

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO**

**PENAL CODE §987.9 RULES AND PROCEDURES
FOR DEATH PENALTY ELIGIBLE CASES**

(Revised 3/01, 7/02, 1/03, 5/03, 12/10, 1/15, 12/16, 1/22)

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1. **POLICY**

Penal Code Section 987.9 (PC §987.9) provides for authorization for funds in PC §190.2 special circumstances cases where the defendant faces the possibility of the death penalty, including ones where the District Attorney has not yet announced they will not seek the death penalty.

PC §987.9 is not applicable to murder cases in which PC §190.2 has not been filed, or PC §190.2 cases where the District Attorney has announced they will seek a sentence of life imprisonment without the possibility of parole (LWOP), even though the offense charged is statutorily punishable by death. However, prosecutions under PC §190.05(a) (Second Degree Murder with prior prison term for murder), are, by statute, covered by PC §987.9.

Cases with *in propria persona* (pro per) Defendants: Where it is impractical for the defendant to set up a separately maintained trust account as would normally be required by section 6.1 of these PC §987.9 Procedures, the Court's designated PC §987.9 Judge may order direct payments for the allowable use. County Indigent Defense shall treat claims paid pursuant to such direct payments ordered as confidential.

Per Local Rule of Court 1418.3, applications for ancillary defense funding for capital and capital-eligible Penal Code §190.2 special circumstances cases under Penal Code §987.9 must comply with applicable provisions in the Court's Penal Code §987.2 Rules and Procedures.

PC §987.9 funds may be used to pay for investigator and experts, and for other allowed ancillary defense expenses that are reasonably necessary for preparation or presentation of the defense of indigent defendants.

1.1 **Purpose**

To control the disbursement of monies to investigators, experts, and others for costs incurred under PC §987.9.

1.2 **Definitions**

1.2.1 **PC §987.9 Funding Application** – Defense applications for funding pursuant to the Court's Penal Code 987.9 Rules and

Procedures. Consists of the defense's Declaration or Affidavit, and proposed PC §987.9 Order.

- 1.2.2 PC §987.9 Declaration or Affidavit - A document detailing the purpose for which PC §987.9 funds are sought. (See section 2.1.1 through 2.1.4 in this document for a list of all required information.)
- 1.2.3 PC §987.9 Order - The court's two page adopted *ex parte* order for funds pursuant to PC §987.9, a copy of which is attached, which must be submitted with each PC §987.9 Funding Application.
- 1.2.4 PC §987.9 Judge – A judge designated by the Presiding Judge pursuant to Local Rule of Court 1418.3 to hear PC §987.9 applications either county-wide, or by region(s).
- 1.2.6 PC §987.9 custodian – Court Indigent Defense staff responsible for maintaining all confidential PC §987.9 related documents.
- 1.2.7 *In Propria Persona (Pro Per)* Defendant – A defendant who represents him/herself.

1.3 **Allowable Uses**

- 1.3.1 Specific allowable costs, as defined by PC §987.9 include:
 - Investigators
 - Consultants
 - Expert Witnesses
 - Travel (if pre-approved by the court)
 - Law Clerks (for attorneys only)
 - Paralegals (for attorneys only)
 - Legal Runners (for *pro per* defendants only)

1.4 **Non-allowable Uses**

- 1.4.1 Specific non-allowed costs as defined by PC §987.9 include:

- Dental plates, haircuts, and other expenses relating to improving the defendant's personal appearance
- Clothing
- Cleaning charges
- Cash to defendant
- Any cost reimbursable from any other source
- Attendance at conferences, conventions, seminars or workshops and cost related thereto
- Office equipment & supplies
- Ordinary Office expenses and overhead
- Law Books and other legal resources

1.5 **Availability of Funds Prior To D.A. Election of Penalty**

In cases in which PC §190.2 special circumstances have been alleged, and where the defendant faces the possibility of the death penalty but the District Attorney has not yet determined if the death penalty will be sought, a funding request under Penal Code §987.9 shall be heard on the merits (see *Gardner v. Superior Court* 2010, 185 Cal.App.4th 1003). Should funds be authorized by the Court and the District Attorney then later elects not to seek the death penalty, counsel shall then promptly submit an accounting and remit all unspent sums remaining in the PC §987.9 trust account.

2. **PROCEDURES**

2.1 **Attorney Applications for PC §987.9 Funds**

The Public Defender, or counsel appointed from the Court's Capital/LWOP Case Panel, may request an initial pre-approved fund advance in the amount of \$5,000 upon approval of the Order Setting Compensation (per the Capital/LWOP Case Panel Fee Schedule Agreement). Funding Requests must consist of counsel's declaration or affidavit **and** proposed court order pursuant to Section 2.1.5, below.

All other initial and subsequent requests for PC §987.9 funds shall be by motion supported by counsel's (or *pro per* defendant's) declaration or affidavit setting forth:

- 2.1.1 A summary of the circumstances of the charged offense(s) and any statutory special circumstances which are alleged, and;
- 2.1.2 The status of the proceedings and whether an election has been made to seek the death penalty, and;
- 2.1.3 The purpose for which funds are sought, the nature of the services to be rendered and the basis of counsel's or *pro per* defendant's belief that the services are reasonably necessary for the preparation and presentation of the defense, and;
- 2.1.4 The names of each investigator, expert, or other vendor for whom counsel or *pro per* defendant is seeking funds, and the hourly rate and number of hours of services to be performed by each.
- 2.1.5 The motion, including all declarations or affidavits, shall be accompanied by a proposed court order following the Court's adopted *ex parte* order format incorporated herein as **Exhibit A**. Counsel or *pro per* defendant shall submit one original of the order and three (3) copies, or four (4) copies if the order must also be served on a third party (expert, Sheriff, etc.).

Counsel or *pro per* defendant is responsible for preparing and submitting PC §987.9 Funding Applications pursuant to these PC §987.9 Rules and Procedures. Applications, with signed declaration, shall be submitted to the following address for forwarding to the appropriate PC §987.9 Judge:

Court Indigent Defense
247 West Third Street, 11th Floor,
San Bernardino CA 92415-0302

Court Indigent Defense staff will forward conformed copies of approved court orders to the attorney or *pro per* defendant.

2.1.6 All funds expended for PC §987.9 purposes must have prior approval by order of the court.

Should counsel fail to obtain such approval prior to the expenditure of funds, counsel assumes the risk that the court may choose not to ratify counsel's election to expend the funds. In the event that counsel needs emergency funding, the Court will permit counsel to contact the PC §987.9 judge's clerk who will arrange for a hearing on short notice.

2.1.7 Funds approved for a specific use may not be expended for another use without prior Court approval; however, upon a proper showing the court will ordinarily approve such a request.

2.1.8 All PC §987.9 documents submitted to the Court shall be confidential and maintained in confidential files separate from the Court's case file pursuant to PC §987.9.

3. **TRAVEL EXPENSES**

3.1 No funds may be expended for overnight travel by investigators, attorneys, or others, unless prior approval is obtained from the Court. Pre-approved hourly investigation expenses may not be applied to overnight or airline travel costs unless expressly designated by the Court for travel purposes after an appropriate request has been made. Only in extraordinary circumstances will the court approve travel expenses for counsel.

3.2 To better manage the considerable costs associated with overnight travel, it is the Court's policy to encourage counsel to interview witnesses who do not reside in the local area by telephone whenever feasible.

3.3 To justify the expense of sending a local investigator to the residence of a distant witness, counsel's declaration should establish why it would not be feasible to employ the services of a local investigator in the area of the witness's residence to interview the witness. If telephonic contact with witnesses for interview purposes is not feasible, it is the Court's policy to allow overnight/airline expenses for

travel only upon a showing that it would impracticable to employ the services of an investigator who maintains an office in the area where the witness resides to conduct the interview.

- 3.4 If neither telephone contact nor utilization of a local investigator in the area of the witness's residence can be accomplished, counsel should consider the feasibility of flying the witness to the Ontario airport for an interview, with a return flight the same date, thus avoiding the expense of overnight travel for counsel's investigator.
- 3.5 All applications that include a request for travel expenses to interview witnesses must contain a declaration which shall set forth:
- A clear showing of the relevance and materiality of the witness's proposed testimony
 - Whether the witness is being interviewed for the guilt phase or penalty phase of the trial
 - Whether a telephonic interview would suffice in lieu of a face-to-face interview
 - Why it would be impractical to utilize the services of an investigator in the area where the witness resides to conduct the interview
- 3.6 Applications for airline travel should include a quote from a travel agency or airline indicating that the fare quoted is the least expense available at the time, and is being booked sufficiently in advance to obtain the best possible rates.

4. **EXPENSES FOR MEDICAL AND MENTAL HEALTH PROFESSIONALS**

- 4.1 On initial application for authorization for expenses for doctors, psychologists, psychiatrists and similar experts, the maximum sum allowed by the Court would be an amount sufficient to procure an initial written report from the expert which should set forth the need, if any, for further services at an approved rate.

- 4.2 It is the duty of counsel to endeavor to negotiate the lowest hourly rate the expert will work for recognizing that the expert's services are a charge to the government.
- 4.3 To minimize expert's travel time, whenever possible, counsel should utilize experts who reside in the Southern California area. Should counsel or *pro per* defendant elect to retain an expert from another locale, the declaration shall set forth in detail the reasons why local experts could not be employed to provide similar services.
- 4.4 Transportation Orders of inmates for purposes of medical examinations must include a statement that the defendant will not be informed of the exact day and time of the transport until the latest possible time (allowing fasting, shaving hair, etc.). If the defense needs help arranging transportation of an inmate, counsel may contact the PC §987.9 Judge or the Court's Indigent Defense Program for assistance.

5. **SUBSEQUENT APPLICATIONS FOR FUNDS**

- 5.1 Each subsequent application for PC §987.9 funds shall be accompanied by a brief summary of prior orders approving funding including the date, amount, and subject of any prior funding orders.
- 5.2 Any application for additional funding for a previously approved expert shall include a declaration setting forth:
 - The date and amount of previously approved funds
 - The amount of any billings for completed services received from the expert for whom additional funds are sought
 - The trust account balance remaining for funds previously authorized for said expert
- 5.3 Request for additional PC §987.9 funding should specify, in detail, the work or services remaining to be undertaken, or completed and, in the

case of a medical or mental health expert, should be accompanied by a declaration of the expert setting forth the necessity for the additional funds.

6. **ATTORNEY'S DUTY TO ACCOUNT FOR FUNDS ADVANCED**

6.1 All funds received by counsel pursuant to a PC §987.9 order shall be deposited in a separately maintained trust account, bearing the name of the defendant, pursuant to the provisions of PC §987.9.

6.2 All expenditures made from such trust funds shall be supported by signed Court orders authorizing expenditures.

Claims, invoices and receipts for expenditures shall follow the Court's PC **§987.2 Rules and Procedures, Local Rules and Appointed Services Fee Schedule**, including itemization of services. Claims must include original invoices or receipts, unless otherwise specifically authorized in the Court's order.

6.3 Counsel shall not disburse any trust account funds in the absence of a billing statement or invoice reflecting the specific service provided pursuant to a previous authorization of the court.

6.4 Within thirty (30) days of end of quarter, counsel is required to submit trust fund accountings on a quarterly basis to:

County Administrative Office
County of San Bernardino
385 N. Arrowhead Avenue, 4th Floor
San Bernardino, CA 92415-0123

The quarterly accounting is to include a chronologically arranged journal of all receipts and disbursements of trust funds, including the date, check number, and purpose of each disbursement (current as of date of quarterly accounting), and invoices or receipts, bank account statements, and cancelled checks or images of both sides of cancelled check.

6.5 Within thirty (30) days of the defendant's sentencing; termination of the

case in any other manner; or issuance of an order relieving counsel of further representation of the defendant, counsel shall remit any unspent funds to County Administrative Office (payable to the County of San Bernardino). Counsel shall include a full accounting to the County of all such trust funds received and expended, along with the journal and documentation described in paragraph 6.4.

- 6.6 Failure to submit the quarterly or final accounting, or failure to obtain prior Court authorization for fund expenditures, may result in an Order to Show Cause hearing before the designated PC §987.9 Judge, and may result in the court's not ratifying counsel's election to expend the funds.

EXHIBIT A

1 [Attorney's name], Attorney for Defendant, who is to deposit said funds on behalf of the
2 defendant in a separately maintained trust account, pursuant to the provisions of PC §987.9.

3 IT IS FURTHER ORDERED: All expenditures made from such trust account shall be
4 only for the specific purposes authorized by the order of court, shall be supported by a
5 chronologically arranged journal of all receipts and disbursements of trust funds, including the
6 date, check number, and purpose of each disbursement, and supporting documentation shall
7 include all bank account statements, canceled checks, invoices, orders authorizing expenses or
8 rates, and other documentation of all disbursements.

9 IT IS FURTHER ORDERED: Counsel shall submit quarterly accountings of trust
10 funds received and expended to the court within thirty (30) days of the end of the quarter, and
11 within thirty (30) days of the defendant's sentencing hearing or termination of the case in any
12 other manner, or within thirty (30) days following an order relieving Counsel of further
13 representation of the defendant, Counsel shall remit any unspent funds to the court and shall
14 submit the final accounting of all such trust funds received and expended to the court, as required
15 by PC §987.9 and this order, together with the journal and documentation described above.

16 This order and all related declarations and motions made pursuant to PC §987.9 shall
17 remain confidential and sealed.

18
19 Dated: _____

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21 By: _____
22 Designated PC §987.9 Judge

23 Specify:
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EXHIBIT A

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[] The above PC §987.9 order was approved pursuant to the attorney’s declaration alone (without a hearing), or;

[] The above PC §987.9 order was approved pursuant to a hearing with a transcript prepared by court reporter _____, and sealed.
(name)

SAMPLE

EXHIBIT B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN BERNARDINO

1)	CASE NO. [Case #]
2)	
3)	
4)	
5	THE PEOPLE OF THE STATE OF)	
6	CALIFORNIA,)	EX-PARTE ORDER FOR FUNDS
7	Plaintiff,)	PURSUANT TO PENAL CODE
8	vs.)	SECTION 987.9
9	[DEFENDANT'S NAME],)	
10	Defendant)	CONFIDENTIAL

The Court having read and considered Defendant's request for order authorizing defense funds pursuant to Penal Code Section 987.9 (PC§ 987.9), the Court finds that a sufficient showing has been made that funds are reasonably necessary for payment of investigators, experts, and others for the preparation and presentation of the defense as follows:

[Expert/investigator/other's name and title, hourly rate (if applicable), total hours (if applicable), total funding request]. Refer to Superior Court's P.C. § 987.2 Rules and Procedures for Authorized Services for [Expert type, such as Appointed Legal Runner], available on the Court website at <https://www.sb-court.org/forms-and-rules/appointed-services-and-claim-forms>.

Payment shall be made by the Auditor/Controller of the County of San Bernardino upon submittal of an appropriate itemized claim on Court forms and presentation of original invoices or receipts, and upon verification of the claim by the Court, for expenditures and services rendered at the authorized rate.

EXHIBIT B

1 For further information contact Court Indigent Defense at 909-708-8762.

2 This order and all related declarations and motions made pursuant to PC§ 987.9 shall
3 remain confidential and sealed.

4 Dated: _____

5 By: _____
6 Designated PC§ 987.9 Judge

7
8
9 Specify:

10 [] The above PC§ 987.9 order was approved pursuant to the defense's declaration
11 alone (without a hearing), or;

12 [] The above PC§ 987.9 order was approved pursuant to a hearing with a transcript
13 prepared by court reporter _____, and sealed.
14 (name)