



EXPERT SERVICES

Policies and Procedures

Summary

This memo outlines the procedures and protocols involved when attorney Layne T. Rushforth is engaged as an expert consultant or witness as part of a trust- or estate-related dispute in which an attorney or fiduciary is being accused of conduct (action or inaction) that fails to comply with a legally required standard of conduct governing the attorney or the fiduciary. If Mr. Rushforth is engaged as an expert, you will be expected to provide documents and information as outlined in **Section 4**.

Section 1. Introduction

1.1 Expert Consultant or Expert Witness. An expert consultant is usually hired by an attorney to evaluate whether a fiduciary or an attorney who is involved estate planning, the administration of a probate estate, or the administration of a trust has acted in accordance with the applicable standard of care. When an expert attorney is hired by another attorney as a consultant, the reports of the expert are confidential and subject to the attorney-client privilege. In many jurisdictions, including Nevada, if the expert is engaged as a witness, the work and file of the expert becomes available to the opposing party and that party's attorneys.

1.2 Terminology. In this memo, references to "you" and other second-person pronouns are references to the advocating attorney, whether you are suing or defending the fiduciary or attorney who is accused of wrongful conduct. References to "the Firm" and references to "us" and other first-person pronouns are references to Rushforth Firm Ltd. The only attorney in the firm is Layne T. Rushforth, and all references to Mr. Rushforth are references to him.

Section 2. Expertise of Mr. Rushforth

2.1 Law License; Admissions. 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. Over the years since then, Mr. Rushforth has been consulted as an expert witness in cases in: the Eighth Judicial District Court in Clark County, Nevada; the Second Judicial District Court in Washoe County, Nevada; the Ninth Judicial District Court in Douglas County, Nevada; and the Third Judicial District Court in Salt Lake County, Utah.

2.2 Prior Experience. 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.

Section 3. Engagement of Mr. Rushforth

3.1 Scope of Engagement. Even if the goal is to engage Mr. Rushforth as an expert witness, in most cases, the Firm 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.

3.2 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.

3.2.1 *Testimony re Facts.* Experts cannot testify as to facts other than facts related to a standard of care or to generally accepted standards of practice. Any expert report that is prepared 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.

3.2.2 *Testimony re Law.* 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 the application of 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. As another example, some courts allow experts to testify as to fiduciary duties, but others treat those as questions of law. We will leave it to the advocating attorney to deal with any objections to the scope of the expert's report and testimony.

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

- (a) These exhibits:
 - (1) The letter sent by you requesting an expert opinion on specific questions.
 - (2) Mr. Rushforth's curriculum vitae.
 - (3) A list of recent cases in which Mr. Rushforth has been engaged as an expert.
 - (4) A listing of the parties involved and the names by which they will be referenced.
 - (5) A listing of the documents provided, identifying those that have been specifically reviewed and relied on. This can be the document index described in paragraph 4.4.3 or a list derived therefrom.
- (b) A recitation of the facts that are assumed to be true.
- (c) A summary of the questions asked and a brief answer.
- (d) A detailed answer to each question asked.
- (e) A conclusion.

3.3 Rebuttal to Other Experts. If the opposing party has provided a report or a synopsis of opinions of another expert on specific issues before our initial report, responses to the other expert's opinions will be incorporated into our initial report. If such information is provided after our initial report, we can prepare a rebuttal report upon request.

3.4 Attorney-Client Privilege. You are responsible to preserve the attorney-client privilege and the attorney work-product privilege to the extent such privileges apply. For that reason, we defer to you to decide if and when Mr. Rushforth is to be identified as an expert witness and to decide the formalities of

the engagement. You and your client should agree whether the Firm will be engaged by the client directly or by you. We recommend having you, the attorney, engage us.

3.4.1 *Confidentiality.* 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.

3.4.2 *Lack of Confidentiality.* Unless you inform us otherwise, we will assume that the Firm's files will be subject to discovery if Mr. Rushforth is identified as an expert witness, 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.

3.5 Our Protocols. To minimize what is discoverable from our files, we employ the following policies unless and until you instruct us otherwise in writing:

3.5.1 *No Notes.* We will not take notes as to discussions that go beyond the facts and legal arguments that are found in the pleadings.

3.5.2 *No Mail or E-mail.* 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.

3.5.3 *Destruction of Drafts.* 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.

3.5.4 *Retention of Signed Report Only.* When a written report is signed, it will be the only version that is retained in our files or on our network file storage.

Section 4. Documents and Information You Provide

4.1 Provide List of Parties. First, provide a list of the names and mailing addresses of all parties involved in the case so that we (i.e., Rushforth Firm Ltd.) can determine if there is a conflict of interest that prevents us from accepting the case. This is usually done by providing us with a copy of the parties' list used to send court notices.

4.2 Provide Case Synopsis. Next, provide us with a synopsis of the case to get a sense of the factual and legal issues involved in the case without disclosing confidential information (unless Mr. Rushforth will never be engaged as an expert witness). This is usually done by providing us with a copy of the pertinent pleadings, including complaints, motions, petitions, counter-petitions, answers, responses, and replies. A follow-up discussion with Mr. Rushforth should help determine if he is willing to accept the case, and, if he is, a formal engagement agreement will be prepared.

4.3 Provide Questions for Mr. Rushforth. Please give us a written list of the specific questions that Mr. Rushforth should address. The questions asked should specifically address whether specific conduct is appropriate under the expected standard of care or specific duty that is perceived to have been violated. Examples:

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

- *Was it proper for the trustee to invest trust assets in the trustee's own company?*
- *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?*
- *Did the attorney who drafted the pertinent estate-planning documents breach a standard of care by including herself as a fiduciary, adviser, or trust protector in those documents?*
- *Did the trustee breach a fiduciary duty by decanting the trust or by participating in a nonjudicial settlement agreement?*
- *Did the trustee breach a fiduciary duty by exercising a power to designate a successor trustee or by exercising another power granted under the trust?*
- *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?*
- *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?*

4.4 Provide Documents for Review. Once engaged, Mr. Rushforth will need the documents that you want him to review.

4.4.1 *Key Documents.* The documents provided should include the relevant pleadings and the relevant estate-planning documents (e.g., will, trust, asset-ownership documents, etc.). They may also include the report or witness-disclosure document of any expert retained by the opposing party, answers to interrogatories, admissions, or assertions in correspondence, notes, and excerpts from testimony given in depositions and evidentiary hearings.

4.4.2 *File Organization.* To save time and money, it is imperative that the documents be organized, easy to access, and easy to reference.

(a) For ease of access and reference, please give each document an identifying number or letter or add Bates numbering.

(b) 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 documents) and specific instructions as to what specific pages of other documents should be considered.

(c) In most cases, it is unreasonable, in terms of both time and expense, to expect Mr. Rushforth to read lengthy documents, especially complete deposition transcripts. In a typical deposition transcript, most of the dialog generates more heat than light. If you provide us deposition transcriptions, we encourage you to provide a list of the specific pages that contain the testimony that you want mentioned in the expert report.

(d) It helps if key passages are bookmarked and/or highlighted.

4.4.3 *Document Index.* It is essential that you provide us with an index or other list of documents provided, including references to Bates numbers, if any, as well as any short-form citations used in the pleadings to refer to the documents. That list should be updated by you as you provide additional documents during the course of the case. We suggest using an

Excel spreadsheet or a Word document with a table so that the list can be sorted by date, number, or other parameters and so that additions can be easily made.

4.4.4 *Searchable Text.* Ideally, all documents should be text searchable.¹ Depositions can be provided in .ptx format or in a condensed format as a .pdf document.

4.4.5 *File Sharing.* Unless we agree on another method of document production, we will provide you an upload link so that documents can be sent using Citrix ShareFile.² **Please do not send us printed documents.**

4.5 Provide Factual Assumptions. We will assume that the facts in your complaint (if you represent the plaintiff) or your answer (if you represent the defendant) are true. We will also assume that any deposition testimony of your client is true. Please provide us with a list of any additional documents or any additional facts that we should assume to be true. It helps if the list includes references to related pleadings, documents, or corroborating testimony, such as references to paragraphs in the pleadings, Bates numbers for related documents, related page numbers, or exhibit numbers from deposition transcripts.

4.6 Provide a Case Chronology. Provide us with a list of chronological events, preferably as a table in Word or as an Excel spreadsheet. As with the factual assumptions, the list should ideally include references to related pleadings, documents, or corroborating testimony.

4.7 Keep Things Current. All of the foregoing should be kept current during the course of the case.

Section 5. 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 steps outlined above.

RUSHFORTH FIRM LTD.

Mailing Address: 10470 W. Cheyenne Ave, Ste 115 PMB 400, Las Vegas, NV 89129-8733
702-255-4552 (Office) | 702-255-4677 (Fax)

office@rushforthfirm.com

<https://rushforthfirm.com> | <https://rushforthfirm.info>

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¹ We can use optical character recognition software to make scanned documents searchable, but it will be more efficient if you do that before sending them to us.

² We use Citrix ShareFile for secure file sharing. Until we provide you with a ShareFile invitation so that you can have your own login and file access, point your web browser to <https://upload.rfl.legal/> to securely upload files to us. For tracking purposes, it will require your name and e-mail address.