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5.4 Components of Request for Funding

A. Generally

This section discusses potential ingredients of a motion for funds for an expert. Many of these ingredients are now included in the form applications for expert funding, referenced *supra* in § 5.3, Applying for Funding. Some of these components, such as a more detailed description of and justification for the work to be performed, should be included in the supporting motion.

In motions to a judge in a noncapital case, some defense attorneys make a detailed showing in the motion itself; others make a relatively general showing in the motion and present the supporting reasons and evidence (documents, affidavits, counsel's own observations, etc.) when making the motion to the judge. In either event, counsel should be prepared to present all supporting evidence to make the request as persuasive as possible and to preserve the record for appeal.

The exact showing will vary with the type of expert sought. For a discussion of different types of experts, *see infra* § 5.6, Specific Types of Experts. Sample motions for experts are available in the Motions Bank on the IDS website, as well as on IDS's Forensic Resources site.

B. Area of Expertise

Defense counsel should specify the particular kind of expert needed (e.g., psychiatrist, pathologist, fingerprint expert, etc.). A general description of a vague area of expertise may not be sufficient. *See, e.g.*, *State v. Johnson*, 317 N.C. 193 (1986) (trial court did not err in denying general request for "medical expert" to review medical records, autopsy reports, and scientific data). Although a defendant may obtain more than one type of expert on a proper showing, a blunderbuss request for several experts is unlikely to succeed. *See, e.g.*, *State v. Mills*, 332 N.C. 392, 399 (1992) (characterizing motion as "fanciful 'wish list'" and denying in entirety motion for experts in psychiatry, forensic serology, DNA identification testing, forensic chemistry, statistics, genetics, metallurgy, pathology, private investigation, and canine tracking).

C. Name of Expert

Counsel should determine the expert he or she wants to use before applying for funding. Identifying the expert (and describing his or her qualifications) not only authorizes payment to the expert if the motion is granted but also helps substantiate the need for expert assistance. A curriculum vitae can be included with the motion. Counsel should interview the prospective expert before making the motion, both to determine his or her and suitability and availability for the case (before and during trial) and to obtain information in support of the motion.

Several sources may be helpful in locating suitable experts. Often the best sources of referrals are other criminal lawyers. In addition to public defender offices and private criminal lawyers, it may be useful to contact the Forensic Resource Counsel Office of IDS, which maintains a database of forensics experts; the Capital Defender's Office of IDS, and the Center for Death Penalty Litigation, which work on capital cases but may have information about experts who would be helpful in noncapital cases; and organizations of criminal lawyers (such as the National Association of Criminal Defense Lawyers and National Legal Aid & Defender Association). Counsel also can look at university faculty directories, membership lists of professional associations, and professional journals for potential experts.

D. Amount of Funds

The actual relief requested in a motion for expert assistance is authorization to expend state funds to retain an expert. Counsel should specify the amount of money needed (based on compensation rate, number of hours required to do the work, costs of testing or other procedures, travel expenses, etc.) and should be prepared to explain the reasonableness of the amount. Counsel may reapply for additional funds as needed. The expert may not be paid if his or her time exceeds the preapproved amount.

Compensation rates for expert witnesses paid from IDS funds may not be higher than the rates set by the Administrative Office of the Courts (AOC) for expert witnesses paid from AOC funds under G.S. 7A-314(d). *See* G.S. 7A-498.5(f). Counsel therefore should find out from the potential expert whether he or she is willing to work within state rates. IDS may authorize a deviation from the standard rates when justified. The applicable form applications, referenced *supra* in § 5.3, Applying for Funding, contain the standard rates and grounds for requesting a deviation. *See also* "Information for Experts" on the IDS website.

Practice note: The form application for funding in noncapital cases includes an order by the court authorizing a specified amount of money for the expert's services as well as a compensation calculator to be filled out by the expert on completion of the work. The expert submits the entire form to IDS for payment on completion of the work and provides a copy, along with an itemized time sheet, to defense counsel.

E. What Expert Will Do

Counsel should specifically describe the work to be performed by the expert—review or interpretation of records, examination of defendant, interview of particular witnesses, testifying at trial, etc. Failure to explain what the expert will do may hurt the motion. *Compare State v. Parks*, 331 N.C. 649 (1992) (trial court erred in denying motion for psychiatric assistance where defendant intended to raise insanity defense and needed psychiatrist to evaluate his condition, testify at trial, and counter opinion of State's expert), *with State v. Wilson*, 322 N.C. 117 (1988) (motion denied where defendant indicated only that assistance of psychologist might be helpful to him in preparing his defense).

F. Why Expert's Work Is Necessary

This part is the most fluid—and by far the most critical—part of a showing of need. *See generally State v. Jones*, 344 N.C. 722, 726 (1996) (to determine the requisite showing, "the court should consider all the facts and circumstances known to it at the time the motion" is made). Although there are no rigid rules on what to present, consider doing the following:

- Identify the issues that you intend to pursue and that you need expert assistance to develop. To the extent then available, provide specific facts supporting your position on those issues. For example, if you are considering a mental health defense, describe the evidence supporting the defense. *See, e.g.*, *Parks*, 331 N.C. 649 (court found persuasive the nine circumstances provided in support of request, including previous diagnosis of defendant and counsel's own observations of and conversations with defendant).
- Emphasize the significance of the issues: the more central the issue, the more persuasive the assertion of need may be. *See, e.g.*, *Jones*, 344 N.C. 722 (defendant entitled to psychiatric expert because only possible defense to charges was mental health defense); *State v. Moore*, 321 N.C. 327 (1988) (defendant entitled to fingerprint expert where contested palm print was only physical evidence connecting defendant to crime scene).
- Deal with contrary findings by the State's experts. For example, if the State already has conducted an analysis of blood or other physical evidence, explain what a defense expert may be able to add. Although the cases state that the defendant need not show that the State's expert is wrong (*see Moore*, 321 N.C. 327), you can strengthen your motion by pointing out areas of weakness in the State's analysis or at least areas where reasonable people might differ. Before making the motion, try to interview the State's expert and obtain any reports, test results, or other information that may support the motion. If the State's expert is uncooperative, that fact may bolster your showing.
- Explain why you cannot perform the tasks with existing resources and why you require special expertise or assistance. In some instances, the point is self-evident. *See, e.g.*, *Moore*, 321 N.C. 327 (defense could not challenge fingerprint evidence without fingerprint expert). In other instances, you may need to convince the court

that the expert would bring unique abilities to the case. *See, e.g.*, *State v. Kilpatrick*, 343 N.C. 466 (1996) (defense failed to present any specific evidence or argument on why counsel needed assistance of jury selection expert in conducting voir dire).

G. Documentation

Counsel should provide documentary support for the motion—affidavits of counsel and prospective experts, information obtained through discovery, scientific articles, etc. How to present this evidence to minimize the risk of disclosure to the prosecution is discussed further in the next section.