TO: JUSTICE CHARLES JOHNSON, SUPREME COURT RULES COMMITTEE, NAN SULLINS
FROM: JUDGE KIM PROCHNAU[1]

RE: GR 22(F) (PROPOSED)
DATE: June 18, 2008

~~The draft version of GR 22(f) reads as follows:~~

> ~~*When a judicial officer determines that information contained within a judicial information services (JIS) database is relevant to the placement of a child in a parenting plan, the judicial officer shall disclose the relevant information to the parties and, on timely request, provide any party an opportunity to be heard regarding that information. Disclosure of JIS database information irrelevant to child placement is not required.*~~

~~The rule is proposed to address the requirements of~~
The drafters are to be commended for taking on the difficult task of implementing RCW 26.09.182. However, I would suggest that the GR 22(f), as proposed, could benefit from further refinement.
~~. RCW 26.09.182 requires the court to determine the existence of any information and proceedings relevant to the placement of a child that are available in the judicial information system and databases before entering a permanent parenting plan. It makes no distinction between parenting plans entered after trial or by agreement or upon default. Note that RCW 26.09.187 requires the court to consider a variety of factors before approving a final parenting plan. Agreement of the parties is not dispositive but is only one of the factors to be considered. In certain situations, such as where there has been domestic violence or child abuse, the court may be required to impose certain restrictions regardless of the wishes of the parties.~~

~~Although the court has been required to consult the judicial information system database for many years before issuing protection orders involving placement of a child, the language in that statute differs from RCW 26.09.182 in certain aspects and consequently has been implemented in a different fashion than as proposed in GR 22. See, RCW 26.50.135.~~[2]

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[1] These comments are my individual comments and are not necessarily based on any policies of my court.

[2] I was part of the SCJA drafting committee that initially proposed amending the evidence rules in order to implement RCW 26.09.135; that proposal was adopted as ER 1101(c)(4) in 1999, as well as both a local and statewide ad-hoc task force that studied implementation of RCW 26.09.135. ~~Other materials used in implementing the requirements of RCW 26.09.135 were the Judicial Information System Committee Data Dissemination Policy, 10/02/98; Attorney General's Opinion, 11/23/98; RCW 26.50; Report to King County Superior Court, by Comm. Prochnau; OAC Domestic Violence Manual for Judges, 1998 (Glossary and codes); 1999 Washington State Judges' Spring Conference Database Materials on DV database; and July 1999 King County Superior Court Judges' Policy Memorandum. .~~

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The proposed changes to GR 22 do not clearly address how, and under what circumstances, the court is to provide notice to the parties ~~wh~~as to the contents of any JIS information. For example, may the court provide copies of the JIS information or orally disclose that information to *only* those parties appearing at the hearing~~ether the court may simply provide copies of the JIS information to the parties or must orally disclose t~~ or must the court take on the responsibility of providing that information to parties not present ~~he information to the parties~~at the time a final parenting plan is entered? This is not a minor point given that the rule when adopted will need to be followed for ALL final parenting plans whether they are entered by agreement, default or after trial.

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And given that RCW 26.50.060 requires that the court make residential provisions for children of the parties in protection orders "on the same basis as specified in chapter 26.09 RCW..." it can be expected that if GR 22(f) is enacted as proposed that the court would also need to apply GR 22(f) in all protection orders where the parties have children in common. The language in the rule differs from ER 1101(c)(4), however, and either the proposed rule or ER 1101(c)(4) will need to be amended to make them consistent.

Although the courts have had the responsibility for consulting JIS records in domestic violence proceedings for several years, ER 1101(c)(4) only requires oral disclosure of information that the judicial officer proposes to consider and only to those parties present at the protection order hearing. (Both ER 1101(c) (4) and the proposed GR 22(f) also require that the court afford all parties an opportunity to be heard with respect to the disclosed JIS information, "upon timely request"...)

Thus, under ER 1101(c) (4) a judge may choose not to disclose a conviction for shoplifting or if the judge doesn't intend to consider it for the purposes of determining whether a protection order should issue. The proposed GR 22(f) (consistent with the statute) requires the judicial officer to disclose ALL information in the database that is relevant to placement of a child. - ER 1101 allows the court to make a subjective determination of what appears to be important whereas ER 401 imposes an objective standard of relevance. Given that ER 401 is defined to include any evidence having the tendency to make the existence of a fact of consequence more probable or less probable, a judge would be hard pressed to assess whether information in the database might be relevant to issuance of a parenting plan unless he or she was to first disclose that information to the parties and afford them an opportunity to respond.

~~. It does require that the documents be filed under seal after the hearing, however, and indicates that the parties and their attorneys may have access to these records after filing. See, GR (h) (2) (Parties and their attorneys may have access to all documents filed in a family law case; exceptions to this rule do not~~

~~include JIS database records). There would seem to be no difference than with simply giving the parties a copy of the records at or before the hearing.~~

Historically, courts and clerks have preferred that ~~been reluctant to provide~~ copies of the records to the parties in domestic violence protection order proceedings not be provided ~~for~~ for fear that the information could be used by a perpetrator to locate the whereabouts of his or her victim.

~~. Normally, the judicial officer orally reads at the domestic violence protection order hearing the information contained in the database that he or she proposes to consider and gives the parties a chance to correct or deny the accuracy of the information.[4] Query on how to balance protection of domestic violence victims with the logistics of providing this information in all parenting plan cases and how to do it in a fashion that comports with due process.~~However, if RCW 26.09.182 is interpreted as requiring that ALL JIS data reviewed by the judge be disclosed, then oral disclosure may be impractical. Some parties to a parenting plan may have a lengthy but very old and low-level offense history. It is not practical for the court on a crowded docket to orally read out all of the JIS records that might be considered relevant to one or both parties and to take the time to make sure each party does not dispute the information. It is also embarrassing to parties who may have lived a blemish-free life for many years to hear their old criminal history read out in open court. It will also be expensive if the court is expected to mail a copy of the JIS database to all parties either before the hearing or, when one party does not appear, to continue the hearing and mail a copy of the database so that they may have a timely opportunity to be heard.

~~It~~ It may also be that given the proliferation of websites that provide access to court record data and the availability of electronic court records, that the barn door is already wide open on this information and that the policy of only providing oral notice is now less important. ~~take the time to make sure each party does not dispute the information. It is also to parties who may have lived a blemish-free life for many years to hear their old criminal history read out in open court. It will also be expensive if the court is expected to mail a copy of the JIS database to all parti~~

Courts may also wish (and parties may demand) that copies of these records be available to the parties before entry of a final parenting plan given that parties may wish to challenge the accuracy of the records or take steps to address any concerns before the final hearing. Many people, of course, make plans (such as

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~~[4] Neither RCW 26.09.182 nor RCW 26.09.135 were requested by court associations, such as the Superior Court Judges Association, probably due to the difficulty in implementing this legislation. After RCW 26.09.135 was enacted, an ad hoc task force initiated by Justice Bobbe Bridge was formed to consider implementation; members included domestic violence protection advocates, members of the family law bar, prosecutors, defense counsel, judicial officers, and court clerks.~~

remarriage!) that hinge on a date certain for entry of final orders and would not appreciate having the hearing continued at the last minute.[1]

~~Given that RCW 26.50.060 requires that the court make residential provisions for children of the parties in protection orders "on the same basis as specified in chapter 26.09 RCW..." it can be expected that if GR 22(f) is enacted as proposed that the court would need to apply GR 22(f) to protection orders.~~

~~The proposed language in GR 22 (f) imposes disclosure requirements upon the Judicial Officer that are more extensive than under ER 1101(c) (4). Under ER 1101(4), the judicial officer has the discretion not to disclose information in the JIS database that he or she does not propose to consider. ER 1101 allows the court to make a subjective determination of what appears to be important whereas ER 1101(c) (4) imposes an objective standard of relevance. Thus, under ER 1101(c) (4) a judge may choose not to disclose a conviction for shoplifting if the judge doesn't intend to consider it for the purposes of determining whether a protection order should issue. GR 22(f) (consistent with the statute) requires the judicial officer to disclose ALL information in the database that is relevant to placement of a child. Given that ER 401 is defined to include any evidence having the tendency to make the existence of a fact of consequence more probable or less probable, a judge would be hard pressed to assess whether information in the database might be relevant to issuance of a parenting plan unless he or she was to first disclose that information to the parties and afford them an opportunity to respond.~~

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~~The language in GR 22(f) also provides more stringent notice requirements on the court than that in ER 1101(c) (4). Under ER 1101(c) (4), the court is only required to disclose the information it proposes to consider to each party present at the hearing. Under GR 22(f) the court shall disclose the relevant information to the parties, without any limitation on whether a party is present at the hearing. Both ER 1101(c) (4) and the proposed GR 22(f) also require that the court afford all parties an opportunity to be heard with respect to the disclosed JIS information, "upon timely request"...~~

~~I believe ER 1101 (c)(4) is commonly interpreted, as intended by its proponents, to simply require the court to briefly read the information in the JIS database it proposes to consider during the course of the protection order proceedings. This can be done relatively quickly and in my experience is rarely disputed by the parties. However, because the vast majority of parenting plans are entered by agreement or upon default, one party is frequently not present at hearings to finalize parenting plans. GR 22(f) would thus appear to impose a new duty upon~~

[1] Consumer credit reports come to mind as an analogy. Not so long ago, consumer credit reports were almost exclusively in the province of the creditors and consumers never saw their reports. Now many consumers routinely request copies of their ~~reports inreports in~~ order to correct errors and work on improving their scores before they apply for credit.

~~the court to provide a copy of the JIS information to any party not present and to allow them a timely opportunity to be heard before entering the parenting plan.~~

~~The logistics of the new rule are very problematic. Some parties to a parenting plan may have a lengthy but very old and low-level offense history. It is not practical for the court on a crowded docket to orally read out all of the JIS records that might be considered relevant to one or both parties and to take the time to make sure each party does not dispute the information. It is also embarrassing to parties who may have lived a blemish-free life for many years to hear their old criminal history read out in open court. It will also be expensive if the court is expected to mail a copy of the JIS database to all parties either before the hearing or, when one party does not appear, to continue the hearing and mail a copy of the database so that they may have a timely opportunity to be heard.~~

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The rule does not address what the court should do when information in the database is confidential, such as one of the parties has had a dependency action filed against them, not necessarily involving the other party. Given that the legislature has mandated that the court consider all relevant information before entering a final parenting plan and is presumed to understand considerations of due process, the rule should resolve this issue by indicating that all information in the database may be disclosed whether or not it contains information as to sealed court proceedings.

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The rule could be improved by clarifying that the court may decide in what form and under what circumstances to give that information to the parties. Depending on the circumstances and each court's policies, a court may choose to wait until the final hearing to either read the information out loud or provide it in writing to all parties present at the hearing. Or, the court may choose to provide the parties with this information at the time of filing. I am not aware of the courts having received any additional funds from the Legislature to implement these new requirements; ~~This statute has imposed an unfunded mandate upon the courts;~~ each court should be able ~~has~~ to make a decision about the logistics of providing this information within the constraints of their own resources and due process. In some circumstances, it may not be necessary to provide this information to both parties given that the parties are presumed to be familiar with the law (although it would afford better notice if the mandatory forms, such as the petition and parenting plan forms, were modified to include language to warn the litigants that the court may choose to adopt or not adopt a parenting plan based on the JIS information regardless of the parties' agreements.) (For example, the petitioner may have requested that the respondent have no contact with the children until further order due to a history of abandonment. If the respondent does not appear or answer, the court should be able to proceed with a final hearing in the respondent's absence. Even though the hearing may result in production of JIS database information not disclosed in the petition i.e. respondent has a new conviction for child abuse, the respondent is on notice that this is a possible consequence at the hearing.

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Consideration should also be given to amending the Rules of Evidence to address any evidentiary objections, such as hearsay, to the Court's consideration of information in the JIS databases.

~~ER 1101 should also be amended to be consistent with this rule to allow the court to overcome evidentiary barriers that prevent it from considering the information in the JIS databases. (I am not suggesting that the rules of evidence not be required for family law proceedings but that the court can explicitly consider information in the JIS database regardless of whether evidentiary objections such as hearsay could be raised.)~~

Sincerely,

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