

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

2 (a) In all appeals where a party is entitled to appointed counsel, only an attorney
3 proficient in appellate practice may be appointed to represent such a party before either
4 the Utah Supreme 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
7 in accordance with this rule.

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

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

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

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

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

27 (e) Notwithstanding counsel's apparent eligibility for appointment under subsection
28 (c) or (d) above, counsel may not be appointed to represent a party before the Utah
29 Supreme Court or the Utah Court of Appeals if, during the three-year period
30 immediately preceding counsel's proposed appointment, counsel was the subject of an

31 order issued by either appellate court imposing sanctions against counsel, discharging
32 counsel, or taking other equivalent action against counsel because of counsel's
33 substandard performance before either appellate court.

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

36 (g) Appointed appellate counsel shall represent his or her client throughout the first
37 appeal as of right, respond to a petition for writ of certiorari filed by the prosecuting
38 entity, file a petition for writ of certiorari if appointed counsel determines that such a
39 petition is warranted, and brief the merits if the Supreme Court grants certiorari review.

40 **Advisory Committee Note**

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