

Parts in blue print are instructions to user, not to be included in filed document unless so noted. [Parts and references in green font, if any, refer to juvenile proceedings. See Practice Note, this web page, for guidance in adapting forms to juvenile cases.]

Practice tip re confidentiality aspect of motion: Include the bracketed parts on sealing the motion and filing it ex parte, if but only if it is reasonably possible the information elicited from the expert would be damaging to the client.

In many appeals, the need for confidentiality no longer exists after trial, because by then the defense strategy has been revealed. Courts may resist sealing such motions or allowing them to be filed ex parte. Counsel need to be able to articulate a specific need for confidentiality in the case, taking into account the post-conviction context, if they want to pick this battle.

[Attorney name, bar number]
[Address and telephone number]
[Email address and fax number if available]
Attorney for Defendant *[name]*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION *[NUMBER]*

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

[Name],
Defendant and Appellant.

Court of Appeal
No. *[number]*

Superior Court
No. *[number]*

[See **Practice tip re confidentiality aspect of motion** at beginning of this sample before including the bracketed parts.]

**DEFENDANT'S [CONFIDENTIAL EX PARTE]
APPLICATION FOR AUTHORIZATION OF EXPERT FEES [AND
REQUEST THAT THE APPLICATION AND ALL
CORRESPONDING ORDERS AND DOCUMENTS
PRODUCED BE FILED UNDER SEAL]**

TO THE HONORABLE *[NAME]*, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION *[NUMBER]*:

Under California Rules of Court, rules 8.50 [applications] and 8.54(a) [motions], defendant *[name]* requests that this court authorize and reimburse the expenditure of expert fees up to and including *[amount of money requested]*. The purpose for these expert services is *[briefly set forth what the services involve and why the services are reasonably necessary]*.

[See **Practice tip re confidentiality aspect of motion** at beginning of this sample before including the following bracketed paragraphs.]

[Under California Rules of Court, rule 8.46(e)(2) [application to file under seal] and *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 320, *[name of defendant]* further requests (1) that this application be filed under seal and (2) that all orders made and all other documents produced or filed in connection with this application be sealed and served only upon counsel for defendant, with the exception of orders clearly containing nothing that could lead to the discovery of privileged information or that could in any future trial proceedings lighten the burden of the prosecution or incriminate *[name of defendant]*.]

[Rule 8.46(e)(7) of the California Rules of Court requires that if the motion to seal is denied, the application must not be filed and must be returned to the submitting party unless that party notifies the clerk within 10 days of the denial that the application is to be filed.]

[To protect the confidentiality of the factual information contained in this application and the accompanying declaration, defendant *[name]* requests that this application and declaration be heard without service on the other parties to this proceeding. (See *Corenevsky v. Superior Court, supra*, 36 Cal.3d 307, 320, fn. 12 [court rejected suggestion that government may be present at hearing on requests for expert fees, noting that such a procedure “would create unnecessary conflicts of interest” and “cannot be permitted because such petitions are entitled to be confidential”]; see also *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430; *People v. Worthy* (1980) 109 Cal.App.3d 514, 522, fn. 2; *Puett v. Superior Court* (1979) 96 Cal.App.3d 936, 940, fn. 2; *People v. Faxel* (1979) 91 Cal.App.3d 327, 330, fn. 1.)]

[Provide reasons for confidentiality in this context.]

The application is made pursuant to Penal Code section 1241 and is based upon the record in this appeal and the attached declaration of appellate counsel.

Dated: *[date]*

Respectfully submitted,

[Attorney's name]
State Bar No. *[number]*
Attorney for Defendant *[name]*

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF CASE AND FACTS

[Set forth the procedure and facts with citations to the record and to the declaration of appellate counsel which are relevant to the issue that is being investigated.]

II. ARGUMENT

A. **THIS COURT IS CONSTITUTIONALLY AND STATUTORILY OBLIGATED TO PROVIDE FUNDS FOR ANCILLARY DEFENSE SERVICES, INCLUDING EXPERT FEES, NEEDED TO ENSURE EFFECTIVE LEGAL REPRESENTATION**

Penal Code section 1241 provides, in part:

In any case in which counsel other than a public defender has been appointed by the Supreme Court or by a court of appeal to represent a party to any appeal or proceeding, such counsel shall receive a reasonable sum for compensation and necessary expenses, the amount of which shall be determined by the court and paid from any funds appropriated to the Judicial Council for that purpose.

The language of this statute is very similar to that of Penal Code section 987.2, subdivision (a), which provides that counsel other than the public defender appointed to represent a defendant in the municipal or superior court “shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county[.]”

The California Supreme Court has held that Penal Code sections 987 and 987.8 imply that indigent defendants have the right to court-ordered defense services, including experts and investigators. (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 575.) Penal Code section 987.8,

subdivision (g)(1), defines the “legal assistance” furnished by courts to indigent defendants as “legal counsel and supportive services including, but not limited to, medical and psychiatric examinations, investigative services, expert testimony, or any other form of services provided to assist the defendant in the preparation and presentation of the defendant’s case.”

Moreover, both the California Supreme Court and the United States Supreme Court have recognized that indigent defendants have a due process right to “the basic tools of an adequate defense” (*Ake v. Oklahoma* (1985) 470 U.S. 68, 77 [105 S.Ct. 1087, 84 L.Ed.2d 53], citation omitted.) A necessary concomitant right includes expert and other services as required. (*Ibid.*; see also *id.* at pp. 76-83; *Corenevsky v. Superior Court*, *supra*, 36 Cal.3d at pp. 319-320.) The California Supreme Court has stated in *Corenevsky* and other cases that a defendant’s constitutional right to effective counsel under both the state and federal constitutions also includes the right to reasonably necessary ancillary defense services. (U.S. Const., Amends. VI and XIV; Cal. Const., art. I, §15; *Corenevsky v. Superior Court*, *supra*, at p. 319; *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 428; *Mason v. State of Arizona* (9th Cir. 1974) 504 F.2d 1345, 1351.)

The California Supreme Court has also held that the constitutional right to ancillary services extends to defendants appealing their convictions. (*In re Ketchel* (1968) 68 Cal.2d 397, 401-402 [could assist appellate counsel in overall strategy; could aid in determining whether the defendant was adequately represented by trial counsel].) The importance of investigation in developing evidence for a habeas corpus petition is illustrated in various cases in which habeas corpus relief has been granted to convicted

defendants on the strength of evidence developed by investigation after trial. (See *In re Cordero* (1988) 46 Cal.3d 161; *In re Ledesma* (1986) 43 Cal.3d 171; *In re Hall* (1981) 30 Cal.3d 408; *Usher v. Ercole* (E.D.N.Y. 2010) 710 F.Supp.2d 287.)

**B. EXPERT SERVICES ARE REASONABLY
NECESSARY TO INVESTIGATE AND EXAMINE
[SPECIFY ISSUES]**

The defendant has the burden of showing in his request that the services are “reasonably necessary by reference to the general lines of inquiry [to be] pursue[d], being as specific as possible.” (*Corenevsky v. Superior Court, supra*, 36 Cal.3d at p. 320.) However, it has been “recognized that because of the early stage at which the request typically arises, it will often be difficult for counsel to demonstrate a clear need for such funds.” (*Ibid.*; see also *In re Ketchel, supra*, 68 Cal.2d at p. 402 [“The right to such aid should hardly be conditioned upon a showing of its precise application or utility”].) Therefore, “in appropriate circumstances, [the request should be] ‘view[ed] with considerable liberality.’” (*Corenevsky v. Superior Court, supra*, at p. 320, quoting *Mason v. State of Arizona, supra*, 504 F.2d at p. 1352.)

[Describe the issue(s) that is (are) being investigated, the reason for the fee request, the name of the expert, and the cost estimates obtained. Cite to the declaration of appellate counsel in support of these statements.]

For these reasons, in order to assure that potential issues in *[name of defendant]*'s case are fully explored and raised, funds should be authorized to investigate the above claim.

[See **Practice tip re confidentiality aspect of motion** at beginning of this sample before including the following bracketed sections.]

[C. THIS APPLICATION AND ALL CORRESPONDING ORDERS AND ALL DOCUMENTS PRODUCED MUST BE SEALED]

[To protect the confidentiality of the factual information contained in this application and the declaration submitted herewith, which is based on *[e.g., attorney-work product]*, *[name of defendant]* requests that this application and declaration be filed under seal and heard without service upon the other parties to this proceeding. (See Cal. Rules of Court, rule 8.46(e)(2) [application to file under seal, accompanied by declaration containing facts sufficient to justify sealing] and *Corenevsky v. Superior Court, supra*, 36 Cal.3d 307, 320, fn. 12 [court rejected suggestion that the government may be present at a hearing on such requests, noting that such a procedure “would create unnecessary conflicts of interest” and “cannot be permitted because such petitions are entitled to be confidential”]; see also *Keenan v. Superior Court, supra*, 31 Cal.3d at p. 430; *People v. Worthy* (1980) 109 Cal.App.3d 514, 522, fn. 2; *Puett v. Superior Court* (1979) 96 Cal.App.3d 936, 940, fn. 2.; *People v. Fixel* (1979) 91 Cal.App.3d 327, 330, fn. 1; *People v. Superior Court (Laff)* 25 Cal.4th 703, 718-719 [work-product doctrine precludes disclosure of attorney work product in situations other than formal discovery between parties].)

[Additionally, *[name of defendant]* requests that all orders made, and all other documents produced or filed in connection with this application be sealed and served only upon [her / his] appellate counsel, with the exception of orders clearly containing no privileged information and no information which could lead to the discovery of privileged information or which otherwise lighten the burden of the prosecution in violation of defendant's privilege against self-incrimination.]

[Set forth the grounds that support sealing, such as attorney-work product and cite to the declaration of appellate counsel to support.]

[For these reasons, the application and all orders and documents produced as a result should be ordered sealed.]

[Practice tip: If the application to seal and file ex parte is denied, counsel has 10 days to decide whether to file the request anyway. (Rule 8.46(e)(7).) Include the following paragraph only if counsel decides the risk to the client of disclosure is so great it outweighs the potential benefits to be gained from obtaining the expert services. This may require consultation with trial counsel and the client.

[In the event this court declines to grant the request for confidentiality, *[name of defendant]* requests that this application be deemed to be withdrawn in its entirety and, in such event, that the court return to *[her / his]* appellate counsel all copies of this application.]

III. CONCLUSION

For the foregoing reasons, defendant's request for authorization and reimbursement of the expenditure of expert fees up to and including *[state amount]* should be granted [, and the application and orders and documents produced should be sealed].

Dated: *[date]*

Respectfully submitted,

[Attorney's name]

State Bar No. *[number]*

Attorney for Defendant *[name]*

DECLARATION OF *[appellate counsel's name]*

I, *[appellate counsel's name]*, declare as follows:

1. I am an attorney licensed to practice in the courts of the State of California.

I am appointed appellate counsel for *[defendant's name]* in the Fourth District Court of Appeal, Division *[number]*, Case No. *[number]*.

2. *[Describe the issue(s) that is (are) being investigated and the reason(s) for the fee request.]*

3. *[Summarize or detail off-record information supporting the petition, such as talks with trial counsel or review of trial counsel's file.]*

4. *[Explain why the expert evidence is material and why defendant would have had a more favorable verdict [Strickland standard of prejudice if investigation involves IAC] if the expert's testimony and/or evidence had been presented at trial.]*

5. *[Describe the name of the expert(s), qualifications (attach CVs if available), and the cost estimates obtained including hourly rate, estimated number of hours needed, and whether travel is involved.]*

6. I declare under penalty of perjury of the laws of California that the foregoing is true.

Dated: *[date]*

[Attorney name]
State Bar No. *[number]*
Attorney for Defendant *[name]*

PROOF OF SERVICE

Practice tip: If the motion is being filed ex parte and confidentially, **no proof of service is needed**, at least until the court later requires service.