



2023 Annual Conference

Syracuse, New York

Sex Offender Registration Act (SORA)

Date: Tuesday, October 3, 2023

Instructors:

Peter DeLucia, Esq.

Judith Osburn, Esq.

MCLE: 1.0 Professional Practice

This program has been approved for credit in
New York State for all attorneys
including those who are Newly Admitted
(less than 24 months) and administered by
the Onondaga County Bar Association

Presenters

Peter DeLucia is employed as a Principle Law Clerk to the Hon. Joseph F. Cawley, Broome County Court. He is admitted to practice law in the State of New York. Prior to working for Judge Cawley, he was an Assistant Attorney General in the Special Investigations Unit of the Office of the New York State Attorney General; a Senior Assistant District Attorney with the Office of the Broome County District Attorney; and spent time in private practice with two Binghamton-area law firms. He earned a Bachelor's Degree from the University of Notre Dame and Juris Doctor degree from Albany Law School of Union University.

Judith "Judy" Osburn is an attorney who works for the New York State Unified Court System as Chief Clerk of Broome Supreme & County Courts. She is admitted to practice law in both New York and Massachusetts. Prior to joining the Courts, she was an Assistant District Attorney in Western Massachusetts; she was in private practice at a small law firm in Johnson City, New York for 10 years; and she had her own law firm, Osburn Law Offices, in Binghamton, New York for 10 years. She earned a Bachelor's Degree from Tufts University and a Juris Doctor degree from Cornell Law School. She is a past president of the Broome County Bar Association and remains an active member.

SENTENCING STEPS

- STEP 1:** DETERMINE IF OFFENSE IS REGISTERABLE (*Use Charts*)
- STEP 2:** SENTENCE AS USUAL
(*Any Objection to Sentence, Acknowledge receipt of PSR, People wish to be Heard, Defense Counsel wish to be Heard, Defendant wish to be Heard, Pronounce Sentence*)
- STEP 3:** PRONOUNCE/CERTIFY (*on the record*) DEFENDANT AS A SEX OFFENDER
- STEP 4:** ADVISE DEFENDANT OF OBLIGATIONS AND DUTIES TO REGISTER AND VERIFY
(*Read verbatim "Duties to Register and Verify" - Back of Registration Form*)

(*Have the Defendant acknowledge understanding*)
- STEP 5:** (*All sentences, ***except*** straight jail) HAVE DEFENDANT FILL OUT/REVIEW SORA REGISTRATION FORM
(*Suggestion: Have Defendant fill out SORA Registration Form with his/her attorney prior to commencing sentence - Court to review for missing information*)

(*Following sentence, Clerk sends Registration Form with Photograph to SORA Registry at DCJS - **DO NOT** hold for Hearing*)
- STEP 6:** (*All sentences, ***except*** straight jail) SCHEDULE SORA HEARING AND SERVE ALL PARTIES/COUNSEL WITH NOTICE OF HEARING
- STEP 7:** ORDER DNA AND ASSESS FINES (*if any*), SURCHARGES, DNA DATABANK FEE, SEX OFFENDER REGISTRATION FEE (*if applicable*) AND SUPPLEMENTAL SEX OFFENDER VICTIM FEE (*if applicable*)

(* If sentence is straight jail, mail or e-mail or fax a copy of the Jail Commitment Order, with an added notation on the Order that "the Defendant is certified as a Sex Offender" to the NYS Board of Examiners of Sex Offenders at:

NYS Board of Examiners of Sex Offenders
Alfred E. Smith Building
80 South Swan Street, 2nd Floor Rm 202
Albany, New York 12210
ph: 518.457.4215
fax: 518.457.4162

or by

E-Mail : michele.harrington@beso.ny.gov or karl.laware@beso.ny.gov or BESO@dcjs.ny.gov

SEX OFFENDER REGISTRATION ACT (SORA)

Presenters: **Peter DeLucia, Esq.**
Principal Law Clerk to the Hon. Joseph F. Cawley, Broome County Court
Judith Osburn, Esq.
Chief Clerk, Broome County Supreme and County Clerk's Office



THE BASICS: "MEGAN'S LAW": ARTICLE 6-C, CORRECTION LAW

- Enacted in 1996, updated / amended after that date
- Upheld as constitutional: *Doe v. Pataki*, 481 F.3d 69 (2d Cir 2007)
- Regulatory, non-penal piece of legislation which requires individuals convicted of certain offenses to "register" with the New York State Division of Criminal Justice Services



PURPOSE OF SORA

- “With this in mind, we turn to the purpose underlying SORA – to protect the public from sex offenders. Given the significance of the mission, an accurate determination of the risk a sex offender poses to the public is the paramount concern” (*People v. Mingo*, 12 NY3d 563, 574 [2009]).

WHO’S WHO?

- DIVISION OF CRIMINAL JUSTICE SERVICES (DCJS)
 - SEX OFFENDER REGISTRY
 - Provides New Yorkers information about sex offenders living in their communities
- BOARD OF EXAMINERS OF SEX OFFENDERS
 - Develops guidelines and procedures to assess the risk of repeat offense by a sex offender and the threat posed to public safety.
 - Makes risk level recommendation to sentencing court for defendants that are incarcerated.

SENTENCING REGISTERABLE DEFENDANTS UNDER SORA

Sentencing defendants who are registerable under New York's Sex Offender Registration Act (SORA) requires the court to perform several additional tasks beyond the normal sentencing proceeding.

What follows is a **step by step** approach to sentencing defendants who have been convicted of registerable offenses under SORA.

Handout:



SENTENCING REGISTERABLE DEFENDANTS UNDER SORA

ASSIGNMENT OF COUNSEL

If the sex offender applies for assignment of counsel and the court finds that the offender is financially unable to retain counsel, the court shall assign counsel to represent the sex offender (Corrections Law §168-n[3]).

SENTENCING REGISTERABLE DEFENDANTS UNDER SORA

The SORA procedure used will be determined by
defendant's sentence:

straight incarceration -v- every other sentence
(probation, conditional discharge, unconditional
discharge, fine or split sentence)

SENTENCING REGISTERABLE DEFENDANTS UNDER SORA

- STEP 1: Determine if the offense is a registerable offense under SORA

Handout: 
SORA Chart (4).pdf

- STEP 2: Proceed to sentencing as you normally would

SENTENCING REGISTERABLE DEFENDANTS UNDER SORA

- **STEP 3:** Following the imposition of sentence, place on the record that the conviction is for a registerable offense under SORA. Certify the defendant as a sex offender.
- **STEP 4:** Advise defendant of the obligations and duties to register (*have defendant acknowledge understanding on the record*)

Handout:



Duties.pdf

SENTENCING REGISTERABLE DEFENDANTS UNDER SORA

If sentence will be: Probation, Split Sentence, CD, UCD or Fine:

- **STEP 5:** Have defendant with his / her attorney complete the SORA registration form

Handout:



SORA Registration Form.pdf

SENTENCING REGISTERABLE DEFENDANTS UNDER SORA

If sentence will be: Straight Incarceration ONLY:

- **STEP 5:** Complete a commitment order, with an added notation on the order “The defendant is certified as a sex offender.” Also mail or email a copy of the commitment order to:

NYS Board of Examiners of Sex Offenders

E-mail: Michele.Harrington@beso.ny.gov or

karl.laware@beso.ny.gov or BESO@dcjs.ny.gov

SENTENCING REGISTERABLE DEFENDANTS UNDER THE SEX OFFENDER REGISTRATION ACT (SORA)

- **STEP 6:** Schedule the SORA Hearing and serve all parties with written notice of the hearing.

Handout:



SORA Notice of Hearing.pdf

SENTENCING REGISTERABLE DEFENDANTS UNDER SORA

- **STEP 7, FINAL STEP:** Order DNA and assess surcharges, DNA Databank Fee, Sex Offender Registration Fee (if applicable) and supplemental sex offender victim fee (if applicable).

FEES

In addition to any court-imposed fines and surcharges, the following fees are to be imposed and then reported in the civil column of your monthly Audit & Control Report:

- **Mandatory Misdemeanor Surcharge: \$175.00**
- **Crime Victims Assistance Fee: \$25.00**
- **If convicted of a sex offense as defined by Corrections Law §§ 168(a)(2) or 168(a)(3): Sex Offender Registration Fee of \$50.00**
- **If convicted of a designated offense as defined by Executive Law § 975(7): DNA Databank Fee of \$50.00**
- **If convicted of an offense contained in PL § § 130 or 263 or the offenses of Incest in the 3rd, 2nd or 1st degree: Supplemental Sex Offender Victim Fee of \$1000.**

SENTENCING REGISTERABLE DEFENDANTS UNDER SORA

- If not a straight jail sentence, then following sentencing, the clerk sends the registration form with defendant's photograph to SORA Registry at DCJS
- **DO NOT** hold the form until a hearing has been conducted.

CPL §§ 420.10, 420.40

- File all registration forms regardless of whether fees are paid or not. Unpaid fees and surcharges may be subsequently converted to a civil judgment or other remedy under the Criminal Procedure Law (CPL) §420.10 and CPL §420.40.
- Note: Youthful Offenders are not required to pay Sex Offender and DNA Fees.

CONDUCTING A SORA HEARING

RISK LEVEL/DESIGNATION HEARING



CONDUCTING A RISK LEVEL/DESIGNATION HEARING

Where there is a dispute between the parties concerning the determinations, the court **shall** adjourn the hearing as necessary to permit the offender and/or D.A. to obtain relevant materials.

Such materials may be obtained by subpoena if not provided voluntarily.



“MINI – HEARING” REQUIREMENT

Prior to a RISK LEVEL/DESIGNATION HEARING the court might be required to conduct a mini-hearing:

- If defendant is convicted of: PL 130.52 (forcible touching), PL 130.55 (sexual abuse, second degree) OR PL 230.04 (patronizing a prostitute, third degree)
AND
- Defendant controverts (contests) allegation that the victim was under 18 / 17
OR
- That defendant has a prior sex offense conviction

CONDUCTING A RISK LEVEL / DESIGNATION HEARING

- As with sentencing, the procedure for conducting a SORA hearing depends on whether the defendant is sentenced to **straight incarceration or a sentence of probation, conditional discharge, unconditional discharge fine or split sentence.**

Handout:



Hearing Steps [Non-Jail].pdf

SENTENCE OF PROBATION, CONDITIONAL DISCHARGE, UNCONDITIONAL DISCHARGE FINE OR SPLIT SENTENCE

- **STEP 1:** Court schedules and notifies sex offender and D.A. of risk level / designation hearing
 - Statute provides “at least 45 days after sentencing”, but the parties often agree to do it at sentencing.
- **STEP 2:** D.A. makes recommendation regarding defendant’s risk level and designation
 - At least 15 days before hearing

SENTENCE OF PROBATION, CONDITIONAL DISCHARGE, UNCONDITIONAL DISCHARGE, FINE OR SPLIT SENTENCE, CONT.

- **STEP 3:** Court holds risk level / designation hearing:
 - Burden of proof is on the prosecution
 - Standard of proof is clear and convincing evidence
 - Court may consider reliable hearsay:
 - PSI; Board’s case summary; GJ testimony; misdemeanor information
 - Internal office documents of DA’s Office?? Admissible provided there is foundation (*People v. Mingo*, 12 NY3d 563 [2009]).
 - If the defendant does not appear at the hearing without sufficient excuse after having received notice, the Court can proceed with the hearing in the defendant’s absence

CLASSIFICATIONS

- **RISK LEVEL** is assigned based upon the likelihood of re-offense as follows:
- **Level 1** - Sex Offender poses a Low Risk of repeat offense.
- **Level 2** - Sex Offender poses a Moderate Risk of repeat offense.
- **Level 3** - Sex Offender poses a High Risk of repeat offense and there exists a threat to the public safety.

SEX OFFENDER DESIGNATIONS

- **Sexual Predator** - Sex Offender who has been found guilty of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent offenses. A sexual predator must register for life.
- **Sexually Violent Offender** - Sex Offender who has been found guilty of a sexually violent offense. A sexually violent offender must register for life.
- **Predicate Sex Offender** - Sex Offender who has been found guilty of two or more sex crimes. A predicate sex offender must register for life.

**SENTENCE OF PROBATION, CONDITIONAL
DISCHARGE, UNCONDITIONAL DISCHARGE
FINE OR SPLIT SENTENCE, CONT.
RISK ASSESSMENT INSTRUMENTS**

Handout:



**SENTENCE OF PROBATION, CONDITIONAL
DISCHARGE, UNCONDITIONAL DISCHARGE
FINE OR SPLIT SENTENCE, CONT.**

- **STEP 4:** Court renders decision and order based upon findings of fact
- **STEP 5:** Court sends order and findings of fact to Sex Offender Registry and parties / counsel

Handout:



Fact and Order Determining Risk Level and Designation Form.pdf

SENTENCE OF STRAIGHT INCARCERATION

▪ **STEP 1:** Upon conviction:

- Court certifies defendant as a Sex Offender
- Include certification on commitment and/or judge of conviction

Handout



Hearing Steps [Jail].pdf

SENTENCE OF STRAIGHT INCARCERATION

- Board of Examiners of Sex Offenders is notified by jail / prison that offender is to be released 120 days prior to the release date
- Sex Offender is notified case is under review no later than 30 days prior to Board's recommendation regarding risk level and designation (90 days prior to release date)
- Board of Examiners makes recommendation to Court 60 days prior to release
- Very important to have / obtain that recommendation

SENTENCE OF STRAIGHT INCARCERATION

- **STEP 2:** Court schedules hearing:
 - Notifies Sex Offender and D.A. 20 days prior to hearing (50 days prior to release)
 - Court sends copies to Board of Examiners' recommendation to all parties / counsel

Handout:



Notification of Hearing Jail Sentence.pdf

SENTENCE OF STRAIGHT INCARCERATION

- **STEP 3:** 10 days prior to the hearing date (40 days prior to release):
 - D.A. required to notify Court and Sex Offender if determination sought differs from Board's recommendation

SENTENCE OF STRAIGHT INCARCERATION

- **STEP 4:** Court conducts hearing (30 days prior to release)
 - Court renders findings of fact and conclusions of law
 - Court sends order and findings of fact to sex offender registry and parties / counsel

Handout:



Fact and Order Determining Risk Level and Designation Form.pdf

SENTENCE OF STRAIGHT INCARCERATION

- Jail / prison registers defendant as sex offender at least 15 days before release
- Jail / prison sends registration form to sex offender registry 10 days before release
- Sex Offender Registry enters registration form information into sex offender registry database

RISK ASSESSMENT GUIDELINES AND COMMENTARY

- HANDOUT PAGES 28-57:

[06_SORAGuidelines.pdf \(nycourts.gov\)](#)

SEALING IF APPROPRIATE

- Upon application of either party, the court shall seal any portion of the court file or record which contain material that is confidential under any State or Federal statute.
- Either party may appeal the order pursuant to the provisions of Civil Practice Laws & Rules (CPLR) Articles 55, 56 and 57.

UPWARD DEPARTURES: OVERRIDES

An upward departure from the presumptive risk level is justified when an aggravating factor, not adequately taken into account by the risk assessment guidelines is established by clear and convincing evidence (*People v. Waters*, 198 AD3d 1024 [3d Det 2021]).

- Burden of proof on the prosecution
- Still need to score the remaining factors

DOWNWARD DEPARTURES

- Defendant must demonstrate by a *preponderance of the evidence* the existence of mitigating factors not adequately taken into consideration by the risk assessment guidelines to warrant a downward departure (*People v. Scrom*, 205 AD3d 1238 [3d Dept 2022], citing *People v. Gillotti*, 23 NY3d 841 [2014]).

PETITIONS FOR MODIFICATION

- Can be done annually
- Defendant's burden: clear and convincing evidence that the modification is warranted.
- Court's inquiry??
 - The relevant inquiry is whether conditions have changed, subsequent to the initial risk level classification so as to warrant a modification thereof (*People v. Kaminski*, 208 AD3d 1395, 1396-1397 [3d Dept 2022]).
- Court must request an updated recommendation from the Board of Sex Examiners before conducting the modification and reaching a final decision

OTHER RECENT CASELAW

- *People v. Moore*, 2022 NY Slip Op 05242 (September 22, 2022)
 - Reversal of Broome County Court decision classifying defendant as a level three sex offender and designating him a sexually violent offender
 - Defendant chose not to attend hearing but did not waive his right to challenge the Board's risk assessment and the People's proof
 - At the hearing defendant's attorney admitted he lacked the benefit of defendant's input and was at a disadvantage because he had not spoken with defendant. Counsel failed to present a defense, raise an objection or present proof at the hearing.
 - Reversal: Ineffective assistance of counsel

AND THE COURT OF APPEALS??

- *People v. Ellis, 33 NY3d 582 (2019):* Court of Appeals
- Correction Law 168-f(4): Level 3 sex offender required to report “internet identifier”
- The existence of a Facebook account was not an internet identifier for purposes of the statute and need not be reported.

GETTING HELP!

- Handout page 58:
- Office of Justice Court Support: (800) 232-0630
- DCJS Sex Offender Registry: (518) 417-3385
 - **DO NOT CALL SEX OFFENDER REGISTRY TO DISCUSS HOW TO MAKE THE LEVEL DETERMINATION – CALL OJCS**
 - **BE AWARE OF EX PARTE COMMUNICATION**
 - Contact the Sex Offender Registry only for administrative questions
- Board of Sex Offender Examiners: (518) 457-4215

SPECIAL THANKS:

- **Hon. David S. Gideon:** Town of DeWitt Justice; Special Counsel to the Town and Village Court Supervising Judges in the 5th Judicial District
- **Michele L. Harrington, Esq.:** Chairperson, New York State Board of Examiners of Sex Offenders
- **Wendy J. Maher, Esq.:** New York State Division of Criminal Justice Services (DCJS)(Retired)

CONTACTS

- Peter DeLucia: (Main Number) 607-240-5804; (Direct Line) 607-240-5805; (Cell) 607-743-5783
- Judith Osburn, Esq.: (Main Number) 607-240-5800

