

Committee for Public Counsel Services Assigned Counsel Manual Policies and Procedures

Performance Standards and Complaint Procedures

SEX OFFENDER REGISTRY CASES

These guidelines are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.211D. Counsel assigned pursuant to G.L. c.211D must comply with these guidelines and the Massachusetts Rules of Professional Conduct. In evaluating the performance of counsel, the Committee for Public Counsel Services will apply these guidelines and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in the Assigned Counsel manual and other CPCS publications.

Assigned counsel should note that these guidelines refer to, and assume that counsel is familiar with the MCLE training materials, including the book *Sex Offender Registry Practice*, which are provided to counsel as part of the certification training. Many pleadings mentioned in these standards are contained in the training materials.

SUMMARY OF CONTENTS

1. General Principles of Representation
 - 1.1 The Role of Counsel
 - 1.2 Education, Training and Experience of Counsel
 - 1.3 General Duties of Counsel
 - 1.4 Counsel Response to Complaint Letter
2. Preliminary Proceedings and Preparation
 - 2.1 Receipt of Assignment
 - 2.2 Contacting the Client
 - 2.3 Obtaining Materials from the SORB
 - 2.4 Investigation and Preparation for the Hearing
 - 2.5 Expert Issues
 - 2.6 Filing and Obtaining Rulings on Pre-hearing Motions
 - 2.7 Identifying and Summoning Witnesses and Documents
 - 2.8 Reciprocal Discover Obligations
3. The Registry Board Hearing
 - 3.1 Client's Right to a Hearing
 - 3.2 Obtaining Rulings on Pre-hearing Motions

- 3.3 Client Default
- 3.4 Opening Statement
- 3.5 The SORB's Case in Chief
- 3.6 Putting on a Defense
- 3.7 Closing Statement
- 3.8 Motion for Delayed Dissemination or Immediate Notice of Decision
- 3.9 Proposed Findings of Fact and Rulings of Law
- 4. Superior Court Review of the Hearing Examiner's Decision.
 - 4.1 Preparing for the Appeal
 - 4.2 Filing the Initial Papers
 - 4.3 The Hearing on Motion for Stay of Registration and Dissemination
 - 4.4 Obtaining a Transcript and Copy of the Record
 - 4.5 Additional Motions that May be Filed in Superior Court
 - 4.6 Filing and Arguing Motion for Judgment on the Pleadings
 - 4.7 Relief from Final Superior Court Decision
 - 4.8 Authorization from CPCS Required for Additional Filings
- 5. Preserving the Client's Appellate Rights
 - 5.1 Deciding Whether to Appeal to the Appellate Court
 - 5.2 Transferring the Case to CPCS for Appeal to the Appeals Court
 - 5.3 Informing Client of Registration Obligations, Failure to Register Penalties, Right to Move for Reclassification and Right to Move for Early Termination

1. GENERAL PRINCIPLES OF REPRESENTATION

1.1 The Role of Counsel

Counsel's goal in representing a client in a matter pertaining to the Sex Offender Registration and Notification Act ("the Act"), G.L. c. 6, §§ 178C-P, is to try to obtain a ruling that the client does not have to register under the Act, or that he is not subject to the notification provisions of the Act, or at least that the client receives the lowest risk level classification possible. Counsel's goal is also to preserve all of the client's constitutional and other challenges to the Act so that the client may receive the benefit of any future favorable opinions from appellate courts.

The Supreme Judicial Court has held that former sex offenders are entitled to the effective assistance of counsel at Sex Offender Registry Board (SORB) proceedings and that the civil formulation of the *Saferian* standard applies to such claims. *Poe v. Sex Offender Registry Board*, 456 Mass. 801, 811 (2010).

1.2 Education, Training and Experience of Defense Counsel

- a. Counsel should familiarize himself/herself with the Act, with the Sex Offender Registry Board (SORB) regulations, Massachusetts case law on the subject of the sex offender registry, and relevant scholarly articles on sex offender recidivism. Counsel should familiarize himself/herself with the Rules of Civil Procedure and the Superior Court Rules which apply to superior court civil actions challenging the SORB's risk level classification. Counsel are expected to keep abreast of new legal developments and cases governing the sex offender registry law.
- b. Any attorney assigned a mentor/resource attorney shall diligently work with the mentor and follow all required guidelines such as those listed in the letter received by a mentee upon the assignment of a mentor.
- c. An attorney accepted onto the CPCS SORB panel is provisionally accepted contingent upon successful completion of the SORB Certification Training and of several SORB cases with the supervision of a mentor.

1.3 General Duties of Counsel

- a. The following General Duties of Defense Counsel from the Performance Standards Governing Representation of Indigents in Criminal Cases are incorporated by reference: C1, C3, C4, C5, C7, C8, C10 and C12.

1.4 Counsel Response to Complaint Letter

- a. Counsel must respond in a timely and complete manner to any complaint letter or inquiry sent by CPCS oversight staff. See Chapter IV of Civil Performance Standards, Part VII, Complaints Regarding Performance and Conduct of Assigned Counsel.

2. PRELIMINARY PROCEEDINGS & PREPARATION

2.1 Receipt of Assignment

- a. Upon receipt of a Notice of Assignment of Counsel (NAC), counsel should immediately contact the client as required in section 2.2.
- b. If counsel receives a NAC and cannot accept the assignment, counsel must contact the CPCS Assignment Coordinator by telephone, email or letter within two business days.
- c. After counsel has spoken to the client in depth as described in section 2.2, counsel should contact the SORB to schedule a hearing date and to arrange for the SORB to send counsel discovery materials. Counsel may delay scheduling a hearing date if, in the circumstances of the case,

counsel determines that this delay would benefit the client by allowing additional time for counsel to have the client evaluated by an expert, to have the client begin treatment, or to otherwise prepare the case. Counsel should make every effort to ascertain the client's and witnesses' schedules before scheduling a hearing date with the SORB.

2.2 Contacting the Client

- a. Counsel must make every effort to speak with the client, in person or by telephone, within three business days of receipt of the NAC. Counsel should explain to the client the SORB classification and hearing procedures and, if this initial contact is by phone, arrange for a follow-up meeting with the client in person.
- b. Counsel must arrange for consultation with the client, in person, in an appropriate and private setting, within ten business days of receiving the assignment letter from CPCS. Counsel should be aware that it is a criminal offense for the client to reside, work, or attend a post-secondary educational institution at an address other than the addresses at which the client has registered, and advise the client accordingly.
- c. If the client does not speak English, counsel must immediately secure the services of an interpreter to assist with the client interview, if needed.
- d. If at any time during representation of the client, counsel's ability to prepare the case is substantially affected by his inability to contact the client, counsel must contact the CPCS Alternative Commitment and Registration Support Unit for advice.
- e. At the initial meeting, counsel should carefully question the client about his prior criminal record, and determine, by reviewing the Court docket, whether the client has been convicted of one of the sex offenses designated in § 178C of the Act. If the client's sex offense conviction is out of state, counsel should determine whether an argument can be made that it is not a like offense to an enumerated offense in § 178C. Once counsel has obtained the client's CORI in the initial discovery packet from the SORB, counsel should verify that the information obtained from the client is accurate. In the event that the client has erroneously registered as an offender, counsel must contact the SORB and take steps to remove the client's name from the registry.
- f. Counsel should discuss with the client the client's conviction(s) for sex offenses and determine whether it is possible to mount a collateral attack on the conviction(s), in order to relieve the client of the duty to register. If a collateral attack seems appropriate, counsel must contact the Alternative Commitment and Registration Support Unit at CPCS about either obtaining assistance in collaterally attacking the conviction or having this issue assigned to other counsel.
- g. Counsel should determine whether the client has been the subject of a sexually dangerous person civil commitment proceeding and, if so, contact the attorney who most recently represented the client in this matter.

- h. At the initial interview, counsel should ask the client in detail about each of the factors enumerated in 803 CMR 1.40, as well as details regarding the client's current lifestyle, education, employment, and any other indicators of a stable lifestyle. Counsel should inquire about any physical condition the client may have which would make it less likely that he would commit a sex offense.
- i. Counsel should identify employment, education, treatment, medical, mental health, probation, or other records that may be helpful to the client at the hearing, and obtain from the client the releases necessary for counsel to obtain the records. Counsel should obtain releases that will permit him to view and copy materials from the files of the attorneys who represented the client on the underlying sex offense convictions and sexually dangerous person civil commitment proceedings, if applicable, and who currently represent the client on pending cases.
- j. Counsel should, with the client's help, identify available witnesses whose testimony may be helpful to the client at the hearing.

2.3 Obtaining Materials from the SORB

- a. Counsel should make personal contact with the SORB attorney assigned to the client's case within 5 business days of receiving the Notice of Hearing. Counsel should request that any discovery materials be forwarded to counsel as soon as they become available.
- b. According to SORB Regulations, 803 CMR 1.09 and 1.18, counsel will be provided with notice of the hearing not less than 30 calendar days prior to the date of the hearing and, at such time, shall also be provided with a copy of his file as compiled by the Board to make its recommendation. In addition, at least 10 business days prior to the hearing, SORB must provide counsel with a copy of any documents the Board intends to introduce into evidence that have not previously been provided. Counsel should contact the SORB attorney if these materials are not received in a timely manner and, if necessary, file motions asking the hearing examiner to order their production.
- c. Within one week of receipt of the client's criminal record information (CORI), counsel should review the record, telephone the clerks' offices for the courts where the client has sex offense convictions, and determine who represented the client in each case. Counsel should then, where possible, contact each attorney to review the case file and discuss the details of the case with the attorney. Counsel should arrange to obtain copies of any pertinent documents from each attorney.
- d. Counsel should contact attorneys on any pending matter involving the client which may include, but not be limited to, an appeal of a criminal conviction, sexually dangerous person civil commitment, or criminal complaint or indictment.

2.4 Investigation and Preparation for the Hearing

- a. For each fact favorable to the client that counsel has identified through interviewing the client and reviewing the records, counsel should determine how this information can be placed before the hearing examiner.
- b. Counsel should interview all persons who are potential witnesses at the hearing.
- c. Counsel must attempt to contact any current or recent sex offender treatment provider of the client, to determine if that person is available (and useful) as a witness at the hearing. If the provider is not available, counsel should determine whether any records or a letter or affidavit from the provider may be useful to introduce into evidence at the hearing.
- d. Counsel should obtain copies of all available treatment records of the client. Counsel should also obtain copies of all the medical records relevant to the client's risk of re-offense or degree of dangerousness.
- e. If the client is currently on probation or parole, or has recently completed probation or parole, Counsel should contact the probation or parole officer, interview him to the extent possible, and determine whether that person would make a good witness, would be willing to testify, or would be willing to submit a letter or affidavit on the client's behalf.
- f. Counsel should consider documenting the client's current living situation using documents (such as rent or utility receipts), photographs, affidavits (e.g. from a landlord), and/or live testimony.
- g. Counsel should obtain supportive letters on behalf of the client from community members, friends, family, employers, and colleagues.
- h. Counsel should obtain copies or any awards, educational certificates, certificates of program completion (e.g. substance abuse, anger management), job evaluations or other documents that reflect well on the client.
- i. Counsel should obtain all information on client's prior sex offender treatment, including any evaluations, progress reports, therapist's letters, and relapse prevention plan.
- j. Counsel should review all SORB-provided discovery with the client, and investigate any discrepancies between the SORB materials and information counsel has received from other sources.
- k. If the SORB's discovery materials are inaccurate (for instance, if the police report provided by SORB does not reflect the actual facts of the case, or the facts to which the client pled guilty), counsel should first bring any errors to the attention of the SORB attorney, and see if they will agree to a stipulation to the correct set of facts. If counsel cannot obtain a stipulation, she must obtain admissible testimonial or documentary evidence to refute the inaccurate information.
- l. If the client is not currently in a treatment program, counsel should discuss with the client the advisability of the client entering treatment prior to the hearing.

- m. If the client does not have a Relapse Prevention Plan, counsel should encourage client to create one, either on his own or with the help of a treatment provider.
- n. Counsel should research the relevant scientific literature on risk of recidivism and consider which articles may be helpful to introduce into evidence at the hearing. If the client is older, a juvenile, female or has other characteristics or circumstances where the empirical research has found a lower risk of recidivism, counsel should familiarize himself/herself with the scientific studies in the area and consider introducing the relevant articles into evidence.
- o. Counsel should consider introducing into evidence any research article cited in the SORB regulations that would support his client's case.
- p. Counsel should obtain copies of the client's records from his incarceration at the Massachusetts Treatment Center, Department of Correction, House of Correction, Department of Youth Services or other facility and determine whether any such records would help the client's case.

2.5 Expert Issues

- a. Counsel should file a pre-hearing motion requesting funds for an expert to evaluate the client and to possibly testify at the SORB hearing, stating, at a minimum, the following grounds: that the funds are necessary for the attorney to effectively represent the sex offender; that the funds are necessary to adequately address SORB's claims of likelihood of re-offense.. Counsel should include as much detail as possible without compromising the client's case to support the motion for expert funds. Counsel should preserve the client's rights with respect to the denial of this, and any other, pre-hearing motion by ensuring that the motion is part of the record, and by objecting on the record to the denial of the motion.
- b. Counsel should obtain copies of all sex offender evaluations done of the client in the past. For any recent, favorable evaluations, counsel should contact the evaluator and determine whether he would be willing to testify at the client's hearing, and what his fee would be. Counsel should file a motion for funds for an expert, as described in 2.5(a), unless the client or his family has resources sufficient to pay the expert. Counsel should consider issuing a subpoena for the testimony of a treatment provider, if necessary.
- c. Counsel must familiarize himself/herself with the SORB regulations limiting the use of expert reports and testimony (803 CMR 1.18(6) and any relevant Pre-hearing Orders and Standing Orders, and explore ways of introducing expert reports and testimony within these constraints.
- d. For favorable expert reports or documents that may not be admitted in evidence at the SORB hearing, counsel should nonetheless provide copies to the SORB as part of the reciprocal discovery process, and be prepared at the hearing with copies of these documents. Counsel should move to

- introduce the documents during the client's case, and if that motion is denied, have the documents marked for identification.
- e. Counsel should discuss with the client the potential waiver of privilege that will result from an expert testifying on the client's behalf.
- f. Counsel should attempt to get a letter in support of the client from any current or recent therapist.

2.6 Filing and Obtaining Rulings on Pre-hearing Motions

- a. Counsel should be familiar with the sample pre-hearing motions in the training materials, and file any motions that are appropriate as soon as possible, but in any event no later than 10 business days prior to the hearing. Counsel should ensure that both the assigned hearing examiner and the SORB attorney who has been assigned the case receive copies of these motions. All motions must be accompanied by a supporting affidavit.
- b. Counsel should determine which issues in the case require decision prior to the hearing, and move pre-hearing for rulings on those motions. Counsel should send copies of the motions to the SORB attorney, and directly to the hearing examiner's attention at the SORB. Counsel should follow up with a telephone call to SORB to verify that the hearing examiner has received copies of the motions.
- c. If the client does not speak English, counsel must notify the SORB in writing that an interpreter will be needed at the hearing. If counsel needs an interpreter for pre-hearing preparation, counsel should engage the services of a qualified interpreter. See Chapter VI of the Private Counsel Manual to determine whether counsel may bill CPCS directly for these expenses as an ordinary cost of litigation or whether a motion for funds is required.
- d. Counsel must file a separate pre-hearing motion indicating with specificity which motions counsel wants rulings on prior to the hearing, and moving for such rulings within a requested time frame.
- e. Where supported by the facts, counsel must file a motion that the client be relieved from the obligation to register pursuant to 803 CMR 1.37A. If the client's convictions of sex offenses make him ineligible under the regulations, counsel may nonetheless file such a motion, arguing that the limitations laid out in the regulations are unconstitutional and in violation of recent SJC decisions. Counsel should refer to the training materials for sample motions.
- f. Counsel should ascertain as early as possible whether all necessary witnesses will be available on the hearing date. If a necessary witness is unavailable, counsel should move for a continuance under 803 CMR 1.12, and attach a detailed affidavit showing good cause for the requested continuance.

- g. Counsel should never assume that a request for continuance will be granted. Counsel should explore alternative ways of introducing the evidence that would have been elicited from an unavailable witness.
- h. If a ruling on a motion prevents the client from exercising his right to a fair hearing, counsel should explore the option of filing an action to challenge the ruling in Superior Court.

2.7 Identifying and Summoning Witnesses and Documents

- a. Counsel should identify, well in advance of trial, those witnesses and/or documents that counsel will need to summons.
- b. Counsel must submit to the hearing examiner, in writing, at least 21 days prior to the hearing, requests for subpoenas of witnesses and documents. Alternatively, counsel may have subpoenas issued by the notary public or a Justice of the Peace. G.L. c. 30A, § 12(5).
- c. Counsel should subpoena any probation or parole officer whose testimony is needed at the hearing.
- d. Counsel may request a capeas from Superior Court for any witness who does not appear in response to the summons. G.L. c. 30A, § 12(5).

2.8 Reciprocal Discovery Obligations

- a. Counsel must timely comply with all reciprocal discovery obligations as described in SORB regulations and all relevant Pre-hearing Orders and Standing Orders.
- b. Counsel must provide to the SORB, at least 10 days prior to the hearing, a copy of any documents that counsel intends to introduce at the hearing, any outstanding substantive motions, a complete witness list and, if intending to present an expert, notice of expert testimony, including the expert's report or a written substantive summary of the expert's findings.
803 CMR 1.18

3. THE REGISTRY BOARD HEARING

3.1 Client's Right to a Hearing

Under no circumstances may counsel waive the client's right to a hearing before the SORB without discussing this option in detail with the CPCS Alternative Commitment and Registration Support Unit.

3.2 Obtaining Rulings on Pre-hearing Motions

- a. Counsel must make a record, at the hearing, of any pre-hearing motions that have been filed by referring to each motion, verifying that it is part of the record, and ensuring that it has been ruled upon. At the hearing,

counsel should place objections on the record for each motion that has been denied, stating the basis for the objection and, where appropriate, the way in which the client has been harmed by denial of the motion. Where appropriate, counsel should make an offer of proof as to any excluded evidence.

- b. Counsel should move for reconsideration of any motions which the hearing examiner has denied prior to the hearing.

3.3 Client Default

- a. If the client does not appear at the hearing, counsel should preserve the client's rights in accordance with the current case law.

3.4 Opening Statement

- a. Counsel should summarize for the hearing examiner the evidence that counsel expects to present, and the implications of that evidence for the client's sex offender classification.

3.5 The SORB's Case in Chief

- a. For every witness on the SORB's witness list (if any), Counsel should be prepared to cross-examine the witness. Counsel should look for: positive facts to which this witness can testify; any errors or overstatements in the witness' testimony; any omission of positive facts about the client in the witness' testimony or written reports; and any inconsistencies in the witness' testimony or written submissions.
- b. For every document introduced by the SORB, either directly or through a witness, Counsel should be prepared to object to admission and move to strike all or parts of the document based on issues of privilege, relevance, reliability, or other appropriate grounds. Counsel should consider filing motions in limine on specific evidentiary issues.

3.6 Putting on a Defense

- a. Counsel should prepare each of her witnesses in advance of the hearing. Counsel should review with the witness the anticipated direct examination, likely areas of cross-examination, and appropriate dress and demeanor for the hearing. Witnesses should be made aware of the details of the client's offense(s) when preparing them for cross-examination.
- b. Counsel should be prepared to introduce into evidence all documents helpful to the client's position. To the extent possible, these documents should be introduced in the context of the testimony of a witness who can explain what each document is and why it is important.
- c. Counsel should, well in advance of the hearing, discuss with the client the advisability of the client testifying. Counsel must advise the client that

there is a possibility (however small) that the SORB will call the client to the stand. Counsel must prepare each client to testify at the hearing, regardless of the decision made prior to the hearing as to whether or not Counsel will be calling the client to the stand. Counsel should advise the client of his right to submit a letter or affidavit in lieu of testifying.

- d. Counsel should put into evidence any scholarly articles that are helpful to the client; counsel should pay particular attention to articles which contradict the SORB's regulatory factors, 803 CMR 1.40, where such factors are damaging to the client. See Principle 2.4 (n) and (o) above.
- e. Any expert reports, documents, or testimony that is excluded at the hearing should be marked for identification. Counsel should object to their exclusion from admission on due process, right to a fair hearing, and any other appropriate grounds.
- f. If evidence comes in through the SORB's case that the client is denying or has in the past denied guilt for the sex offenses, counsel should introduce scholarly articles indicating that denial of guilt is not related to an increase in recidivism (see e.g., *Sexual Offender Recidivism Risk: What We Know and What We Need to Know*, Hanson, Morton, & Harris; in the training materials). Counsel should, as a general rule, not call a client to testify if he is going to deny guilt for the offenses.

3.7 Closing Statement

- a. Counsel should give a closing statement persuasively summarizing the evidence that points to a low risk of reoffense for her client. Counsel should anticipate and respond to SORB's arguments regarding those factors that might point to her client having a higher risk of reoffense.
- b. Counsel should be familiar with, and refer to, the regulatory factors listed in 803 CMR 1.40 when making a closing statement.
- c. Counsel should be familiar with, and refer to, articles on sex offender recidivism that support the client's argument, contradict the regulatory factors, where such factors are unhelpful to the client, or support the regulatory factors, where the factors are helpful to the client.

3.8 Motion for Delayed Dissemination or Immediate Notice of Decision

- a. At the close of the hearing, counsel should move orally and in writing that counsel be immediately informed by telephone, email, or fax of the SORB's classification decision, and that the SORB not begin dissemination until three business days after the decision. If this is denied, Counsel should do everything possible to obtain a ruling that will give counsel access to the SORB's decision at the earliest possible moment.

3.9 Proposed Findings of Fact and Rulings of Law

- a. At the close of the hearing, counsel should request permission to file proposed findings of fact and rulings of law, and a memorandum in support thereof. Counsel should request sufficient time to prepare a detailed, fact-specific document. Counsel should familiarize herself with the sample Proposed Findings and Rulings and memorandum in the training materials. Counsel may also request that the record remain open for submission of additional evidence or for the submission of a legal memorandum on a particular issue that arose in the course of the hearing.

4. SUPERIOR COURT REVIEW OF THE HEARING EXAMINER'S DECISION

4.1 Preparing for Superior Court Review

- a. A complaint for judicial review must be filed **within 30 days** of receiving the hearing examiner's decision. This is a jurisdictional deadline.
- b. Because counsel will only have a short time to file for superior court review after the hearing examiner's decision (two days if the client is seeking a restraining order, and thirty days otherwise), counsel must begin to prepare for the superior court review prior to the issuance of the hearing examiner's decision.
- c. Counsel must discuss with her client, well in advance of the hearing examiner's decision, the range of possible decisions the hearing examiner may reach, and which of these decisions the client would want to appeal. Counsel should also discuss whether the client wants to seek a stay of registration and/or dissemination if the hearing examiner's decision is adverse to the client. Except in extraordinary circumstances, counsel should advise a client who has been classified as a level 3 after a board hearing to appeal the classification decision and to seek a stay of registration and dissemination. In general, counsel should advise a client to appeal a level 2 classification if that does not represent a reduction in the preliminary classification given to the client by SORB. For a client who has chosen to appeal a level 2 classification, counsel should advise the client to seek a stay of registration and dissemination. In preparation of the Superior Court action, counsel should have the client sign the required affidavit of indigency.
- d. If the client, after consultation with counsel, has decided to seek a stay of an adverse decision of the hearing examiner, counsel must be prepared to file quickly the superior court papers. Counsel must prepare in advance as much of each of the following documents as is feasible:
 - 1. Motion to Proceed in Forma Pauperis
 - 2. Affidavit of Indigency
 - 3. Motion to Proceed under a Pseudonym and Affidavit
 - 4. Motion to Impound
 - 5. Complaint for Judicial Review
 - 6. Motion for Stay of Registration and Dissemination Pending Appeal
 - 7. Memorandum in Support of Motion for Stay

- e. The complaint for Judicial Review must state all possible grounds upon which an appeal may be based (see sample Complaint in the training materials).
- f. Counsel and the client should decide in advance in which superior court to file the complaint.
- g. Counsel should make every effort to maintain client contact information that will allow counsel to quickly reach her client once the hearing examiner issues a decision.
- h. In the event that counsel cannot acquire a signed affidavit of indigency in a timely manner, counsel should consider filing all necessary paperwork along with a Motion to Late File Affidavit of Indigency.
- i. Counsel should review and follow all of the statutes and rules governing the review of the hearing examiner's decision in Superior Court, such as G.L. c. 6, §178M, G.L. c. 30A, §14, Superior Court Standing Order 1-96, Massachusetts Rules of Civil Procedure, 4, 5, 12, 65, and Superior Court Rule 9A.

4.2 Filing the Initial Papers

- a. As soon as counsel receives the SORB's decision, s/he must inform the client and consult with the client about whether a complaint for judicial review should be sought. In addition to pursuing the judicial review of the hearing examiner's decision pursuant to G.L. c. 6, §178M and G.L. c. 30A, §14, counsel should consider adding a claim under G.L. c. 231A (the declaratory judgment statute), if warranted, and authorized (see section 4.7 below).
- b. If the client wants to appeal the SORB's decision and pursue a stay of registration and/or dissemination, counsel must:
 1. File a Request for Transcript with the SORB pursuant to 803 CMR 1.24.
 2. Immediately finish preparing the papers listed in 4.1(c), above.
 3. Arrange to meet the client as soon as possible in the Superior Court in order to file these papers and to have the client sign an affidavit of indigency, if not already signed.
 4. File the papers listed in 4.1(c), above, and request an immediate *ex parte* hearing on the Motion for Stay (seeking a temporary stay until the motion can be heard with a SORB representative present), the Motion to Proceed in Forma Pauperis, and the Motion to Impound.
 5. Argue these motions immediately before a judge.
 6. Schedule a date for hearing on the Motion for Stay of Registration and Dissemination at which the SORB attorney will be present.
 7. All motions filed under a pseudonym must contain the client's SORB number. For example, Doe No. 8032 v. Sex Offender Registry Board.

- c. Unless counsel has secured an agreement from SORB to defer dissemination for a period of time after the issuance of the hearing examiner decision, counsel must make every effort to have a motion for temporary stay of registration and dissemination heard within two days of the issuance of the SORB decision. Failure to do this may result in dissemination occurring before counsel has the opportunity to be heard on the Motion for Stay.
- d. Where the client does not want to pursue a Stay of Registration and/or dissemination, counsel must, within 30 days of receipt of the hearing examiner's decision, follow steps 1 through 4 of 4.2(b), above, and file the papers (1-5 of 4.1(c), above). **This is a jurisdictional deadline and if it is missed, the client loses the right to the G.L. c. 30A review of the Hearing Examiner's decision.**
- e. Counsel must make proper service on the SORB of the papers filed in Superior Court in compliance with Mass.R.Civ.P. 4 and 5.

4.3 The Hearing on Motion for Stay of Registration and Dissemination

- a. Counsel should familiarize herself with the training materials on Motions for Stay, and insure that all possible bases for the motion are asserted and argued.

4.4 Obtaining a Transcript and Copy of the Record

- a. If counsel has not already requested a copy of the transcript of the SORB hearing pursuant to 803 CMR 1.24 (see 4.2(b)(1), above), counsel should do so immediately.
- b. Counsel should carefully review the transcript and correct any errors using the procedure outlined in 803 CMR 1.24(3).
- c. Counsel should contact the SORB attorney to make sure that counsel is sent a copy of the complete record in the case at the same time that it is filed with the Superior Court.

4.5 Additional Motions that May be Filed in Superior Court

- a. Counsel should consider whether to file a motion for leave to present additional evidence, (G.L. c. 30A § 14(6)) or a motion for leave to present evidence of irregularities in procedure not shown in the record (G.L. c. 30A § 14(5)), if warranted by the facts of the case.
- b. These motions must be filed within 20 days of service of the record. See Superior Court Standing Order 1-96. The filings must conform with the requirements of Superior Court Rule 9A.

4.6 Filing and Arguing Motion for Judgment on the Pleadings

- a. Counsel should carefully review the entire record and identify issues specific to the client's case that are appealable.
- b. Counsel should prepare a Motion for Judgment on the Pleadings and a memorandum in Support thereof. The memorandum should address, at a minimum, the following:
 1. Statement of the Case;
 2. Statement of the Facts;
 3. Where appropriate, counsel may argue, among other possible grounds, that the hearing examiner has:
 - a. Not considered certain pertinent factors;
 - b. Considered factors for which there is little if any evidentiary support in the literature;
 - c. Considered factors not specified by the SORB;
 - d. Not given sufficient weight to certain factors;
 - e. Given excessive weight to certain factors; and has thereby committed errors of law, abused his discretion, acted arbitrarily or capriciously, or drawn conclusions against the substantial weight of the evidence.
 - f. Made a finding or applied a regulation that is in excess of the statutory authority or jurisdiction of the agency.
 - g. Made an error of law by misinterpreting or misapplying a regulation, ruling or statutory provision.
 - h. Excluded relevant and reliable evidence, thereby denying the client his due process right to present evidence.
 - i. Allowed and relied upon irrelevant and/or unreliable hearsay evidence, which does not amount to substantial evidence in support of the classification, thereby denying the client his due process rights.
 - j. Denied the client's motion for expert funds in violation of due process.
 - k. Issued a decision that is not supported by substantial evidence.
 4. Counsel should also include arguments to preserve the client's state and federal constitutional rights.
 - a. Counsel should review the memorandum and motion with the client.
 - b. Counsel should file the motion and memorandum and serve a copy on the SORB in compliance with the rules of civil procedure, and Superior Court Rule 9A. The motion and memorandum must be filed within 30 days of the filing of the record. Superior Court Standing Order 1-96.
 - c. Counsel should fully argue all bases for appeal that are laid out in the Motion and Memorandum for Judgment on the Pleadings.

4.7 Relief from Final Superior Court Decision

- a. Rule 60 of the Massachusetts Rules of Civil Procedure allows an attorney to correct any mistakes in an Order or Judgment or to file for relief from the Judgment or Order based on (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for new trial; (3) fraud, misrepresentation or other misconduct of an adverse party; (4) the judgment is void under Rule 59(b); (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.
- b. A motion pursuant to Rule 60 must be filed within a reasonable time, and for reasons (1), (2) and (3), not more than one year after the judgment enters.

4.8 Authorization from CPCS Required for Additional Filings

- a. Counsel must seek authorization from CPCS prior to filing a rule 60 motion, motion for new trial, complaint for declaratory judgment or any collateral matter.

V. PRESERVING THE CLIENT’S RIGHT TO APPEAL TO THE APPEALS COURT

5.1 Deciding Whether to Appeal to the Appeals Court

- a. Counsel should discuss with the client whether or not he wants to appeal the decision of the Superior Court to the Appeals Court. Except in extraordinary circumstances, counsel should advise a client who has been classified as a level 3 after an appeal to the Superior Court to appeal the classification decision. In general, counsel should advise a client to appeal a level 2 classification if that does not represent a reduction in the classification given to the client by the SORB hearing examiner.

5.2 Transferring the Case to CPCS for Appeal to the Appeals Court

- a. Counsel must file a Notice of Appeal with the Superior Court within 60 days of the entry of the court’s judgment. M.R.A.P. 3, 4. Counsel should serve a copy of this notice to the SORB attorney.
- b. Counsel should immediately notify the CPCS Assignment Coordinator by email to ac@publiccounsel.net and attach the completed SORB Appellate Referral Form. Because Appellate Counsel’s brief is due 40 days after entry of a case on the Appeals Court docket, it is essential that counsel send the Appellate Referral Form to CPCS immediately and that counsel send the client’s file to successor counsel immediately.

- c. If oral argument on the Motion for Judgment on the Pleadings addressed any issues that were not raised in the filed papers, or if other events that occurred at oral argument are pertinent to the appeal, counsel should, within 10 days of filing the Notice of Appeal, order from the court reporter a transcript of the argument of the Motion for Judgment on the Pleadings, pursuant to M.R.A.P. 8(b)(1). See Chapter VI of the Assigned Counsel Manual to determine whether counsel may bill CPCS directly for these expenses as an ordinary cost of litigation or whether a motion for funds is required. A copy of the transcript order and the supplementary affidavit must be served on the SORB attorney.
- d. If it is counsel's judgment that a transcript of the oral argument is not needed for appeal, counsel must, within 10 days of the filing of the Notice of Appeal, file in the Superior Court clerk's office a letter indicating that she does not intend to order a transcript of the proceedings. A copy of this letter must be served on the SORB attorney. M.R.A.P. 8(b)(1).
- e. If counsel has ordered a transcript as described above in 5.2 (c), counsel must, within 40 days of filing the Notice of Appeal, either file the transcript with the Superior Court clerk or provide the clerk with a signed statement that she has ordered the transcript from the court reporter. M.R.A.P.9(c)(2).
- f. Shortly after completing (c) or (d), above counsel should receive notice from the Superior Court that the record has been assembled. Within 10 days of receiving this notice, counsel must file in the Appeals Court a motion to waive the Appeals Court filing fee, together with client's Affidavit of Indigency (this Affidavit of Indigency must be on a particular form which is available from the Appeals Court Clerk's Office). If the Affidavit of Indigency cannot be completed and filed within the 10 days, the motion to waive the filing fee should be filed together with a motion for leave to late file the Affidavit of Indigency. M.R.A.P. 10(a)(1).
- g. If the motion to waive the filing fee is allowed, counsel must send a letter to the Clerk of the Appeals Court, requesting that the appeal be entered on the docket. M.R.A.P. 10(a)(1).
- h. Hearings counsel is responsible for completing all these steps to ensure the client's right to appeal is protected. Counsel retains responsibility for the case until and unless another attorney assumes that responsibility. Once appellate counsel has been appointed, hearings counsel should communicate with appellate counsel regarding the steps remaining to perfect the client's appeal and can then transfer the case to appellate counsel. It is at this point that hearings counsel is free to withdraw from the case.
- i. Hearings counsel must cooperate with appellate counsel, or any successor counsel, by providing a copy of the client's file (including contact information, Hearing Examiner decision, work product and other relevant papers) immediately upon request and upon receipt of the client's release. It is expected that the material will be mailed to appellate or successor counsel within 14 days of request absent extraordinary circumstances.

5.3 Informing Client of His Registration Obligations, Failure to Register Penalties, Right to Move for Reclassification and Right to Move for Early Termination

- a. Counsel should inform her client of the client's registration obligations under the SORB statute and the fact that failure to comply with his registration obligations may result in criminal sanctions pursuant to the Failure to Register Statute, G.L. c. 6, § 178H. Counsel should also inform the client about his reclassification or early termination rights pursuant to the SORB statute and regulations.