



## **EXPERT SERVICES**

Policies and Procedures

Layne T. Rushforth has been an expert consultant and an expert witness in cases involving trusts and estates, including issues related to estate planning and to the administration of trusts and estates. This memo outlines the procedures used when Mr. Rushforth is engaged as a expert, either as a consultant or as a witness.

### **A. INTENT OF THIS MEMO**

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This memo is intended for an attorney or firm that is representing a client in a trust- or estate-related dispute in which either (1) the client is an attorney or fiduciary who is being accused of wrongful conduct or (2) the client is a beneficiary of a trust or estate who believes the attorney or fiduciary is guilty of wrongful conduct. In this context, “wrongful conduct” generally refers to conduct (action or inaction) that falls short of a standard of conduct that the law expects the attorney or the fiduciary to abide by.

In this memo, references to “you” and other second-person pronouns are references to the advocating attorney. References to “the Firm” and references to “us” and other first-person pronouns are references to Rushforth Lee & Kiefer LLP, a professional limited-liability company doing business as Rushforth Lee & Kiefer LLP. Up to now, the only member of the Firm who has been accepted as an expert witness in a case is Layne T. Rushforth, and all references to Mr. Rushforth are references to him.

### **B. EXPERTISE OF MR. RUSHFORTH**

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Mr. Rushforth has been licensed to practice law in Utah since 1978 and in Nevada since 1981. He was first admitted as an expert witness with respect to estate planning in the early 1980s in a criminal proceeding in the U. S. District Court in the District of Nevada. Since then, he has testified as an expert witnesses in the Eighth Judicial District Court in Clark County, Nevada and in the Second Judicial District Court in Washoe County, Nevada.

Mr. Rushforth has been qualified as an expert with respect to the fiduciary duties of personal representatives and trustees and with respect to attorneys, both as to the preparation of estate planning documents and as to their duties with respect to advising fiduciaries as to estate and trust administration. Mr. Rushforth has testified on behalf of both plaintiffs and defendants.

### **C. ENGAGEMENT OF MR. RUSHFORTH**

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C.1 Conflict-of-Interest Search. The initial step in a case is to determine whether Rushforth Lee & Kiefer LLP (“the Firm”) and any of its professionals has a conflict of interest with any of the parties involved in the case. A list of the names and mailing addresses of all parties involved in the case should be provided for the Firm to determine if it is even able to accept the engagement.

C.2 Initial Case Evaluation; Engagement. The second step is for us to review a synopsis of the case to get a sense of the factual and legal issues involved in the case. Unless Mr. Rushforth will never be engaged as an expert witness, no confidential information should be shared with anyone in the Firm.

C.3 Scope of Engagement. Even if the goal is to engage Mr. Rushforth as an expert witness, in most cases, the Firm’s will initially be engaged as a consultant because we cannot guarantee that our

legal opinion will be favorable to your client. If the Firm's research and evaluation of the case results in an opinion that is negative to the client, it is anticipated that the opinion will be considered confidential under the attorney-client privilege or attorney work-product privilege as long as Mr. Rushforth is never identified as an expert witness. If Mr. Rushforth is identified as an expert prior to the preparation of an opinion or a report, you assume the risk that the opinion ultimately rendered may not be consistent with your client's position.

C.4 Preferred Genesis of Initial Opinion. The initial expert report usually consists of formal responses to specific questions that ask for opinions based on specific facts that are given. **We request that you — the attorney or firm asking for the opinion — provide us with the questions to be addressed (i.e., the opinions requested) and the facts that should be assumed to be true as the factual basis for the opinions.** Provide us in writing only that information that you do not mind being discoverable by opposing counsel.

(a) Most expert reports that we provide state one or more opinions as to whether or not specific conduct meets or fails to meet a standard of care or a duty that is applicable to the conduct of a fiduciary or an attorney. The questions asked should specifically address whether or not specific conduct is appropriate under the expected standard of care or specific duty that is perceived to have been violated. Examples:

(i) *Was it proper for attorney Jones to prepare a trust in which he is named as one of the primary beneficiaries?*

(ii) *Was it proper for the trustee to invest trust assets in the trustee's own company?*

(iii) *Did the trustee's attorney violate a duty of care owed to the trust's beneficiaries by not taking action when the trustee embezzled trust funds?*

(iv) *Did the trustee's investment policy violate the "prudent investor" standard required under Nevada law or violate the trustee's duty of impartiality to all beneficiaries?*

(v) *Did the trustee's actions in response to the beneficiaries' request for a trustee's account violate any fiduciary duty owed by the trustee to the beneficiaries?*

(b) Experts cannot testify as to the facts, except as to facts related to a standard of care or to generally accepted standards of practice. The expert report will be based on facts that are assumed to be true, but the advocating attorney or firm will have to convince the trier of fact as to the truth of those facts.

(c) Experts are not generally allowed to testify as to the law, but it is common to ask advisory questions about the applicable law. Some judges who are not familiar with the laws relating to Nevada law on trust or estate issues may allow such testimony; however, arguments as to what the law are normally asserted by the advocating attorneys rather than by an expert witness. There is more latitude in federal-court cases that are to be decided under applicable state law. Even so, there are gray areas. For example, some courts have allowed expert testimony as to the legal meaning of trusts and wills and as to the admissibility of certain evidence, and some courts have not. We will leave it to you as the advocating attorney to deal with any objections to the scope of the expert's report and testimony.

C.5 **Rebuttal Report.** If the opposition has provided the report of another expert on specific issues, we can prepare a rebuttal report upon written request. If you want the rebuttal report limited to specific issues, or if you want to have the report cover issues not covered in the other expert's report, the request should be specific as to the issues to be covered (or ignored).

C.6 **Facts to be Assumed.** It is up to you, the advocating attorney, to provide us the facts that can be relied upon by the expert in writing.

(a) The facts can be stated as a part of hypothetical questions, but the response will be more persuasive if the facts presented are documented. For that reason, it is good to provide us with the pertinent documents that set forth the facts of the case. Those documents may include the pleadings, the relevant estate-planning documents (e.g., will, trust, asset-ownership documents, etc.), answers to interrogatories, admissions or assertions in pleadings, correspondence, notes, and excerpts from testimony given in depositions and evidentiary hearings.

(b) It is common for us to be provided with a significant number of documents. In the past, some firms have provided multiple storage boxes of documents, but that was rarely practical or helpful. Some firms have provided us with document binders that contained exhibits that will be offered as evidence, with tabs that are numbered or lettered and an index as to what document is behind each tab. Others have provided us with one or more CDs with a detailed index or table of contents referring to Bates-numbered pages. In most cases, we prefer computer files that contain searchable text, including deposition transcripts in .ptx format, and we will provide you with an upload link or an invitation to a shared online folder so that you can send these to us securely and confidentially.<sup>1</sup> To save time and money, it is imperative that the documents be organized, easy to access, and easy to reference.

(i) In most cases, it is unreasonable, both in terms of time and expense, to expect us to read voluminous documents. For that reason, we encourage you to provide only those things that we really need to look at, accompanied by a list of the documents that should be read in full (generally the pleadings and other key, brief documents) and specific instructions as to what other documents (or portions of documents) that should be considered.

(ii) To avoid having to read lengthy documents, it is best to provide excerpts from deposition transcripts and other long documents. Another alternative is to provide us with a list of specific pages (usually referring to Bates numbers) and paragraphs from specified documents to be reviewed.

(iii) It helps if key passages are bookmarked and highlighted.

(c) As a general rule, we will assume that the facts alleged in your pleadings are true. It is imperative that you let us know if your position has changed as to any allegation in your pleadings. It is also helpful to know if the position of any witness has changed during the course of the dispute.

C.7 **Content of Expert Report.** Unless you specifically instruct us otherwise, the expert report prepared by us will contain these elements:

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<sup>1</sup>We use Citrix ShareFile for secure file sharing. Until we provide you with a custom we blink that is unique to a specific case, point your web browser to <http://r4th.us/sharefile-rlk> to securely upload files to us. For tracking purposes, it will require your name and e-mail address.

- (a) The following exhibits:
  - (i) The letter sent by you requesting an expert opinion on specific questions.
  - (ii) Mr. Rushforth's *curriculum vitae*.
  - (iii) A list of recent cases in which Mr. Rushforth has been engaged as an expert.
- (b) A listing of the parties involved and the names by which they will be referenced.
- (c) A listing of the documents provided, identifying those that have been specifically reviewed and relied on.
- (d) A recitation of the facts that are assumed to be true (usually by reference to the written statement of facts that you provided).
- (e) A summary of the questions asked and a brief answer.
- (f) A detailed answer to each question asked.
- (g) A conclusion.

**C.8 Attorney-Client Privilege.** The attorney or law firm that represents the client in the underlying case is responsible to preserve the attorney-client privilege and the attorney work-product privilege.

(a) For that reason, we defer to that attorney or law firm to decide if and when Mr. Rushforth is to be identified as an expert witness and to decide the formalities of the engagement. We also defer to the client in the underlying case to decide whether the Firm will be engaged by the client directly or by the attorney or law firm representing the client.

(i) If Mr. Rushforth is never identified as a witness, we will disclose nothing without your permission unless compelled to do so by court order. It will be up to you to oppose any motion or petition for such an order.

(ii) If and when Mr. Rushforth is formally identified as an expert in the case, the Firm's files will be subject to discovery, and we will assume that the attorney-client privilege does not apply to anything provided us or as to any correspondence or notes in the file.

(b) To minimize what must be disclosed, we employ the following policies unless and until you instruct us otherwise in writing:

(i) We will not take notes as to discussions that go beyond the facts and legal arguments that are found in the pleadings.

(ii) An unsigned draft of a written report will never be sent via e-mail or postal mail, but will be instead provided through a temporary download link or printed and provided for runner pick-up.

(iii) Once a draft of a written report has been superseded by another draft, all copies of the prior version — written and digital — will be destroyed, and any download links will be deactivated.

(iv) When a written report is signed, it will be the only version that is retained in our files or on our network file storage. Even our automatic backup files will be replaced with dummy files with the same name.

#### **D. SUMMARY**

Our desire is to produce and submit a cogent report containing the expert opinions that you require. The process will be more efficient if you follow the following steps.

##### **D.1 First, communicate to us:**

(a) The questions to be addressed and the opinions you are seeking; and

(b) Specify in writing the facts we should assume to be true.

**D.2 To support the factual assumptions and legal arguments you are making, provide us with only the documents or excerpts of documents that we need to look at.**

(a) Please do not expect us to read and evaluate the complete version of lengthy pleadings, deposition transcripts, correspondence, and other documentation. It will be more efficient if you identify the portions of those documents that support your factual assumptions.

(b) Please provide documents in PDF format (or, for deposition or hearing transcripts, .ptx format) rather than printed paper. If each page of documents other than transcripts is Bates-numbered, it is more easy for you to identify the portions to be reviewed and for us to refer to in a written report.

(c) For ease of access and reference, please give each document an identifying number or letter, and provide an index or table of contents listing those documents. If and when you provide additional documents, please provide an updated index or table of contents.

(d) Please consider uploading documents using ShareFile<sup>2</sup> or another file-sharing service instead of sending us binders, storage boxes with files, USB drives, or CDs.

[Version of January 1, 2018]

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<sup>2</sup>See footnote 1.