

1 **Rule 38B. Qualifications for Appointed Appellate Counsel.**

2 (a) In all appeals where a party is entitled to appointed counsel, only an attorney proficient in
3 appellate practice may be appointed to represent such a party before either the Utah Supreme Court or
4 the Utah Court of Appeals.

5 (b) The burden of establishing proficiency shall be on counsel. Acceptance of the appointment
6 constitutes certification by counsel that counsel is eligible for appointment in accordance with this rule.

7 (c) Counsel is presumed proficient in appellate practice if any of the following conditions are satisfied:

8 (c)(1) Counsel has briefed the merits in at least three appeals within the past three years or in 12
9 appeals total; or

10 (c)(2) Counsel is directly supervised by an attorney qualified under subsection (c)(1); or

11 (c)(3) Counsel has completed the equivalent of 12 months of full time employment, either as an
12 attorney or as a law student, in an appellate practice setting, which may include but is not limited to
13 appellate judicial clerkships, appellate clerkships with the Utah Attorney General's Office, or appellate
14 clerkships with a legal services agency that represents indigent parties on appeal; and during that
15 employment counsel had significant personal involvement in researching legal issues, preparing
16 appellate briefs or appellate opinions, and experience with the Utah Rules of Appellate Procedure.

17 (d) Counsel who do not qualify for appointment under the presumptions described above in
18 subsection (c) may nonetheless be appointed to represent a party on appeal if the appointing court
19 concludes there is a compelling reason to appoint counsel to represent the party and further concludes
20 that counsel is capable of litigating the appeal. The appointing court shall make findings on the record in
21 support of its determination to appoint counsel under this subsection.

22 (e) Notwithstanding counsel's apparent eligibility for appointment under subsection (c) or (d) above,
23 counsel may not be appointed to represent a party before the Utah Supreme Court or the Utah Court of
24 Appeals if, during the three-year period immediately preceding counsel's proposed appointment, counsel
25 was the subject of an order issued by either appellate court imposing sanctions against counsel,
26 discharging counsel, or taking other equivalent action against counsel because of counsel's substandard
27 performance before either appellate court.

28 (f) The fact that appointed counsel does not meet the requirements of this rule shall not establish a
29 claim of ineffective assistance of counsel.

30 (g) An attorney who, before adoption of Rule 11-401 of the Utah Code of Judicial Administration,
31 contracted with a government entity to represent indigent individuals on appeal is subject to the
32 provisions of this rule. Upon termination, expiration, or renewal of the contract, the attorney is subject to
33 the provisions of Rule 11-401.

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36 Advisory Committee Note:

37 This rule does not alter the general method by which counsel is selected for indigent persons entitled
38 to appointed counsel on appeal. In particular, it does not change the expectation that such appointed
39 counsel will ordinarily be appointed by the trial court rather than the appellate court. The rule only
40 addresses the qualifications of counsel eligible for such appointment. See generally *State v. Hawke*, 2003
41 UT App 448 (2003).

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