

## Proposed Trial Court Rule 18

### **Background Note**

*Senate Bill 504 was enacted during the 2016 regular session. In this bill, the Legislature amended statutory provisions in Chapters 49 and 62 to provide that recorded interviews of children relating to investigations of alleged criminal behavior or alleged child abuse or neglect are confidential, and subject to disclosure only pursuant to court order. Also in the amendments, the Legislature included a provision requesting that the Supreme Court "promulgate a rule or rules regulating in the courts of this state the publication and duplication of recorded interviews, including use, duplication and publication by counsel, and to include in any such rule limitations upon the publication, duplication, distribution or use of the recorded statements of a child." W. Va. Code § 62-6B-6(c).*

*The following proposed rule is the initial effort to address the various issues by court rule (or rules). At first, it was thought that the rule provisions regulating these recorded interviews ought to be included in the criminal procedure rules and the procedural rules relating to the child abuse and neglect proceedings. Because the child interviews relate to investigations of alleged criminal conduct or alleged child abuse or neglect, the recorded interviews would have primary relevance and use in criminal cases and abuse and neglect proceedings. Upon further investigation, however, it became evident that these recorded interviews can be sought for use (or misuse) in many other kinds of litigation. For example, a divorcing parent seeking child custody could subpoena a recorded interview of a child relating to an investigation of abuse by the other parent. It therefore appears appropriate to promulgate a rule that applies to all types of proceedings in every kind of court. That is why the rule is proposed for inclusion in the Trial Court Rules. Sections 18.01 through 18.03 cover the confidential restrictions and related court order provisions requested by the Legislature. Section 18.04 was added to provide protection for third parties (e.g. CAC's) that often conduct these child interviews and possess the recordings. A bare subpoena should not trigger the compulsory disclosure of these sensitive records. This section establishes procedure to automatically require a court hearing regarding the propriety of the release and use of a recorded interview in a particular case that is outside the typical setting of a criminal prosecution or child abuse and neglect case.*

### **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.

**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) Authorize access to and use of recordings, transcripts, and related documentation by 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) Authorize parties to the proceeding 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;

(4) Authorize access and duplication of recordings, transcripts, and related documentation 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) Require counsel and guardians ad litem to take reasonable and appropriate measures to prevent unauthorized access to, or use of recordings, transcripts, and related documentation;

(6) Provide specific confidentiality protections 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) Require advance approval of the court prior to any use of a recording, transcript, or related documentation during a deposition, hearing, or trial in the proceeding;

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

(9) Provide any other protective measure deemed appropriate by the court.

**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.