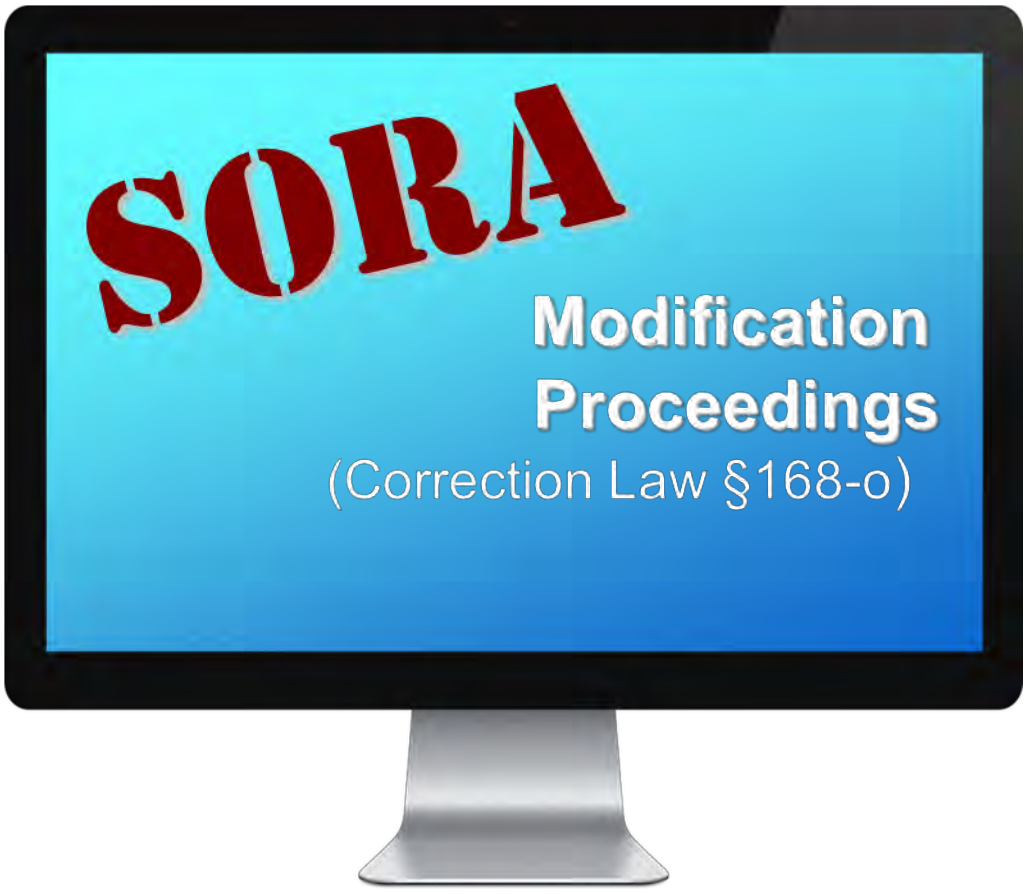
A Defense Attorney's Guide to



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Acknowledgements

I would like to first acknowledge the many clients from whom I have learned about the trials and tribulations that they faced on a daily basis because of New York's SORA requirements. Their cases have taught me invaluable lessons that I seek to pass on to other defense attorneys who will take on these issues in many different forums.

I want to thank the many individuals who have written, published and conducted Continuing Legal Education Programs on this subject. I have borrowed from them liberally and acknowledge their contributions. By sharing our work we hopefully help raise the bar for the performance of defense attorneys throughout New York, be they assigned counsel, public defenders, or privately retained counsel. My special thanks to Patricia Warth, Gary Muldoon, Robert Newman, Jim Eckert, John Brunetti, Al O'Connor, Faye Santacroce, Kim Duguay and Nancy Little.

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Modification

Correction Law § 168-o

There are days when my SORA registration
and its effect on my life seem deeper and
darker than any prison cell I was ever stuck in.

Jeff, SORA Registrant

Punishment – not at all, say the courts. SORA isn't punishment, but merely a regulatory measure to protect public safety. As one legislator so empathetically put it, it's like affixing warning labels to toxic substances. Despite these disingenuous claims that SORA is not punitive, so designated as civil and not criminal in order to conveniently avoid *ex post facto* and other constitutional challenges, just ask any one of your clients who are subject to registration what they think.

Their photographs, addresses, and a description of the past offense are made publicly available online. They are denied jobs, education and housing, including shelters. They may be evicted, fired or hounded from the neighborhood by civic-minded vigilantes.

Modification of registrants' risk levels down to a level 1 can relieve them of registration altogether with the passage of 20 years, and can help them regain some semblance of normal life. As defense attorneys we usually find ourselves acting defensively and in reaction to a prosecutor's initiative. A petition for modification is your opportunity to be proactive and to push back against the punishment and ignorance that threatens to crush your client.

Petition for Relief or Modification

Correction Law § 168-o actually refers to three different types of proceedings that may be brought after the initial SORA determination. These are a petition for relief by the registrant, a petition for downward modification by the registrant, and a petition for upward modification by the district attorney.

Petition for Relief

Subsection 1 of Correction Law § 168-o provides procedures for obtaining "relief" from SORA. If such a petition is granted it will allow the petitioner to "be relieved from any further duty to register." But don't get too excited. It is a high bar, it is very limited, and it requires three decades of registration. This relief is only available to a person who is classified as a level 2 risk who has not been designated as a sexual predator, a sexually violent offender, or a predicate sex offender. It is not available for a person who is classified as a level 1 or a level 3 risk. This relief allows registrants who are level 2 to be relieved of their lifetime registration requirement. However, they must complete at least thirty years of registration before petitioning for this relief.

- Eligibility
  - Level 2
  - Not designated
  - Been registered for a minimum of 30 years
  - Petition cannot be considered more than once every two years

- Burden on Petitioner
  - Bears the burden of proof by clear and convincing evidence
  - That his or her risk of repeat offense and threat to public safety is such that registration or verification is no longer necessary

- Other Statutory Provisions
  - If petition granted, it shall not relieve the petitioner of the duty to register under SORA upon conviction of an offense requiring registration in the future
  - If petition for relief is granted, the district attorney may appeal as of right from the order pursuant to CPLR articles 55, 56 and 57
  - If counsel has been assigned, that assignment shall be continued throughout the pendency of the appeal, and the person may appeal as a poor person pursuant to County Law article 18-B

Since SORA went into effect on January 1, 1996, no person will be eligible to petition for this "relief" until January 1, 2026. Thus, we have eight years from the first publication of this handbook to get ready. An update to this handbook will address this issue further as the deadline for filing approaches. For now, we will focus on modifications.

Practice Tips

As addressed in the section below on modification, a person who is classified as a level 2 risk is eligible to petition for modification down to a level 1 annually, after their initial SORA

classification. Although for strategic reasons a person may not want to petition after waiting just a year or two, he or she certainly does not have to wait for any specific period of time to elapse, and it would certainly not have to be a thirty-year wait. If a level 2 registrant successfully petitions to reduce his or her risk to a level 1, this will result in being automatically relieved from registration after 20 years. Therefore, as a practical matter, the better practice would be to petition for modification rather than waiting to petition for "relief." And even after the thirty years of registration have passed, modification may still be the preferred way to proceed. Modification, as can be seen, is the better approach for at least three reasons: 1) the standard of what needs to be proven is lower for modification than for "relief"; 2) termination from registration can be accomplished after 20 years – that being the duration of registration for a risk level 1, thus avoiding the 30-year waiting period; and 3) a judge may be more amenable to a petition that "only" seeks to modify the risk level down to a level 1, rather than to a petition for outright release from registration.

Modification – Petition by Registrant

Subsection 2 of Correction Law § 168-o authorizes any person required to register or verify under SORA to petition for an order modifying his or her level of notification. Of course, as a practical matter, this only applies to people who have been classified as risk level 2 or 3. A person with a risk level 1 cannot modify below that level and cannot petition to get off early. *People v. Wyatt,* 89 A.D.3d 112 (2d Dept. 2011) and *Doe v. Cuomo,* 755 F.3d 105 (2d Cir. 2014). Note that there is no procedure for modifying a designation. Modification is limited to risk levels only. A person is stuck with his or her designation (and registration) for life.

- Eligibility
  - Any person required to register or verify pursuant to SORA who is a risk level 2 or 3
  - A person who was designated as a sexual predator, a sexually violent offender or a predicate sex offender is not precluded from eligibility for modification
  - Petition cannot be considered more than annually

- Burden on Petitioner
  - Bears the burden of proving the allegations of the petition
  - Standard – clear and convincing evidence
  - What needs to be proven? That the current (and future) risk of repeat offense and the threat to the public safety is less than previously determined (this is not in the statute but comes from case law)

- Contents of Petition
  - Statute requires only two specific allegations be included:
    i) the level of notification sought, and
    ii) the reasons for seeking such determination
  - Other suggestions for inclusion in the petition:
    i) allegations that explain why the risk of repeat offense and the threat to the public safety is less than previously determined
    ii) evidence of an extended period of crime-free time in the community, particularly since discharge from supervision

iii) describe what has changed in petitioner's life since his or her initial SORA classification
iv) describe stability in personal life
v) completion of sex offender treatment
vi) problems encountered because of higher level of notification
vii) attach documents that substantiate the "reasons"

- Sample Petition
  - See sample in this Appendix p. 33
  - Although no notice requirement is imposed on the petitioner by the statute since it is the court that sends out notice of the petition to the DA and the Board, better practice may be to provide such written notice. A sample notice of petition is included in the Appendix along with the sample petition. (Appendix p. 32).

- Other Statutory Provisions
  - If petition to modify is granted, the district attorney may appeal as of right from the order pursuant to CPLR articles 55, 56 and 57
  - If counsel has been assigned, that assignment shall be continued throughout the pendency of the appeal, and the person may appeal as a poor person pursuant to County Law article 18-B

Cases of Interest

- Petitioner has the burden of proof by clear and convincing evidence. *People v. Grossman,* 85 A.D.3d 1632 (4th Sept. 2011), *People v. Willis,* 130 A.D.3d 1470 (4th Dept. 2015).

- Upon the filing of a modification petition, the court must request an updated recommendation from the Board. But no new RAI is required. *People v. Williams,* 128 A.D.3d 788 (2d Dept. 2015).

- Procedures for modification reviewed. Modification granted from level 3 to level 2 but not to level 1. *People v. McClinton,* 153 A.D.3d 738 (2d Dept. 2017).

- Petitioner is entitled, as a matter of procedural due process, to pre-hearing discovery of the documents relied upon by the Board for its recommendation to the Court. *People v. Lashway,* 25 N.Y.3d 478 (2015).

Practice Tips

When drafting the modification petition you begin to think about what you will need to prove to meet the requirements for modification and what you need to allege. Because so much attention and reliance is placed on the SORA RAI and the standard for departure at the initial classification, there is a temptation to think about the modification petition as being dependent upon re-scoring the RAI, challenging the risk factors, or identifying mitigating factors that would qualify for departure. Avoid that temptation. Nothing in the modification statute correlates modification with the RAI or departure from the presumptive score on the initial RAI. It should be clear that the RAI is irrelevant to a modification. That is underscored by the fact that

when the Court advises the Board that there has been a petition for modification, the Board is not required to prepare another RAI, but instead simply makes an updated recommendation. *See, People v. Williams,* 128 A.D.3d 788 (2d Dept. 2015) holding that no new RAI is required to consider a petition for modification, as the RAI "was designed to assist the courts in reaching an initial SORA determination."

There is also a temptation to equate the concept of "departure" as used in the initial RAI scoring with reasons for modification. Nothing in the modification statute (Correction Law § 168-o) references departure. Undoubtedly some of the factors that might support a departure will indeed serve as the reasons for a modification, and the court decisions on factors for departure may be relied upon as legal support for those factors serving as reasons for modification. Although similar, they do not seem to be intended to be the same as a statutory construct. At least one court seems to use them interchangeably, but without much thought or analysis behind it. *See People v. McFarland,* 35 Misc. 3d 1243(A) (Sup. Ct. N.Y. Co., 2012) rev'd on appeal, *People v McFarland,* 120 A.D.3d 1121 (1st Dept. 2014). Judge Conviser used the term departure when granting a petition for downward modification. It would seem better practice for defense counsel to avoid the term "departure" in the context of a modification petition.

The Board has given a clear indication of what it is looking for in a modification petition. They have spelled it out in a public document that they had made available, apparently for *pro se* petitioners.[1] "The Board does not re-score the Risk Assessment Instrument when reviewing petitions for modification. Rather, we look at what has changed in the offender's life since his/her level was assigned." In that same document the Board goes on to explain that in the modification petition you "should provide evidence of an extended period of crime-free time in the community since your sex offense without external constraints of supervision, completion of sex offender treatment and stability in your personal life." Of course, these suggested factors warranting a modification are not exclusive. Your imagination should be your guide. In the section below entitled "Reasons for Modification", some of the factors that have been used to support a modification are addressed. A sample modification petition (Appendix p. 33) also lists a number of the factors that may be alleged as "reasons" for modification.

This does not mean that you should ignore the RAI that was used to initially score your client. If there are patent errors in the scoring of the initial RAI, this should be raised. For example, if a mathematical error went unnoticed and resulted in a presumptive risk level that was incorrect, that should be raised. Likewise, a legal error that resulted in incorrectly scoring a factor should be pointed out. However, do not rely upon these issues alone. They must be supplemented with the issues discussed in the paragraph above regarding life-changes.

When drafting the modification petition, you may wonder what is meant by the requirement that you must set forth "reasons for seeking such determination" as it is used in Correction Law § 168-o (2). Does it mean that you should describe what hardships petitioner has faced as a result of the SORA risk level, or does it mean that you should explain the changes that have occurred in petitioner's life since the initial classification that make his or her risk of

[1] This Board document was only in use for a short period of time and was withdrawn at the urging of the defense community as it solicited information from an unrepresented petitioner that was problematic. It is on file with the author.

repeat offense and the threat to public safety less than previously determined by the initial determination as the reasons for granting the modification? When thought about in that way it seems clear that it is the latter.[2] However, you still may want to include the former in the petition. It may help cultivate some empathy from the Judge, if not the Board, and may promote the argument that a modification can enhance public safety by facilitating successful reentry.

Burden of Proof

The burden of proof is on petitioners in modification proceedings and they must meet the "clear and convincing" evidence standard. That standard is set by statute [Correction Law §168 -o (2)] and approved by case law [*See People v. Willis,* 130 A.D.3d 1470 (4th Dept. 2015)]. Take note that this is a high standard. You will appreciate this high standard when you are attempting to defend against a risk factor score or an upward departure and you get to hold the district attorney to this standard. But when it is your burden, such as on a downward modification, it will seem quite exacting. In plain language, case law has equated the clear and convincing standard with proof that it is "highly probable" that what is alleged actually happened. *See, People v. Stewart,* 61 A.D.3d 1059 (3d Dept. 2009) and *People v. Warrior,* 57 A.D.3d 1471 (4th Dept. 2008).

Note that for a modification petition, whether upward or downward, the standard is "clear and convincing" while for departures at the initial SORA hearing it is different. For upward departures the district attorney is held to the "clear and convincing" standard, however for a downward departure the defendant's burden of proof is the less taxing standard of "preponderance of the evidence."

Doe v. Pataki – Redetermination Hearing

The difference in the standards raises one other important issue when investigating the possibility of petitioning for a modification. There are clients who will come to you seeking a modification. But keep in mind that there are still some people who were part of the *Doe v. Pataki*, 3 F. Supp. 2d 456 (S.D.N.Y. 1998) class, who may not have received notice from OCA of their right to a redetermination hearing, and who may therefore still be entitled to their redetermination hearing as a result of the stipulation in that class action lawsuit. In short, you would much prefer to proceed on a redetermination hearing than on a modification hearing. Make sure you get the right hearing and are litigating under the right burden of proof standard. At a redetermination hearing you will only have to make out your case for downward departure by a preponderance of the evidence. The DA will have to prove the presumptive risk factors by clear and convincing evidence, and will be held to that standard if they seek an upward departure. For an example of a redetermination hearing that could have been mistaken for a modification hearing *see People v. Wilbert,* 35 A.D.3d 1220 (4th Dept. 2006).

As a practical and strategic matter, all supporting statements, letters, and documents should be attached to the Petition to be part of the record. Since hearsay is admissible, you should consider submitting an affidavit from your client on any issues where you need his or her

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[2] The Board generated document makes it clear what they are looking for. "Simply disagreeing with your level, or indicating how your level has negatively impacted you (such as residency restrictions and employment barrier) are not sufficient reasons in and of themselves for a level reduction."

statement to establish certain facts. In that way you might avoid the need for your client to testify at the modification hearing and can avoid any cross-examination.

A modification petition can be filed annually, and could theoretically be filed a year after the initial classification hearing. Unless there are compelling reasons to petition to modify shortly after a year has passed, you may want to urge your client to be patient and allow a considerable amount of time to pass before filing. What is that considerable amount of time? Perhaps waiting five or ten years. Considering the factors of stability and extended time crime-free, the more time that you can wait the better. A review of case law leads to cases that tend towards the upper range of ten years or more. It is worth noting that there have been unreported cases in which modification has been granted after as little as three or five years. The period of time is very case-specific.

Although a modification petition can be filed annually, whether to repeatedly file is a strategic decision that should be thought through carefully. Repetitious modification petitions, that raise nothing new, may only serve to antagonize the judge. On the other hand, there may be very specific issues that you might address in a subsequent modification petition, such as newly developed factors, additional rehabilitation, or a factor that was not adequately documented at the previous hearing. Analyze the timing and issues raised carefully.

One more concern about multiple modification petitions. A warning is sounded in *People v. Cullen,* 79 A.D.3d 1677 (4th Dept. 2010). While addressing and rejecting an appeal of a modification petition that was denied, the court made passing reference to the fact that "many of the factors upon which defendant relies in support of his modification petition were previously considered by this Court in his prior appeal…." At some point repetition falls on deaf ears. On the other hand, one should not ignore the fact that courts have recognized the cumulative effect of rehabilitation. Courts have applied a "totality of the record" analysis to determine rehabilitation as a mitigating factor. *See, People v. Williams,* 148 A.D.3d 540, (1st Dept. 2017) and *People v. Madison,* 98 A.D.3d 573 (2d Dept. 2019). In light of that type of analysis, the cumulative effect of rehabilitation efforts over the course of years should not cause a court to be dismissive of factors previously raised during prior unsuccessful modification proceedings. That is the essence of "totality of the circumstances."

If the Board recommends against your petition for modification, do not despair. As with a Board recommendation at an initial classification hearing, a Board recommendation at a modification hearing is just that, a recommendation. The court ultimately determines whether or not to grant modification, and it is not bound by the Board's recommendation. *See, People v. Lashway*, 25, N.Y.3d 478 (2015) and *People v. McClinton,* 153 A.D.3d 738 (2d Dept. 2017).

While preparing to proceed with a modification petition you may want to consider consulting with a clinical psychologist or other mental health expert. This is particularly true if your client does not have a treating mental health professional or treatment provider that you can consult with. Your expert will be able to help you identify those factors that reduce your client's likelihood of recidivism that you can then develop in the petition and at the hearing. Your expert can also assess your client and provide an expert opinion as to whether your client is a lower risk to reoffend now than at the time of the initial SORA classification. For its persuasive value, the treating psychologist or counselor, who has known and worked with your cli-

ent over an extended period of time, may be an important resource.

If you are contacted by a client who has recently had an initial SORA hearing where there was some patent error and you are considering an appeal or a modification, first consider whether this is an appropriate case to go back and ask for reconsideration or reargument. The trial court has the inherent authority under SORA to reconsider and correct its prior determination, and the statutory authority under CPLR 2221. *People v. Wroten,* 286 A.D.2d 189 (4th Dept. 2001) lv denied 97 N.Y.2d 610 (2002). See page 24 for procedural issues regarding filing a notice of appeal.

Modification – Petition by District Attorney

Subsection 3 of Correction Law § 168-o authorizes the district attorney to file a petition to modify a risk level. Undoubtedly this will be a petition for upward modification. But more to the point, the statute only allows the DA to petition for modification under aggravating, not mitigating circumstances. Filing for modification is limited to the statutory circumstances, and filing is discretionary, not mandatory.

- Eligibility
  - The registrant has been convicted of a new crime, or there has been a determination after a hearing that there has been a violation of one or more conditions of a conditional discharge, probation, parole, or post-release supervision for a designated crime, and
  - The conduct underlying the new crime or the violation is of a nature that indicates an increased risk of a repeat sex offense.

- Burden on District Attorney
  - The district attorney bears the burden of proving the facts supporting the requested modification.
  - Standard – by clear and convincing evidence.
  - What must be proven? That there has been a new conviction or a violation of a condition of a conditional discharge, probation, parole, or post-release supervision for a designated offense and the conduct underlying the new crime or violation "is of a nature that indicates an increased risk of a repeat sex offense."

- Contents of Petition
  - Statute requires only two specific allegations
    - i) the level of notification sought
    - ii) the reasons for seeking such determination

- Other Statutory Provisions
  - If the district attorney's petition is granted, the registrant may appeal as of right from the order, pursuant to the provisions of CPLR articles 55, 56 and 57.
  - If counsel has been assigned, that assignment shall be continued through

out the pendency of the appeal, and the person may proceed as a poor person, pursuant to County Law article 19-B.

Cases of Interest

● Defendant who was previously convicted and classified at a SORA hearing and then convicted of a new registerable offense is subject to new classification hearing without the need for the prosecution to file a modification petition. *People v. Iverson,* 90 A.D.3d 1561 (4th Dept. 2011).

● If a defendant was sentenced to probation and was classified as a level 1, and then violated probation and was imprisoned, upon his release the court cannot reclassify him. The DA must petition for modification. *People v. Damato,* 58 A.D.3d 819 (2d Dept. 2009).

● Modification must be by petition not motion. *People v. Damato, 58 A.D.3d 819* (2d Dept. 2009).

● Court must hold hearing on modification petition. *People v. Damato,* 58 A.D.3d 819 (2d Dept. 2009).

● Court must forward a copy of the petition to the Board and seek its recommendation. *People v. Damato,* 58 A.D.3d 819 (2d Dept. 2009).

Procedures for Downward Modification: From Filing to Hearing

Subsection 4 of Correction Law § 168-o sets forth the procedures for a modification proceeding.

□ The petition is made to the sentencing court or the court which made the determination regarding the level of notification.

□ Upon receipt of a petition, the court shall forward a copy of the petition to the Board and request an updated recommendation and shall provide a copy of the petition to the other party.

□ The court shall advise the petitioner of the right to be represented by counsel at the hearing and counsel will be appointed if he or she is financially unable to retain counsel.

□ After the court receives an updated recommendation from the Board, the court shall, at least thirty days prior to ruling upon the petition, provide a copy of the update recommendation to the petitioner, petitioner's counsel and the district attorney, and notify them, in writing, of the date set by the court for the hearing.

□ The court must actually hold a hearing. *People v. Damato,* 58 A.D.3d 819 (2d Dept. 2009).

□ After reviewing the recommendation from the Board and any relevant materials and evidence submitted by the petitioner and the district attorney, the court may grant or deny the petition.

□ The court shall render an order setting forth its determination, and the findings of fact and conclusions of law on which the determination is based.

□ If the petition is granted, it shall be the obligation of the court to submit a copy of its order to the division (DCJS).

□ Upon application of either party, the court shall seal any portion of the court file or record which contains material that is confidential under any state or federal statute.

Commencement of a Modification Proceeding

A modification proceeding is commenced by the filing of a petition with the sentencing court or the court which made the determination regarding the level of notification.

For the petitioner who has counsel from the inception, whether retained or assigned, the procedure is quite straightforward. Counsel will prepare a petition that meets the statutory requirements and will ensure that all of the appropriate supporting documents are attached. No petition format is prescribed by Correction Law § 168-o, other than to require that the petition set forth the level of notification sought, together with the reasons for seeking such determination. Experienced counsel will recognize the danger of an overly simplified petition, lacking in detail, elaboration and supporting documents. Such a scant petition will invite the board to make short shrift of its review of the petition, and be unpersuaded to recommend in favor of modification.

Assignment of Counsel

There is greater concern for the indigent petitioner who is initially without counsel. The manifest question is how can the indigent person obtain assignment of counsel and receive assistance preparing the modification petition? The statute is impracticable and disadvantages the person who is initially forced to proceed *pro se*. Correction Law § 168-o (4) seemingly fails to provide for assignment of counsel to assist in preparing of the modification petition. Instead, the statute assumes that *pro se* litigants will have the wherewithal to file their own petition with the court and that they will somehow conjure up the correct language to meet the statutory requirements. Pursuant to Correction Law § 168-o (4), upon the court's receipt of the *pro se* petition, it must forward a copy of the petition to the board and request its updated recommendation. The Board then reviews this uncounseled, and perhaps inartfully prepared, and inadequately documented *pro se* petition in order to make its recommendation. Clearly this is not the optimum circumstance for the petitioner, and not conducive to positive recommendations.

The timing of the court's next step is troublesome and statutorily vague. According to the statute, upon receipt of the petition the court forwards a copy of the petition to the Board and "shall also advise" the petitioner "that he or she has the right to be represented by counsel at the hearing and counsel will be appointed if he or she is financially unable to retain counsel." The statute leaves it unclear whether the court's assignment of counsel can precede the time when it forwards a copy of the petition to the Board, whether it can be contemporaneous, or whether it is done afterward.

This gives rise to several practical questions. Can assigned counsel amend the *pro se* pe-

tition? Can assigned counsel amend the petition in timely fashion in order to get it to the Board for its consideration and review before it makes a recommendation based on the *pro se* petition? Should the court advise the Board to forbear from making its recommendation until it has received an amended petition prepared by counsel? Should the court refrain from forwarding a copy of the *pro se* petition until assigned counsel has had a chance to review and amend it? The statute answers none of these questions.

What is particularly vexing about the statute is that it will result in the Board reviewing uncounseled and at times ill-prepared petitions. Without the benefit of counsel's knowledge and experience, the Board's recommendation may be based on its review of weak, overly simplistic, incomplete or poorly articulated reasons set forth by the unwitting *pro se* applicant. However, with counsel, additionally compelling and well-documented reasons might be added to the petition that strongly weigh in favor of modification.

The consequence of this problematic procedure is that without a "counseled" petition, the modification petitioner may miss the opportunity to convince the Board that it should recommend in favor of granting the modification requested. Instead, the court will give weight to a negative board recommendation based on considerably fewer and less persuasive reasons than are actually presented to the court by counsel.[3]

Practice Tips

There are several solutions. In some counties, including Onondaga, the assigned counsel program or public defender office has established a procedure for intake and assignment of counsel to clients seeking to apply for modification. In that way assigned counsel are made available to help draft the original modification petition. It may behoove a program seeking to proceed in this manner to coordinate their efforts with the administrative judge.

An alternative is to draft a form letter readily available to *pro se* petitioners in which they very specifically ask the court to assign counsel and refrain from sending the letter to the Board until counsel has been assigned and had the opportunity to file the petition. A sample letter is included in the Appendix at p. 41.

Reasons for Downward Modification: Case Law

Correction Law § 168-o (2) requires that a petitioner in a modification proceeding must set forth "the reasons for seeking such determination." In the sample modification petition, and in the list below are a number of the reasons that have been used in petitions that have successfully sought modification. A checklist of reasons in included in the appendix. The list is not exclusive. *People v. Barber,* 27 Misc. 3d 1234 (Sup. Ct. Westchester Co., 2010) is a good case to look at to get an idea of the wide range of factors that can be alleged to support a successful modification petition.

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[3] For counsel who find themselves in this position, you might do well to argue to the court that had the Board had the benefit of all of the reasons and documentation that counsel has been able to assemble for the court, the recommendation would undoubtedly be different and for that reason the court should ignore the Board's recommendation.

Keep in mind that the reasons you allege in the modification petition need to address certain requirements. As stated previously, the Board has helped to elucidate what factors will help support a modification determination. In a document released by the Board specifically addressing modification petitions the Board explained what it was looking for. "[W]e look at what has changed in the offender's life since his/her level was assigned." The Board went on to further explain what they considered to be some of the critical factors and that they did not rescore the RAI. "[Y]ou should provide evidence of an extended period of crime-free time in the community since your sex offense without external constraints of supervision, completion of sex offender treatment and stability in your personal life." [4] In practical terms you are seeking to establish by clear and convincing evidence that there now exist factors such that petitioner's "risk of repeat offense and the threat posed to the public safety" is less than previously determined. The statue does not set forth how much of a decrease in risk caused by various factors and circumstances must be demonstrated by the petitioner in order to prevail.

Here are some suggested factors that have resulted in successful petitions or appeals.

- Considerable time crime-free while in the community and in particular crime-free while no longer under supervision [*People v. Witchley,* 9 Misc. 3d 556 (County Ct. Madison Co. 2005) and *People v. Taylor,* 27 Misc. 3d 1201(A) (Sup. Ct. Westchester Co. 2010)]

- Evidence of rehabilitation and an upstanding lifestyle (*People v. Abdullah,* 31 A.D.3d 515 (2d Dept. 2006)

- Compliance with all of the terms of community supervision (*People v. Barber,* 27 Misc. 3d 1234(A) (Sup. Ct. Westchester Co. 2010)

- Engagement in treatment for sexually offending and successful completion while in the community (*People v. Barber,* 27 Misc. 3d 1234(A) (Sup. Ct. Westchester Co. 2010) and *People v. Rodriguez,* 33 Misc. 3d 1236(A) (Sup. Ct. Kings Co. 2011)

- Living with an intimate partner for a period of two or more years (*See*, Static-99R Coding Rules, Revised-2016, "On the whole, we know that the relative risk to sexually reoffend is lower in men who have been able to form and maintain intimate partnerships.")

- Current age, such that the risk of recidivism is diminished (Guidelines at 5 and *People v. Santiago,* 137 A.D.3d 762 (2d Dept. 2016)

- Significant stabilizing factors in petitioner's life, including family, employment, education and pro-social activities

- A physical disability or impairment that reduces the risk of reoffending [*People v. Stevens,* 55 A.D.3d 892 (2d Dept. 2008); *People v. Barber,* 27 Misc. 3d 1234(A) (Sup. Ct. Westchester Co. 2010)]

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[4] This Board document is on file with the author.

• Recent assessment by a clinical psychologist who has concluded that there is a low risk of reoffending. [*See,* Correction Law § 168-l (5)(d)]. (*People v. Shiley,* 54 Misc. 3d 1220 (County Ct. Monroe Co. 2016)

• Reconciliation and or counseling with the victim (Unreported case on file with author) (This factor should be used with great care so as not to violate any order of protection)

• Mathematical or patent scoring errors on the initial RAI (*People v. Whalen,* 22 A.D.3d 900 (3d Dept. 2005) – SORA court erroneously added 30+20+20+10 to get 100)

• Participation in drug or alcohol counseling since release from prison and/or extended period of being drug or alcohol free (*People v. Galligan,* 35 A.D.3d 691 (2d Dept. 2006)

• Other protective factors that were not considered at the time of the initial RAI or that have developed since the initial risk classification

The significance of most of these reasons is self-evident. Nonetheless it is worth reviewing some of the more common reasons so that they can more fully be addressed in a memorandum of law or at oral argument at the time of the hearing.

Time Offense-Free

It is well-established in both case law and research that time offense-free while in the community and not under supervision is the greatest single factor in making an accurate of assessment of the risk of reoffending sexually. It will serve as your most frequent and solid basis to apply to modify a risk level downward. As noted in *People v. Witchley,* 9 Misc. 3d 556, 558 (County Ct. Madison Co. 2005), "just as the old adage the proof of the puddling is in the tasting is true, the best indicator of a sex offender's likelihood of reoffending is his actual postrelease history." The longer people convicted of sex offenses have been free of detected sexual offending since their release to the community from their current sex offense, the lower their risk of recidivism. A remarkable finding from a highly regarded study bears repeating (over and over again): "Our research has found that, in general, for every five years the offender is in the community without a new sex offence, their risk for recidivism roughly halves." *See Static-99R Coding Rules, Revised – 2016* citing Hanson, R.K., Harris, A.J.R., Helmus, L., & Thornton, D., *High Risk Sex Offenders May Not Be High Risk Forever,* 29 Journal of Interpersonal Violence 2792-2813 (2014).

Modification or Redetermination Granted Based on Time Offense-Free

• *People v. Witchley,* 9 Misc. 3d 556, 558 (County Ct. Madison Co. 2005) (6 years without reoffending since release from prison).

• *People v. Santos,* 25 Misc. 3d 1212(a) (Sup. Ct. NY Co. 2009) (14 years offense-free).

• *People v. Sotomayer,* 143 A.D.3d 686 (2d Dept. 2016) (15 years offense-free).

• *People v. Taylor,* 27 Misc. 3d 1201(A) (Sup. Ct. Westchester Co. 2010 (13 years on parole and 2 more after parole without incident,) (citing to *People v. Buss,* 11 N.Y.3d 553, 557 (2008).

("Common sense and experience dictate that a defendant's conduct while on parole is a reliable predictor of the risk he poses to society.")

Modification or Redetermination Denied

• *People v. Mercado,* 117 A.D.3d 1367 (3d Dept. 2014). (Approximately 2 years in the community while under parole supervision was not enough to show reduced risk of recidivism for a downward modification because positive adjustment may be due to the external controls on his behavior, despite having completed treatment for sexually offending, stable residence, stable employment, establishing an adult relationship, complying with parole conditions and a recent clinical assessment finding his "risk of recidivism is remote").

• *People v. McFarland,* 120 A.D.3d 1121 (1st Dept. 2014) (17 months crime-free was not enough to modify from a level 3 to a level 2 even with other factors including sobriety, 76 years of age, relationship with wife, participation in treatment for sexually offending, and psychologist evaluation of moderate risk).

• *People v. McGrigg,* 67 A.D.3d 1426 (4th Dept. 2009) (A remarkably unfavorable case holding that 10 years offense-free was not enough to warrant a redetermination down from a level 2 to a level 1).

Research and Literature

When writing a memorandum of law in support of your modification, in addition to citing to case law, you should consider including references and citations to research and scholarly articles on recidivism, and the factors that the leading scholars in the field have identified that reduce recidivism rates. On the factor of "time offense-free" here are a few articles to start with.

Literature

• Hanson, R.K., Harris, A.J.R., Helmus, L., & Thornton, D., *High Risk Sex Offenders May Not Be High Risk Forever,* 29 Journal of Interpersonal Violence 2792-2813 (2014).

• Phenix, A., Fernandez, Y., Harris, A.J.R., Helmus, M., Hanson, R.I., & Thornton, D., *Static-99R Coding Rules Revised – 2016.*

• Blumstein, A. & Nakamura, K., *"Redemption" in an Era of Widespread Criminal Background Checks,* 263 NIJ Journal 1-17 (June 2009).

• Kurlychek, M.C., Brame, R., Bushway, S.D., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?* 5 (3) Criminology & Public Policy 483-504 (August 2006).

Practice Tips

There are several lessons to be drawn from both the modification cases that have been granted and those that have been denied. First, to succeed on a modification petition based primarily on time offense-free it needs to be a significant amount of time. As a practical matter, and based upon experience, and from both reported and unreported cases, a reasonable rule of thumb would seem to be 10 years or more, and in the exceptional case with very strong additional circumstances, perhaps dipping as low as 6 years. There is no hard-and-fast rule, and as

a practical matter, the strength of other factors may support moving ahead with a modification petition where the time offense-free is under 6 years. Second, case law suggests that even with very strong additional factors, a relatively short amount of time crime-free, particularly when still on supervision, is not likely to make for a successful modification. Finally, from *People v. McFarland,* 125 A.D.3d 1121 (1st Dept. 2014), we learn that age and marriage, both factors that make recidivism less likely, are less persuasive when the sex offense was committed at a time when your client was already at an age when sex offending should be reduced (68 years old) and was also married at the time of the offense. The take away is that you should carefully analyze your circumstances and not simply use "reasons" in a rote manner.

Recidivism Decreases with Advanced Age

Aging is a corollary to the previous discussion of "time offense-free." Time works in your favor for both. Just as more time offense-free reduces the risk of reoffending, the same can be said for aging.

Research on recidivism clearly shows that advanced age puts a person at a very low risk to reoffend. Studies have consistently found that recidivism declines with age. For people with a past sex offense conviction, the impact of aging on recidivism is not strictly linear, but is instead curvilinear. This means that rates of recidivism actually increase for those aged 25 to 40 years old, but then start to decline at age 40. After age 60, recidivism rates decline dramatically. Hanson, R.K., *Does Static-99 Predict Recidivism Among Older Sex Offenders?,* 18 Sexual Abuse 343 (2006).

The Board's Guidelines recognize that advanced age reduces the risk of reoffending and is for that reason a basis to depart downward. *See* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, (2006), at 5. (Hereinafter, Guidelines). The authorizing statute for the Board [Correction Law § 168-l (5)] confirms that such conditions as "advanced age or debilitating illness" are mitigating factors that are considered to minimize risk of reoffense.

Advanced age (78 years old) was recognized as a reason for a downward modification in *People v. McFarland,* 35 Misc. 3d 1243(A) (Sup. Ct. N.Y. Co. 2012), On appeal the Appellate Division rejected this reason, although not taking issue with the actuarial and research evidence about aging and recidivism. Instead, the Appellate Division reject advanced age as a reason for downward modification because petitioner's offense had occurred at the advanced age of 68. *People v. McFarland,* 120 A.D.3d 1121 (1st Dept. 2014). The appellate court's decision in *McFarland* should not be considered a rejection of aging as a basis for downward modification, but as limited to very case specific circumstances. Aging was recognized as a potential mitigating factor in *People v. Santiago*, 137 A.D. 3d 762, 765 (2d Dept. 2016).

Practice Tips

Modification for all of your clients is important, but for many registrants of advancing years in need of supportive housing and medical supports, it is critical. Yet accessing such support is extremely difficult for seniors who are on the registry, and more particularly on the registry as a life-time registrant. They are often barred from supportive living options. For seniors, housing is often a prerequisite for much needed medical care, and therefore critical to the health and stability needed to ensure that a person does not reoffend. *See* McNeal, M.K. &

Warth, P., *Barred Forever: Seniors, Housing, and Sex Offense Registration,* 22 Kansas Journal of Law & Public Policy 317 (2013).

Be mindful of the fact that it may not be sufficient to simply allege in the modification petition that the applicant's advancing age results in a reduced risk of recidivism. Based upon the decision in *People v. Santiago,* 137 A.D.3d 762, 765 (2d Dept. 2016) it might be necessary to not only cite to the supporting research and literature in a memorandum of law submitted to the modification court, but to also have the research and data admitted into evidence.

As noted above, you should consider citing in a memorandum of law to the overwhelmingly favorable literature that establishes that the risk of recidivism decreases with the advance of age beyond 40 years old. A word of caution. This argument for a client who was 20 years old at the time of offense and who is now 35, will find little support in the research regarding a reduced risk of recidivism based upon age. Here are some articles to get your research started:

Literature

- McNeal, M.K. & Warth, P., *Barred Forever: Seniors, Housing, and Sex Offense Registration,* 22 Kansas Journal of Law & Public Policy 317, 346-347 (2013).

- Hanson, R.K., *Does Static-99 Predict Recidivism Among Older Sex Offenders?,* 18 Sexual Abuse 343 (2006).

Treatment for Sexually Offending Reduces Likelihood of Reoffense

The well-accepted myth is that treatment for people who have committed sex offenses does not work. The research, however, belies this conventional belief and demonstrates that treatment can be quite effective at reducing a person's likelihood of reoffending. Concededly there is still an open debate among researcher as to the extent of the efficacy of treatment and the extent to which it is effective for all individuals. The myth "that treatment doesn't work" has it roots in the last century when treatment was in its early stages, and lacked a strong research foundation. Fortunately, over the past two decades, advances in research have led to increased success with treatment.

Two studies are often cited regarding the effectiveness of treatment for people who have sexually offended. The 2002 Hanson study and the 2005 Losel and Schmucker study, both meta-analysis, are cited below in the literature heading. Hanson's team found a reduction in recidivism rates from 17.3% for people who did not complete treatment to 9.9% for those who did. Similarly, Losel and Schmucker found a 37% decrease in recidivism rates for those who obtained treatment for sexually offending.

The Board, in its own Guidelines, recognizes that treatment may reduce a person's risk of reoffense, establishing it as a basis for downward departure where the response to treatment is exceptional. Guidelines at 17.

Several courts have recognized that treatment can serve as a basis for a downward departure on the initial risk assessment. And in *People v. Barber,* 27 Misc. 3d 1234(A) (Sup. Ct.

Westchester Co. 2010,) compliance with the terms of probation and mandated treatment programming "presents a compelling change in circumstances indicative of a diminished risk of repeat offense, as well as a diminished threat to the public safety" so as to warrant a downward modification.

Cases

- *People v. Barber,* 27 Misc. 3d 1234(A) (Sup. Ct. Westchester Co. 2010)
- *People v. Shiley, 54 Misc. 3d 1220(A)* (County Ct. Monroe Co. 2016)
- *People v. Lewis,* 140 A.D.3d 1697 (4th Dept. 2016)
- *People v. Migliaccio,* 90 A.D.3d 879 (4th Dept. 2011)

Literature

- Hanson, R.K., Gordon, A., Helmus, L. & Hodgson, S., *A Meta-Analysis of the Effectiveness of Treatment for Sex Offenders: Risk, Need, and Responsivity,* Public Safety Canada (2009).
- Hanson, R.K., Gordon, A., Harris, A.J.R., Mareques, J.K., Murphy, W., Quinsey, V.L., & Seto, M.C., *First Report of the Collaborative Outcome Data Report on the Effectiveness of Psychological Treatment for Sex Offenders,* 14(2) Sex Abuse: A Journal of Research and Treatment (2002).
- Losel, F. & Schmucker, M., *The Effectiveness of Treatment for Sex Offenders: A Comprehensive Meta-Analysis,* 1 Journal of Experimental Criminology 117-146 (2005).
- Przybylski, R., *The Effectiveness of Treatment for Adult Sexual Offenders,* Sex Offender Management Assessment and Planning Initiative Research Brief, U.S. Department of Justice (July 2015).

Documents to Include With Petition

For a number of reasons you will want to attach additional documents to your petition as exhibits. Because petitioner has the burden of proof it is not enough simply to make the allegation of "reasons" in the petition. You should submit evidence that establishes the "reasons" by clear and convincing evidence. Generally, do not hold back any of your proof, waiting for the hearing. Submit it all. Remember, the original modification petition will be sent by the judge to the Board for its recommendation, as required by statute. A supportive recommendation from the Board, which certainly does happen on occasion, may be enough to get the district attorney to consent, and even if not, it will go a long way to convincing the judge that your petition should be granted. Below are some suggested documents that you might want to consider attaching as exhibits:

- Updated psychological evaluation and risk assessment
- Affidavit from petitioner
- Letters of recommendation and commendation

- Certificate of Relief from Disabilities or Good Conduct

- DCJS criminal history record to show time offense-free (Instructions for obtaining DCJS records are found at http://www.criminaljustice.ny.gov/ojis/recordreview.htm)

- Discharge from parole or probation or if early discharge, even better

- Employment records

- Educational records

- Treatment records and successful discharge summary from programs for sexually offending

- Alcohol and drug treatment records and discharge summary

- Letters from family members establishing stability in family life

- Medical records – if they support reduced risk to reoffend

Practice Tips

There will be occasions when you do not get into the case until after your client's *pro se* petition has been filed and sent by the Judge to the Board. After reviewing the original petition and thoroughly interviewing your client, if you determine that there are either additional factors that need to be raised, or additional supporting documents that should have been attached to the petition, act quickly. You may want to immediately amend the petition and attach additional supporting documents and file it, so as to get this in front of the Board for its consideration before it makes a recommendation. If you delay, it may be difficult to get the Judge or the Board to agree to a re-recommendation, once the Board has sent its recommendation to the Judge.

Generally, resist the temptation to put witnesses on the stand to testify at the hearing. Bad things can happen when they get cross-examined (or even on direct). Remember, hearsay is admissible at this hearing and your documents, if reliable, and uncontradicted, can meet your burden of proof. On the other hand, there are times when you should carefully consider putting a witness on the stand, particularly one who is empathy-evoking and poses little risk under cross-examination.

Discovery

Although in a particular modification case discovery may be significant, in general it is less likely to be as important as in the initial determination hearing. The reason is simple. When a registrant petitions for downward modification it is the petitioner who bears the burden of proof. The district attorney and the Board will usually not rely upon evidence extrinsic to the petition and its supporting exhibits. The argument will boil down to a question of whether petitioner's evidence is sufficient, and not whether there is countervailing evidence. In general, the Board will only review and rely on the Petition and the attached documents. In contrast, at the initial classification hearing the burden is on the Board and the District Attorney to establish

each of the 15 risk factors as well as an upward departure by clear and convincing evidence. In such a case the registrant needs discovery to determine what is the evidentiary basis for scoring a risk factor or an upward departure. It is likely this distinction that led the legislature to treat discovery differently in the case of an initial risk level determination than in a modification proceeding.

As the Court of Appeals has pointed out, there is significant difference between the two proceedings and the discovery rights under each. *People v. Lashway,* 25 N.Y.3d 478 (2015). In an initial risk level determination the registrant is entitled to prehearing discovery by statute [Correction Law § 168-n (3)] from both the Board and the district attorney. In contrast, Correction Law § 168-o contains no language entitling the modification petitioner seeking to prehearing discovery.

Despite the statutory difference, you may still come across the unusual modification case in which the Board relies on extrinsic evidence. In such a case you will want to discover that evidence. And the Court of Appeals agrees that you should be able to do so. "While there are statutory difference in the two proceedings, we agree with defendant that the procedural due process rights, in regard to the requested documents, were the same. Thus, defendant was entitled to access to the documents." *People v. Lashway* at 484. Likewise, the district attorney must disclose to petitioner the documents submitted for the court's reliance for a determination. *People v. McClinton,* 153 A.D.3d 738 (2d Dept. 2017).

Practice Tips

If you learn in advance of the hearing that the district attorney intends to oppose your request for modification, you should serve a demand to produce requesting any documents that she intends to submit to the judge at the modification hearing. A sample Demand is included in the appendix.

If the Board recommends denying your modification petition and its recommendation relies upon evidence other than that which is in your petition, you should obtain copies of those documents. The Board apparently takes the position that they will not voluntarily release such documents, even if the request from Petitioner's attorney includes a release executed by petitioner. Their position is that there is no provision for discovery in a modification proceeding, despite previous court rulings that make such disclosure a due process requirement. If you seek disclosure from the Board you will need to proceed by judicial subpoena duces tecum. See the appendix for a sample judicial subpoena. A reminder that because you are seeking documents from a department of the state, you will need to follow the procedures in CPLR 2307. Pursuant to that section you will need to proceed by motion to request the court issue the subpoena, with at least one day's notice to the Board and to the district attorney.

Do not hesitate to ask for an adjournment to obtain this discovery in advance of the hearing. Support for this adjournment can be found in the Court of Appeals decision in *People v. David W.,* 95 N.Y.2d 130 (2000). In *David W.* the registrant had not received the materials that would be relied upon for the determination, causing the court to caution that "[t]he need for expediency cannot overshadow the fact that a critical decision was being made about defendant…" at 139.

Appeals and Reconsideration

The SORA modification statute confers an appeal "as of right" in two specific instances. Correction Law § 168-o (2) provides that the district attorney may appeal as of right in the event that the petition to modify the level of notification downward is granted, and that the registrant may appeal as of right in the event that the district attorney's petition to modify the level of notification upward is granted. Note that these are civil appeals, subject to the CPLR regarding order, notice of entry, notice of appeal and time to file. The procedures for taking an appeal are addressed by CPLR 5515 and the time to take the appeal is addressed by CPLR 5513. An appeal as of right is taken by filing a notice of appeal.

For the registrants whose modification petitions are denied, that leaves an obvious question. How do they take an appeal? The answer is not altogether clear. One possibility is to interpret Correction Law §168-o (2) to imply that since they were not explicitly granted an appeal as of right, they must appeal by motion for permission to appeal pursuant to CPLR 5701 (c). Notwithstanding that interpretation, the Appellate Divisions have consistently heard these appeals when initiated by a notice of appeal. Apparently, they consider these cases to be appeals as of right under CPLR 5701 (a).

In *People v. Willis,* 130 A.D.3d 1470 (4th Dept. 2015), a case that involved an appeal of a denial of a SORA downward modification petition, the Court relied upon the CPLR, without reference to Correction Law §168-o (2), to conclude that an appeal may be taken to the appellate division from such denial as of right. It would seem reasonable to conclude that *Willis* stands for the proposition that when it comes to an appeal as of right, unless specifically excluded, the authority for an appeal as of right is controlled by the CPLR and not by an implied exclusion in Correction Law §168-o.

For a number of practical reasons, until the Appellate Divisions determine that there is no appeal as of right and that the only way to take an appeal of a denial of a petition for a downward modification is to move for permission to appeal, defense counsel should proceed by notice of appeal.

To appeal, an order must be entered. *People v. Joslyn,* 27 A.D.3d 1033 (3d Dept. 2006). If the court does not issue an order your appeal will be stalled. You will need to bring a proceeding to force the court to issue an order. With an appeal as of right, the notice of appeal must be filed and served within 30 days after service by a party upon the appellant of a copy of the order and written notice of its entry. In some instances a district attorney's office is delinquent in serving the order and notice of entry, being unfamiliar with civil practice, consequently extending the time to file a notice of appeal. With an appeal by permission, the motion for permission to appeal must be made within 30 days of service of notice of entry [CPLR 5513 (b)].

A motion, formal or informal, for reconsideration, may help avoid an appeal or a petition for modification. There may be instances when a court has made a patent error either in the initial risk determination hearing or in the determination of a modification proceeding. Since several courts have concluded that a SORA court has the inherent authority to correct an erroneous determination, this may afford you the necessary recourse. *People v. Wroten,* 286 A.D.2d 189 (4th Dept. 2001); *People v, Harris,* 178 Misc. 2d 858 (Crim. Ct. City of NY, Queens Co. 1998). An example of a patent mathematical error is found in *People v. Whalen,* 22 A.D.3d 900

(3rd Dept. 2005) where the county court judge added 20, 30, 20 and 10 points for four risk factors only to come up with an erroneous total of 100 points. This was only discovered on appeal and could have been corrected more easily by reconsideration.

Practice Tips

If you run across a judge who fails to see the merits of your modification petition, think carefully as to whether you want to move ahead with an appeal. Unlike the appeal of a criminal trial or the appeal of an initial SORA determination, where you only have one bite at the apple, and an appeal is your only recourse, you do have multiple bites at the modification apple. Depending on what the basis was for the denial of your modification petition, you may realize that you might be better off waiting a year and filing another modification petition. Perhaps you now realize that you should have made a better record. Perhaps in a year your client will be able to satisfy some of the judge's concerns. In light of the amount of time and resources that go into an appeal, another try at a petition to modify may be the better way to go.

In addition, if there is a patent error in the initial SORA determination, consider a motion for reconsideration relying on *People v. Wroten,* 286 A.D.2d 189 (4th Dept. 2001) rather than proceeding by a petition for modification or by appeal.

One parting thought. Always check the math from an RAI total risk score. Math is not necessarily a judicial or attorney strong suit. *See, People v. Whalen,* 22 A.D.3d 900 (3rd Dept. 2005).

APPENDIX

Correction Law § 168-o.
Petition for relief or modification

1. Any sex offender who is classified as a level two risk, and who has not been designated a sexual predator, or a sexually violent offender, or a predicate sex offender, who is required to register or verify pursuant to this article and who has been registered for a minimum period of thirty years may be relieved of any further duty to register upon the granting of a petition for relief by the sentencing court or by the court which made the determination regarding duration of registration and level of notification. The sex offender shall bear the burden of proving by clear and convincing evidence that his or her risk of repeat offense and threat to public safety is such that registration or verification is no longer necessary. Such petition, if granted, shall not relieve the petitioner of the duty to register pursuant to this article upon conviction of any offense requiring registration in the future. Such a petition shall not be considered more than once every two years. In the event that the sex offender's petition for relief is granted, the district attorney may appeal as of right from the order pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules. Where counsel has been assigned to represent the sex offender upon the ground that the sex offender is financially unable to retain counsel, that assignment shall be continued throughout the pendency of the appeal, and the person may appeal as a poor person pursuant to article eighteen-B of the county law.

2. Any sex offender required to register or verify pursuant to this article may petition the sentencing court or the court which made the determination regarding the level of notification for an order modifying the level of notification. The petition shall set forth the level of notification sought, together with the reasons for seeking such determination. The sex offender shall bear the burden of proving the facts supporting the requested modification by clear and convincing evidence. Such a petition shall not be considered more than annually. In the event that the sex offender's petition to modify the level of notification is granted, the district attorney may appeal as of right from the order pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules. Where counsel has been assigned to represent the sex offender upon the ground that the sex offender is financially unable to retain counsel, that assignment shall be continued throughout the pendency of the appeal, and the person may appeal as a poor person pursuant to article eighteen-B of the county law.

3. The district attorney may file a petition to modify the level of notification for a sex offender with the sentencing court or with the court which made the determi-

nation regarding the level of notification, where the sex offender (a) has been convicted of a new crime, or there has been a determination after a proceeding pursuant to section 410.70 of the criminal procedure law or section two hundred fifty-nine-i of the executive law that the sex offender has violated one or more conditions imposed as part of a sentence of a conditional discharge, probation, parole or post-release supervision for a designated crime, and (b) the conduct underlying the new crime or the violation is of a nature that indicates an increased risk of a repeat sex offense. The petition shall set forth the level of notification sought, together with the reasons for seeking such determination. The district attorney shall bear the burden of proving the facts supporting the requested modification, by clear and convincing evidence. In the event that the district attorney's petition is granted, the sex offender may appeal as of right from the order, pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules. Where counsel has been assigned to represent the offender upon the ground that he or she is financially unable to retain counsel, that assignment shall be continued throughout the pendency of the appeal, and the person may proceed as a poor person, pursuant to article eighteen-B of the county law.

4. Upon receipt of a petition submitted pursuant to subdivision one, two or three of this section, the court shall forward a copy of the petition to the board and request an updated recommendation pertaining to the sex offender and shall provide a copy of the petition to the other party. The court shall also advise the sex offender that he or she has the right to be represented by counsel at the hearing and counsel will be appointed if he or she is financially unable to retain counsel. A returnable form shall be enclosed in the court's notice to the sex offender on which the sex offender may apply for 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 offender, pursuant to article eighteen-B of the county law. Where the petition was filed by a district attorney, at least thirty days prior to making an updated recommendation the board shall notify the sex offender and his or her counsel that the offender's case is under review and he or she is permitted to submit to the board any information relevant to the review. The board's updated recommendation on the sex offender shall be confidential and shall not be available for public inspection. After receiving an updated recommendation from the board concerning a sex offender, the court shall, at least thirty days prior to ruling upon the petition, provide a copy of the updated recommendation to the sex offender, the sex offender's counsel and the district attorney and notify them, in writing, of the date set by the court for a hearing on the petition. After reviewing the recommendation received from the board and any relevant materials and evidence submitted by the sex offender and the district attorney, the court may grant or deny the petition. The court may also

consult with the victim prior to making a determination on the petition. The court shall render an order setting forth its determination, and the findings of fact and conclusions of law on which the determination is based. If the petition is granted, it shall be the obligation of the court to submit a copy of its order to the division. Upon application of either party, the court shall seal any portion of the court file or record which contains material that is confidential under any state or federal statute.

CHECKLIST:
Preparing for a SORA Hearing

- □ Interview client and begin to identify reasons for petition
- □ Explain to client what can and cannot be accomplished by modification
- □ Review "reasons" checklist
- □ Review client's DCJS criminal history record
- □ Collect and review all prior SORA determination documents
- □ Determine client's current risk level and what level she seeks
- □ Determine if client previously designated, override or departure
- □ Check to make sure no previous petition filed in past year
- □ Check to make sure it is a modification case and not a Doe v. Pataki redetermination
- □ Determine amount of time client has offense-free in community – Does it meet minimum threshold?
- □ Consult with clinical psychologist to identify protective and mitigating factors
- □ Consider a new risk assessment
- □ Collect all documents that will help prove "reasons"
- □ Prepare client affidavit to support petition
- □ File notice of petition, petition and exhibits with the sentencing or SORA court
- □ Upon receipt of Board recommendation, carefully review
- □ If Board opposes petition, determine if discovery is needed
- □ Serve judicial subpoena on the Board
- □ If district attorney opposes petition serve demand for disclosure
- □ Review disclosure from Board and district attorney
- □ Prepare, serve and file a memorandum of law in support of petition
- □ Prepare for SORA hearing

CHECKLIST:
Reasons For Modifications

- □ Significant time offense-free in the community without supervision
- □ Evidence of rehabilitation and upstanding lifestyle
- □ Compliance with all of the terms of community supervision
- □ Engagement in treatment for sexually offending and successful completion while in the community
- □ Living with an intimate partner for a period of two or more years
- □ Current age, such that the risk of recidivism is diminished
- □ Significant stabilizing factors including family, employment and pro-social activities
- □ A physical disability or impairment that reduces the risk of reoffending
- □ Recent assessment by clinical psychologist concluding that there is low risk of reoffense
- □ Reconciliation and or counseling with the victim
- □ Mathematical or patent scoring error on the initial RAI
- □ Participation in drug or alcohol counseling since release from prison and/or extended period of being drug or alcohol free
- □ Other protective factors that were not considered at the time of the initial RAI or that have developed since the initial risk classification
- □ Educational accomplishments

COUNTY COURT ONONDAGA COUNTY
STATE OF NEW YORK

People of the State of New York,

vs.

Dudley Doright,
Defendant.

Notice of Petition for
an Order for Modification
of SORA Level of Notification

Indictment #:_____

Index #: _____

NYSID #: _____

PLEASE TAKE NOTICE that upon the annexed petition and exhibits and all proceedings had herein, the undersigned will apply to this Court, at a hearing date to be set by this Court by notice pursuant to Correction Law §168-o (4) no less than 30 days after such notice and a copy of the updated recommendation of the Board are provided to the parties, for an order, pursuant to Correction Law §168-o (2), modifying Petitioner's risk level under the Sex Offender Registration Act (SORA) from risk level ____ to risk level ____, and granting such other and further relief as this Court deems just and proper.

Dated:

_____

Clarence Narrow
Attorney for Petitioner
100 E. Washington Street, Suite 204
Syracuse, New York 13202
(315) 481-2884

To: Judge Fair N. Square
Onondaga County Court

District Attorney, Onondaga County

COUNTY COURT ONONDAGA COUNTY
STATE OF NEW YORK

People of the State of New York,

vs.

Dudley Doright,
Defendant.

Petition for an Order
for Modification of SORA
Level of Notification

Indictment #:_____

Index #: _____

NYSID #: _____

Clarence Narrow, an attorney duly admitted to practice in the Court of the State of New York, and not a party to this proceeding, pursuant to CPLR 2106 subscribes and affirms the following to be true under the penalties of perjury:

1) I am the attorney for Petitioner, Dudley Doright, and I petition this Court pursuant to Correction Law § 168-0 (2) for an order modifying the current level of notification to which Petitioner is subject.
2) Petitioner was convicted and sentenced under Indictment # _____ on _____, at which time he was certified as a person who had sexually offended.
3) Petitioner is required to register under the Sex Offender Registration Act of New York.
4) On or about _____ Petitioner was sentenced to a sentence of _____, by Onondaga County Court Judge Fair N. Square.
5) On _____, an initial SORA hearing was held and Judge Square made a determination regarding the level of notification, which was a risk level 2.
6) Petitioner was released from his sentence of imprisonment on _____ (or discharged from Probation).
7) Petitioner was under community supervision by the New York State Department of Corrections and Community Supervision (or Onondaga County Probation Department) and was discharged from that supervision on _____.

LEVEL OF NOTIFICATION SOUGHT

8) Petitioner now seeks to modify that risk level from a level 2 to a level

9) By this petition for modification and the attached documents incorporated by reference herein, and upon evidence to be produced at a hearing pursuant to Correction Law §168-0 (4) Petitioner will establish by clear and convincing evidence that changes have occurred in Petitioner's life, since the initial classification process such that his risk of repeat offense and the threat to public safety is less than previously determined by Judge Square upon the initial determination.

REASONS FOR SEEKING MODIFICATION

10) The reasons for seeking such determination to modify Petitioner's risk level from level 2 to level 1 are as follows: (Insert all that are applicable and add others if appropriate).

a) Since release from incarceration on ____ 20__, Petitioner has lived a law-abiding life and has been crime free for a period of _____ years.

b) Since his release from incarceration there is clear and convincing evidence that Petitioner has been rehabilitated, transformed his life and has live an upstanding lifestyle.

c) Since discharge from community supervision on _____, 20__, Petitioner has lived a law -abiding life and has been crime free for a period of ____ years.

d) While under community supervision Petitioner successfully complied with all of the conditions and was discharged successfully.

e) Petitioner has engaged in treatment for sexually offending after his initial SORA classification, has responded well, and has successfully completed such counseling. (See report and discharge summary).

f) Petitioner is involved in a committed relationship with his wife _____, and they have been living together for a period of over two years. Living with an intimate partner for two years or more is a well-recognized protective factor.

g) Petitioner is now _____ years of age. As a consequence of his age he is statistically of a lower risk to reoffend than a person of a younger age.

h) There are significant stabilizing factors in Petitioners life that reduce the likelihood of reoffending, including a stable family, employment, and volunteer and other pro-social activities.

i) Since his initial SORA classification hearing Petitioner has been diagnosed with _____, and as a result suffers a physical disability that reduces his risk of reoffending.

j) Petitioner has been assessed by a clinical psychologist who has concluded that he is a low risk to reoffend.

k) Petitioner has engaged in counseling with the victim of his offense. They have reconciled and the victim supports this modification request. (See letter from victim attached).

l) There was a mathematical error in the scoring of the initial SORA risk assessment instrument causing Petitioner to be presumptively scored a level ___ instead of as a lower level of _____.

m) At the time of Petitioner's initial classification by Judge Square, the Board of Examiners of Sex Offenders had over-assessed Petitioner on Risk factor # _____, and the Judge adopted that recommendation.

n) Petitioner has participated in drug and alcohol counseling since his release from prison and has been alcohol and drug free for the past ___ years.

o) Other protective factors that were not considered at the time of the initial RAI or that have developed since the initial classification.

11) **(In the next several paragraphs insert the facts that help establish the reasons set forth above).**

12)_____

13)_____

14) There has been no prior petition for an order modifying the level of notification/ or a petition for modification has not previously been submitted within the last year, the last petition have been determined on _____.

15) As a consequence of Petitioner's current level of notification he has suffered harassment and ridicule, his pursuit of employment has been greatly hampered and his search for decent housing has been thwarted.

CONCLUSION

16) Petitioner readily concedes that the crime for which he was convicted, and for which he has accepted responsibility, was a very serious one for which punishment was warranted.

17) Petitioner has in fact served his sentence and paid his debt to society, and has been appropriately and fully punished. He has not only been punished by ___ years of imprisonment (____ years of probation), ____ years of parole supervision, but also by enduring the stigma and shame associated with being designated as a "high risk"/ "moderate risk" person who has sexually offended for more than _____ years.

18) Our courts have repeatedly recognized that the SORA statute was not intended to be punitive in nature, is civil not criminal, and is designed to protect the public from the risk of repeat offense by people who have been convicted of a sex offense.

19) SORA can achieve its goal of enhancing public safety only if each registrant's risk level accurately captures that registrant's risk of reoffending.

20) Designating a low risk individual as moderate or high risk and subjecting that person to needless stigma associated with this higher risk label would not only be punitive, it also would be counter-productive in that it would needlessly destabilize and stigmatize the person, impairing rather than promoting the person's ability to live a law-abiding life in the community.

21) Because Petitioner's commitment to live a law-abiding life is overwhelming, public safe-

ty would be enhanced by granting his request to have his risk level modified from a level 2 to a level 1, which reflects his low risk of reoffending.

WHEREFORE, it is respectfully requested that pursuant to Correction Law § 168-o (4), that this Court:

i. Provide a copy of this petition to the District Attorney of Onondaga County, and

ii. Forward a copy of this petition to the Board of Examiners of Sex Offenders and request an updated recommendation pertaining to Petitioner, and

iii. Upon receipt of the updated recommendation, provide a copy to Petitioner, Petitioner's counsel and the District Attorney, and

iv. Provide written notice of the date set by the Court for a hearing on the petition, not sooner than 30 days after notice and a copy of the recommendation are so provided, and

v. Assign counsel to represent Petitioner, pursuant to County Law article 18.

vi. For the reasons set forth above, and based upon all of the evidence presented before this Court, make a determination granting the requested modification and issue an order setting forth the determination and finding of fact and conclusions of law on which the determination is based, and submit a copy of its order to the Division of Criminal Justice Services, or such further and other relief as this Court may deem just and proper.

Dated:

_____

Clarence Narrow
Attorney for Petitioner
100 E. Washington Street, Suite 204
Syracuse, New York 13202
(315) 481-2884

VERIFICATION

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

Dudley Doright, the Petitioner in this proceeding, swears that he has read the foregoing petition and knows the contents thereof; that the petition is true to the best of my knowledge, except as therein stated upon information and belief, and as to those matters I believe them to be true based upon the sources identified in the petition.

Dated: _____, 2018

_____
Dudley Doright
Petitioner

Sworn to before me this
_____ day of _____, 2018.

_____
Notary Public

COUNTY COURT ONONDAGA COUNTY
STATE OF NEW YORK

People of the State of New York,

SORA MODIFICATION PROCEEDING

vs.

DEMAND FOR DISCLOSURE

Indictment #:
John Doe, Index #:
Defendant. NYSID #:

To: District Attorney, Onondaga County

The above-named Defendant has filed a petition for a downward modification pursuant to Correction Law §168-o with Judge _____. The Board of Examiners of Sex Offenders (Board) has made a recommendation in opposition / in support of the petition for downward modification, a copy of which has been provided to you by the court.

In the event that you intend to oppose the petition for downward modification, it is hereby requested that you provide the undersigned counsel for defendant with copies of all documents you intend to submit for the court's consideration at the scheduled hearing in support of your opposition to the modification request. Demand is made that the copies of such documents be provided to the undersigned at his/her office at least 10 days before the scheduled hearing.

In the event that you do not oppose the petition for modification, please notify the undersigned so that an appropriate stipulation may be agreed upon for submission to the Court, thus obviating the need for a hearing.

Dated:

_____

Alan Rosenthal, Esq.
Attorney for Defendant / Petitioner
Law Office of Alan Rosenthal
White Memorial Building, Suite 204
Syracuse, New York 13224
(315) 559 - 2289

COUNTY COURT ONONDAGA COUNTY
STATE OF NEW YORK

People of the State of New York,

vs.

Dudley Doright,
Defendant.

JUDICIAL SUBPOENA DUCES TECUM
(Records Only)

Indictment #:_____

Index #: _____

NYSID #: _____

THE PEOPLE OF THE STATE OF NEW YORK

TO: NEW YORK STATE BOARD OF EXAMINERS OF SEX OFFENDERS

GREETINGS:

WE COMMAND YOU, *that all business and excuses being laid aside, you produce and deliver to Alan Rosenthal, attorney for the Defendant, at the Law Office of Alan Rosenthal, White Memorial Building, Suite 204, 100 E. Washington Street, Syracuse, New York on or before April 1, 2018 complete and accurate certified copies of the following:* each and every document relied upon by the Board of Examiners of Sex Offenders to make the recommendation to this Court dated _____ in opposition to the petition for modification of the above-named defendant, other than the petition and attached exhibits.

The reason that this disclosure is necessary is that the above-named defendant has petitioned this Court for modification of his SORA risk level and is entitled to the due process disclosure of the evidence that the Board of Examiners of Sex Offenders relied upon for its recommendation.

To the extent that the documents to be disclosed are considered patient's records, written authorization executed by the patient is attached.

Your failure to comply with this subpoena is punishable as a contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed fifty dollars and all damages sustained by reason of your failure to comply

All papers or other items delivered pursuant to this subpoena shall be accompanied by a copy of this subpoena.

WITNESS, Honorable _____ one of the Judges of the Onondaga County Court, the _____ day of _____, 2018.

ENTER:

_____
Onondaga County Court Judge

SAMPLE LETTER TO JUDGE REQUESTING ASSIGNMENT OF COUNSEL

Dudley Doright
25 Freedom Rd.
Syracuse, New York 13224

April 1, 2018

Judge Fair N. Square
Onondaga County Court
Criminal Courts Building
505 South State Street
Syracuse. New York 13202

Re: People v. Dudley Doright (Petition for SORA Level Modification)
Indictment #: 99-366-1; Index #: 98-3277

Dear Judge Dougherty:

Please accept this letters as notice of my intention to petition for modification pursuant to Correction Law §168-o (2). I hereby request assignment of counsel as authorized by Correction Law §168-o (4). In anticipation of assignment of counsel, and with the assistance of an attorney, a petition for modification will be filed.

I am statutorily eligible to petition for modification of my risk level. I was convicted of Attempted Rape in the First Degree on October 18, 1999. I was sentenced on November 17, 1999 to a determinate sentence of 5 years.

A SORA hearing was held on October 8, 2004 and a Decision/Order was entered on October 13, 2004 by this court determining that I was a risk level 2. As a result, I have been required to register and verify pursuant to Article 6-C of the Correction Law. I now seek that this risk level be modified to a risk level 1.

Once counsel has been assigned I will review my reasons for seeking this modification with that attorney so that the reasons can be set forth in the petition.

I have not previously filed a modification petition since the initial determination in 2004.

I am financially unable to retain counsel. For this reason I ask that this court assign counsel to assist me to prepare my modification petition and represent me at the hearing.

I ask that this court refrain from sending a copy of this letter to the Board until counsel has been assigned and had the opportunity to prepare and file the petition. This will allow the Board to base its recommendation on the review of a complete, properly prepared, and fully counseled petition.

Thank you.

Very truly yours,

Dudley Doright