

1 **Rule 38B. Qualifications and Duties 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
4 Court or the Utah Court of Appeals.

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

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

10 (c)(1) Counsel has briefed the merits in at least three appeals within the past three years or in
11 12 appeals total; or

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

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

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

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

30 because of counsel's substandard performance before either appellate court.

31 (f) The fact that appointed counsel does not meet the requirements of this rule shall not
32 establish a claim of ineffective assistance of counsel.¹

33 (g) Appointed counsel shall represent his or her client throughout the first right of appeal and
34 in any other proceedings filed in connection with an appeal or which otherwise challenge lower
35 court action, including:

36 (g)(1) any appeal filed pursuant to section 77-18a-1;

37 (g)(2) any petition for writ of certiorari in the Utah Supreme Court where appointed counsel
38 determines that such a petition is warranted or where the State of Utah files any such petition,
39 and any proceeding in the Utah Supreme Court after a writ of certiorari is granted; and

40 (g)(3) any appeal from an order, decree or judgment of the juvenile court.

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42 **Advisory Committee Note**

This rule does not alter the general method by which counsel is selected for indigent persons entitled to appointed counsel on appeal. In particular, it does not change the expectation that such appointed counsel will ordinarily be appointed by the trial court rather than the appellate court.

See generally State v. Hawke, 2003 UT App 448.