



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 9

ETHICS AND PROFESSIONAL PRACTICE

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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.**

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EXCELLENT EFFORT!!

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(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**

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Question 1.7

Select the correct answer:

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

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

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

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

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

Question 1.8

Select the correct answer:

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

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

Question 1.9

Select the most correct answer from the options below.

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

Please choose the most correct answer.

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

Question 1.10

Select the most correct answer from the options below.

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

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

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

QUESTION 2 (direct questions) [10 marks]

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Question 2.1 [maximum 3 marks]

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

The most common elements associated with the existence of a fiduciary relationship include that the fiduciary has undertaken to act on behalf of another and that the fiduciary has discretion and power over the interests of the other. A further element of vulnerability on the part of the other is sometimes included as an indicative element of the existence of a fiduciary relationship.

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Question 2.2 [maximum 4 marks]

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

*Insolvency professionals should exhibit the highest levels of objectivity, independence and impartiality in the exercise of their powers and duties, in accordance with Principle 2 of the INSOL International's Ethical Principles for Insolvency Professionals. Independence, in this regard, is two-pronged in nature. IPs must be both independent *in fact* and also seen or perceived to be independent. This means that IPs must, first, be factually free from any influences that could compromise their judgment (including personal and professional relationships and direct or indirect interests that could adversely influence, impair or threaten their integrity and ability to make unbiased decisions). Secondly, that independence must be readily apparent from the outside, and there should be nothing that gives the impression that an IP is not independent or impartial, even if that is not, in fact, the case. The rationale for this second tier of impartiality and independence is that if the stakeholders involved in the proceedings perceive the IP to be biased or lack independence (even if untrue), it may nonetheless negate the trust and reliance that they have placed in him, which could result in a discontinuance of cooperation with the IP and the insolvency process, which is essential to the good working of an insolvency regime.*

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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.

It is in the IP's interests to ensure that policies, procedures and systems are implemented to ensure that its practice is managed in a manner that allows him to perform his duties to the best of his ability. In that regard, risk management, including through obtaining appropriate insurance, is essential in controlling threats to the IP's practice and appointment. Two key types of insurance are professional indemnity and fidelity. Professional indemnity insurance covers against the risk of stakeholders instituting action against the IP for acting negligently. On the other hand, fidelity insurance protects stakeholders in the event that the IP (or someone working for him) acts dishonestly or defrauds the estate. It is of particular importance for IPs to obtain these types of insurance because of the extensive, important and often complicated duties that are owed by IPs, to ensure that both they (the IPs) and the many stakeholders of the estate are fully protected.

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

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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.

In accordance with Principle 1 of the INSOL International's Ethical Principles for Insolvency Professionals, IPs must endeavour to demonstrate the highest levels of integrity, not only by being straightforward, honest and truthful, but also by adhering to high moral and ethical principles in all aspects of their professional practice. It is, in this regard, important to note that morality and ethics, while closely related, are not the same thing. Morals generally refer to a person's personal beliefs regarding what is right and wrong. They can, therefore, be heavily influenced and dependent upon a person's individual upbringing, culture, education and religious beliefs and tend to be subjective in nature. Ethics, on the other hand, are more objective in nature. They refer to the specific rules and actions that are regarded as correct behaviour and often relate to a specific group of people who function in similar circumstances (as, in this case, IPs). While morals will generally form the basis for ethics, ethics is not concerned with beliefs on what is right and wrong but, rather, the acceptable standards of conduct.

For example, an IP may believe that, morally, creditor companies who adhere to the strictest of environmental standard should be applauded and rewarded for those actions, as compared to those creditors who actively participate in the destruction of the environment. However, ethically, IPs are required to treat all creditors (of the same class) in a fair and equitable manner and with an even hand and cannot treat one more favourable than the other based on his subjective opinions and beliefs. Similarly, an IP may have a moral desire to be full, frank and honest with all stakeholders, but, ethically, he is required to keep certain information confidential. As a final example, an IP may believe morally that every person on his team should be given the opportunity to participate in an appointment, as everyone "has to start somewhere", and, as such, give a junior member a role in an engagement that is beyond his capabilities. However, ethically, persons must be sufficiently and appropriately experienced and resourced to deal with engagements and cases, and the appointment of a junior resource to an engagement over which he is not adequately equipped to handle could significantly impact stakeholders in a negative way.

Where there is a conflict between an IP's personal beliefs and that of the profession, the profession's ethical standards should trump the IP's personal opinions. By this INSOL Principle, IPs are required to hold both: a personal set of beliefs to guide his actions, while still adhering to the ethical values of the group that he belongs to (insolvency professionals).

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Question 3.2 [maximum 9 marks]

Which elements of insolvency proceedings are especially prone to create or give rise to threats to independence and impartiality? Please elaborate with reference to primary and secondary sources of law.

IPs are expected to exhibit the highest levels of independence and impartiality in the exercise of their powers and duties. This principle is enshrined in Principle 2 of the INSOL International's Ethical Principles for Insolvency Professionals. There are a number of threats to independence and impartiality that can arise during insolvency proceedings, including threats of self-interest, self-review, advocacy, familiarity and intimidation.

Elements of insolvency proceedings that are especially prone to creating or giving rise to these threats to independence include:

- (1) Pre-commencement involvement. In practice, prior consultations occur between the IP and the company or stakeholders. While they may, and often do, serve legitimate purposes, pre-appointment consultations may give the appearance of a lack of independence on the part of the IP. As a result, there must be limits to what can be deemed acceptable engagement during consultations, and safeguards should be put in place. The risks inherent in this element of the insolvency process were demonstrated in the Australian case of *Re Kordan, Ten Network Holdings Ltd*. Here, the IP's firm had been involved in reviewing the company's financial position for an extended period prior to their appointment, and the question before the court became whether the IP should be allowed to continue to act as a result of that relationship. The court found that certain safeguards could be put in place to protect IPs from the risks, including the potential IP making it clear to the company's boards that they may become the administrator (or IP) if the measures they impose during their pre-appointment interactions do not succeed, and the proper record keeping of all meetings held and tasks performed. In the English case of *Re 1 Blackfriars Limited*, the IP's pre-commencement discussions with the appointing creditor regarding the nature of the likely administration led to the question of whether the IP's independence had been obstructed. The court, ultimately, found no impropriety.*
- (2) The appointment process. In the appointment of an IP, there is the possibility that an IP may find himself aligned with, or feeling indebted to, the person who proposed or supported his appointment. IPs can, in many jurisdictions, be appointed either by the Board of Directors of the company or another stakeholder, usually a creditor or shareholder. This may leave to an expectation, by the appointee, that the practitioner may prioritise their interests or that they have the power to influence the IP. The IP is, therefore, urged not to make any promises to his appointor and to make it very clear that his duties are owed to all beneficiaries. In the case of a creditor-led appointment, there is a threat to independence and impartiality where a particular creditor has advocated for the IP's appointment, and the IP may believe himself to be duty bound to assist*

that creditor, in circumstances where he is, really, duty bound to serve all creditors equally and fairly. As was noted in the Singapore case of *The Royal Bank of Scotland NV v TT International Ltd. et anor*, this is especially so when the appointer of the IP is not the creditors, but the company's management, as the IP's role is to act in the best interests of the creditors, and an allegiance with the company can lead to serious ethical infringements. In *The Royal Bank of Scotland NV v TT International Ltd. et anor*, the success of the shareholders voluntary arrangement depended upon the success of the scheme, and so there was said to be an incentive on the part of the IP, who had aligned his interest with those of the company, to have the plan approved for reasons other than attempting to rescue the company.

(3) *Subsequent appointments. Scenarios where the same IP is allowed to act in different insolvency capacities in relation to the same debtor company allow for threats to his independence and integrity. Some jurisdictions have express prohibitions against this, such as South Africa, whilst others, like England and Singapore, have no restrictions. These subsequent appointments create threats of self-review and self interests. Indeed, the Insolvency Code of Ethics of the Institute of Chartered Accountants of England and Wales (ICAEW) recognises the potential conflict of interest in this scenario, citing it as an example of circumstances that may lead to the creation of a self-review threat. A self-review threat is one where an IP, due to being involved in prior decision-making, will not be able to appropriately evaluate the results of previous judgments made or services rendered (ICAEW, 2114.1 A5(b)(ii)). A self-interest threat relates to the issue of remuneration, as the IP may run the risk of being remunerated twice for work done in relation to the same company. The South African Companies Act 2008 provides that a business rescue practitioner may not be appointed as the liquidator of the debtor in subsequent liquidation proceedings, representing an express prohibition on subsequent appointments due to the real threat they impose on impartiality.*

(4) *Personal transactions with the company. In situations where the IP, or his friends or family, would like to purchase assets from the company, there is a particular risk of a threat to independence/impartiality, as it may place the IP at both ends of the contract and create a suspicion and the appearance that the IP is servicing himself and his own interests, rather than the beneficiaries. He may fix an advantageous price, or prepare contracts with favourable clauses. To this end, in those jurisdictions where transactions between an IP and the debtor company are allowed, an IP must generally follow procedural steps, such as disclosure, and obtaining informed consent. Reference should be made to the familiar "no profit" and "no conflict" rules present in Corporate Law, which underpin an IP's duty of undivided loyalty to the beneficiaries.*

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

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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.

(1) The personal relationship between Mr. Relation and Mr. B InLaw

Principle 2 of INSOL International’s Ethical Principles for Insolvency Professionals (the “Principles”) provides that members should exhibit the highest levels of objectivity, independence and impartiality in the exercise of their powers and duties, and should avoid circumstances likely to result in a conflict of interest. In this regard, the Principles’ commentary confirms that independence should be considered not only as a matter of fact, but also as a matter of perception, from the perspective of an informed observer. The commentary suggests that a member should not accept an appointment in connection with the estate if his, or a related party’s, relationship with the directors of the company or any stakeholders would give rise to a perceived lack of independence.

It is against that background that the fact that Mr. Relation, who is appointed as administrator of WeBuild Ltd (the Company), is the brother-in-law, and godfather to the daughter, of Mr. B InLaw, a director and shareholder of the Company, creates a real ethical issue. IPs are required to perform a balancing act in considering and dealing with competing interests of all stakeholders and, for that reason, can only exercise their discretion and powers in the best interests of beneficiaries when they are truly independent and impartial.

The case of Commonwealth Bank of Australia v Irving perfectly illustrates the impact that personal relationships with stakeholders may have on an IP's independence, due to the perception the relationship creates. Indeed, the facts of Commonwealth Bank are similar to the facts at hand, whereby the appointed administrator had known one of the company's directors for 16 years and had, at numerous times, acted as legal advisor to another. He had also provided consultation services to the company regarding its financial appointment prior to the commencement of insolvency proceedings - as had Mr. Relation in respect of the Company. Although the administrator disclosed his relationship with the directors and the company prior to taking the appointment and confirmed his belief that he could act independently, and there was no factual evidence of impropriety, the court found that, as administrator of the company, the administrator would have to investigate the affairs of the company and the conduct of the directors, including the director with which he had a relationship, to determine whether or not action should be taken against them. His relationship with the director created the perception that the administrator held him in high regard, and the court found that a reasonable person would have trouble believing that he could conduct his investigation without any bias. The mere fact that he had a longstanding friendly and professional relationship with a director would create doubt in his ability to act independently and, as such, the court found that it would not be appropriate for him to continue as administrator.

Indeed, the court's comments in Commonwealth Bank on the administrator's responsibility for investigating the affairs of directors are especially relevant here, as the directors have expressly put Mr. Relation on notice that they were trading when the company's financial status was questionable. Not only would there be a perception that Mr. Relation may not properly and independently investigate the affairs of the directors, including especially his brother-in-law, in this instance, but there appears to be a real likelihood that he, in fact, did not, having found no impropriety despite the directors continued trading and initiating of several large payments to themselves by way of performance bonuses before the administration. In addition, Mr. Relation's lack of impartiality can be seen from his calling of a meeting with solely the company's shareholders (excluding its creditors), assuring the directors that his focus would not be on them and his reliance on the reports drafted by Mr. B Inlaw regarding the company's business.

While disclosure or the appointment of an independent joint practitioner may be considered to rectify these ethical threats (as provided for in the commentary to the Principles), these safeguards will not necessarily cure a lack of independence. In this case, Mr. Relation disclosed his relationship and confirmed his ability to act independently prior to his appointment but, as was the case in the Commonwealth CASE, this is unlikely to be sufficient in circumstances of such close and clear familiarity.

(2) Mr. Relation's involvement in pre-commencement discussions

A similar ethical issue arises with regard to Mr. Relation's independence and integrity in connection with his pre-commencement involvement in the company's affairs (also governed by Principle 2 of the Principles). While prior consultations often occur between the IP and the company or stakeholder, pre-appointment consultations may give the appearance of a lack of independence on the part of the IP. As a result, there are limits to what can be deemed acceptable engagement during consultations, and appropriate safeguards should be put in place. Should the consultation involve material engagement by any of the stakeholder parties, the IP would no longer be independent and should not be appointed as practitioner. Advice from the IP should be limited to the company's financial position, its solvency, the effects of potential insolvency, and any alternatives to the insolvency.

In Mr. Relation's case, he participated in the shareholders' meeting to discuss the company's operations that led to its administration. Mr. Relation, arguably, went beyond the limits of what should be discussed in pre-commencement discussions so as to retain independence, by expressly advising the company to enter into a voluntary administration procedure.

*The Australian case of *Re Kordan, Ten Network Holdings Ltd* suggests some safeguards that may be put in place to remove or minimise ethical threats caused by pre-commencement discussions. These included the potential IP making it clear to the company's boards that they may become the administrator if the measures they impose during their pre-appointment interactions do not succeed, and the proper record keeping of all meetings held and tasks performed.*

(3) Mr. Relation's appointment in the liquidation proceedings

*Scenarios where the same IP is allowed to act in different insolvency capacities in relation to the same debtor company allow for threats to his independence and integrity. Some jurisdictions have express prohibitions against this, such as South Africa, whilst others, like England and Singapore, have no restrictions. These subsequent appointments create threats of self-review and self interest. Indeed, the *Insolvency Code of Ethics of the Institute of Chartered Accountants of England and Wales (ICAEW)* recognises the potential conflict of interest in this scenario, citing it as an example of circumstances that may lead to the creation of a self-review threat. A self-review threat is one where an IP, due to being involved in prior decision-making, will not be able to appropriately evaluate the results of previous judgments made or services rendered (ICAEW, 2114.1 A5(b)(ii)). A self-interest threat relates to the issue of remuneration, as the IP may run the risk of being remunerated twice for work done in relation to the same company.*

In this case, Mr. Relation, having just acted as administrator in the failed administration, is subsequently appointed as the liquidator in the liquidation proceedings. This has potential to be a real ethical issue, as the threats of self-review and self-interest will both be prevalent. Having managed the failed administration, Mr. Relation is unlikely to be able to independently evaluate the decisions that were made

during the administration process, including those relating to the maladministration by the company's directors. It is also possible that the subsequent appointment as administrator and its resultant remuneration may have influenced the behaviour of Mr. Relation as administrator, as he may have been motivated to not put his best effort into saving the Company from liquidation, as he knew he would be subsequently appointed as liquidator and be paid once more.

(4) Mr. Relation's beliefs that the interests of lower ranking creditors should outweigh "big money" creditors.

Principle 1 of the Principles provides that members should endeavour to demonstrate the highest levels of integrity by being straightforward, honest and truthful; and by adhering to high moral and ethical principles in all aspects of their professional practice. Morality and ethics, while closely related, are not the same thing. Morals generally refer to a person's personal beliefs regarding what is right and wrong. They can, therefore, be heavily influenced and dependent upon a person's individual upbringing, culture, education and religious beliefs and tend to be subjective in nature. Ethics, on the other hand, are more objective in nature. They refer to the specific rules and actions that are regarded as correct behaviour and often relate to a specific group of people who function in similar circumstances (as, in this case, IPs). While morals will generally form the basis for ethics, ethics is not concerned with beliefs on what is right and wrong but, rather, the acceptable standards of conduct. In that regard, where there is a conflict between an IP's personal beliefs and that of the profession, the profession's ethical standards should trump the IP's personal opinions. By this Principle, IPs are required to hold both: a personal set of beliefs to guide his actions, while still adhering to the ethical values of the group that he belongs to (insolvency professionals).

*Mr. Relation's public statements in which he expresses his opinion that banks should be more accommodating in restructuring proceedings and that the interests of lower ranking creditors should sometimes outweigh "big money" presents a real ethical issue, by illustrating a class conflict between Mr. Relations morals, and the profession's accepted ethical guidelines. It may be that Mr. Relation personally believes that, morally, low ranking creditors' interests should trump the interests of institutional and "big" creditors, but this belief is in direct contravention to one of the essential principles of insolvency appointments: that of fair dealing. In that regard, IPs are required to treat all creditors (of the same class) in a fair and equitable manner. As per Rajah JA in *Fustar Chemicals Ltd. (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd*, he must "at all times, be independent and hold an even hand in dealing with the often competing interests of creditors, contributories and his appointers". and with an even hand and cannot treat one more favourable than the other based on his subjective opinions and beliefs.*

As is evident here, through the reaction of ABC Bank, an indication (even if not acted upon) that an IP may not adhere to the ethical requirements of the profession, or the rules central to the same - such as that of fair dealing - can negate the trust and

confidence of key stakeholders in the IP, which is essential to the good workings of any insolvency process. For those reasons, Mr. Relation's public statement of his belief that one type of creditor should be favoured over another, presents a real ethical issue.

Commented [LJ12]: An excellent discussion.
15/15

*** End of Assessment ***