

NO. 37537-1-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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In re:

RACHEL KANTOLA  
Respondent

vs.

GILBERT J. JUVINALL  
Appellant

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY  
LIBBY

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Gary Steiner, Judge

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OPENING BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. Statement of the Issues.....1

B. Summary of Argument.....1

C. Argument.....2

I. The SAPO Act Creates a Summary Proceeding Like the Domestic Violence Prevention Act After Which It Is Modeled.....2

II. The Trial Court Has Broad Discretion to Manage Discovery and Issue Protective Orders.....3

III. A Requirement of Formal Discovery is Inconsistent with the SAPO Act.....7

IV. The SAPO Act Does Not Specify a Particular Type of Discovery or Mandate a Trial.....8

V. The Procedural Protections in the SAPO Act Adequately Protect Respondent’s Due Process Rights.....11

D. Conclusion.....14

E. Exhibit 1 (RCW 7.90.080 (Evidence)).....16

F. Exhibit 2 (RCW 9A.44.020 (2) (Rape Shield Law)).....18

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

*Spence v. Kaminski*, 103 Wn. App. 325, 329, 12 P.3d 1030 (2000).....3,12

*Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 232, 235, 654 P.2d 673 (1982).....4, 5

*State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988).....4

*Mayer v. Sto Industries*, 156 Wn.2d 677, 685, 132 P.3d 115 (2006).....4,5

*Associated Mortgage Investors v. G.P. Kent Const. Co., Inc.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976).....4

*Gillet v. Conner*, 132 Wn. App. 818, 822, 133 P.3d 960 (2006).....5

*State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997).....8

*Washington Independent Telephone Ass'n v. Washington*, 110 Wn. App. 498, 508, 41 P.3d 1212 (2002).....11, 12

*Gourley v. Gourley*, 158 Wn.2d 460, 473, 145 P.3d 1185 (2006).....13, 14

**CASES FROM OTHER JURISDICTIONS**

*Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701 (1972).....12

*Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893 (1976).....12, 13

**RULES, STATUTES, & OTHER AUTHORITIES**

RCW §§ 7.90.005-7.90.900 (SAPO Act).....1, 4, 7

RCW 7.90.080.....1, 2, 10, 11, 16, 17

CR 26 (c).....1, 5, 7, 8

RCW 7.90.090.....	2, 9, 10
RCW 7.90.005.....	2, 7, 14
RCW §§ 26.50.005-26.50.903 (Domestic Violence Protection Order Act).....	3, 10, 12, 14
ER 1101 (c) (4).....	3, 4
RCW 26.50.035, Findings—1993 c 350.....	3
CR 26 (b) (1).....	5
CR 81.....	7, 8
RCW 7.90.120 .....	8, 9, 10, 13
RCW 7.90.110.....	9
RCW 9A.44.020 (2).....	10, 18, 19
RCW 9A.46.110.....	12
RCW 7.90.020.....	13
RCW 7.90.040.....	13
RCW 7.90.050.....	13
RCW 7.90.130.....	13
RCW 7.90.170.....	13
<b>OTHER RESOURCES</b>	
5C Wash. Prac., Evidence Law and Practice § 1101.1 (5 <sup>th</sup> ed.).....	3
Appellant’s Opening Brief, page 4, paragraph 2.....	4
CP 11 (Order on Petitioner’s Motion for Protective Order, <i>Kantola</i> (No. 07-2-01801-3)).....	6

Response to Motion for Discretionary Review, page 3, lines 13-18 .....	6
Black's Law Dictionary 1504 (6 <sup>th</sup> ed. 1990).....	11

**A. STATEMENT OF ISSUES**

1. Given the legislative intent behind RCW §§ 7.90.005-7.90.900 (SAPO Act; Sexual Assault Protection Order), was the trial judge acting within his discretion when he granted the protective order limiting discovery to an interview of the petitioner in the presence of a court reporter?

2. Is a requirement of formal discovery inconsistent with the SAPO Act?

3. Does RCW 7.90.080 (2) mandate a trial in the case of a petition for a SAPO?

4. Do the procedural protections in the SAPO Act adequately protect respondent's due process rights?

**B. SUMMARY OF ARGUMENT**

The correct standard of review is abuse of discretion. Thus, the court must affirm the Superior Court's issuance of the protective order unless it finds that the use of discretion was manifestly unreasonable or untenable. In this case, the Superior Court found that there was good cause for granting the protective order under CR 26 (c). Given the legislative intent behind RCW §§ 7.90.005-7.90.900 (SAPO Act), the issuance of the protective order was clearly within the court's discretion. To subject a victim of sexual assault to protracted discovery, including interrogatories

and a formal deposition, would discourage her from seeking the protection of the court and would be contrary to both her private right of safety as well as the legislative intent underlying the SAPO Act. Additionally, although 7.90.080 (Evidence) provides for very limited circumstances under which a trial may be appropriate, adherence to this provision is not a requirement to obtain a protective order under RCW 7.90.090 (Burden of proof—Issuance of protection order—Remedies—Violations). Finally, the procedural protections in the SAPO Act adequately protect respondent's due process rights.

### **C. ARGUMENT**

#### I. The SAPO Act Creates a Summary Proceeding Like the Domestic Violence Prevention Act After Which It Is Modeled.

The Legislature has recognized a public interest in preventing sexual assault, describing it as “the most heinous crime against another person, short of murder.” RCW 7.90.005 (Legislative Declaration). In 2006, the Legislature passed the Sexual Assault Protection Order Act (SAPO Act). The legislative intent behind the SAPO Act is to create an order as a remedy for victims who do not qualify for a domestic violence order of protection. RCW 7.90.005.

As this is an issue of first impression, the court should pay close attention to the treatment of similar issues which the courts have ruled on

in interpreting the Domestic Violence Protection Order Act, codified as RCW §§ 26.50.005-26.50.903. Just as the Legislature designed the Domestic Violence Protection Order Act to be a streamlined process, it also designed the SAPO Act to provide speedy relief.

The Domestic Violence Protection Act created a summary proceeding by which victims of domestic violence could obtain an order of protection. The Rules of Evidence do not apply to domestic violence protection order proceedings. ER 1101 (c) (4) (When Rules Need Not Be Applied). Additionally, a 1992 amendment to the Domestic Violence Prevention Act explicitly stated that “victims must have easy, quick, and effective access to the court system [as] envisioned at the time the protection order was first created.” *Spence v. Kaminski*, 103 Wn. App. 325, 329, 12 P.3d 1030 (2000) (quoting RCW 26.50.035, Findings—1993 c 350).

A drafter’s comment in support of a proposed amendment adding SAPO orders to the list of proceedings covered under ER 1101 (c) (4) stated that, “The same need for ‘easy, quick, and effective access to the court’ [as recognized in the Domestic Violence Prevention Act] applies to the issuance of orders under the Sexual Assault Protection Order Act.” 5C Wash. Prac., Evidence Law and Practice § 1101.1 (5<sup>th</sup> ed.). This would seem to imply agreement that, like the Domestic Violence Prevention Act,

the SAPO Act created a summary proceeding. *See* ER 1101 (c) (4) (2008) (“Protection orders under RCW [ §§ 7.90.005-7.90.900 (SAPO Act) are included]”).

## II. The Trial Court Has Broad Discretion to Manage Discovery and Issue Protective Orders.

The appellant concedes that the correct standard of review in the case at bar is abuse of discretion. Appellant’s Opening Brief, page 4, paragraph 2 (“The trial court is given broad discretion to control the discovery process...”) (quoting *Rhinehart v. Seattle Times Co.*, 98 Wn. 2d 226, 232, 654 P.2d 673 (1982)). Because the scope of discovery is within the trial court’s sound discretion, the decision should not be disturbed absent a manifest abuse of that discretion. *State v. Yates*, 111 Wn. 2d 793, 797, 765 P.2d 291 (1988).

“An abuse of discretion occurs when a decision is ‘manifestly unreasonable or exercised on untenable grounds or for untenable reasons.’” *Mayer v. Sto Industries*, 156 Wn. 2d 677, 685, 132 P.3d 115 (2006) (quoting *Associated Mortgage Investors v. G.P. Kent Const. Co., Inc.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976)). “A discretionary decision rests on ‘untenable grounds’ or is based on ‘untenable reasons’ if the trial court relies on unsupported facts or applies the wrong legal standard; the court’s decision is ‘manifestly unreasonable’ if ‘the court,

despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take.’” *Mayer*, 156 Wn. 2d at 684 (emphasis added) (internal citations omitted).

A trial court must manage the discovery process in a fashion that promotes “full disclosure of relevant information while protecting against harmful side effects.” *Gillet v. Conner*, 132 Wn. App. 818, 822, 133 P.3d 960 (2006) (emphasis added). Although CR 26 (b) (1) provides for liberal discovery, it also provides several safeguards to protect against harmful side effects.

[A] court may limit discovery where it would be unduly burdensome, whether or not a party to the dispute so requests. Specifically, CR 26 (b) (1) provides, in part, that the frequency or extent of use of the discovery methods shall be limited by the court if it determines that the discovery sought is ... unduly burdensome or expensive. ... The court may act upon its own initiative after reasonable notice or pursuant to a motion under [CR 26](c).

*Gillet*, 132 Wn. App. at 823 (quoting CR 26(b)(1)).

The court has broad discretion under CR 26 (c) to fashion any remedy it deems necessary to protect a client from annoyance, embarrassment, undue burden, or expense. *See Rhinehart*, 98 Wn. 2d at 235 (“The language of the discovery rule, which provides that upon ‘good cause shown’ the court may make ‘any order which justice requires to protect a party or person from annoyance embarrassment, oppression, or

undue burden or expense,' makes it clear that interests other than financial warrant protection under the rule") (emphasis added). Because the rule does not define "good cause," this finding would appear to be within the discretion of the court.

In this case, the trial court reviewed the files and records of the case and heard oral argument of both counsel for the petitioner and counsel for the respondent. CP 11 at 1. As stated in the Response to Motion for Discretionary review, counsel for Petitioner argued that (a) the SAPO Act creates a summary proceeding, (b) formal discovery would unnecessarily delay the proceedings, and (c) formal discovery is inconsistent with the procedural aspects prescribed in the SAPO Act. *See* Response to Motion for Discretionary Review, page 3, lines 13-18. The court agreed, finding that there was good cause shown to enter the protection order. CP 11 at 1 (emphasis added).

Once the court has found good cause shown, it may order any remedy it deems appropriate; however, the following orders are set out as illustrations:

1. That the discovery not be had;
2. That the discovery may be had only on specified terms and conditions, including designation of the time or place,
3. That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

4. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
  5. That discovery be conducted with no one present except persons designated by the court...
- CR 26 (c) (emphasis added).

In this case, the court ruled that the discovery was to be limited to an interview of the petitioner in the presence of the court reporter. The procedure ordered by the court was thus similar to the deposition originally requested by the respondent, except that the court specified the manner of the discovery and ordered that the petitioner not be required to submit to interrogatories. This ruling was clearly within the discretion of the court and is in accord with both the legislative intent behind the SAPO Act and the requirements to obtain a SAPO.

### III. A Requirement of Formal Discovery is Inconsistent with the SAPO Act.

Although appellant is correct that the statute characterizes the proceeding as a civil proceeding (RCW 7.90.005), this does not mean that formal discovery is triggered. RCW §§ 7.90.005-7.90.900 (SAPO Act) is codified as a “Special Proceeding” under Chapter 7 of the Revised Code of Washington. Under CR 81, the procedures under the SAPO Act supersede the civil rules when they are in conflict. CR 81 (“Except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings”) (emphasis added).

Thus, the court appropriately exercised its discretion under both CR 26 (c) and CR 81 by ensuring that the discovery was limited so as not to be inconsistent with the procedure laid out in the SAPO Act. As discussed above, the Legislature intended to create a streamlined process that would create quick, effective access to the courts by which victims of sexual assault could petition the court for protection. A requirement of formal discovery would unduly protract the proceedings. Because a final protection order may be issued as soon as fourteen days after issuance of a temporary SAPO under RCW 7.90.120, any additional discovery requirements would be inconsistent with the SAPO Act.

IV. The SAPO Act Does Not Specify a Particular Type of Discovery or Mandate a Trial.

The Washington Supreme Court has laid out the general principles of statutory construction as follows:

[I]n interpreting a statute, the fundamental duty of the court is to ascertain and carry out the intent of the Legislature. ... If a statute is unambiguous, it is not subject to judicial construction and its meaning is to be derived from the language of the statute alone. ... The court may not add language to a clear statute, even if it believes the Legislature intended something else but failed to express it adequately.

*State v. Chester*, 133 Wn. 2d 15, 21, 940 P.2d 1374 (1997)  
(emphasis added) (internal citations omitted).

Thus, the court must interpret the SAPO Act according to its legislative intent and must stay within the specified parameters for obtaining SAPO orders.

The provision of the SAPO Act specifying the requirements to obtain a SAPO order states that:

If the court finds by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent, the court shall issue a sexual assault protection order; provided that the petitioner must also satisfy the requirements of RCW 7.90.110 for ex parte temporary orders or RCW 7.90.120 for final orders.

RCW 7.90.090 (1) (a) (Burden of proof—Issuance of protection order—Remedies—Violations) (emphasis added).

Nothing in the provisions regarding either temporary or final orders mandates a trial or any particular form of discovery. A petitioner must establish two things to obtain a temporary SAPO order:

- (1) [She] must establish by a preponderance of the evidence that [she] has been the victim of nonconsensual sexual contact, and
- (2) [She] must establish that there is good cause to grant the remedy, regardless of the lack of prior service of process or of notice upon the respondent, because the harm which that remedy is intended to prevent would be likely to occur if the respondent were given any prior notice, or greater notice than was actually given, of the petitioner's efforts to obtain judicial relief.

RCW 7.90.110 (1).

To obtain a final order of protection, a full hearing must be set for not later than fourteen days from the issuance of the temporary order. RCW 7.90.120.

Any ambiguity regarding the form of proceedings under the SAPO Act is the result of a single provision, RCW 7.90.080 (Evidence) (See attached; Ex. 1). This provision is the only section that mentions the words “trial” or “cross examine.” There is no similar provision in the Domestic Violence Prevention Act (RCW §§ 26.50.50.010-26.50.903). A logical explanation for the addition is that because the SAPO Act expressly concerns sexual assault, the Legislature put in an additional evidentiary section in order to protect the petitioner. *Compare* RCW 7.90.080 (Ex. 1) with RCW 9A.44.020 (2) (Rape Shield Law) (Ex. 2).

Additionally, it appears that adherence to RCW 7.90.080 is not one of the requirements for obtaining a SAPO order under RCW 7.90.090. The evidentiary provision applies only where the respondent alleges a prior sexual history with the petitioner that is relevant to the court’s decision of whether to issue a sexual assault protection order or where it is constitutionally required. RCW 7.90.080 (1) (emphasis added). Thus, the use of the words “trial” and “cross-examine” is not determinative and must be taken in context.

The evidence provision does not automatically entitle respondent to a trial. First, an offer of proof must be made in camera for the court to determine whether the respondent has offered information specific enough to impeach the witness at trial. RCW 7.90.080 (2). If the respondent is able to meet this burden, then the court may order a trial. *Id.*

“Trial” is defined as, “A judicial examination and determination of issues between parties to an action, whether they be issues of law or of fact, before a court that has jurisdiction.” Black’s Law Dictionary 1504 (6<sup>th</sup> ed. 1990). Nothing in this definition mandates any particular form of discovery; additionally, the judge retains broad discretion to protect the petitioner by issuing protective orders.

#### V. The Procedural Protections in the SAPO Act Adequately Protect Respondent’s Due Process Rights.

Although it is not clear whether counsel is abandoning a due process argument, this issue is likely to be raised at oral argument. Therefore, a brief discussion of the procedural protections in the SAPO Act is warranted.

“To determine whether a procedure has violated due process, [the court] engage[s] in a two-step analysis. First, [it] must determine whether a liberty or property interest exists entitling an individual to due process protections.” *Washington Independent Telephone Ass’n v.*

*Washington*, 110 Wn. App. 498, 508, 41 P.3d 1212 (2002) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701 (1972)). "Second, if there exists such a constitutionally protected interest, [the court] employ[s] a balancing test to determine what process is due." *Washington Independent Telephone Ass'n*, 110 Wn. App. at 508 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893 (1976)).

Like the protection order issued under RCW §§ 26.50.010-26.50.903, the order issued under the SAPO Act does not constitute a substantial impairment of the respondent's rights:

As with the stalking statute, RCW 9A.46.110, the protection order ... curtails an abuser's right to move about when such movement is harmful or illegal and interferes with the victim's right to be free of invasive, oppressive, and harmful behavior... The protection order does not interfere with [respondent's] legitimate freedom of movement or right to travel. It, like the stalking statute, is a reasonable exercise of police power requiring one person's freedom of movement to give way to another person's freedom not to be disturbed

*Spence v. Kaminski*, 103 Wn. App. 325, 336, 12 P.3d 1030 (2000)

(emphasis added).

Assuming that the court finds it necessary to continue with the analysis, the next step is to balance the three following factors:

- (1) The private interest that will be affected by the official action;

- (2) The risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and
- (3) The Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.

*Matthews v. Eldridge*, 424 U.S. at 321.

As shown above, the private interest at risk is minimal.

Nevertheless, the SAPO Act provides the following procedural protections:

- (1) A petition to the court accompanied by an affidavit made under oath alleging that the person has been the victim of nonconsensual sexual conduct or nonconsensual sexual penetration committed by the respondent which gives rise to a reasonable fear of future dangerous acts, for which relief is sought (RCW §§ 7.90.020, 7.90.040);
- (2) Notice to the respondent within five days of the hearing (RCW 7.90.050);
- (3) A hearing before a judicial officer where the petitioner and respondent may testify (RCW 7.90.050);
- (4) A written order (RCW 7.90.130);
- (5) The opportunity to move for revision in superior court (RCW 7.90.170);
- (6) The opportunity to appeal; and
- (7) A limit on the duration of the order [14 days for a temporary order and 2 years for a final order] (RCW 7.90.120).

These procedural protections are nearly identical to those in the Domestic Violence Protection Order Act. In that context, these protections were found to be adequate. *See Gourley v. Gourley*, 158 Wn. 2d 460, 468, 145 P.3d 1185 (2006) (“The due process requirements of being heard at a

meaningful time and in a meaningful manner are protected by the procedures outlined in chapter 26.50 RCW”).

Due Process is “a flexible concept in which varying situations can demand differing levels of procedural protection.” *Gourley*, 158 Wn. 2d at 467. Therefore, considering the strong governmental interest in preventing sexual assault (as articulated in RCW 7.90.005), and the minimal risk to respondent’s rights, it is clear that the procedural protections provided in the SAPO Act satisfy due process.

#### **D. CONCLUSION**

This court should affirm the trial judge’s order granting the protective order. The appellant has failed to meet the high burden of showing that the trial court’s decision to limit discovery is manifestly unreasonable or untenable. Nothing in the SAPO Act mandates a trial or a particular form of discovery, and any requirement of protracted discovery would be inconsistent with the SAPO Act. Additionally, the procedural protections in the SAPO Act satisfy due process. Therefore, the Superior Court acted within its discretion in entering the protective order upon finding good cause shown.

DATED this 19th day of August 2008.

RESPECTFULLY SUBMITTED,



Kevin G. Rundle, WSBA # 28341  
Attorney for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington that I, in the manner indicated below, caused the following document(s):

**Opening Brief of Respondent w/ Exhibits**

along with this Certificate to be served upon:

Mr. Steven R. Levy  
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by hand delivery.

SIGNED AND DATED THIS 19th DAY OF AUGUST, 2008, AT  
TACOMA, WA.

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STATE OF WASHINGTON  
BY  DEPUTY

  
Kevin G. Rundle

**EXHIBIT 1**  
**(RCW 7.90.080 (Evidence))**

**RCW 7.90.080**  
**Evidence.**

(1) In proceedings for a sexual assault protection order and prosecutions for violating a sexual assault protection order, the prior sexual activity or the reputation of the petitioner is inadmissible except:

(a) As evidence concerning the past sexual conduct of the petitioner with the respondent when this evidence is offered by the respondent upon the issue of whether the petitioner consented to the sexual conduct with respect to which the offense is alleged; or

(b) When constitutionally required to be admitted.

(2) No evidence admissible under this section may be introduced unless ruled admissible by the court after an offer of proof has been made at a hearing held in camera to determine whether the respondent has evidence to impeach the witness in the event that prior sexual activity with the respondent is denied. The offer of proof shall include reasonably specific information as to the date, time, and place of the past sexual conduct between the petitioner and the respondent. Unless the court finds that reasonably specific information as to date, time, or place, or some combination thereof, has been offered as to prior sexual activity with the respondent, counsel for the respondent shall be ordered to refrain from inquiring into prior sexual activity between the petitioner and the respondent. The court may not admit evidence under this section unless it determines at the hearing that the evidence is relevant and the probative value of the evidence outweighs the danger of unfair prejudice. The evidence shall be admissible at trial to the extent an order made by the court specifies the evidence that may be admitted and areas with respect to which the petitioner may be examined or cross-examined.

[2006 c 138 § 9.]

**EXHIBIT 2**

**RCW 9A.44.020 (2) (Rape Shield Law)**

**RCW 9A.44.020**

**Testimony — Evidence — Written motion — Admissibility.**

(1) In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.

(2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

(3) In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:

(a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

(b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.

(d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(4) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence.

[1975 1st ex.s. c 14 § 2. Formerly RCW 9.79.150.]