# RUNNING THE ETHICAL OBSTACLE COURSE: JOINT DEFENSE AGREEMENTS

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The general counsel of one of your long-time corporate clients asks you to defend his company in a significant multi-party environmental litigation. During the intake process, you carefully go through your conflicts checklist getting the general nature of the dispute and the names of all parties involved — namely, the plaintiffs, the other defendants, potential third parties, and the other law firms. You check the information against your firm's excellent database, confirming that you have no matters in your office that are adverse to your representation of the client in this dispute. You also confirm that you have never represented the plaintiffs, the other defendants (against whom there might be cross-claims), or the third parties (against whom there might be claims). You confirm that your firm does not represent any of the other law firms involved[1] and that none of your firm's attorneys have close relatives employed as attorneys in the other firms involved.[2] In short, you have done everything you could be expected to do to make sure you have no conflicts.

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1. Under New Jersey Ethics Opinion 679, such "dual representation" might be deemed to create an "appearance of impropriety" under some circumstances. *See* N.J. Sup. Ct. Comm. on Professional Ethics, Formal Op. 679 (1995).

2. Under New Jersey Ethics Opinion 600, such a familial relationship might require disclosure to the client of the relation's employment and possible screening and client consent "if one of the related attorneys" is working on the matter. N.J. Sup. Ct. Comm. on Professional Ethics, Formal Op. 600 (1987).

Having satisfied your ethical responsibilities, you are engaged. As you begin working on the matter, you conclude that due to the nature of the litigation and the relationship between the various defendants, a joint defense group makes sense because it can result in significant cost savings without compromising the quality of your client's representation. You locate your firm's finest and most comprehensive joint defense agreement form and "sign-on" with seven other defendants. Notwithstanding all the ethical due diligence that preceded your agreeing to represent your client, if you are like most law firms in the United States, chances are you did no due diligence inquiry to determine whether any of the law firms who represent the other parties to the joint defense agreement have themselves cleared conflicts. And even if you had bothered to ask, you certainly did not conduct your own "audit" to determine whether any of the other firms were as thorough as you or whether you agree with their conclusions.

Unfortunately, the world of ethics and conflict problems grows ever more complicated. Indeed, a recent federal district court decision in New Jersey suggests that lawyers should rethink their procedures before entering into joint defense agreements.

In *Essex Chemical Corp. v. Hartford Accident & Indemnity Co.*,[3] Essex sued eight insurance companies seeking coverage under primary, umbrella, and excess insurance policies for environmental-related damage to its property.[4] All the insurance companies entered into a Joint Defense Agreement in 1996, three years after the start of the litigation.[5] During the 1997 deposition of Essex's former in-house counsel, Essex learned that Skadden, Arps, Slate, Meagher & Flom (Skadden), who represented one of the insurance defendants, had in fact represented Essex in 1988.[6] Skadden's representation of Essex in 1988 included opposing a takeover by Dow Chemical.[7] In the course of that representation, Skadden participated in attempts to locate "white knights" to fend off the takeover.[8] Skadden's participation included assembling information about Essex and disclosing

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3. 975 F. Supp. 650 (D.N.J. 1997) [hereinafter *Essex I*], *rev'd*, 993 F. Supp. 241 (D.N.J. 1998).

4. *See id.* at 652.

5. *See id.* at 652–53.

6. *See id.* at 653.

7. *See id.* at 652.

8. *See id.*

it to the white knights, information that allegedly concerned the environmental status of the Essex property.[9]

Essex moved to disqualify Skadden in 1997, claiming that although it was no longer Skadden's client, the litigation seeking insurance coverage was substantially related to Skadden's 1988 takeover representation, thus creating a conflict of interest.[10] Furthermore, Essex argued Skadden had learned confidential information from Essex during the course of the 1988 representation that could be used to its disadvantage in the 1997 litigation.[11] Skadden voluntarily withdrew,[12] but the disqualification issue remained because Essex had moved to disqualify counsel for *all* defendants.[13] Essex argued that the Joint Defense Agreement necessarily led to Skadden sharing Essex's confidential information with all the insurance defendants.[14]

The magistrate judge granted plaintiff's motion and disqualified all defense counsel.[15] There were several reasons for the decision:

A. The magistrate judge made two findings: first, there was a similarity between the facts involved in the instant litigation and Skadden's prior representation of Essex; second, that Skadden had access to Essex's confidential information.[16]

B. The magistrate judge assumed that confidential information learned by Skadden "ha[d] been shared between all participants to the Joint Defense Agreement, despite defense counsel's certifications to the contrary"[17] and that "an implied attorney-client relationship exist[ed] between Essex and all defense counsel in light of the Joint Defense Agreement entered into by all defense attorneys."[18]

C. Using a separate rationale, the magistrate judge also concluded that under Rule 1.9(b) of New Jersey's version of the *Rules of Professional Conduct*,[19] the "ordinary citizen would conclude that an

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9. *See Essex I*, 975 F. Supp. at 652.
10. *See id*. at 655–56.
11. *See id*. at 653.
12. *See id*. at 652.
13. *See id*. at 653–54.
14. *See id*.
15. *See Essex I*, 975 F. Supp. at 657.
16. *See id*. at 655.
17. *Id*. at 656.
18. *Id*.
19. *See* N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) (1997). Rule 1.9(b) prohibits a lawyer from representing a client whose interests are adverse to interests of a

appearance of impropriety exists here."[20] Therefore, disqualification of all counsel was required independent of the presumed sharing of confidential information.[21]

On appeal, District Judge John C. Lifland reversed and remanded the disqualification order for a hearing.[22] In Judge Lifland's analysis, he presumed that knowledge obtained by Skadden attorneys during their representation of Essex was irrebuttably imputed to all members of the firm for conflict purposes.[23] However, he found no law controlling the issue of whether the second level of imputation, from the Skadden firm to all other counsel in the joint defense group, should be presumed.[24] Relying on cases that addressed this issue in the somewhat similar context of co-counsel relationships,[25] the court concluded that "the Magistrate Judge's application of an irrebuttable presumption of shared confidences among Skadden and all defense counsel was improper."[26] Analyzing cases from around the country,[27] the court held that "where knowledge is not actual, but imputed based on the presumption that members of a firm share confidences, automatic re-imputation of that same knowledge to another attorney with whom the vicariously disqualified attorney collaborated is unreasonable."[28]

The procedure the court adopted to determine whether there had been sufficient sharing of information to require disqualification was a hearing in which defense counsel would have the burden of demonstrating "they did not acquire any confidential information

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former client. *See id*. By incorporating Rule 1.7(c), the general rule on conflict of interest, Rule 1.9(b) also prohibits representations that create the "appearance of impropriety." *Id*.; *accord* Rule 1.7(c).

20. *Essex I*, 975 F. Supp. at 657.

21. *See id*.

22. *See* Essex Chem. Corp. v. Hartford Accident & Indem. Co., 993 F. Supp. 241, 255 (D.N.J. 1998) [hereinafter *Essex II*].

23. *See id*. at 246.

24. *See id*.

25. *See id*. at 247–50.

26. *Id*. at 251.

27. *See id*. at 251–52 (discussing the imputation analyses in Dewey v. R.J. Reynolds Tobacco Co., 536 A.2d 243 (N.J. 1988); Smith v. Whatcott, 774 F.2d 1032 (10th Cir. 1985); Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564 (Fed. Cir. 1984); Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979); Akerly v. Red Barn Sys., Inc., 551 F.2d 539 (3d Cir. 1977); American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971); and Realco Servs., Inc. v. Holt, 479 F. Supp. 867 (E.D. Pa. 1979)).

28. *Essex II*, 993 F. Supp. at 252.

from Skadden's counsel and . . . the precise nature of the relationship among all defense counsel."[29]

The district court also concluded that the magistrate judge incorrectly found that the Joint Defense Agreement created an implied attorney-client relationship between any firm in the joint defense group and any client in the joint defense group.[30] Finally, the district court held that there is no appearance of impropriety as a matter of law without considering the relevant facts surrounding the creation and operation of the joint defense group.[31]

Even with the "kinder and gentler" approach taken by the district court, counsel involved in a joint defense group still risk disqualification, or an expensive and uncomfortable hearing to avoid disqualification, if a conflict surfaces in the course of the litigation. The following are some precautionary steps attorneys considering a joint defense group can take to reduce the risk, but they do not eliminate it:

1. Obtain representations from all firms that they have carefully and accurately checked conflicts and either (a) concluded that there are none, or (b) have obtained the appropriate waivers. Including these representations in the joint defense agreement does not eliminate the *Essex Chemical* problem, but presumably will focus all member counsel on the importance of doing a thorough and accurate conflict check. A member firm whose error triggers multiple disqualifications may, in theory, find itself liable to other parties in the group for the adverse financial consequences that result.

2. The joint defense agreement should address the use and dissemination of confidential information. From the standpoint of reducing conflict problems, the ideal provision would ensure that confidential information learned by any member firm from its clients would not be disclosed to other member firms. This prohibition minimizes two potential problems: first, the risk of disqualification if one member firm has a conflict; second, the risk of every member firm being deemed to have an implied attorney-client relationship with all members of the joint defense group. On the other hand, the practicality of representation within the group may require the dissemination of some confidential information; thus, at the very least,

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29. *Id.*
30. *See id.* at 253.
31. *See id.* at 254.

the agreement should provide that any such information will be used solely for purposes of handling the joint defense, and not be disclosed to any third parties.

3. Finally, the agreement should state that by virtue of the formation of the joint defense group, no member firm is considered to be counsel for any member of the group other than that firm's individual client.

With forethought and careful drafting, some of the pitfalls highlighted by *Essex Chemical* can be reduced. However, in the final analysis, every firm entering into a joint defense agreement must be aware of the risk that a motion to disqualify may arise due to the status of another firm, notwithstanding the most careful drafting. To minimize exposure, and as a matter of precaution, counsel should advise their client of both the benefits and potential risks of entering into a joint defense agreement.