

# Sex Offender Registration

Case law and legislation changes the landscape for failure to register and removing the registration requirement.

BY TOM WEAVER AND AMY MUTH



During the 2010 legislative session, at the behest of the Sex Offender Policy Board, the Washington State Legislature unanimously passed Substitute Senate Bill 6414.<sup>1</sup> Additionally, in *State v. Hooper*, Division III of the Washington Court of Appeals held that courts can't place conditions, like completion of a psychosexual evaluation and polygraph, on juveniles who petition to remove this requirement. These two actions have resulted in significant changes for offenders required to register as sex offenders.

Because the sex offender registration statute has been revised and re-drafted so many times, the law in this area has been confusing and complex. SSB 6414, which became effective on June 10, 2010, is an effort to provide some clarity in this area. This bill:

- Provides a comprehensive list of criteria for courts to consider when deciding a petition to remove the registration requirement;
- Broadens the category of offenders whose duty to register will expire automatically as well as the category of offenders eligible to petition for release by creating a category of

disqualifying offenses;

- Makes the first Failure to Register offense a non-sex offense;
- Makes significant changes to how out-of-state sex offenders are classified; and
- Eliminates the 90-day check-in requirements for level II and III sex offenders.

This article summarizes the legislative and judicial changes to the sex

But for those who have an out-of-state or federal conviction, making this determination is not so easy. Compounding the problem is the fact that there is no easy judicial mechanism to get into court to resolve these issues. The authors of this article have each had some success using common law writs to get into court in order to clarify the duty to register, but the procedure is arcane and difficult to follow.

Under SSB 6414, there are two ways that a duty to register may attach

It deserves to be emphasized that failure to register is a crime of omission, not of commission.

offender registration removal scheme.

## Out-of-State Sexually-Related Convictions

It deserves to be emphasized that failure to register is a crime of omission, not of commission. As such, before a person can be cited for failing to register, law enforcement must determine that he or she has a duty to register. For Washington residents who are convicted of certain enumerated sex offenses, the duty to register is easy to determine. Those enumerated offenses are all felony sex offenses; an attempt, conspiracy, or solicitation to commit a felony sex offense; or the misdemeanor offenses of Communication with a Minor for Immoral Purposes and Sexual Misconduct with a Child in the Second Degree.<sup>2</sup>

for offenders with out-of-state or federal convictions:

- First, if the offender was convicted of an offense that required registration as a sex offender while residing in the state of conviction.<sup>3</sup>
- Second, if the offender was not required to register in the state of conviction, he or she was convicted of an offense that would be classified as a sex offense under Washington law — unless a court in the person's state of conviction has made an "individualized determination" that the person should not be required to register.<sup>4</sup>

Compare this to the prior law, which imposed a duty to register on anyone with a federal or out-of-state conviction

for an offense that under the laws of this state would be classified as a sex offense.

On the one hand, the charge has the effect of expanding the number of people who have a duty to register. Under prior law, determining whether a person has a duty required a person to place the applicable statute under a jurisprudential magnifying glass that only William Blackstone could appreciate. Consider the case of *State v. Werneth*, 147 Wn. App. 549, 197 P.3d 1195 (2008), where the court of appeals held that a Washington resident was not required to register because his Georgia conviction for second degree Child Molestation was not comparable to Washington's Child Molestation charge. The court deemed it significant that Georgia does not require that the perpetrator and victim not be married to each other or that the perpetrator be at least thirty-six months older than the victim. The fact that the thirteen-year-old victim was significantly younger than the offender and unmarried to anyone did not deter the court of appeals from determining that these facts had not been pleaded and proved in Georgia. SSB 6414 changes all of this. The court of appeals in *Werneth* could simply have deferred to the fact that the offender was convicted in Georgia of an offense that requires registration in Georgia.

On the other hand, SSB 6414 presents an opportunity for creative lawyering in some instances. Regardless of whether the person has been convicted of an offense that would be classified a sex offense under Washington law, if the convicting state makes an "individualized determination" that registration is not required, then Washington must honor that determination. This is particularly useful when an out-of-state offender has been convicted of a lesser offense that



does not require registration in the convicting state. The authors of this article have each had the experience, prior to the passage of SSB 6414, of litigating — in different counties — the

is sufficient to get the convicting state to declare — on the judgment and sentence, for instance — that registration is not required.<sup>5</sup> This change may also prove to be useful for juvenile sex offenders, since registration requirements for juveniles vary widely around the country .

It is worth noting that the earlier these issues are litigated, the better. Including the operative language in the out-of-state guilty plea and judgment and sentence is best. Barring that, getting a court order signed prior to the offender entering the state is nice. Unfortunately, however, many of these issues must be litigated after our clients have entered the state and been charged with a new offense of failure to register.

A related issue arises when a person has a clear duty to register but seeks to be relieved of registration. Pursuant to SB 6414, a person's duty to register for an out-of-state or federal conviction does not end automatically. Offenders with out-of-state convictions may petition to be relieved of sex offender registration after fifteen years in the community without a disqualifying offense. (Note that this is different than offenders with in-state convictions, who may petition after ten years.) But, the offender still has the

---

## One area where SB 6414 does clarify the law is the use of updated polygraph examinations.

---

issue of whether out-of-state sexual misdemeanors are properly classified as sex offenses, with different results. In both cases, the convicting state did not require registration. Pursuant to SSB 6414, it is no longer necessary to engage in a comparability analysis; it

option of going back to his or her state of conviction and asking for an "individualized determination" that registration is no longer required — and SB 6414 makes it clear that Washington must honor that determination. Consequently, out-of-state offenders

have two possible avenues of being removed from the registration rolls and lawyers should explore both in order to determine which state's rules and guidelines will provide greatest benefit to your client. (Note also that the disparate treatment of in-state and out-of-state sex offenders creates another area of possible litigation — whether this disparate treatment violates the Due Process, Equal Protection, or Commerce clauses.)

### Criteria for Registration Removal

SSB 6414 creates a non-exclusive list of thirteen factors to be considered by courts when determining whether to remove a particular offender from the registration rolls, including:

1. The nature of the registrable offense, including the number of victims and length of offense history;
2. Subsequent criminal history;
3. Compliance with supervision;
4. Length of time since the charged incident;
5. Input from CCOs, law enforcement, or treatment providers;
6. Participation in sex offender treatment;
7. Participation in other treatment and rehabilitative programs;
8. Housing and employment stability;
9. Personal and community support system;
10. Risk assessments or evaluations;
11. Updated polygraph exams;
12. Input from the victim; and
13. Any factors the court considers relevant.<sup>6</sup>

The old statute did not list any

factors for courts to consider when deciding these petitions although, as a practical matter, courts were already taking many of these factors into account. The most important factor is the offender's treatment history — four of the thirteen factors refer directly to psycho-sexual evaluations and follow-up treatment. Most of the factors listed correspond to recidivism risk.

One area where SB 6414 does clarify the law is the use of updated polygraph examinations. It is interesting that polygraphs, which are generally frowned upon in most areas of criminal law, have become the industry standard for both identifying treatment needs and monitoring compliance for sex offenders. As a result, many courts were requiring an updated polygraph prior to considering the application. This practice became questionable in February of 2010 when the Washing-

ton State Court of Appeals, without the benefit of SB 6414's thirteen factors, held that the trial court had abused its discretion by requiring an updated polygraph. See *State v. Hooper*, 154 Wn. App. 428, 225 P.3d 446 (2010). SB 6414, however, explicitly states that a court may consider an updated polygraph; while SB 6414 does not go so far as to require an updated polygraph, it is doubtful our appellate courts would find an abuse of discretion if a trial court denied a petition for failure to submit an updated polygraph.

### Removal from Registration by Operation of Law

One area that SSB 6414 tries to clarify is that registration requirements

for gross misdemeanor and Class C sex offenses automatically end after ten years in the community without a disqualifying offense, and for Class B sex offenses after fifteen years in the community without a disqualifying offense.<sup>7</sup> It places a duty on the county sheriff — if requested by the offender — to investigate whether the requisite ten or fifteen years has passed.<sup>8</sup> Under the terms of the statute, no court order is required.<sup>9</sup> Technically, this is not a change from the earlier law, except insofar as it makes it clearer that court action is not required and that law enforcement must work with offenders to investigate whether the offender still has a duty to register.<sup>10</sup> It also places the burden on the offender to contact law enforcement to request this investigation.<sup>11</sup> The authors believe that while the new system will work better in some counties, it will work equally

---

## Under the former statute, any new criminal offense was a disqualifying offense.

---

inefficiently in others.

For Washington residents who wish to move out of state, however, the absence of a court order is problematic: Without a court order, most states will continue to require registration. So, while the statute does not require a court order, the authors recommend obtaining one — particularly if the offender is considering or planning a move to another state.

One issue that is left ambiguous after SSB 6414 is whether the duty to register automatically ends for juveniles.<sup>12</sup> The authors disagree whether the statute requires juvenile offenders to seek a court order or, absent a court order, the duty automatically ends after ten or fifteen years for Class C and

Class B offenses. As a practical matter, however, this issue rarely comes up. The vast majority of sex offenses charged in juvenile court are Class A felonies, for which registration requirements do not automatically end. The authors do agree that, whether or

should have the benefit of clarifying that a first offense for FTR no longer requires 36 months of community custody.

For adult offenders, a second or subsequent FTR would be a disqualifying offense if it is a felony, as

*Tom Weaver has a law practice in Bremerton, and Amy Muth recently opened her own law practice in Seattle. Tom and Amy both focus much of their practice on sex crime defense and sex offender registration removal. They serve on the WACDL Board of Governors.*

---

## At JRA, youth are exposed to programming designed to encourage rehabilitation and pro-social choices.

---

not the statute *requires* a court order, the safest course is to obtain a court order.

### Disqualifying Offenses

SB 6414 also redefines a disqualifying offense. Under the former statute, any new criminal offense was a disqualifying offense. Pursuant to SB 6414, all felonies, crimes against persons, and domestic violence offenses are disqualifying offenses. As a practical matter, this means that most misdemeanors are not disqualifying offenses. This will be particularly helpful for offenders who have minor traffic or misdemeanor drug offenses.


### First-Time Failure to Register

Even though, as stated above, FTR is a crime of omission, these offenses have nonetheless been classified as sex offenses, requiring both the standard community custody period of 36 months for sex offenses and an additional ten-year period of sex offender registration. Under SSB 6414, the first FTR conviction is no longer classified as a sex offense; RCW 9.94A.030(45) states that only the second and subsequent FTR convictions fall under the definition of "sex offense." This

is a second or subsequent attempt, conspiracy, or solicitation to commit a felony FTR. Such a conviction would require another ten years before a person may petition to be relieved of registration.<sup>13</sup> However, misdemeanor FTR pursuant to RCW 9A.44.132(2) is not a disqualifying offense. This may create an opening for creative plea bargains for deserving individuals where the person pleads to a misdemeanor FTR offense in exchange for promptly petitioning to be relieved of sex offender registration.

The rules are different for juvenile offenders; they must only wait 24 months following a conviction for FTR before petitioning to be relieved of registration.<sup>14</sup>

### Looking Ahead

Sex offender registration removal has undergone significant changes in the past year and, by and large, these well-intentioned changes are designed to make sex offender registration removal easier for our clients. We understand that the Sex Offender Policy Board is continuing to review the registration process and may propose additional changes in the coming session. 

---

## Notes

---

1. This bill made changes to several existing sex offender registration statutes, and created several new statutes. For the purposes of clarity, when referring to the changes as a whole, the authors will use the term "SSB 6414," and when referring to specific statutes, the authors will provide the statutory cite. The bill either modified or created the following statutes: RCW 9A.44.128 (Definitions), .130 (Procedures for registration of sex offenders and kidnapping offenders), .132 (Failure to Register), .135 (Address verification), .140 (Duty to register), .141 (End of duty to register), .142 (Relief from duty to register), .143 (Relief from duty to register—juveniles), .145 (Notification of changes to offenders); RCW 36.28A.230 (Address and residency verification program); 4.24.550 (Release of information to public regarding registered offenders—website).
2. See RCW 9A.44.140.
3. RCW 9A.44.128 (6) (d).
4. Id.
5. Id.
6. RCW 9A.44.142(4) (b) (adults); RCW 9A.44.143(4) (juveniles).
7. RCW 9A.44.140.
8. RCW 9A.44.141.
9. RCW 9A.44.141(1).
10. Id.
11. Id.
12. See RCW 9A.44.142, .143.
13. RCW 9A.44.128(3).
14. RCW 9A.44.143(2).