

1 **Rule 8. Appointment of counsel.**

2 (a) **Right to counsel.**

3 (1) A defendant charged with a ~~public criminal~~ offense has the right to counsel when  
4 a possible penalty of conviction includes physical detention. ~~self-representation the~~  
5 ~~penalty for which includes the possibility of incarceration, regardless of whether~~  
6 ~~actually imposed, has the right to counsel, and if~~

7 (2) An indigent, defendant charged with a criminal offense has the right to court-  
8 appointed counsel when a possible penalty of conviction includes physical detention  
9 ~~if the defendant faces any possibility of the deprivation of liberty.~~

10 (b) **Waiver of counsel.** A defendant has the right to self-representation if the right to  
11 counsel is waived.

12 (1) Prior to accepting a waiver of the right to counsel, the court will engage in a  
13 colloquy with the defendant to ensure that such waiver is knowing, intelligent, and  
14 voluntary. The colloquy must:

15 (A) inform the defendant of the dangers, disadvantages, and consequences of self-  
16 representation, including the applicability of legal defenses which may be  
17 available;

18 (B) discuss the defendant's specific understanding:

19 (i) of the nature of charges and the range of potential penalties; and

20 (ii) that the case is subject to the Rules of Criminal Procedure, and the Rules  
21 of Evidence.

22 (C) determine whether the defendant is indigent pursuant to Utah Code section  
23 78B-22-202.

24 (i) If the defendant is determined to be indigent, the court:

25 1. will offer the defendant the opportunity for appointed counsel;

26 2. may appoint counsel for the limited purpose of advising and consulting  
27 with the defendant regarding the waiver of counsel.

28 (2) In evaluating the waiver of the right to counsel, the court may inquire as to the  
29 defendant's literacy, educational background, and legal training to assess the  
30 defendant's understanding of the consequences of waiver.

31 **(bc) Capital case qualifications.** In all cases in which counsel is appointed to represent  
32 an indigent defendant who is charged with an offense for which the punishment may be  
33 death, the court shall appoint two or more attorneys to represent such defendant and  
34 shall make a finding on the record based on the requirements set forth below that  
35 appointed counsel is competent in the trial of capital cases. In making its determination,  
36 the court shall ensure that the experience of counsel who are under consideration for  
37 appointment have met the following minimum requirements:

38 (b)(1) at least one of the appointed attorneys must have tried to verdict six felony cases  
39 as defense counsel within the past four years or twenty-five felony cases total, with at  
40 least six of the twenty-five felony cases as defense counsel;

41 (b)(2) at least one of the appointed attorneys must have appeared as counsel or co-  
42 counsel in a capital or a felony homicide case, as defense counsel, which was tried to  
43 a jury and which went to final verdict;

44 (b)(3) at least one of the appointed attorneys must have completed or taught within  
45 the past five years an approved continuing legal education course or courses at least  
46 eight hours of which deal, in substantial part, with the trial representation of  
47 defendants in death penalty cases; and

48 (b)(4) the experience of one of the appointed attorneys must total not less than five  
49 years in the active practice of law.

50 **(ed) Capital case appointment considerations.** In making its selection of attorneys for a  
51 appointment in a capital case, the court should also consider at least the following factors:

52 (e)(1) whether one or more of the attorneys under consideration have previously  
53 appeared as counsel or co-counsel in a capital case, as defense counsel;

54 (e)(2) the extent to which the attorneys under consideration have sufficient time and  
55 support and can dedicate those resources to the representation of the defendant in the  
56 capital case now pending before the court with undivided loyalty to the defendant;

57 (e)(3) the extent to which the attorneys under consideration have engaged in the  
58 active practice of criminal law in the past five years;

59 (e)(4) the diligence, competency, the total workload, and ability of the attorneys being  
60 considered; and

61 (e)(5) any other factor which may be relevant to a determination that counsel to be  
62 appointed will fairly, efficiently and effectively provide representation to the  
63 defendant.

64 ~~(de)~~ **Capital case appeals.** In all cases where an indigent defendant is sentenced to death,  
65 the court shall appoint one or more attorneys to represent such defendant on appeal and  
66 shall make a finding that counsel is competent in the appeal of capital cases. To be  
67 found competent to represent on appeal persons sentenced to death, the combined  
68 experience of the appointed attorneys must meet the following requirements:

69 ~~(d)~~(1) at least one attorney must have served as counsel in at least three felony  
70 appeals; and

71 ~~(d)~~(2) at least one attorney must have attended and completed within the past five  
72 years an approved continuing legal education course which deals, in substantial part,  
73 with the trial or appeal of death penalty cases.

74 ~~(ef)~~ **Post-conviction cases.** In all cases in which counsel is appointed to represent an  
75 indigent petitioner pursuant to Utah Code § 78B-9-202(2)(a), the court shall appoint one  
76 or more attorneys to represent such petitioner at post-conviction trial and on post-  
77 conviction appeal and shall make a finding that counsel is qualified to represent persons

78 sentenced to death in post-conviction cases. To be found qualified, the combined  
79 experience of the appointed attorneys must meet the following requirements:

80 (e)(1) at least one of the appointed attorneys must have served as counsel in at least  
81 three felony or post-conviction appeals;

82 (e)(2) at least one of the appointed attorneys must have appeared as counsel or co-  
83 counsel in a post-conviction case at the evidentiary hearing, on appeal, or otherwise  
84 demonstrated proficiency in the area of post-conviction litigation;

85 (e)(3) at least one of the appointed attorneys must have attended and completed or  
86 taught within the past five years an approved continuing legal education course  
87 which dealt, in substantial part, with the trial and appeal of death penalty cases or  
88 with the prosecution or defense of post-conviction proceedings in death penalty cases;

89 (e)(4) at least one of the appointed attorneys must have tried to judgment or verdict  
90 three civil jury or felony cases within the past four years or ten cases total; and

91 (e)(5) the experience of at least one of the appointed attorneys must total not less than  
92 five years in the active practice of law.

93 **(fg) Appointing from appellate roster.** When appointing counsel for an indigent  
94 defendant on appeal from a court of record, the court must select an attorney from the  
95 appellate roster maintained by the Board of Appellate Judges under rule 11-401 of the  
96 Utah Rules of Judicial Administration, subject to any exemptions established by that rule.

97 **(gh) Noncompliance.** Mere noncompliance with this rule or failure to follow the  
98 guidelines set forth in this rule shall not of itself be grounds for establishing that  
99 appointed counsel ineffectively represented the defendant at trial or on appeal.

100 (h)(1) Cost and attorneys' fees for appointed counsel shall be paid as described in  
101 Chapter 22 of Title 78B.

102 (h)(2) Costs and attorneys' fees for post-conviction counsel shall be paid pursuant to  
103 Utah Code § 78B-9-202(2)(a).

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*Effective* \_\_\_\_\_