

APPENDIX 3-2

**SAMPLE JOINT DEFENSE AGREEMENT**

This document sets forth the Joint Defense Agreement (hereinafter the "Agreement") between the undersigned counsel and their respective clients in connection with the investigation being conducted by the ABC Agency into certain conduct and/or practices at healthcare entity XYZ Skilled Nursing Facilities, Inc., d/b/a XYZ Nursing Home and/or its related or affiliated entities.

This Agreement also confirms that, to the extent that counsel have already been in communication with each other since the commencement of the above-referenced investigation, their communications and work product are subject to the joint defense privilege and now are subject to this written Agreement.

The respective clients of each of the undersigned counsel are either affected by or could possess information relevant to the investigation referenced above. Undersigned counsel and their firms (hereinafter the "members of the joint defense group") and their respective clients therefore believe that a common interest exists on the part of their clients with respect to the defense of the investigation and any related civil, criminal, or administrative proceedings arising therefrom. Counsel for the parties believe that participation by each of the undersigned counsel is necessary to effectuate the best defense interests of their clients, and that without such participation, counsel cannot fully advise and represent their respective clients. Accordingly, the members of the joint defense group wish to pursue the common interests of their clients and to make clear that their clients do not waive any privilege as to any communication or any work product protection.

We therefore agree:

1. Members of the joint defense group are entitled to communicate and share information, to the extent each member of the joint defense group and his or her client sees fit, regarding facts relevant to the above-referenced investigation. Except as set forth below, unless expressly stated in writing to the contrary, any communication between any members of the joint defense group from the effective date of this Agreement onward concerning the referenced matter, including but not limited to attorney work product, conversations, documents, interview memoranda and the results of research or investigations, are confidential and are protected from disclosure to any third party by our clients' attorney-client privileges and by our own work product privileges.

2. All work performed by members of the joint defense group pursuant to this Agreement and communications among members of the joint defense group in connection with such representation of their respective clients shall be conducted and protected pursuant to the joint defense doctrine recognized in such cases as United States v. McPartlin, 595 F.2d 183 (9th Cir. 1965) and 1321, 1336-37 (7th Cir.), cert. denied, 444 U.S. 833, 100 S. Ct. 65 (1979); Hyundee v. United States, 355 F.2d 183 (9th Cir. 1965); and Continental Oil Company v. United States, 330 F.2d 347 (9th Cir. 1964).

3. None of the information or documents obtained by any members of the joint defense group or clients pursuant to this Agreement shall be disclosed to third parties without consent of the member of the joint defense group who provided the information pursuant to this Agreement.

4. The client of a member of the joint defense group is not a third party and disclosure by a member to that member's client conforms to this Agreement and is not a waiver of the attorney-client privilege, work product protection, or the joint defense privilege. Except as set forth below, however, this Agreement recognizes that a client in receipt of such information is precluded from disclosing it to third parties without the consent of the member of the joint defense group who provided the information pursuant to this Agreement.

5. Nothing in this Agreement shall be construed to affect the separate and independent representation of each client by its or his respective counsel according to what that counsel believes to be in the client's best interests. The parties recognize their respective rights to conduct separate witness interviews or otherwise to undertake independent investigative efforts. Any party undertaking such separate investigative efforts is free to disclose any information obtained pursuant to those independent efforts to any third party or to use the information in any manner which that party desires, without the consent of any other party to this Agreement. Furthermore, any information already in the possession of a member of the joint defense group is not brought within the Agreement by the subsequent receipt of the same information from another member of the joint defense group and can be disclosed or used in any manner without the consent of any other party to this Agreement.

6. Should the interest of any client signing this Agreement diverge from the common interest of the members of the joint defense group, that client and its attorney shall withdraw from this Agreement. No party to this Agreement whose interests diverge from the common interest of the members of the joint defense group shall accept or request from any member of the joint defense group information covered by this Agreement. Furthermore, any party to this Agreement is free to withdraw from the Agreement at any time upon giving express written notification to all other members of the joint defense group. Following the withdrawal of a party to this Agreement, this Agreement shall no longer be operative as to subsequent communications between a party who has withdrawn and the remaining parties but shall continue to protect all communications and information covered by the Agreement and disclosed to the withdrawing party prior to the party's notification of withdrawal. Upon demand, a withdrawing party and his or her counsel shall immediately return any joint defense materials and copies thereof received under the Agreement.

7. All parties agree that in the event that any party to the Agreement withdraws from the Agreement, or if any party to the Agreement is charged with an offense arising out of the investigation of this matter, the remaining parties to the Agreement are free to use the leads and to make derivative use of any privileged information, including information which they obtained from the withdrawing party, in preparation and in furtherance of a joint defense to the investigation or proceedings referred to above.

8. Prior to entering into this Agreement, each counsel has fully advised his or her client that it is possible that other parties to this Agreement may later become witnesses against the client or hold a position adverse to that of the client. Each counsel has explained fully to this client the limitations on direct and derivative use of any privileged information obtained pursuant to the Agreement. Each counsel and client represent that they have considered the foregoing and believe that the benefits of being a member of this Agreement outweigh any of the limitations imposed by this Agreement. Therefore, as a condition precedent to the receipt of any joint defense material or information, each counsel and his client represent that they will not assert any future claim that any attorney party to this Agreement is barred from continuing his representation in this matter by virtue of his receipt of joint defense material.

9. Each client signing this Agreement waives any claim of conflict of interest which might arise by virtue of participation by his or her attorney in this Agreement. Each client signing this Agreement and each attorney party to this Agreement waives any right to seek the disqualification as counsel of any other attorney party to this Agreement based upon a communication of joint defense privileged information.

10. It is agreed that all information obtained pursuant to this Agreement, and information derived therefrom, may be used for no purpose other than preparation of and in furtherance of a joint defense to the investigation or proceedings referred to above.

11. The parties recognize that, upon approval of all existing members of the joint defense group, other counsel and their clients may be permitted to join in this Joint Defense Agreement in the future. All existing members of the joint defense group shall be notified before information covered by this Agreement is provided a new member. Counsel executing this Agreement do so on their own behalf and on behalf of their respective clients.

12. Modifications of this joint defense agreement may be made, if such modifications are in writing and signed by the parties.

13. This joint defense agreement shall be executed in counterparts with the same force and effect as if executed in one complete document by all members of the joint defense group and their clients as listed below.

**AGREED TO BY AND BETWEEN:**

\_\_\_\_\_/\_\_\_\_\_  
XYZ, SKILLED NURSING FACILITIES, INC. /date

by: \_\_\_\_\_, Administrator/President

FLORIDA NURSING LAW MANUAL

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\_\_\_\_\_/\_\_\_\_\_  
DEF, Esquire /date  
Counsel for XYZ, Inc.

\_\_\_\_\_/\_\_\_\_\_  
JANE DOE, R.N. /date

\_\_\_\_\_/\_\_\_\_\_  
PQR, Esquire /date  
Counsel for Jane Doe

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