

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

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

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

9 (b) **Waiver of counsel.** A defendant has the right to self-representation if the defendant
10 waives the right to counsel.

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

14 (A) inform the defendant of the dangers, disadvantages, and consequences of self-
15 representation;

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

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

18 (ii) that the case is subject to the Rules of Criminal Procedure and the Rules
19 of Evidence; and

20 (iii) that the elements of the charged crime(s) and the existence of any legal
21 defenses are governed by the laws of the State of Utah;

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

24 (i) If the Court determines the defendant is indigent, the court:

- 25 1. will offer the defendant the opportunity to have counsel appointed;
26 and
27 2. may appoint counsel for the limited purpose of consulting with the
28 defendant regarding the waiver of counsel.

29 (2) As part of its colloquy with the defendant, the court may inquire as to the
30 defendant's literacy, educational background, and legal training to assess the
31 defendant's understanding of the consequences of waiver.

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

41 (b)(1) at least one of the appointed attorneys must have tried to verdict at least six
42 felony cases as defense counsel within the past four years or ~~twenty-five~~ 25 felony
43 cases total, with at least six of the 25 felony cases as defense counsel;

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

47 (b)(3) within the last five years, at least one of the appointed attorneys must have
48 completed or taught, in person, ~~within the past five years an~~ at least eight hours
49 of approved continuing legal education ~~course or courses at least eight hours of~~
50 which dealt, in substantial part, with the ~~trial~~ representation of defendants in
51 death penalty cases; and

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

54 ~~(e)~~**(d) Capital case appointment considerations.** In making its selection of attorneys for a
55 appointment in a capital case, the court ~~should~~will also consider at least the
56 following factors:

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

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

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

65 ~~(e)~~(4) the diligence, competency, the total workload, and ability of the attorneys being
66 considered; and

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

70 ~~(d)~~**(e) Capital case appeals.** In all cases where an indigent defendant is sentenced to death,
71 the court ~~shall~~will appoint one or more attorneys to represent such defendant on appeal
72 and ~~shall~~will make a finding that counsel is competent in the appeal of capital cases. To
73 be found competent to represent on appeal persons sentenced to death, the combined
74 experience of the appointed attorneys must meet the following requirements:

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

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

81 ~~(e)~~**f** **Post-conviction cases.** In all cases in which counsel is appointed to represent an
82 indigent petitioner pursuant to Utah Code § section 78B-9-202~~(2)(a)~~, the court ~~shall~~will
83 appoint one or more attorneys to represent such petitioner at post-conviction trial and on
84 post-conviction appeal and ~~shall~~will make a finding that counsel is qualified to represent
85 persons sentenced to death in post-conviction cases. To be found qualified, the combined
86 experience of the appointed attorneys must meet the following requirements:

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

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

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

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

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

101 ~~(f)~~**g** **Appointing from appellate roster.** When appointing counsel for an indigent
102 defendant on appeal from a court of record, the court ~~must~~will select an attorney from

103 the appellate roster maintained by the Board of Appellate Judges under rule 11-401 of the
104 Utah Rules of Judicial Administration, subject to any exemptions established by that rule.
105 ~~(g)~~ **Noncompliance.** Mere noncompliance with this rule or failure to follow the
106 guidelines set forth in this rule ~~shall~~ will not ~~of-in~~ itself be grounds for establishing that
107 appointed counsel ineffectively represented the defendant at trial or on appeal.

108 (1) Litigation expenses and attorney fees.

109 ~~(h)~~(A) ~~Cost~~ Litigation expenses and attorneys' fees for appointed counsel ~~shall~~ will
110 be paid as described in Chapter 22 of Title 78B.

111 ~~(h)~~(B) ~~Cost~~ Litigation expenses and attorneys fees for post-conviction counsel ~~shall~~
112 will be paid pursuant to Utah Code ~~§ section~~ 78B-9-202(2)(a).