

CHAPTER 9

Civil Protection Orders

By
Laura Jones, J.D.

I. Introduction

The effects of sexual assault are devastating. As the Washington State Legislature has acknowledged, “Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims.”¹ This is especially true if the perpetrator continues to have contact with the victim after the assault.

Until recently, civil protection orders were not available to many sexual assault victims. Prior to 2006, a sexual assault victim could only petition the court for a Domestic Violence Protection Order or an Antiharassment Protection Order. However, based on the eligibility requirements for these two orders, victims who were assaulted one time by someone outside their family or household were unable to meet the requirements of either protection order. This gap in protection was significant because many sexual assaults are perpetrated by acquaintances or persons known but not related to the victim.²

In 2006, the Washington State Legislature passed chapter 7.90 RCW, the Sexual Assault Protection Order Act. This law filled the gap that had existed for many sexual assault victims by providing them with an avenue to obtain “stay away” protection from the offender.³ Only 16 other states have a civil sexual assault protection order.⁴

This chapter is intended to assist the court in crafting effective orders and in developing effective and efficient procedures for handling cases of sexual violence in order to uphold the rights of all parties involved.

¹ RCW 7.90.005 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.005>

² Lucy Berliner, David Fine and Danna Moore, “Sexual Assault Experiences and Perceptions of Community Response to Sexual Assault: A Survey of Washington State Women” (Seattle: Harborview Medical Center 2001)

³ Kelly O’Connell, “A New Tool for Safety: Introducing Washington’s Sexual Assault Protection Order” *Washington Coalition of Sexual Assault Programs Advocate Newsletter* 3 October 2006: 2-5 <http://www.wcsap.org/legal/PDF/Sexual%20Assault%20Protection%20Order%20Newsletter%20.pdf>

⁴ Other states with civil sexual assault protection orders are: Alaska, California, Colorado, Florida, Illinois, Maine, Maryland, Minnesota, Montana, Oklahoma, North Carolina, South Dakota, Tennessee, Texas, Vermont, and Wisconsin. American Bar Association Commission on Domestic Violence. “Sexual Assault Civil Protection Orders (CPOs) By State.” June 2009 http://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Legal-resources/sa_cpo_chart.pdf

II. Chapter Overview

A. Orders Available for the Protection of a Victim

Washington statutes provide for the following protection orders for sexual assault victims:

1. sexual assault protection orders- civil & criminal (chapter 7.90 RCW)
<http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90>
2. domestic violence protection orders (chapter 26.50 RCW)
<http://apps.leg.wa.gov/rcw/default.aspx?cite=26.50>
3. antiharassment orders (chapter 10.14 RCW)
<http://apps.leg.wa.gov/rcw/default.aspx?cite=10.14>
4. vulnerable adult protection orders (chapter 74.34 RCW)
<http://apps.leg.wa.gov/rcw/default.aspx?cite=74.34>
5. criminal no-contact orders
6. restraining orders (RCW 26.09.060 and 26.09.300)
<http://apps.leg.wa.gov/rcw/default.aspx?cite=26.09.060>
<http://apps.leg.wa.gov/rcw/default.aspx?cite=26.09.300>
(RCW 26.10.040)
<http://apps.leg.wa.gov/rcw/default.aspx?cite=26.10.040>
(RCW 26.44.063)
<http://apps.leg.wa.gov/rcw/default.aspx?cite=26.44.063>
(RCW 26.26.130)
<http://apps.leg.wa.gov/rcw/default.aspx?cite=26.26.130>

B. Scope of this Chapter and Cross-References

This chapter is primarily concerned with civil sexual assault protection orders (SAPOs) issued pursuant to chapter 7.90 RCW. Although the policy concerns addressed in this chapter apply whenever a court is issuing an order for the protection of a sexual assault victim, the procedural discussions contained in this chapter apply only to orders initially obtained pursuant to chapter 7.90 RCW. Court-initiated SAPOs that are issued in conjunction with a criminal case are discussed in Chapters 4 and 8.

Domestic violence protection orders are discussed in detail in Chapter 8 of Washington's *Domestic Violence Manual for Judges* and guidelines for domestic violence protection and anti-harassment orders are discussed in Appendix J of the manual. The manual is available at <http://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/domViol/index>

Because the Sexual Assault Protection Order Act incorporates RCW 26.50.110 by reference with respect to enforcement of SAPOs, please refer to Chapter 8, pp. 30-40, of Washington's *Domestic Violence Manual for Judges* for a detailed discussion of civil and criminal enforcement.

Appendix A to this chapter contains a chart which summarizes the significant attributes of the various types of civil orders available to sexual assault victims. Appendix B to this chapter contains a bench card for judges conducting SAPO hearings.

C. Distinction Between “Ex Parte” and “Final” Orders

“Sexual assault protection order” is defined as an ex parte temporary order or a final order, which includes a remedy authorized by RCW 7.90.090.⁵ This chapter will distinguish between the two types of orders as follows:

1. Ex parte orders

RCW 7.90.110 & .120 provide for the issuance of an “ex parte temporary sexual assault protection order.” Because the distinguishing characteristic of these orders is not their temporary nature, but the fact that they may be issued ex parte, they will be referred to throughout this chapter as “ex parte orders.”

2. Final orders

RCW 7.90.090 provides for the issuance of a “sexual assault protection order” upon notice to the respondent and after a hearing. These orders have occasionally been referred to as “permanent orders.” This is a misnomer because they can only be issued for a maximum of two years. Instead, orders issued following notice and a hearing will be referred to throughout this chapter as “final orders.”

III. Standard Forms

A. Statutory Authority

RCW 7.90.180 directs the Administrative Office of the Courts to develop standard forms and instructional brochures to be available in all court clerk offices. These forms are available at: <http://www.courts.wa.gov/forms/?fa=forms.contribute&formid=65>

B. Use of Mandatory Forms Ensures that the Orders Will Be Enforceable

Courts should use the standard Washington State forms developed by the Administrative Office of the Courts in order to meet all state and federal requirements

⁵ <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.010>

regarding sexual assault cases. The Sexual Assault Protection Order, SA 3.015,⁶ is a mandatory form. Law enforcement officers, judicial and criminal information gathering agencies, and other courts are familiar with and rely upon the standard forms.

If the court enters a sexual assault protection order other than the mandatory standard order, the standard order should be attached to and/or incorporated by reference in the order entered to ensure that the order contains all necessary language, including in a conspicuous location of the following required statement:

A knowing violation of this sexual assault protection order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order.⁷

A protection order that does not contain the above language is legally insufficient and a violation of the order cannot be criminally enforced.⁸

C. List of Current Forms⁹

SA 1.015	Petition for Sexual Assault Protection Order (2007)
SAi-1.015	Instructions for Petition for Sexual Assault Protection Order (2010)
WPF 01.0400	Law Enforcement Information Sheet (2010)
SA 1.060	Confidential Information Form (2006)
SA 1.061	Addendum to Confidential Information Form (2006)
SA 2.015	Temporary Sexual Assault Protection Order and Notice of Hearing (2007)
SA 3.015	Sexual Assault Protection Order (2007)
SAi-3.015	Instructions for Sexual Assault Protection Order (2010)
SA 3.070	Appendix A: School Transfer (2006)
SA 4.020	Return of Service (2006)
SA 5.010	Reissuance of Temporary Sexual Assault Protection Order and Notice of Hearing (2006)
SA 5.020	Order Transferring Sexual Assault Protection Order Case and Setting Hearing (2006)

⁶ SA 3.015 is available at <http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=65>

⁷ RCW 7.90.130(e)(3) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.130>

⁸ See *State v. Marking*, 100 Wn. App. 506, 997 P.2d 461(2000), review denied, 141 Wn.2d 1026 (2000) (statutory language not contained in criminal no-contact order)

⁹ These forms are available at: <http://www.courts.wa.gov/forms/?fa=forms.contribute&formid=65>

SA 5.030	Petition for Renewal of Sexual Assault Protection Order and Notice of Hearing (2006)
SA 6.020	Denial Order (2006)
SA 6.050	Respondent’s Petition to Reopen Temporary Sexual Assault Protection Order (2006)
SA 6.060	Order on Respondent’s Petition to Reopen Temporary Sexual Assault Protection Order (2006)
SA 7.010	Motion to Modify/Terminate Sexual Assault Protection Order (2006)
SA 7.020	Notice of Hearing (2006)
SA 7.030	Order Modifying/Terminating Sexual Assault Protection Order (2006)
SASTMT	Statement (2006)

IV. Statute of Limitations

There is no time limit within which a party must file for a SAPO; however, the alleged victim must allege a reasonable fear of future dangerous acts in the petition.¹⁰ The Washington State Legislature recognizes that victims who do not report a sexual assault still desire safety and protection from future interactions with the offender.¹¹

V. Issuance of a Sexual Assault Protection Order

A. Grounds

Any person may seek relief by filing a petition that alleges that he or she has been the victim of nonconsensual sexual conduct or nonconsensual sexual penetration committed by the respondent.¹²

B. Definitions

1. “Nonconsensual” means “lack of freely given agreement.”¹³ Note, however, that under the following statutes, because of the age differential or the nature of the relationship between the victim and the offender, the victim

¹⁰ RCW 7.90.020 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.020>

¹¹ RCW 7.90.005 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.005>

¹² RCW 7.90.040(1) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.040>

¹³ RCW 7.90.010(1) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.010>

is considered to be incapable of freely giving agreement to sexual contact or sexual penetration as a matter of law:¹⁴

- a. The petitioner is under 12 years of age and the respondent is at least 2 years older (1st degree rape of a child; 1st degree child molestation)¹⁵
- b. The petitioner is 12 or 13 years of age and the respondent is at least 3 years older (2nd degree rape of a child; 2nd degree child molestation)¹⁶
- c. The petitioner is 14 or 15 years of age and the respondent is at least 4 years older (3rd degree rape of a child; 3rd degree child molestation)¹⁷
- d. The petitioner is a resident at a correctional facility and the respondent is an employee or contractor at the facility (1st and 2nd degree custodial sexual misconduct)¹⁸
- e. The petitioner is 16 or 17 years of age and the respondent is a foster parent, or in a supervisory position (1st and 2nd degree sexual misconduct with a minor)¹⁹
- f. The petitioner is a student at least 16 years of age but not more than 21 years of age and the respondent is a school employee at least five years older than the student (1st and 2nd degree sexual misconduct with a minor)²⁰

2. “Sexual conduct” is defined as:

- a. Any intentional or knowing touching or fondling of the genitals, anus, or breasts, directly or indirectly, including through clothing
- b. Any intentional or knowing display of the genitals, anus, or breasts for the purposes of arousal or sexual gratification of the respondent

¹⁴ Such conduct is a “strict liability offense.” See *State v. Knutson*, 121 Wn.2d 766, 775, 854 P.2d 617 (1993) (purpose of these statutes is to “protect persons who, by virtue of their youth, are too immature to rationally or legally consent;” see *State v. Clemens*, 78 Wn. App. 458, 467, 898 P.2d 324 (1995) (citing *State v. Dodd*, 53 Wn. App. 178, 181, 765 P.2d 1337 (1989))

¹⁵ RCW 9A.44.073, .083 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.073> , <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.083>

¹⁶ RCW 9A.44.076, .086 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.076> <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.086>

¹⁷ RCW 9A.44.079, .089 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.079> <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.089>

¹⁸ RCW 9A.44.160, 170 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.160> <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.170>

¹⁹ RCW 9A.44.093, .096 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.093> <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.096>

²⁰ *Id.*; see *State v. Hirschfelder*, 170 Wn.2d 536, 242 P.3d 876 (2010)

- c. Any intentional or knowing touching or fondling of the genitals, anus, or breasts, directly or indirectly, including through clothing, that the petitioner is forced to perform by another person or the respondent
- d. Any forced display of the petitioner’s genitals, anus, or breasts for the purposes of arousal or sexual gratification of the respondent or others
- e. Any intentional or knowing touching of the clothed or unclothed body of a child under the age of thirteen, if done for the purposes of sexual gratification or arousal of the respondent or others
- f. Any coerced or forced touching or fondling by a child under the age of thirteen, directly or indirectly, including through clothing, of the genitals, anus, or breasts of the respondent or others.²¹

3. “Sexual penetration” is defined as

any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio, or anal penetration. Evidence of emission of semen is not required to prove sexual penetration.²²

C. Parties to Sexual Assault Protection Order Cases

1. Petitioner

A victim of nonconsensual sexual conduct or nonconsensual sexual penetration, *including a single incident*, who does not qualify for a domestic violence protection order under chapter 26.50 RCW, and who is at least sixteen years of age, may petition the court for a sexual assault protection order.²³ However, a victim who is in a dating relationship with the respondent, or a family or household member of the respondent, as defined by RCW 26.50.010, is entitled to seek a domestic violence protection order as provided in chapter 26.50 RCW, and is excluded from seeking a SAPO.²⁴

A parent or guardian may file for a SAPO on behalf of a minor child, a vulnerable adult, or any other adult who, because of age, disability, health, or inaccessibility, cannot

²¹ RCW 7.90.010(1) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.010>

²² RCW 7.90.010(5)

²³ RCW 7.90.030(a), .040(2) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.030>
<http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.040>

²⁴ RCW 7.90.030

file the petition.²⁵ The court may appoint a guardian ad litem for the petitioner as it deems necessary.²⁶

2. Respondent

No guardian or guardian ad litem need be appointed on behalf of a respondent who is 16 or 17 years of age; however, the court may appoint a guardian ad litem for the respondent as it deems necessary.²⁷ The appointment of a guardian ad litem shall be at no cost to either party.²⁸

See section XIV.C of this chapter for a discussion of the parties' Fifth Amendment rights against self-incrimination in the context of a SAPO hearing.

VI. Jurisdiction and Venue

A. Court Jurisdiction

1. Ex parte orders

Washington municipal, district, and superior courts have jurisdiction to issue ex-parte SAPOs pursuant to RCW 7.90.110²⁹ and domestic violence protection orders pursuant to chapter 26.50 RCW.³⁰

2. Final orders

Washington municipal, district and superior courts have concurrent jurisdiction to issue final orders in most situations. However, only superior courts have jurisdiction to issue final orders if:

- a. A superior court has exercised or is exercising jurisdiction over a proceeding under title 26 RCW or chapter 13.34 RCW involving the parties; or
- b. The petition for relief presents issues of residential schedule of and contact with the children of the parties; or
- c. The petition for relief under chapter 7.90 RCW requests the court to exclude a party from a dwelling which the parties share.³¹

²⁵ RCW 7.90.030(b)

²⁶ RCW 7.90.040(4)

²⁷ RCW 7.90.040(3),(4) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.040>

²⁸ RCW 7.90.040(4)

²⁹ RCW 7.90.040(5)

³⁰ RCW 26.50.020(5) <http://apps.leg.wa.gov/rcw/default.aspx?cite=26.50.020>

³¹ RCW 7.90.040(5), 26.50.020(5)

B. Venue

Venue lies in the county or municipality within which the petitioner resides.³²

C. Personal Jurisdiction

Personal jurisdiction over the respondent is based upon the fact that a sexual assault, which constitutes a tortious injury, was committed in the state of Washington.³³ Jurisdiction lies within any state in which any part of the sexual assault occurred, regardless of whether either of the parties actually resides in the state where the act was committed. Washington can obtain jurisdiction over a non-resident by using the state's long arm statute.³⁴

A person who resides within the state, even if on a federal enclave, is still subject to the jurisdiction of a Washington court.³⁵

VII. Filing Fees

No fees for filing may be charged to a petitioner seeking relief under chapter 7.90 RCW.³⁶

VIII. Notice and Service of Process

A. No Notice of Ex Parte Hearing Required

A hearing on a petition for an ex parte order does not require service of notice of the hearing on the respondent.³⁷ If the respondent appears at the hearing he or she may enter a general appearance and testify. In any event, however, at the conclusion of the hearing the court may enter an ex parte order.³⁸

³² RCW 7.90.040(6) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.040>

³³ RCW 4.28.185(1)(b) <http://apps.leg.wa.gov/rcw/default.aspx?cite=4.28.185>

³⁴ RCW 4.28.185

³⁵ See, e.g., *Tammy S. v. Albert S.* 408 N.Y.S.2d 716 (1978) (court has jurisdiction over the residents although they lived in a federally owned installation); *Cobb v. Cobb*, 545 N.E.2d 1161 (Mass. 1989) (wife's status as a member of Armed Forces residing and working at a military installation in an area ceded to the federal government did not preclude the issuance of an abuse protection order. Further, protection order was effective in a ceded area, absent any indication that order interfered with federal function)

³⁶ RCW 7.90.055 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.055>

³⁷ RCW 7.90.110(b) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.110>

³⁸ RCW 7.90.110(2)

B. Notice of Hearing on Final Order

1. Personal Service

A hearing on a petition for a final order requires personal service upon the respondent not less than five court days prior to the hearing.³⁹

If timely personal service cannot be made, the court shall either require additional attempts to obtain personal service, or permit service by publication or service by mail.⁴⁰ If the court authorizes service by publication or mail, the court shall set a hearing date not less than 24 days from the date of the order.⁴¹ The court shall not require more than two attempts at obtaining personal service unless the petitioner so requests.⁴²

2. Service By Publication

The court may allow service by publication under the following circumstances⁴³:

- The sheriff or municipal peace officer files an affidavit stating that the officer was unable to complete personal service, describing the number and type of attempts the officer made to complete service;
- The petitioner files an affidavit stating that he/she believes the respondent is evading service, including the reasons for that belief
- The server has mailed a copy of the summons, notice of hearing, and ex parte order of protection to the respondent's last known address, unless the server states that he/she does not know the respondent's address; and
- The court finds reasonable grounds exist to believe the respondent is concealing him/herself to avoid service, and that further attempts to personally serve the respondent would be futile or unduly burdensome.

Publication must be made in a newspaper of general circulation in the county in which the petition was brought and in the county of the last known address of the respondent once a week for three consecutive weeks. The selected newspaper must be one of the three most widely circulated papers in the county. Service of the summons is considered complete when the publication has been made for three consecutive weeks.

The summons must be signed by the petitioner, it must contain the date of the first publication, and it must require the respondent to appear and answer the petition on the date set for the hearing. The summons must also contain a brief statement of the reason for the petition and a summary of the provisions under the ex parte order.

³⁹ RCW 7.90.050 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.050>

⁴⁰ RCW 7.90.050

⁴¹ Id.

⁴² Id.

⁴³ RCW 7.90.*** (new section to be added)

3. Service By Mail⁴⁴

The court may order service by mail if the circumstances justifying service by publication (as described above) apply, the court determines that service by mail is just as likely to give actual notice as service by publication, and that the serving party is unable to afford the cost of service by publication.

The service must be made by a competent person over age 18, who is not a party to the case. Copies of the order and other process must be mailed, postage prepaid, one by ordinary first-class mail and the other by a form of mail requiring a signed receipt showing when and to whom it was delivered. The envelopes must bear the return address of the sender. Service is deemed complete upon the mailing of the two copies.

C. No Service Fees for Personal Service

No service of process fees may be charged by a public agency to petitioners seeking relief under chapter 7.90 RCW and petitioners shall be provided with the necessary number of certified copies at no cost.⁴⁵

The sheriff of the county or the peace officers of the municipality in which the respondent resides shall serve the respondent personally unless the petitioner elects to have the respondent served by a private party.⁴⁶

IX. Relief Available

A. Restraint From Contact

The respondent may be restrained from having any contact, including nonphysical contact, with the petitioner directly, indirectly, or through third parties regardless of whether those third parties know of the order.⁴⁷

B. Exclusion From Premises

The respondent may be excluded from the petitioner's residence, workplace, school, or from the day care or school of a child, if the victim is a child.⁴⁸

⁴⁴ RCW 7.90.*** (new section to be added)

⁴⁵ RCW 7.90.055 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.055>

⁴⁶ RCW 7.90.140 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.140>

⁴⁷ RCW 7.90.090(2)(a) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.090>

⁴⁸ RCW 7.90.090(2)(b) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.090>

C. Distance Prohibition

The respondent may be prohibited from knowingly coming within, or knowingly remaining within, a specified distance from a specified location.⁴⁹

D. Transfer of Schools

In cases in which the petitioner and respondent are both under 18 years of age and attend the same public or private elementary, middle, or high school, the court may order that the respondent transfer to another school.

In determining whether to order a school transfer, the court must consider:

1. the facts of the case
2. the severity of the act
3. any continuing physical danger or emotional distress to the petitioner
4. the expense, difficulty, and educational disruption that would be caused by a transfer of the respondent to another school⁵⁰

The parents or legal guardians of the person restrained are responsible for transportation and other costs associated with the school transfer.

The court must send notice that the respondent may not attend the same school as the petitioner to the public or private schools that the petitioner attends, and that the respondent will attend.

E. Other Injunctive Relief

The court may enter other injunctive relief that is necessary or appropriate.⁵¹

F. Monetary damages are not recoverable.⁵²

⁴⁹ RCW 7.90.090(2)(c)

⁵⁰ RCW 7.90.090(3)

⁵¹ RCW 7.90.090(2)(d)

⁵² RCW 7.90.090(5)

X. Duration of Orders

A. Ex Parte Orders

Ex parte orders shall be effective for a fixed period not to exceed fourteen days if there is personal service, or not later than 24 days if service by publication or mail is permitted.⁵³

Note: The reason ex parte orders cannot exceed 14 or 24 days is to prevent a due process violation for a respondent who does not have notice of the proceedings against him or her. However, if both parties appear and either agree to a continuance or the respondent requests a longer continuance, arguably the respondent's due process rights are no longer in jeopardy, the temporary order before the court is no longer an ex parte order, and it is within the discretionary authority of the court to extend the temporary SAPO beyond fourteen or twenty-four days to a continued hearing date.

B. Final Orders

Upon a full hearing, a final order may be granted for a fixed period not to exceed two years.⁵⁴

XI. Findings Required If Ex Parte Order Not Granted

If the court denies issuance of an ex parte order, the court shall state the particular reasons for its denial.⁵⁵

XII. Evidence

A. Rules of Evidence Need Not Be Applied to Protection Order Hearings

The rules of evidence, except for the rules and statutes concerning privileges, need not be applied during hearings for sexual assault protection orders. Thus, hearsay is admissible at such hearings.⁵⁶

⁵³ RCW 7.90.120(1)(a) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.120>

⁵⁴ RCW 7.90.120(2)

⁵⁵ RCW 7.90.110(3) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.110>

⁵⁶ ER 1101(c)(4)

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer1101; see *Gourley v. Gourley*, 158 Wn.2d 460, 467, 145 P.3d 1185 (2006)

The rationale for not applying the rules of evidence in such hearings is to make the process more accessible to pro se litigants, who represent the majority of the parties in protection order proceedings.

Note: In order to make the proceedings accessible to all parties, especially those not represented by counsel, it is helpful for the court to announce and explain its policy on applying the rules of evidence at the beginning of the calendar. If the court will not consider hearsay, for example, such an announcement affords the parties the opportunity to request a continuance to enable them to bring witnesses or documentation to be considered at the full hearing.

B. Prior Sexual Activity or Reputation of the Petitioner is Generally Inadmissible

Evidence of a petitioner's prior sexual activity or reputation may only be admitted as it relates to past sexual conduct between the petitioner and respondent on the issue of consent to the alleged sexual assault, or when constitutionally required.⁵⁷

A party intending to offer such evidence must 1) file a written motion at least 14 days before the hearing specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause, requires a different time for filing or permits filing during the hearing, and 2) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.⁵⁸

The court may not admit such evidence until it has held an *in camera* hearing to determine 1) that the information is reasonably specific as to date, time, or place and 2) that the probative value of the evidence outweighs the danger of unfair prejudice.⁵⁹

The victim and other parties have the right to attend the hearing and be heard, and the motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.⁶⁰

C. Burden of Proof

1. Ex parte orders

An ex parte order shall issue if the petitioner shows by a preponderance of the evidence that 1) the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent, and 2) that there is good cause to

⁵⁷ RCW 7.90.080(1)(a)-(b) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.080>, ER 412
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0412

⁵⁸ ER 412(d)(1)

⁵⁹ RCW 7.90.080(2), ER 412(c)

⁶⁰ ER 412(d)(2)

grant the remedy, regardless of the lack of prior service of process 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.⁶¹

2. Final orders

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 final order.⁶²

Note: There is some ambiguity in the statute as to whether the petitioner, in order to secure a final SAPO, need only prove nonconsensual sexual conduct or penetration or must also prove a reasonable fear, as is required to be alleged in an affidavit accompanying the petition. This ambiguity could become an issue, particularly in cases in which a substantial period of time has elapsed between the alleged assault and the filing of the petition. In such cases an argument may be made that the requirement in RCW 7.90.020(a) of an allegation of fear exists because of due process concerns for the respondent who would have no knowledge of the pending protection order case against him or her, and that once a respondent is on notice, if the petitioner succeeds in proving that the respondent engaged in nonconsensual sexual conduct or penetration, then that is enough to demonstrate a reasonable fear of future acts. Because "sexual assault inflicts humiliation, degradation, and terror on victims,"⁶³ it is reasonable to expect a victim to be afraid of the respondent, even if the probability of another assault is low.

D. Limitations Upon Consideration of Evidence

The petitioner must not be denied a sexual assault protection order because either party is a minor or because the petitioner did not report the assault to law enforcement.⁶⁴

The court may not require proof of physical injury of the victim or proof that the petitioner has reported the sexual assault to law enforcement.⁶⁵

Denial of a remedy may not be based, in whole or in part, on evidence that the respondent was voluntarily intoxicated, the petitioner was voluntarily intoxicated, or the petitioner engaged in limited consensual sexual touching.⁶⁶

⁶¹ RCW 7.90.110(1) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.110>

⁶² RCW 7.90.090(1)(a) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.090>

⁶³ RCW 7.90.005 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.005>

⁶⁴ RCW 7.90.090(1)(b)

⁶⁵ Id.

⁶⁶ RCW 7.90.090(4)(a)-(c)

XIII. Discovery

When one or both parties to a SAPO case are represented by an attorney, discovery requests, including interrogatories and requests for production, may be made. The civil rules make special provision for discovery in protection order cases, expressly giving the court the authority to limit discovery when “justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”⁶⁷ CR 26(c) also states that the court may place the following limitations on discovery:

- that discovery may not be allowed
- that discovery may be limited to specific terms and conditions
- that only certain types of discovery may be allowed
- that certain matters may not be inquired into
- that discovery be conducted with no one present except persons designated by the court
- that the contents of a discovery deposition not be disclosed or be disclosed only in a designated way
- that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court⁶⁸

Good cause for limiting discovery in SAPO cases is established by showing the threat of annoyance, embarrassment, oppression, or undue burden or expense, and that these harms can be avoided without impeding the discovery process.⁶⁹ There are no specific provisions within chapter 7.90 RCW that provide for discovery or trial in a SAPO case.

XIV. Conducting the Hearing

A. Victim Safety and Privacy

As in domestic violence cases, there are additional concerns when a sexual assault victim must appear in the same courtroom as the alleged perpetrator. Petitioners may be very fearful for their safety because the hearing may be the first time since the assault that they are in the presence of the respondent.

Note: The court should consider these safety concerns when determining how to elicit testimony from the parties. It may be inappropriate, for example, to allow pro se parties to conduct questioning through direct or cross examination.

⁶⁷ CR 26(c)

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CR&ruleid=supcr26

⁶⁸ Id.

⁶⁹ See the non-precedential decision in *Kantola v. Juvinal*, 150 Wn. App. 1007 (2009 unpublished) citing *Rhinehard v. Seattle Times Co.*, 98 Wn.2d 226, 256, 654 P.2d 673 (1982)

The court should arrange for the positioning of the parties and the deployment of court and security personnel within all courtroom areas to prevent contact between the parties.

Note: If court facilities do not have a separate waiting area for petitioners and respondents, contact between the parties can be minimized if there are separate and clearly-marked seating areas for petitioners and respondents on the gallery benches.

B. Scheduling Hearings

Due to the especially sensitive nature of SAPO proceedings, two important scheduling issues arise.

1. Uncontested hearings for default or continuance

Attention should be given to minimizing the time SAPO parties are required to wait if the hearing will involve only the entry of a default or an uncontested order of continuance by identifying those cases and calling them at the beginning of the calendar. Parties to SAPO proceedings, particularly petitioners, are very often nervous and apprehensive, and requiring parties to sit through a full calendar until their case is called for a brief, non-contested hearing unnecessarily exacerbates their stress and can discourage petitioners from following through.

Caution should be exercised, however, when entering defaults against a petitioner at the beginning of the calendar. Frequently, petitioners will be apprehensive about proceeding with a SAPO, may be fearful of encountering the respondent at court, and may find the process confusing and intimidating, which can contribute to a petitioner appearing after the beginning of the calendar. In those cases in which the petitioner arrives after the court has entered a default and dismissal, and the respondent has not appeared at the hearing, the court may find it appropriate to simply vacate the default and dismissal. However, in those cases in which the respondent was present when the court entered a default and dismissal, then left before the petitioner later arrived, the court is faced with the choice of vacating the default and dismissal without notice to the respondent who appeared and was present when the default and dismissal were ordered or requiring the petitioner to file a new petition. To avoid such a problematic choice, the court should consider identifying those cases in which the respondent is present but the petitioner is not and, in those cases, directing the respondent to remain present for a period of time it deems appropriate, to determine if the petitioner will appear.

2. Contested hearings

If SAPO hearings are set on a calendar that includes other types of cases, full SAPO hearings at which both parties will be present, should be scheduled at the end of the calendar, when persons involved in other types of cases have left the courtroom.

Note: A recommended best practice for scheduling SAPO hearings is the following sequential order:

- 1. Cases in which there is no proof of service*
- 2. Cases in which only one party is present and the case will be dismissed or a default order entered*
- 3. If both SAPO cases and non-SAPO cases are scheduled on the same calendar, the non-SAPO cases in which both parties are present and ready to proceed with a full hearing*
- 4. SAPO cases in which both parties are present and ready to proceed with a full hearing*

C. Telephonic Hearing

The court may schedule a hearing by telephone pursuant to local court rule to reasonably accommodate a disability, or in exceptional circumstances to protect a petitioner from further nonconsensual sexual conduct or nonconsensual sexual penetration. The court shall require assurances of the petitioner's identity before conducting a telephonic hearing.⁷⁰

D. Existence of Criminal Investigation or Charge

Whether there is an ongoing criminal investigation or charge should be a standard inquiry in SAPO cases to identify potential Fifth Amendment issues.

Note: If there is a pending investigation or if criminal charges have been filed, a best practice is to advise respondents of their Fifth Amendment rights and/or grant a continuance to allow the respondent time to consult with an attorney regarding those rights.

Continuances of SAPO hearings pending the outcome of criminal investigations or charges should be avoided if possible because investigations often take many months. This places an undue burden on the petitioner to continue coming back to court to get the temporary protection order reissued or to re-file the petition without resolution in his or her case. Moreover, the outcome of the criminal investigation and the prosecutor's filing decision should not impact the outcome of a civil SAPO case. The state must make a charging decision based on whether it believes it could prove "beyond a reasonable doubt" that a sexual offense occurred, whereas the burden of proof in a civil SAPO case is a "preponderance of the evidence" standard.

⁷⁰ RCW 7.90.050 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.050>

However, if Fifth Amendment rights are asserted, the court should carefully consider the application of the analysis prescribed in *King v. Olympic Pipeline*.⁷¹ The competing interests that must be balanced include:

1. implication of the Fifth Amendment privilege⁷²
2. similarities between civil and criminal cases⁷³
3. status of the criminal case⁷⁴
4. plaintiffs' interests and potential prejudice⁷⁵
5. the burdens on the party asserting the privilege⁷⁶
6. convenience and efficiency of the court⁷⁷
7. interests of non-parties to civil litigation⁷⁸
8. public interest in civil and criminal litigation⁷⁹

E. Sexual Assault Advocates

A “sexual assault advocate” is an employee or volunteer from a rape crisis center, victim assistance unit, program, or association, that provides information, medical or legal advocacy, counseling, or support to victims of sexual assault, who is designated by the victim to accompany the victim to the hospital or other health care facility and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings.⁸⁰

The victim must be allowed to receive assistance from a sexual assault advocate in preparing the petition, and is also allowed to confer with an advocate and have one accompany him/her to court. Sexual assault advocates are not engaged in the unauthorized practice of law when providing the foregoing assistance.⁸¹

⁷¹ 104 Wn. App. 338, 16 P.3d 45(2000)

⁷² Id. at 353-57

⁷³ Id. at 357-58

⁷⁴ Id. at 358-59

⁷⁵ Id. at 359-62

⁷⁶ Id. at 362-65

⁷⁷ Id. at 365

⁷⁸ Id. at 366

⁷⁹ Id. at 366-68

⁸⁰ RCW 5.60.060 <http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060>

⁸¹ RCW 7.90.060 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.060>

Communications between the petitioner and a sexual assault advocate are protected.⁸²

F. Appointment of Counsel

RCW 7.90.070 states: “The court may appoint counsel to represent the petitioner if the respondent is represented by counsel.”⁸³

*Note: This statutory provision helps to maintain fairness in the proceedings, which is often jeopardized when a respondent appears with counsel. The danger is illustrated in a study conducted in King County in 2010 which found that all SAPO cases in which the respondent had an attorney and petitioner did not were dismissed.*⁸⁴

G. Non-English Speaking Parties

Non-English speaking parties may be unable to articulate relevant facts or the relief that they are requesting due to language or cultural barriers, putting them at a disadvantage during legal proceedings.

The Administrative Office of the Courts has translated information about sexual assault protection orders into Russian, Tagalog, and Vietnamese. This informational brochure is available in those languages in PDF format on the Washington Courts internet site: <http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=65>

A qualified interpreter shall be appointed to assist a non-English speaking person or a person who cannot readily understand or communicate in spoken language due to a hearing or speech impairment.⁸⁵

XV. Multiple Protection Orders

A petitioner protected by an order entered in a criminal proceeding under RCW 7.90.150 or by a criminal no-contact order may also seek a civil SAPO because protection orders entered in a criminal proceeding will be dismissed if the criminal proceeding is dismissed.

*Note: If the defendant is acquitted of criminal charges, a SAPO issued in conjunction with the criminal case will be terminated unless the alleged victim files an independent action for a civil SAPO, in which case the court may keep the SAPO in the criminal case in place until a full hearing is conducted in the civil SAPO case.*⁸⁶

⁸² RCW 5.60.060

⁸³ <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.070>

⁸⁴ CourtWatch, A Program of KCSARC, “Analyzing the Impact and Application of the Sexual Assault Protection Order in King County” 17, <http://www.kcsarc.org/courtwatch>

⁸⁵ RCW 2.42.120 <http://apps.leg.wa.gov/rcw/default.aspx?cite=2.42.120>, 2.43.030 <http://apps.leg.wa.gov/rcw/default.aspx?cite=2.43.030>

⁸⁶ RCW 7.90.150(2)(b) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.150>

XVI. Mutual Protection Orders Strongly Disfavored

The court should not enter a SAPO on behalf of a party who has not properly filed and served a petition prior to the hearing. Mutual protection orders can lead to (a) due process violations when issued against a petitioner without prior notice;(b) lack of clarity for law enforcement in determining whose conduct is prohibited by court order;(c) opportunity for a manipulative perpetrator to entrap the victim in a situation that could lead to the victim's arrest; and (d) the impression that the court believes the victim is responsible for the sexual assault.

XVII. Modification or Termination of Final Orders

Either party may petition the court to modify or terminate the terms of an existing sexual assault protection order before its expiration date. The court may modify or terminate the order upon notice and hearing.⁸⁷

XVIII. Renewal of Final Orders

There is no limit to the number of times a final order may be renewed. A petitioner may apply for renewal of the sexual assault protection order by filing a petition for renewal at any time within three months prior to the order's expiration date. If the motion for renewal is uncontested and the petitioner seeks no modification of the order, the order may be renewed on the basis of the petitioner's motion stating that there has been no material change in the relevant circumstances and the reasons for the renewal request. A renewal must be granted in open court.⁸⁸

XIX. Law Enforcement Information System

A copy of a SAPO granted under chapter 7.90 RCW must be forwarded by the clerk of the court to the appropriate law enforcement agency specified in the order on or before the next day. Upon receipt, the law enforcement agency shall immediately enter the order into any computer-based criminal intelligence system available in this state used by law enforcement agencies to list outstanding warrants.⁸⁹

Entry into the law enforcement information system serves as notice to all law enforcement agencies that the order exists. The SAPO is fully enforceable in any county in Washington.

⁸⁷ RCW 7.90.170 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.170>

⁸⁸ RCW 7.90.120(3) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.120>

⁸⁹ RCW 7.90.160 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.160>

XX. Enforcement of Protection Orders

A knowing violation of a SAPO is punishable under RCW 26.50.110.⁹⁰ A detailed discussion of civil and criminal enforcement of SAPOs is contained in Chapter 8, pp. 30-40, of Washington's *Domestic Violence Manual for Judges* available at: <http://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/domViol/index>

XXI. Full Faith and Credit

A protection order from another state may be enforced in Washington so long as (a) it was issued to prevent violent or threatening acts, harassing behavior, sexual violence, or to prohibit contact; (b) the court that issued the order had jurisdiction over the parties; and (c) the respondent received notice and opportunity to be heard.⁹¹

XXII. Sealing Court Records

The petitioner or respondent may bring a motion to seal certain documents in the court file so that they are not a part of the public record. For example, medical or counseling records, photos, or declarations referencing such content may be information that the parties do not want the public to access. The respondent may even bring a motion to seal or redact the original petition if the SAPO is dismissed.

In considering a motion to seal, the court must apply GR 15 and the *Ishikawa* factors before issuing a ruling.⁹² There is a presumption of openness for court records in Washington;⁹³ however, GR 15(c)(2) provides that the court may find that this presumption is outweighed by compelling privacy or safety concerns of the parties, including findings that:

- (A) The sealing... is permitted by statute; or
- (B) The sealing... furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or
-
- (F) Another identified compelling circumstance exists that requires the sealing....⁹⁴

⁹⁰ RCW 7.90.090(6) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.090>

⁹¹ 18 U.S.C. §§ 2265(a) & (b), 2266(5)

⁹² *State v. Waldon*, 148 Wn. App. 952, 202 P.3d 325 (2009)

⁹³ *See Rufer v. Abbott Labs.*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005)

⁹⁴ GR 15(c)(2)

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr15

If some or all of the factors enumerated under GR 15(c)(2) are found to exist, the court must follow these steps:

- a. The proponent of sealing must make some showing of the need therefor, showing a “serious and imminent threat to some other important interest.”⁹⁵
- b. Anyone present at the motion hearing must be given the opportunity to object.
- c. The court and the parties should carefully analyze whether the motion to seal is the least restrictive means to protect the threatened interest.
- d. “The court must weigh the competing interests of the defendant and the public.”⁹⁶
- e. “The order must be no broader in its application or duration than necessary to serve its purpose.”⁹⁷

⁹⁵ *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982); see also *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995)

⁹⁶ *Id.*

⁹⁷ *Id.*