



# Northeast Bankruptcy Conference and Consumer Forum

## **Ethics**

### **Patricia J. Ballard**

Preti, Flaherty, Beliveau & Pachios, Chartered, LLP | Concord, N.H.

### **Shari I. Dwoskin**

Brown Rudnick LLP | Boston

### **Allison A. Economy**

Rudman Winchell | Bangor, Maine

### **Hon. Diane Finkle**

U.S. Bankruptcy Court (D. R.I.) | Providence

### **Morgan C. Nighan**

Nixon Peabody LLP | Boston



## Ethics Panel

Patricia Ballard, Of Counsel, Preti Flaherty, Concord NH

Hon. Peter G. Cary, Bankr. D. Me., Portland ME

Shari Dwoskin, Partner, Brown Rudnick, Boston MA

Allison Economy, Partner, Rudman Winchell, Bangor ME

Hon. Diane Finkle, Bankr. D. R.I., Providence, R.I.

Morgan Nighan, Partner, Nixon Peabody, Boston MA

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### Not-So-Hypothetical 1: Working From Home

Amelia Associate is a bankruptcy lawyer at LargeLaw LLP, working from home during the pandemic. She keeps her files in her home office, which she sometimes shares with her spouse, Larry Lawyer, who also works from home. When she's not working, she puts her papers in an unlocked drawer:

It's a small house, and when she's on calls and Larry is home, he can hear her calls, including calls with clients.

Amelia works on a debtor case with her supervisor, Pat Partner, and frequently has video calls with the debtor's executives to discuss strategy. The execs, Amelia, and Pat have bonded over the pandemic and frequently discuss the shortcomings of all of their work-from-home scenarios.

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### Question 1:

Has Amelia violated the duty of confidentiality?

A. Yes

B. No

# NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



## Answer:

Rule 1.6(c): A lawyer shall make **reasonable efforts** to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

- Amelia has a small house, and needs to talk to her clients. Wearing headphones and closing the door are likely “reasonable efforts” to prevent others from hearing her phone calls.
- Putting documents in a drawer, rather than leaving them out for Larry to see, probably constitute “reasonable efforts.”

# NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



## Comments to Rule 1.6(c):

- Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the **sensitivity of the information**, the **likelihood of disclosure** if additional safeguards are not employed, the **cost of employing additional safeguards**, the **difficulty of implementing the safeguards**, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).
- When transmitting a communication that includes information relating to the representation of a client, the lawyer must take **reasonable precautions** to prevent the information from coming into the hands of unintended recipients. This duty, however, **does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy**. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### Question 2:

Has privilege been waived over the documents in the drawer and the strategic discussions overheard by Larry and the nanny?

A. Yes

B. No

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### Answer:

**Maybe!** (although unclear how opposing counsel would find out):

- Privilege applies to “confidential communications” made for the purpose of legal advice. In re Keeper of Records, 348 F.3d 16, 22 (1<sup>st</sup> Cir. 2003).
- In order for a communication to be confidential, client must “reasonably expect” it to be confidential. United States v. Bigos, 459 F.2d 639, 643 (1<sup>st</sup> Cir. 1972).
- Presence of a third party destroys privilege “only insofar as it is indicative of the intent of the parties that their communication not be confidential.” Id.
- This issue is about whether the communications are privileged in the first place, not about whether privilege has been waived by inadvertent disclosure (See FRE 502(b) for inadvertent disclosure).



**NORTHEAST BANKRUPTCY CONFERENCE**  
SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Hypo 1: Working From Home

Question 3:

Has Pat Partner breached any duties?

A. Yes

B. No

**NORTHEAST BANKRUPTCY CONFERENCE**  
SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Answer:

Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

- LargeLaw LLP should have established practices regarding “information hygiene”
- When Pat became aware of Amelia’s situation, he should have made reasonable efforts to ensure that her setup conformed to the Rules.

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



ABA Formal Opinion 498: Virtual Practice (March 10, 2021)

- Be diligent in installing security-related updates and using strong passwords, antivirus software, and encryption.
- Ensure that your routers are secure and consider using virtual private networks (VPNs).
- Periodically assess whether existing systems are adequate as technology evolves (including preventing phishing and hacking attacks).
- Maintain reliable and secure access to client records (use reputable cloud service, back up data regularly)
- Disable listening capability on smart speakers!
- Communicate with your team and other lawyers at your firm to make sure that they're practicing good information hygiene.

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### Not-so-hypothetical 2: Conflicts of Interest

#### Facts:

Client Corp engages Large Law to represent it in defending against an employment claim. The plaintiff employees have brought their claims against Client Corp and its principal, Mr. Lynn, Client Corp's sole shareholder. Mr. Lynn and Client Corp are co-defendants in state court. Employee plaintiffs, Client Corp, and Mr. Lynn enter into a \$485,000 settlement in which the defendants agree that they are both liable. State court approves the settlement in early November.

Based on *In re Nir West Coast Inc.*, 20-25090 (Bankr. E.D. Cal. Apr. 5, 2022)

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Lauren Litigator, the partner leading the defense team in the state court action, reaches out to Pat Partner for help preparing Client Corp's bankruptcy filing and suggests that Large Law be engaged as debtor's counsel. Pat Partner goes to Amelia Associate and asks her to begin drafting retention papers. Amelia orders a conflicts search through Large Law's conflicts system and the report identifies Client Corp, but not Mr. Lynn, as an active firm client. But, Amelia had heard Jack Junior, the associate working with Lauren Litigator on the Client Corp matter talk about their work for the "defendants" (plural).

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022

Question 4:

Does Amelia have a duty to include Large Law's representation of Mr. Lynn in the Rule 2014 disclosure (which will be signed by Pat Partner)?

A. Yes

B. No



# NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



## 1.7 Client-Lawyer Relationship

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

# NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



## 5.2 Law Firms And Associations

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022

Question 5:

Does Pat have a duty to notify the Bankruptcy Court of Large Law's representation of Mr. Lynn?

A. Yes

B. No

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022

Answer:

Bankruptcy Court: “At a minimum, [Lauren] knew of the connection when the employment application was filed. [Her] representation of Mr. Lynn in the [employment] litigation was ongoing at the time and [s]he was intimately involved in securing the Law Firm’s employment under Section 327(a). As an attorney identified as estate counsel in the employment application, the burden was on [Lauren] to ensure that the full extent of h[er] connection to Mr. Lynn through [Large Law] was disclosed. That did not happen. [Pat] also could – and should – have disclosed the Law Firm’s connection to Mr. Lynn early in the bankruptcy case.”

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### More Facts:

Client Corp files a Subchapter V chapter 11 petition the day after the settlement is approved. Lauren and Pat have several discussions in November and December about the employee plaintiffs' motion for a comfort order to pursue Mr. Lynn on their claims without fear of violating the automatic stay in Client Corp's bankruptcy. They also discuss a potential plan of reorganization that would include third party releases of Mr. Lynn. In February, Pat has a conversation with a creditor's counsel in which he refers to Mr. Lynn as a client of Large Law. Large Law files a proposed chapter 11 plan in May and an amended chapter 11 plan in July, both of which include third party releases that would effectively discharge Mr. Lynn and released him from liability on all claims in which he and Client Corp are co-liable, including the employment claims. In August, Pat signs a supplemental Rule 2014 disclosure in which he states that he learned of Large Law's representation of Mr. Lynn within the last two days.

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### Question 6:

You are the bankruptcy judge reviewing Large Law's fee application seeking payment of fees and expenses during the course of Client Corp's case?

**How do you rule on the fee application?**

- A. Approve
- B. Deny

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### 3.3 Advocate

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

...

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### 8.4 Maintaining The Integrity Of The Profession

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

...

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

...

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### Answer:

Bankruptcy Court: denies fees under 328(c) and Rule 2014, finding that “the Law Firm represented the Debtor as the debtor in possession under an actual conflict of interest during the term of its employment. The opposition to the “comfort order” motion pitted Mr. Lynn’s interest directly against the estate’s interest with regard to liability on the [employment] claim. It effectively required the Law Firm to divide its loyalty between two clients by choosing which client it should prefer at the expense of the other: Oppose the motion and benefit Mr. Lynn at the estate’s expense by precluding the state court from proceeding against him and leaving the Debtor liable for the [employment] claim or ignore the motion and benefit the estate at Mr. Lynn’s expense by exposing him to an adverse judgment and collection on the [employment] claim.”

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



What Model Rules of Professional Conduct are implicated here?



**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022

Answer:

- Rule 1.7 (Conflict of Interest: Current Client)
- Rule 3.3 (Candor toward the tribunal)
- Rule 5.1 (Responsibility of a Partner or Supervising Lawyer)
- Rule 5.2 (Responsibility of a Subordinate Lawyer)
- Rule 8.4 (Misconduct)

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022

**Not-So-Hypothetical 3: The Unexperienced Practitioner**

Downeast Dawna was born and raised in Cherryfield, Maine. After graduating from Maine Law, she set up a solo practice just across from the courthouse in Machias. Dawna tried her hand at some divorces, joined the court-appointed criminal defense list, and even drafted a will or two. Life was pretty good.

One day, Lobsterboat Larry came into her office. He had run into some trouble with Maine Revenue and the IRS. He managed to “sort out” those issues on his own, but in the meantime, he had fallen behind on his boat payments. Now the local bank was threatening a maritime foreclosure action.

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Being ever resourceful, Dawna Googled “how to get out of debt and save your lobster boat” and came up with a miraculous thing called a chapter 12 bankruptcy filing. Dawna had never taken a bankruptcy course in school, but how hard could it be?

It helped that Larry offered to pay a big cash retainer that same morning.

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Question 7:

Is Dawna qualified to represent Lobsterboat Larry in a chapter 12 filing?

A. Yes

B. No

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022

Answer:

It depends (but probably not).

**Rule 1.1: Competence** - provides that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



**Comment on Rule 1.1 [1]:** “In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the **relative complexity** and **specialized nature** of the matter, the lawyer's **general experience**, the lawyer's training and **experience in the field** in question, the **preparation and study** the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or **consult with, a lawyer** of established competence in the field in question. In many instances, the required proficiency is that of a **general practitioner**. Expertise in a particular field of law may be required in some circumstances.”

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



**Comment on Rule 1.1 [2]:** “A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. **A newly admitted lawyer can be as competent as a practitioner with long experience.** Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.”

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



**Comment on Rule 1.1 [5]:** “Competent handling of a particular matter includes inquiry into and **analysis of the factual and legal elements** of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes **adequate preparation.** The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.”

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



What can Dawna do to ensure that she can provide competent representation to Larry?

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Answer:

**Comment on Rule 1.1[5]:** “A lawyer can provide adequate representation in a wholly novel field through **necessary study**. Competent representation can also be provided through the **association of a lawyer** of established competence in the field in question.”



## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Dawna seeks guidance from Practitioner Perry, an experienced debtors' attorney with an office in the big city of Bangor. Dawna doesn't want Lobsterboat Larry to think less of her as an attorney, so she decides not to tell him about this arrangement.

Besides, the retainer Larry paid was large enough to go around.

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Question 8:

Does this raise any ethical implications?

A. Yes

B. No

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022

Answer:

Yes! **Comment on Rule 1.1[6]**: “Before a lawyer retains or contracts with other lawyers outside the lawyer’s own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily **obtain informed consent** from the client and must reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law).”

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Also, just how big was that retainer anyway??

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



**Rule 1.5: Fees** - provides: “(a) A lawyer’s fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the **time and labor** required, the novelty and **difficulty** of the questions involved, and the **skill** requisite to perform the legal services properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will **preclude other employment** by the lawyer;

(3) the **fee customarily charged** in the locality for similar legal services;

(4) the **amount involved** and the results obtained;

(5) the **time limitations** imposed by the client or by the circumstances;

(6) the nature and **length of the professional relationship** with the client;

(7) the **experience, reputation, and ability** of the lawyer or lawyers performing the services; and

(8) whether the fee is **fixed or contingent**”

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### Alternate Facts:

Dawna decided against partnering with Practitioner Perry. Instead, she relied on her recently hired legal assistant, Eager Edgar. Edgar was very proficient at using Google. He searched for and located a Voluntary Petition and Schedules, a Statement of Affairs, and some other forms that looked really official to Dawna. Since Edgar found the forms so easily, Dawna thought Edgar would be best-suited to work with Larry to complete the forms.

I mean, it’s just filling in boxes, right?

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022

Alternate Facts Con't:

Lobsterboat Larry is a busy guy and he was out fishing most of the time, so Edgar communicated with him by email to obtain information about his assets and liabilities. Once Edgar completed the forms, Edgar emailed them to Larry for Larry's review. It must have been a slow day on the water, because Larry signed the forms and returned them to Edgar just a few minutes later. Dawna was thrilled her lucrative new practice area was taking off, and with so little effort on her part. Dawna and Edgar high-fived, and Edgar immediately filed the forms with the Bankruptcy Court.

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022

Question 9:

Has Dawna satisfied her obligations to her client?

A. Yes

B. No

# NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Answer:

No! **Rule 1.4: Communications** – provides: “(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

# NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Question 10:

Has Dawna satisfied her obligations to the Bankruptcy Court?

A. Yes

B. No



# NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Answer:

No! **Rule 3.3: Candor Toward the Tribunal** – provides: “(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false.”

# NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



**Rule 9011(b)** provides: “By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying **that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—**

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.”

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### Question 11:

Are there any other actions Dawna should be taking (or not taking)?

A. Yes

B. No

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### Answer:

**Rule 5.3: Responsibilities Regarding Nonlawyer Assistance** – provides: “With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner; and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



What ethical rules are implicated here?

# NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



## Answer:

Rule 1.1: Competence

Rule 1.4: Communication

Rule 1.5: Fees

Rule 3:3: Candor Toward the Tribunal

Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

# NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



## Not-So-Hypothetical 4: Amelia's Friend, the Judge

- The Code of Conduct for United States Judges includes the ethical canons that apply to federal judges and provides guidance on their performance of official duties and engagement in a variety of outside activities.
- This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges.
- The Code incorporates by reference the Judicial Conference Gift Regulations.

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022

**Facts:**

Amelia is a member of her local IWIRC chapter. One of her fellow members has recently been appointed to the bench. Her chapter would like to do something to honor her fellow member's recent appointment. Her chapter is considering the following, what are the ethical implications associated with each?

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



- Send the Judge a commemorative plaque celebrating her accomplishment

Question 12: May the Judge accept the commemorative plaque?

A. Yes

B. No

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### § 620.25 Definition of Gift

“Gift” means any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other similar item having monetary value but does not include: (a) social hospitality based on personal relationships; (b) modest items, such as food and refreshments, offered as a matter of social hospitality; (c) greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation;

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



- Invite the Judge and her spouse to an IWIRC event free of charge, and offer to pay for any transportation costs incurred.

Question 13: May the Judge and her spouse accept the invitation to the event free of charge?

A. Yes

B. No

Question 14: May the Judge and her spouse accept travel reimbursement for the event?

A. Yes

B. No



# NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



## § 620.35 Acceptance of Gifts by a Judicial Officer or Employee; Exceptions

- (a) A judicial officer or employee is not permitted to accept a gift from anyone who is seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's or employee's official duties.
- (b) Notwithstanding this general rule, a judicial officer or employee may accept a gift from a donor identified above in the following circumstances:
- (3) the gift consists of an invitation and travel expenses, including the cost of transportation, lodging, and meals for the officer or employee and a family member (or other person with whom the officer or employee maintains both a household and an intimate relationship) to attend a bar-related function, an educational activity, or an activity devoted to the improvement of the law, the legal system, or the administration of justice

# NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



## Canon 4: A Judge May Engage in Extrajudicial Activities that are Consistent with the Obligations of Judicial Office

- (H) *Compensation, Reimbursement, and Financial Reporting.* A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:
  - (1) Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.
  - (2) Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative. Any additional payment is compensation.
  - (3) A judge should make required financial disclosures, including disclosures of gifts and other things of value, in compliance with applicable statutes and Judicial Conference regulations and directives.

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### Committee on Codes of Conduct Advisory Opinion No. 17: Acceptance of Hospitality and Travel Expense Reimbursements From Lawyers

When hospitality is extended by lawyer organizations, the risk of an appearance of impropriety is markedly reduced, compared to hospitality conferred by a particular law firm or lawyer. Section 5(b)(3) of the Gift Regulations specifically authorizes acceptance of an invitation and travel expenses for the judge and a family member to attend bar-related functions. We see no impropriety if a judge and spouse are reimbursed for hotel and travel expenses reasonably required for their attendance at dinners and similar social events sponsored by lawyer organizations such as bar associations. An appearance of impropriety might arise, however, if the hospitality was extended by lawyer organizations identified with a particular viewpoint regularly advanced in litigation.

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Additional facts:

Amelia has been friends with the now-Judge for many years and they have regular dinner together with their spouses. Amelia is also the godmother of one of the Judge's children.

Question 15:

May the Judge continue to have social dinners with Amelia after her appointment to the bench?

A. Yes

B. No

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022

**§ 620.25 Definition of Gift**

“Gift” means any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other similar item having monetary value but does not include: (a) social hospitality based on personal relationships; (b) modest items, such as food and refreshments, offered as a matter of social hospitality; (c) greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation;

**NORTHEAST BANKRUPTCY CONFERENCE**

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022

**Canon 4: A Judge May Engage in Extrajudicial Activities that are Consistent with the Obligations of Judicial Office**

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge’s office, interfere with the performance of the judge’s official duties, reflect adversely on the judge’s impartiality, lead to frequent disqualification, or violate the limitations set forth below.

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Amelia has an upcoming matter scheduled before the Judge.

- Must the Judge recuse herself based on their prior social relationship (regular dinners)?  
A. Yes B. No
- Must the Judge recuse herself based on the godparent relationship?  
A. Yes B. No
- Must the Judge recuse herself where a party is represented by any member of LargeLaw?  
A. Yes B. No
- What if Amelia told the Judge about the facts underlying the matter at one of their recent dinners; should the Judge recuse herself?  
A. Yes B. No

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities

(2B) A judge should avoid lending the prestige of judicial office to advance the private interests of the judge or others. For example, a judge should not use the judge's judicial position or title to gain advantage in litigation involving a friend or a member of the judge's family.

# NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



## Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

### (C) Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding...

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding;

# NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



## Committee on Codes of Conduct Advisory Opinion No. 11: Disqualification Where Long-Time Friend or Friend's Law Firm Is Counsel

The first question is not capable of answer by crisp formulation. Canon 2B prohibits a judge from allowing family, social or various other relationships to influence judicial conduct or judgment. It likewise directs judges not to convey or allow others to convey the impression that another person is in a special position to influence the judge. In a similar vein, Canon 3C requires a judge to recuse when "the judge's impartiality might reasonably be questioned, including but not limited to" a number of enumerated circumstances, including the appearance of relatives who are within the third degree of relationship as counsel or a party.

A godfather is not a "relative" within the meaning of Canon 3C(1)(d) and is not otherwise covered by any of the enumerated circumstances requiring recusal. Recusal may nonetheless be required if the circumstances are such that the judge's impartiality could reasonably be questioned. No such question would be raised if the relationship were simply one of historical significance, the godfather being merely within the wide circle of the judge's friends, and the obligation having been perfunctorily assumed. By contrast, if the godfather is a close friend whose relationship is like that of a close relative, then the judge's impartiality might reasonably be questioned. Ultimately, the question is one that only the judge may answer.

The question regarding members or associates of the firm of the friend and godfather poses no problem. We do not believe that judges must recuse from all cases handled by a law firm simply because judges have law firm members for friends. Although there may be special circumstances dictating disqualification, a friendly relationship is not sufficient reason in itself.



## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Additional facts:

Instead of recusing herself, the judge discloses her personal relationship with Amelia on the record and asks the parties to consent to her participation.

- May the Judge continue to participate in the case if all parties agree that the Judge should not be disqualified?

A. Yes

B. No

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

(D) *Remittal of Disqualification.* Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.



## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Additional facts:

The Judge and her spouse have an upcoming wedding anniversary.

- May Amelia send the Judge and her spouse an anniversary present?

A. Yes

B. No

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### § 620.35 Acceptance of Gifts by a Judicial Officer or Employee; Exceptions

Notwithstanding this general rule, a judicial officer or employee may accept a gift from a donor identified above in the following circumstances:

(4) the gift is from a relative or friend, if the relative's or friend's appearance or interest in a matter would in any event require that the officer or employee take no official action with respect to the matter; or if the gift is made in connection with a special occasion, such as a wedding, anniversary, or birthday, and the gift is fairly commensurate with the occasion and the relationship;

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### § 620.45 Additional Limitations

Notwithstanding the provisions of § 620.35, no gift may be accepted by a judicial officer or employee if a reasonable person would believe it was offered in return for being influenced in the performance of an official act or in violation of any statute or regulation, nor may a judicial officer or employee accept gifts from the same or different sources on a basis so frequent that a reasonable person would believe that the public office is being used for private gain. A judicial officer or employee should decline a gift permitted by these regulations if acceptance would cause the officer or employee to violate any applicable provision of the Codes of Conduct.

## NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



### Committee on Codes of Conduct Advisory Opinion No. 17: Acceptance of Hospitality and Travel Expense Reimbursements From Lawyers

Hospitality of an individual lawyer is a matter of private social relationships. Sections 3(a) and (b) of the Gift Regulations exclude from the definition of “gift” “social hospitality based on personal relationships” and “modest items, such as food and refreshments, offered as a matter of social hospitality,” and section 5(b)(4) permits judges to accept ordinary social hospitality and appropriate gifts from relatives and friends. Individual determinations must be made as to the appropriate extent of such relationships and the point at which such relationships warrant recusal from cases in which the lawyer appears.

# Faculty

**Patricia J. Ballard** is an attorney with Preti, Flaherty, Beliveau & Pachios, Chtd., LLP's Real Estate and Finance and Corporate and M&A practice groups in the firm's Concord, N.H., office. She has a wide range of experience advising business and banking clients on creditors' rights issues, including secured and unsecured lending, collections and bankruptcy. Ms. Ballard counsels chapter 7 trustees in asset recovery and the avoidance of preferential transfers, and has represented numerous banks and other creditors in bankruptcy proceedings and state law collection cases. She also has experience representing corporate clients on transactional and corporate matters, including mergers and acquisitions, asset-purchases and corporate governance issues. In addition, she has background in advising government clients on matters ranging from government investigations and audits to compliance with open meetings and open records laws. Prior to re-joining Preti Flaherty, Ms. Ballard practiced in the areas of bankruptcy and creditors' rights at a law firm in Lexington, Ky. She received her undergraduate degree from Merrimack College and her J.D. from Boston College Law School.

**Shari I. Dwoskin** is a partner in Brown Rudnick LLP's Bankruptcy & Corporate Restructuring Practice Group in Boston. She represents creditors' committees, tort victims, bondholders, equity interest-holders, and debtors in chapter 11 restructurings and litigation arising from related disputes, as well as out-of-court wind-downs. Ms. Dwoskin has experience managing many facets of the restructuring process in some of the largest recent bankruptcy cases, including negotiating restructuring support agreements, plans and DIPs; plan-confirmation trials; valuation; avoidance actions; bankruptcy auctions; the claims-resolution process; and related motion practice and litigation. She also regularly consults with Brown Rudnick's Corporate, Intellectual Property and Real Estate Groups on bankruptcy-related matters. Ms. Dwoskin co-chairs the New England Network of the International Women's Insolvency & Restructuring Confederation (IWIRC) and was named an Up and Coming Lawyer by *Massachusetts Lawyers Weekly* in 2021. She received her B.A. in 2002 from McGill University, her M.A. in 2006 from Harvard University and her J.D. in 2014 from Harvard University, where she was editor-in-chief of the *American Criminal Law Review* and was a member of the Georgetown Law Barristers' Council, Appellate Advocacy Division.

**Allison A. Economy** is a partner with Rudman Winchell in Bangor, Maine, and has more than a decade of experience in litigation and creditors' rights matters. She has handled a wide variety of cases in state, federal and bankruptcy courts, ranging from disagreements between business partners to complex construction disputes. She routinely handles insurance defense and subrogation cases, and advises insurance providers on coverage issues. Ms. Economy has experience in commercial lending, finance, personal-injury and real estate law. Her real estate background enables her to provide effective representation in litigation involving boundary disputes and timber trespass claims. In addition, Ms. Economy represents creditors in workouts, bankruptcies and collection actions, including mechanic's lien claims. She also has participated in mediation and arbitration, including before the American Arbitration Association, and has had success at the appellate level, prevailing in cases before the Maine Supreme Judicial Court. Before joining Rudman Winchell, Ms. Economy practiced with Stites & Harbison, PLLC in Nashville, Tenn. *Super Lawyers* recognized her as a Rising Star from 2013-21. Ms. Economy serves on the Bankruptcy Local Rules Committee, and she is a member of the Maine State Bar Association Bankruptcy Section and the John Waldo Ballou Inn

of Court. She also is a volunteer presenter for Credit Abuse Resistance Education (CARE). Ms. Economy received her B.S. *summa cum laude* in 2005 in sports management from St. John's University and her J.D. in 2008 *cum laude* with a business transaction concentration from the University of Tennessee College of Law. Before entering law school, she interned for the Boston Red Sox, New York Yankees and the Major League Baseball Commissioner.

**Hon. Diane Finkle** is a U.S. Bankruptcy Judge for the District of Rhode Island in Providence, appointed on Sept. 6, 2012. She was appointed to the First Circuit Bankruptcy Appellate Panel in 2013. Since taking the bench, Judge Finkle has conducted legal education seminars for the Rhode Island Bar Association on bankruptcy topics and has served on seminar panels for ABI and MCLE/New England. Prior to her appointment, she was an attorney for 30 years with Winograd, Shine and Zacks PC in Providence, R.I., where she represented debtors, secured creditors and creditors' committees in chapter 11 bankruptcy cases, and served as counsel to bankruptcy trustees, also having served as a court-appointed receiver for various manufacturing, service and retail businesses, and commercial and residential real estate developments in numerous state court receivership proceedings. Judge Finkle had been continually listed in *The Best Lawyers in America* for Rhode Island Bankruptcy and Insolvency practitioners since 2007, and was named a *Super Lawyer* in 2008. She has also served on numerous education panels for ABI, the Rhode Island Bar Association and the Massachusetts Continuing Legal Education. Judge Finkle received her B.A. from Colorado University and the University of Rhode Island, and her J.D. from George Washington National Law Center at George Washington University.

**Morgan C. Nighan** is a partner in the Boston office of Nixon Peabody LLP and helps companies and individuals solve business disputes. She represents clients in complex commercial, bankruptcy and white-collar matters in state and federal courts, administrative agencies, arbitrations and mediations across the country. Ms. Nighan represents companies in connection with contract disputes, business torts, employment claims, and other commercial and financial matters. She also has experience representing hospitals and health care institutions in litigations and investigations. Ms. Nighan represents chapter 11 debtors, creditors and other parties in complex bankruptcy litigation. Her representative matters include the contested confirmation trials of Energy Future Holdings Corp. in Delaware, where she litigated and tried claims for \$1 billion in principal and interest and a contested adversary proceeding in Lehman Brothers Holdings, Inc. In addition, Ms. Nighan defends companies and individuals being investigated by governmental agencies, including U.S. Attorneys' offices, the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA). She has been selected to the 2019 Massachusetts Rising Stars list in *New England Super Lawyers* magazine, as well as *Boston* magazine's "Top Women Attorneys in Massachusetts." Ms. Nighan received her B.A. *cum laude* from the University of Albany and her J.D. *cum laude* from Boston College Law School.