: 30,5 OUT OF 50

Where student copied and pasted from the GT only half of the possible marks were awarded.

Note from Course Leader: Be pleased that more stringent action was not taken here. It is stated everywhere that copying and pasting from the Guidance Text is prohibited!

Commented [JL2]: 8 out of 10

Question 1.4

Being truthful and being honest is **not** the same thing.

(a) True

(b) False

Question 1.5

Tony 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, Tony 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 [JL3]: c

(d) intimidation

Question 1.6

A lack of independence and impartiality due to a prohibited relationship with a stakeholder can always be remedied by disclosing the relevant relationship to the relevant parties and issuing a declaration of independence.

(a) True

(b) False

Commented [JL4]: b

Question 1.7

Julie 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. Julie 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

Johnson 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. Johnson 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 Johnson 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

Please choose 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.

(a) This statement is true since jurisdictions always allow for an adjustment of fees where it is necessary.

(b) This statement is false since the practitioner might have carried out more work and invested more resources than is reflected in the fee.

(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

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

Fathima has just completed Module 9 of INSOL International's Foundation Certificate. She works as a junior insolvency practitioner at a large firm. Her firm is contemplating the acquisition of a new information technology system to help ease the administrative burdens of the practitioners at the firm. This new system will digitise all of the documents in relation to insolvency appointments. All the practitioners and administrative personnel employed by the firm will have access to these files as long as they have access to an internet connection. Fathima should advise someone in the office to implement procedures and policies on _____ in relation to this proposed new system.

(a) quality Control

(b) risk Management

(c) compliance management

(d) fidelity insurance

QUESTION 2 (direct questions) [10 marks]

Commented [JL5]: 8 out of 10

Question 2.1 [maximum 4 marks]

What are the main fiduciary and other duties usually associated with insolvency professionals?

【Insolvency practitioners are considered experts in insolvency property management and restructuring strategies. They were given extensive powers to draw on their expertise and experience in appointing targets. However, if bankruptcy practitioners have broad powers and responsibilities but lack integrity, ethics and basic morality, it does not do much good to debtors, stakeholders or society as a whole. To this end, many jurisdictions have implemented fiduciary codes to govern the conduct of insolvency practitioners. A trustee is accepted primarily as a person who (a) undertakes to act on behalf of another, and (b) has discretion and power in the interests of the other. Another element of vulnerability is sometimes added as an indicator of the existence of the fiduciary relationship. It is therefore not surprising that most insolvency practitioners are regarded as fiduciaries. However, the term "trust" is not decisive for a class of relationships applicable to a fixed set of rules and principles; It is necessary to determine the rules governing each type of fiduciary relationship. Many types of relationships are classified as fiduciary in nature and are often described as trusting relationships. Lawyers, accountants, agents, trustees, doctors, and company directors are just a few examples of recognized trustees. Clearly, the fiduciary norms that apply to physicians cannot be applied to bankruptcy practitioners, since their duties and the objectives of their offices differ in many ways. Fiduciary criteria applicable to insolvency practitioners must be developed and sufficiently detailed to provide greater clarity for insolvency professionals and the community in which they operate, including the general public.

In accepting an insolvency practitioner's appointment, the insolvency practitioner voluntarily commits to abide by the rules and responsibilities that define this fiduciary relationship, thereby encouraging trust among the relevant stakeholders. Responsibilities should therefore be clearly defined to ensure compliance by insolvency practitioners and thus the confidence of all parties. While the exact fiduciary duties of insolvency practitioners may vary from jurisdiction to jurisdiction, the following main duties can be broadly agreed to apply: a duty to act in good faith, which implies honest and fair dealing; An obligation to act in the best interests of the beneficiaries of a fiduciary duty; The duty to exercise the powers of the office in an independent and impartial manner, which includes the duty to avoid conflicts of interest; A duty not normally seen as fiduciary, a duty of care, skill, and diligence. Given the already dire circumstances of the debtor, the obligation to exercise care, while not fiduciary in nature, is extremely important in the case of bankruptcy. Furthermore, it is inextricably linked to fiduciary duty, since a fiduciary acting in a negligent manner cannot be said to have complied with the obligation to act in the best interests of the beneficiaries of his responsibility. Taking into account an individual's qualifications and skills, the obligation to act with care becomes even more important, effectively making them specialists and thus allowing them to receive a higher degree of care.】

Commented [JL6]: 4
I have rather mercifully not penalised you for this answer. It is an answer that shows no clear understanding of the question and is in the most part a very poor copy of the Guidance Text.

Question 2.2 [maximum 4 marks]

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

[The purpose of the appeal to the insolvency practitioner to be independent and impartial is to ensure that the insolvency practitioner overturns his professional and/or business judgment in the exercise of bias, conflict of interest or undue influence by others. It is worth noting that many jurisdictions have strict legislation in this area. Insolvency practitioners should not accept independent and impartial appointments because of their relationships with stakeholders. Joint appointments do not necessarily constitute an appropriate safeguard if this relationship preclude the insolvency practitioner from accepting insolvency appointments in the form of an insolvency practitioner. It's twice as independent. An insolvency practitioner must be effectively independent and must be seen or perceived to be independent. In fact, independence requires that the insolvency practitioner be virtually free from any influence that might impair his judgment. Therefore, insolvency practitioners must avoid all personal and professional relationships and direct or indirect interests that would adversely affect, harm or threaten their integrity and decision-making ability. Perceived independence, on the other hand, involves avoiding situations that would lead a reasonably informed third party to conclude that the integrity, independence and impartiality of the insolvency practitioner has been compromised. In bankruptcy proceedings, it is extremely important to see or be seen to be independent and impartial. If stakeholders involved in the proceedings believe that the bankruptcy practitioner is biased, or lacks independence (even though this may not be true), this will negate their trust and reliance on him. Without trust and reliance, stakeholders and beneficiaries will no longer believe that the insolvency practitioner has an obligation to act in their best interests, which may cause them to cease to co-operate with the insolvency practitioner and the proceedings. This can be particularly troublesome for rescue procedures, as certain cooperation is essential to the successful implementation of a rescue plan or strategy. In other words, the apparent lack of independence could undermine the success of the entire rescue process. To ensure the independence of insolvency practitioners, jurisdictions typically identify certain personal and professional relationships or circumstances that may result in a lack of independence. These contacts may include any professional or personal contact with the Company or the Directors of the Company, shareholders of the Company, employees of the Company, business partners of the Company, other companies or entities controlled by the Company, secured or unsecured creditors of the Company, debtors of the Company or even relatives of officials of the Company. Since the above list does not claim to be a quantitative clause of the relationship, each alleged lack of independence must be assessed in the light of the prevailing circumstances. To address threats to independence and impartiality, some jurisdictions require disclosure of this relationship and declaration of independence. In this document, the insolvency practitioner must truthfully disclose any and all relationships he may have with any stakeholder in the insolvency proceedings, and the nature of such relationships and the degree of interaction with the stakeholder. The insolvency practitioner will also state that he will be able to discharge his duties independently and impartially despite his relationship with stakeholders. Yet disclosing such relationships does not suddenly make them seem harmless. If the relationship is not material, and only superficial, then disclosing it and declaring independence might remedy the situation. However, when the insolvency practitioner has a long-standing professional or personal relationship with the person or stakeholder involved in the proceedings, it will be a much more difficult task to persuade the stakeholder to be independent and impartial. The mere disclosure of any relationship as a solution is flawed. Non-disclosure is a warrant for fair and objective conduct. On the contrary, statements by insolvency practitioners should be regarded as disclosures of relationships that do not pose any risk to the independence of the practitioners.]

Commented [JL7]: 2
Copied and pasted from the GT with word replacements that makes no sense. In accordance with point 5 of the instructions set out at the start of the brief I have awarded only half of the possible marks.

Question 2.3 [maximum 2 marks]

What is the preferred method of calculation of insolvency practitioner remuneration? Name one ethical issue in relation to this method of calculation.

[Remuneration is a very sensitive issue and, if the applicable law does not prescribe procedures or standards for remuneration, careful consideration must be given to the way in which members request and provide justification for remuneration (or pay their own remuneration where legal or professional guidance does not require approval). Acceptable methods of compensation calculation may include, but are not limited to: fixed expenses, percentage based expenses, on-time expenses, contingency expenses, and consolidated expenses.

Perhaps one of the most contentious ethical issues with intellectual property compensation is the industry's preference for time-based fees. Although this issue is controversial, it is still the preferred method for calculating INTELLECTUAL property compensation in many jurisdictions as it provides fair compensation for the work it is deemed to have done. The calculated rate on which remuneration is based may be the intellectual property's own hourly or daily rate or the rate specified by legislation or the occupation to which the intellectual property belongs.

It is also possible that this method of calculating compensation does not reflect the actual work done by the IP. Considering the cost of time in Mirror Group Newspaper Picture v Maxwell, Ferris J stated three important principles relating to the cost of time. He said: (a) The time spent represents the cost of providing the service, not the value of the service provided; (b) The time spent should be only one of a number of relevant factors in assessing value; And (c) Starting with the first two questions, the real task is to assess value, not cost. However, the value of services can only be evaluated after the fact. This case also addresses the problem that time-based costing does not reflect the work performed. This is especially true in the case of prescribed costs. Insolvency practitioners are likely to do more work than the prescribed hourly/daily rates allow; Again, they may be paid more than the actual work. They have frequently criticized the amount of the hourly rate as it does not, in their view, represent a clear picture of the full cost of carrying out the insolvency proceedings.]

Commented [JL8]: ?

Commented [JL9]: ?

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

Commented [JL11]: 7,5 out of 15

Question 3.1 [maximum 8 marks]

Which elements of insolvency proceedings are especially prone to create or give rise to threats to independence and impartiality? Please elaborate.

[Independence should be considered both as a fact and from the perspective of an informed observer. Judicial guidance, whether legislative, professional or codified, should be taken into account, but the key principle behind the principle of independence should be to ensure that a member's conduct is, and is seen to be, not unfairly or unduly biased in favour of either party, including the member himself or his colleagues. A member (or an affiliate) shall not accept an appointment in connection with the estate if its relationship with a director of the Company or any stakeholder leads to a possible or perceived lack of independence.

Threats to objectivity, independence, and impartiality may include, individually or in combination, self-interest, self-censorship, publicity, familiarity, and intimidation.

Lack of independence may not necessarily be addressed by disclosure or appointment of an independent associate practitioner or officer, although both options can be considered and may be appropriate in some cases. If a member purchases or deletes assets or cash from

the estate (excluding properly approved remuneration and payments), it is likely that independence, objectivity and/or impartiality has been breached, even if it has not actually been breached. Such action could undermine trust in the integrity of the member and the process. Members appoint real estate commercial retailers to purchase goods or services that commercial retailers sell to the public, and generally such members should be allowed to purchase such items in the ordinary course of business (for example, in the retailer's purchase of food on the same terms as other purchasers). However, members should not take advantage of staff discounts or special payment terms, as doing so might compromise or be perceived to compromise independence. Accepting a bribe, paying or accepting a secret commission for the purpose of accepting a job or offering a job to another person shall be unacceptable. Acquisitions made through tight links, for example. Family affiliates/affiliates often attract as much attention as member's own acquisitions. Therefore, immediate family members and close relationships should be subject to the same restrictions as members. A jurisdiction may wish to allow members (or related persons or associated parties) to purchase assets with the prior express permission of the interested parties.

Nature of pre-work/appointment participation: In practice, CIP consults frequently with companies or stakeholders. These consultations may also give the impression of a lack of independence and impartiality. However, prior negotiations need not result in the disqualification of the person and may in fact result in constituting an important part of the bankruptcy proceedings. Therefore, not all forms of contact between CIP and stakeholders prior to appointment necessarily lead to a lack of independence. During such consultations, however, there should be limits on what would be considered acceptable participation. If the consultation involves the substantial involvement of any stakeholder, CIP will no longer be independent and therefore should not be appointed as a practitioner. Advice provided by practitioners in advance advice shall be limited to the financial condition of the Company, the company's solvency, the impact of a potential bankruptcy and any alternatives to bankruptcy. CIP shall also state the nature and scope of the prior consultations in the disclosure statement. This would promote transparency and help to prevent allegations of a lack of independence.

Appointment: In many jurisdictions, CIP can be appointed by the board of directors or a stakeholder (usually a shareholder or creditor). This may lead appointees to expect that practitioners will put their interests first. In some cases, these people, as heads of companies, "even believed they had the ability to influence CIP. It is therefore essential that CIP be aware of his responsibilities in this regard. The practitioner should not make any promises to the person who appointed him and should make it very clear that he is expected to act in the interest of all beneficiaries. The independence obligation also requires the CIP to carefully review each particular situation before accepting an appointment. Such a review will include reasonable steps to identify possible associations or conflicts of interest with any stakeholder.

Subsequent appointment: Subsequent appointment refers to a situation that allows the same CIP to act in different insolvency capacities with respect to the same debtor company. In some jurisdictions, such as England and Wales, CIP appointments are allowed in this way. Subsequent appointments raised questions of independence and impartiality because of self-censorship and the threat of self-interest. The Insolvency Code of Ethics of the Institute of Chartered Accountants in England and Wales (ICAEW) recognises potential conflicts of interest in this area, citing "successive insolvency appointments" as an example of a situation that could lead to a threat of self-review. A self-censorship threat is a situation in which CIP is unable to properly assess the outcome of a prior judgment or service rendered because of its participation in a prior decision. The threat to self-interest has to do with the CIP pay issue. Subsequent appointments are likely to raise questions about CIP's pay, since CIP will be paid twice for work performed by the same company. A threat of self-interest is a

situation where CIP's interests (including financial interests) may unduly influence its judgment or conduct. An example of a subsequent appointment and corresponding subsequent compensation that might affect CIP's conduct might be that a salvage or turnaround practitioner might not do his best to save the debtor from liquidation, knowing that he would then be appointed liquidator and paid again. Ceos who engage in follow-up appointments often believe that previous appointments do have some benefits and advantages (such as institutional knowledge) in subsequent appointments, and that professionals believe they can act independently and impartially. In jurisdictions that allow follow-up appointments, courts have held that the benefits outweigh the risks. In some jurisdictions, subsequent appointments to the same debtor company are prohibited as a result of the above threats. South Africa is a good example. The South African Companies Act 2008 provides that a business salvage practitioner may not be appointed as liquidator of a debtor in subsequent liquidation proceedings. As noted earlier, other jurisdictions such as England, Wales and New Zealand also allow subsequent appointments.

Slush funds and personal transactions with corporations: CIP shall at all times and in all transactions act in the best interest of the beneficiaries of its duties. As a trustee, CIP must not profit secretly at the expense of the beneficiary or put itself in a position that conflicts with its personal interests (or those of its related or related parties) and its duties. If his judgment is influenced by the fact that he can personally benefit from the decision, he cannot be said to act in the best interests of the beneficiaries of his duties. This is particularly important in cases where the CIP (or CIP's family/friends) wish to purchase assets from the company. This can in effect place the CIP at both ends of the contract, which can raise a strong suspicion that the fiduciary is serving its own interests rather than those of the beneficiary. There are also many ways in which the CIP will be able to manipulate such a transaction for its own benefit, such as determining a favorable price, because the CIP will know that the company will accept and draft (or participate in drafting) contracts with favorable terms. For this purpose, it is important that CIP follow the necessary procedural steps (disclosure) and obtain the necessary informed consent when the jurisdiction permits the necessary transactions between CIP and the company. Thus, CIP's obligation to act independently and impartially incorporates the same values as the familiar "no profit" and "no conflict" rules of corporate law, and underpins his obligation of indivisible loyalty to the beneficiaries. The no-profit rule determines that a trustee cannot profit from his fiduciary status (his status as CIP) and thus become unjustly rich, for example by receiving secret kickbacks or commissions. The no-conflict rule determines that a fiduciary is not allowed to conflict between its responsibilities and the interests of the beneficiary, such as dealing with a debtor company in its personal capacity.]

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Question 3.2 [maximum 7 marks]

As insolvency appointments often involve complex legal issues, it is common practice for insolvency practitioners to rely on the advice and services of legal professionals. What ethical considerations should be borne in mind, especially regarding the fees of these legal professionals?

[As the name implies, these fee arrangements determine that insolvency practitioners will be entitled to compensation based on specific outcomes or conditions satisfied. An outcome or condition is usually associated with a beneficial outcome for the stakeholder. One reason for the controversy surrounding contingency fee arrangements is that the conditions and outcomes for the payment of fees can be said to be conditions and outcomes that the insolvency practitioner, as a trustee, should aspire to anyway and will therefore be part of its remit. Another problem could be to shift the insolvency practitioner's attention to a single task, which would benefit his expense arrangements rather than allowing his approach to be holistic.

Commented [JL13]: This is irrelevant to the question but have copied it nonetheless. It is very difficult to determine whether you have insight and understanding into the issues.

Perhaps one of the most contentious ethical issues regarding insolvency practitioners' compensation is the industry's preference for time-based fees.

There is no ethical problem paying unexpected costs to achieve a truly significant result, which should always be measured objectively. This should not be an achievement in the eyes of bankruptcy practitioners alone. Each method has advantages and disadvantages. Allowing a combination of approaches provides opportunities to exploit each approach, while shortcomings can be avoided as far as ethical behavior is concerned. In most jurisdictions, the decision as to how fees should be constituted rests with the insolvency practitioner. In some cases, it may be predetermined.

The insolvency practitioner must be able to demonstrate that his remuneration is reasonable and that the remuneration he is demanding is fair, reasonable and proportional in the circumstances. To determine whether the pay is reasonable, the following factors are usually considered: the complexity of the case; Whether any aspect of the case creates any special kind or degree of liability for the public officer; The effectiveness with which officials perform their duties; And the value and nature of the property that officials have to deal with." In order for insolvency practitioners to be in the best position to justify their compensation, insolvency practitioners must be able to calculate. As a fiduciary, the insolvency practitioner firm has a duty to explain. Transparency is a key component of CIP's ethical conduct.

The new Insolvency Code of Ethics from the Institute of Chartered Accountants in England and Wales (ICAEW) addresses this issue with very clear and sensible advice. In the section dealing with expert advice and services, ICAEW requires that where an insolvency practitioner intends to rely on the advice or work of a third party, the insolvency practitioner should assess whether such advice or work is necessary. The association also needs an IP to record the reasons for choosing a particular service provider. In addition, if there is a professional or personal relationship between the insolvency practitioner and the service provider, the Code recommends full disclosure of the relationship and an assessment of whether the service is of best value to the creditor. In order to determine whether the service provider will provide the best value and service, the IP must consider: (a) the cost of the service, the provider's expertise and experience; (b) Whether the supplier has appropriate regulatory authority; And (c) the professional and ethical standards applicable to service providers. The requirements and guidelines set out in the Code can be effectively applied to the use of legal professionals. If the insolvency practitioner needs the advice and services of a legal professional, he should be able to demonstrate that this is indeed necessary and should be able to explain why he has chosen a particular legal professional. If his relationship is likely to give the impression that he is not independent of the legal profession, he should disclose it to stakeholders. He should also be able to provide details of the process he follows to ensure that the service provider will provide the best value for the beneficiary.]

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Commented [JL15]: 7 out of 15

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 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 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, 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.

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 difficulty 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.

INSTRUCTIONS

There are at least THREE major ethical issues in this factual scenario.

Please 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.

[1. 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.

To ensure the independence of insolvency practitioners, jurisdictions typically identify certain personal and professional relationships or circumstances that may result in a lack of independence. These contacts may include any professional or personal contact with the Company or the Directors of the Company, shareholders of the Company, employees of the Company, business partners of the Company, other companies or entities controlled by the Company, secured or unsecured creditors of the Company, debtors of the Company or even relatives of officials of the Company. Since the above list does not claim to be a quantitative clause of the relationship, each alleged lack of independence must be assessed in the light of the prevailing circumstances. To address threats to independence and impartiality, some jurisdictions require disclosure of this relationship and declaration of independence. In this document, the insolvency practitioner must truthfully disclose any and all relationships he may have with any stakeholder in the insolvency proceedings, and the nature of such relationships and the degree of interaction with the stakeholder. The insolvency practitioner will also state that he will be able to discharge his duties independently and impartially despite his relationship with stakeholders. Yet disclosing such relationships does not suddenly make them seem harmless. If the relationship is not material, and only superficial, then disclosing it and declaring independence might remedy the situation. However, when the insolvency practitioner has a long-standing professional or personal relationship with the person or stakeholder involved in the proceedings, it will be a much more difficult task to persuade the stakeholder to be independent and impartial. The mere disclosure of any relationship as a solution is flawed. Non-disclosure is a guarantee of fair and objective conduct.

2. Mr Relation assures them that his focus will not be on them but on trying to rescue the company. 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.

Integrity means fair dealing, honesty and honesty. A bankrupt practitioner is deemed to have acted in good faith if he is honest, upright and confidential. Since he is a member of a particular profession, the insolvency practitioner has in most cases been required to demonstrate impeccable integrity and honesty, and the beneficiaries of the bankruptcy proceedings are at the mercy of the insolvency practitioner's discretion; They must trust and rely on bankruptcy practitioners to protect their interests. This reliance on and trust in the practitioner requires honesty, honesty and transparency from the insolvency practitioner. It is essential that insolvency practitioners be honest with their beneficiaries and always act honestly with them. Honesty means that a bankruptcy practitioner should avoid lying, and honesty means that a bankruptcy practitioner should not hide any facts from parties with a stake in the outcome of a bankruptcy. Honesty further implies that insolvency practitioners should be open and transparent in their decision-making and should not withhold or distort any information. An insolvency practitioner shall be honest and honest in negotiating on behalf of the beneficiary and in reporting his conduct and transactions. An insolvency practitioner must refrain from misleading creditors, employees or shareholders of the Company by any act or omission. Honesty and candor from bankruptcy practitioners may also help to dispel any negative feelings in bankruptcy proceedings. Honest and transparent practices will give confidence to beneficiaries and the public and promote better cooperation.

In the restructuring process, this responsibility will include being honest about the prospects for success.

3.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).Mr Relation conducts a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulty 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 .

Members and their firms shall have sufficient and appropriate experience and resources to deal with the contracts and cases accepted by them, or may request experts or further resources as required. If a member fails to give them the level of attention or technical expertise they need to provide the best results for stakeholders, it can bring that member and that professional into disrepute. Members should strive to maintain a high level of competence in their field to provide the services they perform and to fulfil any statutory duties, even if there is no further education or qualification requirement. Bankruptcy practitioners are generally considered to be experts in transformation, restructuring, and liquidation. Thus, members of the public and, more specifically, stakeholders in bankruptcy expect insolvency practitioners to have the necessary experience and technical competence to carry out the duties associated with their appointment. This expectation is further underscored by the fact that insolvency practitioners are paid as skilled professionals. This ethical principle requires an extraordinary degree of self-actualization and introspection on the part of bankruptcy practitioners. Professionals must understand the limitations of their own knowledge, skills and experience (and diaries). Therefore, when a defect area is identified, it is of the utmost importance that the bankruptcy practitioner, as a fiduciary, must ensure that he educates himself so that he can act in the best interest of his beneficiaries. The principles of professional and technical competence and the duty of care of the insolvency practitioner require that the insolvency practitioner should accept the insolvency appointment only if the insolvency practitioner has or is able to obtain sufficient professional knowledge. In addition, bankruptcy practitioners should not accept appointments if they are already overworked and cannot provide the level of attention required for appointment. In addition, the law is dynamic and often changes to accommodate changes in practice, politics, culture and environment. IP owners should try to keep up with changes in law or practice in their field. Many jurisdictions provide opportunities for continued professional development and arrange short courses and conferences for bankruptcy practitioners to keep abreast of the latest developments. This ethical principle is also closely related to the obligations of care, skill, and diligence. When the company is in financial trouble, a person appointed CIP is not allowed to act recklessly with the affairs and property of the company. The objective of bankruptcy proceedings (to protect the interests of stakeholders) can be thwarted by incompetence and carelessness on the part of practitioners. It is clear from statements such as these that a practitioner who takes on too much under the circumstances of appointment, or a practitioner who fails to perform his duties with care, skill and diligence, may be in breach of a duty of care, skill and diligence, and may be personally liable for any loss due to his actions or negligence. In this regard, it may be useful to use the recognized dual tests of nursing skills and duty of care. A CIP act should be measured against a reasonable CIP act. This means that it should be determined whether he acted with the level of care, skill and diligence reasonably expected of him in the same circumstances based on his personal attributes and qualifications.

4.The administration is subsequently converted to liquidation proceedings and Mr Relation is appointed as the liquidator.

Subsequent appointments refer to circumstances that allow the same CIP to act in different insolvency capacities with respect to the same debtor company. In some jurisdictions, such

as England and Wales, CIP appointments are allowed in this way. Subsequent appointments raised questions of independence and impartiality because of self-censorship and the threat of self-interest. The Insolvency Code of Ethics of the Institute of Chartered Accountants in England and Wales (ICAEW) recognises potential conflicts of interest in this area, citing "successive insolvency appointments" as an example of a situation that could lead to a threat of self-review. A self-censorship threat is a situation in which CIP is unable to properly assess the outcome of a prior judgment or service rendered because of its participation in a prior decision. The threat to self-interest has to do with the CIP pay issue. Subsequent appointments are likely to raise questions about CIP's pay, since CIP will be paid twice for work performed by the same company. A threat of self-interest is a situation where CIP's interests (including financial interests) may unduly influence its judgment or conduct. An example of a subsequent appointment and corresponding subsequent remuneration that might affect CIP's conduct might be that a salvage or turnaround practitioner might not do his best to save the debtor from settlement, knowing that he would then be appointed liquidator and be remunerated again. Ceos who engage in subsequent appointments often assume that previous appointments do have some benefit and advantage (such as institutional knowledge) in subsequent appointments, and that the professionals believe they can act independently and fairly. In jurisdictions that allow follow-up appointments, courts have held that the benefits outweigh the risks. In some jurisdictions, subsequent appointments to the same debtor company are prohibited as a result of the above threats. South Africa is a good example. The South African Companies Act 2008 provides that a business salvage practitioner may not be appointed as liquidator of a debtor in subsequent liquidation proceedings. As noted earlier, other jurisdictions such as England, Wales and New Zealand also allow subsequent appointments.]

Commented [JL16]: Your answer has identified several ethical issues. However, it is slightly disjointed as the issue is not linked with the ethical norm nor are the ethical principles applied to the facts. The answer fails to reflect on why the issue is an ethical one in certain parts.
You would probably have done better in this question if you did not copy from the GT and rather reflected on the issues in your own words.
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*** End of Assessment ***