

**Rule 38B. Qualifications for appointed appellate counsel.**

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

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

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

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

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

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

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

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

imposing sanctions against counsel, discharging counsel, or taking other equivalent action against counsel because of counsel's substandard performance before either appellate court.

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

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

*Effective October 8, 2019*

#### **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. The rule only addresses the qualifications of counsel eligible for such appointment. See generally *State v. Hawke*, 2003 UT App 448 (2003). Qualifications for appointed appellate counsel are governed by Utah Code of Judicial Administration (CJA) Rule 11-401. Rule 38B applies only to certain appointed attorneys operating under a contract predating the adoption of CJA Rule 11-401. Upon termination, expiration, or renewal of the contract, the attorney is subject to CJA Rule 11-401 exclusively.~~

*Adopted 2020*