



Psychiatric Security Review Board Attorney Performance Standards With Commentary

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Standards for Representation in Psychiatric Security

Review Board Cases

INTRODUCTION:

Oregon Revised Statute 151.216(j) mandates that the Oregon Public Defense Commission (OPDC) “[d]evelop, adopt and oversee the implementation, enforcement and modification of policies, procedures, minimum standards, and guidelines to ensure that public defense providers are providing effective assistance of counsel consistently to all eligible persons in this state as required by statute and the Oregon and United States Constitutions. The policies, procedures, standards, and guidelines described in this paragraph apply to employees of the commission and to any person or entity that contracts with the commission to provide public defense services in this state.”

The following standards were developed by OPDC staff with input from a psychiatric security review board (PSRB) provider workgroup. Per OPDC policy, these standards will be reviewed and revised one, two, and five years from adoption. OPDC welcomes ongoing provider input regarding the content and efficacy of these standards.

Each standard sets a baseline for practice of appointed case work and is followed by commentary that supplements the baseline standards. OPDC recognizes that in any given case, some standards and commentary might be inapplicable or even mutually exclusive.

Commentary is particularly challenging as there are many times when the commentary is impractical or even against a client’s best interest or desire. OPDC acknowledges that to practice law, exceptions to these baseline rules and their commentary must apply. The commentary provides additional considerations for counsel performing public defense. There are times when items listed in the commentary may be useful or helpful during representation. They are not meant to establish baseline minimum performance standards.

OPDC is grateful to Oregon Public Defense Commission Psychiatric Security Review Board (PSRB) Workgroup for the extensive work OPDC drew upon in the development process.

STANDARD 1.1: THE ROLE OF PSRB COUNSEL

The lawyer for a client in a Psychiatric Security Review Board (PSRB) case should provide quality and zealous representation at all stages of the case. A lawyer should ensure that each client receives competent, conflict-free representation in which the lawyer keeps the client informed about the representation and promptly responds to reasonable requests for information. The lawyer shall be familiar with applicable statutes, caselaw, and Board practices, and should stay aware of changes and developments in the law.

Throughout the representation, the lawyer must determine whether the client has sufficient capacity to understand and form a lawyer-client relationship and whether the client is capable of making reasoned judgments and engaging in meaningful communication.

For clients with full decision-making capacity, the lawyer must maintain a normal lawyer-client relationship with the client, including taking direction from the client on matters normally within the client's control.

For clients with diminished capacity, the lawyer must maintain a normal lawyer-client relationship as far as reasonably possible and take direction from the client as the client's capacity develops. Clients may be competent to make some decisions and not others.

Lawyers must advocate at all times for the client's expressed interests. If a client cannot express their own interests the lawyer should act to preserve all the rights of their client.

Commentary:

1. A lawyer is bound by the client's definition of his or her best interests and should not substitute the lawyer's judgment for that of the client regarding the objectives of the representation except as permitted by the Oregon Rules of Professional Conduct 1.14.
2. A lawyer should provide candid advice to the client regarding the probable success and consequences of pursuing a particular position in the case and give the client the information necessary to make informed decisions to the extent the client is capable. A lawyer should consult with the client regarding the assertion or waiver of any right or position of the client.
3. Lawyers should endeavor to build trust with their clients and, where possible, to offer them comfort and understanding during their commitment.
4. Lawyers should assist the client in planning for the client's potential release as soon as

practicable after case assignment. Preparation should include working with the client to secure suitable housing, clothing, services, mental health care, and access to medications. Lawyers should consider contacting the client's friends and relatives if available.

5. A lawyer should exercise reasonable professional judgment regarding technical and tactical decisions and consult with the client on the strategy to achieve the client's objectives.

STANDARD 1.2: EDUCATION, TRAINING, AND EXPERIENCE OF PSRB COUNSEL

- A. A lawyer must be familiar with the applicable substantive, procedural, and administrative law (OAR Chapter 859) governing appearances before the Board. A lawyer has a continuing obligation to stay abreast of changes and developments in the law and with changing best practices for providing quality representation in PSRB cases.**
- B. Prior to handling a PSRB matter, a lawyer must have sufficient experience or training to provide quality representation. Prior to accepting assignment in a PSRB case, a lawyer must be certified for PSRB cases by OPDC.**

Commentary:

1. To remain proficient in the law, court rules and practice applicable to PSRB cases, a lawyer should regularly monitor the decisions of Oregon and pertinent Federal appellate courts and the work of the Oregon State Legislature. Lawyers should be particularly aware of decisions and bills that impact the Oregon State Hospital.
2. Lawyers should be knowledgeable about the State Hospital system, the resources available to clients in the system, and the constitutional rights that clients have while in the system. Lawyers should monitor the system for any changes that will impact their clients.
3. A lawyer should be familiar with key agencies, people, and services typically involved in PSRB cases such as the Attorney General's Office, the Oregon State Hospital, hospital staff, county behavioral health entity, private treatment facilities, and programs, along with other services and programs available as dispositional alternatives to commitment and detention.
4. Lawyers should have knowledge of mental health disorders, their presentations, and the state mental health treatment system. Lawyers should be aware of county mental

health options in counties where their clients may be placed.

5. Lawyers should be knowledgeable of HIPPA rules and how they impact the lawyer's practice before the Board.
6. Lawyers should know the members of the PSRB and their backgrounds. Lawyers should be mindful that the primary purpose of the Board is public safety and that there will be times when the lawyer's primary role of advocating for their clients will be at odds with the Board's role.

STANDARD 1.3: OBLIGATIONS OF PSRB COUNSEL REGARDING WORKLOAD

Before seeking assignment to act as counsel or accepting assignment, a lawyer has an obligation to ensure that they have sufficient time, resources, knowledge, and experience to offer quality representation to a client in a PSRB case without hampering the representation of the lawyer's existing clients.

Commentary:

1. A lawyer should have access to sufficient support services and resources to allow for quality representation. This includes investigation according to Standard 3.
2. A lawyer should evaluate their ability to appear with clients when deciding whether to accept an assignment to a case. A lawyer must appear personally for all critical stages of the case.
3. When possible, lawyers should appear in person or in the same manner as their clients. Lawyers should be aware of the options for a client's remote appearance.

STANDARD 2: CLIENT COMMUNICATION

A lawyer must contact their client within 7 days of their assignment to the case and attempt to conduct an interview with the client and should thereafter establish a procedure to maintain regular contact with the client in order to explain the process of Board hearings, address the ongoing needs of the client, obtain necessary information from the client, consult with the client about decisions necessary for the representation that clients are competent to make, and respond to requests from the client for information or assistance concerning the case.

Commentary:

1. Lawyers should maintain contact with their clients throughout their commitment to PSRB jurisdiction.
2. A lawyer should use clear, developmentally appropriate language, and should use an interpreter as required. A lawyer should elicit the client's point of view and encourage the client's participation in their own case to the fullest extent possible.
3. Lawyers should be prepared to discuss the timeline of commitment to PSRB jurisdiction at their initial meeting, including ways that timeline may be reduced or extended.
4. Lawyers should be prepared to discuss collateral issues of commitment to the PSRB with the client, including:
 - a. Immigration consequences;
 - b. Restriction of the client's rights as a result of commitment;
 - c. Impact of commitment on other ongoing court cases;
 - d. Issues involving the client's family or contact with family members that may be restricted by the trial court judgment.
5. Prior to all meetings, the lawyer should:
 - a. Be familiar with the requirements of PSRB jurisdiction;
 - b. Obtain copies of any relevant documents that are available including any initiating document, hospital medical records if available, recommendations and reports made by agencies concerning commitment, and law enforcement reports applicable to the commitment order;
 - c. Discuss the client's case with the treating psychiatrist to get a sense of the doctor's intentions in the case;
 - d. Prepare releases of information for client to sign to allow the lawyer to seek records on the client's behalf;
 - e. Be familiar with the legal procedure the client will encounter and be prepared to discuss the process with the client;
 - f. Be familiar with the types of detention that a client may be subject to, the allowable length of the detention, and the process for changing the client's placement.
6. Although there is no right to counsel in a risk review panel, a lawyer should discuss panels with client and provide client with advice on how to achieve the client's desired outcome.

STANDARD 3: INVESTIGATION

A lawyer has a duty to conduct an independent review of the case, regardless of the client's admissions or statements to the lawyer. Where appropriate, the lawyer should engage in a full investigation, which should be conducted as promptly as possible and should include all information, research, and discovery necessary to assess the strengths and weaknesses of the case, to prepare the case for hearing, and to best advise the client. The lawyer should not knowingly use illegal means to obtain evidence or instruct others to do so.

Commentary:

1. A lawyer should attempt to interview all potential witnesses in a case including the client's treatment team, client's family, and other outside professionals who have worked with the client. Lawyers should obtain all pertinent information in the possession of the State or the Oregon State Hospital. The lawyer should pursue formal and informal discovery with authorities as described in Standard 4.
2. A lawyer should review all medical records related to the client and to the client's treatment and be familiar with the types of treatment that the client is undergoing.
3. A lawyer should be familiar with any court cases involving the client which may impact commitment, placement, or which the client's PSRB case may impact.
4. A lawyer should be familiar with the process for requesting indigent defense funding from the Oregon Public Defense Commission including the process for appeals of the Commission's decisions as needed for constitutional representation.
5. A lawyer should always consider whether to reduce investigation to writing.
6. A lawyer may not intentionally destroy evidence in a case and must comply with all statutes governing discovery to the State.

STANDARD 4: DISCOVERY

A lawyer has the duty to pursue formal and informal discovery as soon as possible following assignment to a PSRB case and continue to pursue opportunities for discovery throughout the case. A lawyer has a duty to be aware of all possible sources of formal discovery including the

State and the hospital and to pursue discovery from each source. A lawyer must be familiar with the Oregon Rules of Civil Procedure, all applicable OARs, and other law and case law governing discovery as well as those making sanctions available for discovery violations.

Commentary:

1. A lawyer's discovery review should include, but is not limited to, the following:
 - a. Examinations of the client by the State Hospital;
 - b. Police reports for the incident underlying commitment to the PSRB;
 - c. Any pertinent filings from the underlying case;
 - d. Other psychiatric examinations of the client;
 - e. The client's current treatment plan;
 - f. Any records of the client's previous treatment.
2. Lawyers should be prepared to file protective orders as needed to secure discovery.
3. A lawyer should file motions seeking to preserve evidence where it is at risk of being destroyed or altered.
4. A lawyer should be familiar with and observe the applicable statutes, rules, and case law governing the obligation of the defense to provide discovery. A lawyer request protective orders or otherwise resist discovery where a basis exists to shield information in the possession of the defense from disclosure.
5. Lawyers should not rely on discovery to provide all information in the case and should not assume that parties are compliant with discovery obligations unless the lawyer has verified the compliance.

STANDARD 5.1: HEARING PREPARATION

A hearing before the PSRB is a complex event that requires preparation, knowledge of applicable law and procedure, and skill. A defense lawyer must be prepared to present to the board a compelling case which will advance the client's goals. Lawyers should be prepared to address issues of law and fact but must also be prepared to address the practical issues that the Board may raise. In order fully prepare a lawyer should develop, in consultation with the client and members of the defense team, an overall defense strategy for the hearing.

Commentary:

1. A lawyer should, in advance of any hearing, secure the attendance of necessary witnesses including using subpoenas if necessary and available.
2. In advance of the hearing lawyers should plan for each stage of the hearing, prepare drafts of questions for likely witnesses, as well as for arguments to the Board.
3. Lawyers should be mindful that members of the PSRB are not always legally trained and may not respond the same way a judge would to legal arguments. Lawyers should tailor their arguments accordingly.
4. A lawyer should ordinarily have the following materials available for use at any hearing:
 - a. Relevant documents prepared by the client's doctors or evaluators;
 - b. Outlines of questions for all witnesses;
 - c. Copies of defense subpoenas, if any;
 - d. A list of all exhibits and the witnesses through whom they will be introduced;
 - e. Originals and copies of all documentary exhibits;
 - f. Copies of all relevant OARs and case law;
 - g. Evidence codes or compilations of evidence codes, relevant statutes, copies of relevant case law, and copies of learned treatises that are relevant to the hearing; and
 - h. Outline or draft of closing argument.
5. A lawyer should be fully informed as to the law and procedural rules relating to all stages of the hearing process and be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the hearing. The lawyer should develop strategies for challenging evidence that is not favorable to their client's position.
6. A lawyer should plan with the client the most convenient system for conferring privately throughout hearings. Where necessary, a lawyer should seek an order to have the client available for conferences. A lawyer should, where necessary, secure the services of a competent interpreter for the client during all proceedings.

STANDARD 5.2: PRE-HEARING MOTIONS

A lawyer should research, prepare, file, and argue appropriate pre-hearing motions whenever there is a reason to believe that they would benefit their client. A lawyer must be knowledgeable of all motion and notice deadlines that may apply to their case. Lawyers may not miss filing deadlines.

Commentary:

1. The decision to file a particular pre-hearing motion or notice should be made by the lawyer after thorough investigation, discussion with their client, and after considering the applicable law in light of the circumstances of the case.
2. Lawyers should consider filing motions in order to preserve issues for appellate review and to preserve future litigation which might benefit their client.
3. Among the issues the lawyer should consider prior to filing pre-hearing motions are:
 - a. The impact the motion will have on the evidence available at hearings before the Board.
 - b. The possibility that the motion will delay or expedite the client's next hearing or stated goals.

STANDARD 5.3: INITIAL HEARING

A lawyer should begin preparing for the initial hearing at the time of assignment. Lawyers should examine all reports available from trial counsel, OSH, and any community resources, and should meet with their client well in advance of the hearing to advise the client, explain the hearing process, and begin crafting a strategy for the initial hearing.

Commentary:

1. Lawyers should work to help the client understand the process of being at OSH, their treatment paths, and what to expect during their initial hearing.
2. Lawyers should understand the time limits imposed by the PSRB for questioning and should adhere to those limits.
3. Lawyers should anticipate the DOJ calling the client's treating doctor from OSH or, if client is in community placement, their case manager. Lawyers should be prepared to cross examine all DOJ witnesses to advance their client's case.
4. Lawyers should review DOJ's proposed exhibits as soon as they are provided prior to the

hearing.

5. Lawyers should work with their client to help the client decide if they want to testify at the initial hearing.
6. Lawyers should be prepared to deliver a compelling summation during closing arguments which provides the Board with reasons to find in their client's favor.
7. Throughout the hearing, a lawyer should endeavor to establish a proper record for appellate review. As part of this effort, a lawyer should request, whenever necessary, that all hearing proceedings be recorded.
8. Lawyers should review the written decision of the Board for errors and file necessary motions to correct those errors.

STANDARD 5.4: REPRESENTATION AFTER THE INITIAL HEARING

Lawyers are obligated to continue representation of their client beyond the initial hearing and until the client is discharged by the PSRB. This representation includes being available to answer questions from the client, advising clients about all aspects of their commitment to the PSRB as well as representation at any placement review hearings before the Board. Lawyers should continue to advocate for the client's goals throughout their representation.

Commentary:

1. Lawyers should continue to keep apprised of their client's treatment and progress with that treatment. This may require ongoing review of records generated by the client's treatment team's monthly meetings.
2. Lawyers should be prepared to file ongoing requests for records as needed.
3. The treatment team will have the greatest impact on the Board's decision regarding the client's placement. As such, lawyers should endeavor to understand and inform the team's views and opinions of their client.
4. Lawyers should advise the client on their ability to demand a review hearing and the

advisability of calling a review hearing. Lawyers should demand a review hearing if the client requests one and a review hearing is legally allowed.

5. Lawyers should be prepared to advocate for client's wishes if there is a request for a change in the client's placement that does not align with the client's wishes.

STANDARD 5.5: REVIEW HEARINGS

Lawyers must be prepared to represent their client's interests at any review hearings. If the client's discharge is at issue, lawyers should be prepared to litigate the issue and advocate for the client's desired outcome regarding discharge.

Commentary:

1. OSH can request a hearing at any time, so lawyers need to continually review and update the client's case to be prepared for a review hearing on potentially short notice in addition to preparing for regular periodic review hearings.
2. Discharge can be at issue in any review hearings and a lawyer should be prepared to argue about discharge at any review hearing.
3. Lawyers should review all records in advance of any review hearing.

STANDARD 6.1: OBLIGATIONS OF COUNSEL REGARDING APPEALS

If at any point a lawyer determines that an appeal of a decision of the Board would be in the client's best interest and is legally permissible the lawyer should take the necessary steps to perfect the appeal.

Commentary:

1. When a client pursues an appeal and another lawyer is handling the appeal, the PSRB lawyer should cooperate in providing information to the appellate lawyer concerning the proceedings below.
2. Lawyers who represent indigent clients should be knowledgeable about the process of requesting an appellate attorney from OPDC for appeals of Board Decisions.