

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on September 14, 2016, the following order was made and entered:

RE: REQUEST FOR PUBLIC COMMENT ON ADDITION TO THE WEST VIRGINIA TRIAL COURT RULES, Docket No. 16-RULES-17

On a former day, August 29, 2016, came John M. Hedges, Hedges & Lyons, PLLC, and presented to the Court a proposed addition to the West Virginia Trial Court Rules, to add Trial Court Rule 18, in response to W.Va. Code § 62-6B-6(c). The Court has carefully considered the proposed addition. Upon consideration, the Court is of the opinion to and does hereby publish the following addition for a sixty day comment period. Comments must be filed in writing on or before Monday, November 28, 2016, with the Clerk of this Court. The addition is indicated by underscoring as follows:

TCR RULE 18 - RECORDED INTERVIEWS OF CHILDREN

Rule 18.01: APPLICATION GENERALLY

This Rule applies to all types of proceedings in circuit court, family court, and magistrate court.

Rule 18.02: DEFINITIONS

For the purposes of this Rule, the following definitions shall apply:

(a) "Interviewed child" shall mean any person under the age of eighteen who has been interviewed by means of any type of recording equipment in connection with alleged criminal behavior or allegations of abuse or neglect of any child under the age of eighteen.

(b) "Recorded interview" means any electronic recording of the interview, any transcript thereof, and any written documentation in any form related to the recorded interview, of an interviewed child conducted by: (1) An employee or representative of a child advocacy center as that term is defined in W. Va. Code § 49-3-101; (2) any psychologist, psychiatrist, physician, nurse, social worker or other person appointed by the court to interview the interviewed child as provided in W. Va. Code § 62-6B-3(c); or (3) a child protective services worker, law-enforcement officer, prosecuting attorney or any

representative of his or her office, or any other person investigating allegations of criminal behavior or behavior alleged to constitute abuse or neglect of a child. Criminal complaints, police reports, and other routine law enforcement documentation do not constitute a recorded interview.

Rule 18.03: ACCESS AND USE

(a) Any recorded interview that is subject to access or disclosure pursuant to court rules regarding discovery or production in a proceeding shall be kept strictly confidential as provided by this Rule.

(b) There shall be no access to, or publication, duplication, or use of any such recorded interview, transcript, or related documentation except in accordance with a protective order issued by the judicial officer presiding over the proceeding, which order shall include the following terms and conditions:

(1) All recordings, transcripts, and related documentation shall have the words "CONFIDENTIAL -- PENALTIES FOR UNAUTHORIZED DISCLOSURE OR DUPLICATION," conspicuously affixed thereto;

(2) Access to and use of recordings, transcripts, and related documentation shall be authorized for counsel for parties, guardians ad litem, and their employees who have responsibility to assist in the proceeding, limited to use in that proceeding only, and only to the extent expressly permitted by the protective order;

(3) Parties to the proceeding shall be authorized to review recordings, transcripts, and related documentation only under the supervision of their counsel or guardian ad litem, or their staff, or if unrepresented, by designated court staff, but not be provided duplicates unless authorized by separate order for good cause shown; *Provided*, that the protective order shall prohibit display or disclosure of recordings, transcripts, and related documentation to non-party family members of the defendant, respondent, petitioner, victim, or to any other individual, unless the judicial officer presiding over the proceeding makes a finding that such display or disclosure is necessary for the protection of a party's rights or is in the best interests of the interviewed child.

(4) Access and duplication of recordings, transcripts, and related documentation shall be authorized for consultants, investigators, and experts employed or contracted to assist in the proceeding, but only after such persons have executed and filed with the court an agreement to be bound by the protective order;

(5) Counsel and guardians ad litem shall be required to take reasonable and appropriate measures to prevent unauthorized access to, or use of recordings, transcripts, and related documentation;

(6) Specific confidentiality protections shall be provided for any recording, transcript, or related documentation that is filed as an exhibit to a pleading or memorandum, or discussed in a pleading or memorandum;

(7) Advance approval of the court shall be required prior to any use of a recording, transcript, or related documentation during a deposition, hearing, or trial in the proceeding;

(8) The statutory criminal penalties for knowing and willful duplication or publication of a recorded interview in violation of the terms of the protective order shall be stated, and further that violation of the protective order can result in contempt sanctions imposed by the court; and

(9) Any other protective measure deemed appropriate by the court shall be provided.

(c) Although protective orders are generally required under paragraph (b), a judicial officer presiding over a proceeding retains discretion to permit guardians ad litem and counsel temporary or expedited access to recorded interviews by so permitting through a provisional order; but any such access shall occur while the recorded interview is in the custody of an authorized individual, such as the prosecuting attorney, and the recorded interview shall remain in the custody of the authorized individual for the duration of the access.

Rule 18.04: PRODUCTION BY NON-PARTIES

A person or entity not a party to a proceeding may only be required to produce a recorded interview, any transcript thereof, and any related documentation pursuant to the following procedure and conditions:

(a) The party seeking the production of such recorded interview, transcript, and related documentation must first file a motion with the court in which the proceeding is pending putting forth the grounds for production, along with a copy of the subpoena to be served on the non-party.

(b) A copy of the motion and subpoena, together with a notice of hearing, shall be served on:

(i) all counsel for parties and unrepresented parties;

(ii) the prosecuting attorney of the county where the proceeding is pending;

(iii) the prosecuting attorney in any other county where the recorded interview was conducted or used in relation to an investigation or prosecution of criminal activity or suspected child abuse or neglect; and

(iv) the person or entity to whom the subpoena is directed.

(c) A hearing shall be held on the motion, which may include, in the court's discretion, an *in camera* inspection of the subject records, and upon good cause found and stated in the written order, the court may direct that all or part of the records be produced.

(d) If the court grants the motion for production of such records, the court shall include in the written order the protective order provisions required under paragraph (b) of this Rule.

A True Copy

Attest: //s// Edythe N. Gaiser
Deputy Clerk of Court

