



# MINNESOTA JUDICIAL TRAINING UPDATE



## GUARDIAN AD LITEM (GAL) REPORTS: THE FOOL-PROOF HEARSAY TEST

**QUESTION:** GAL reports usually contain “out of court statements” made by various third parties including the child(ren) at issue, such as “I saw daddy punch mommy in the face.” What legal analysis should the court follow if an attorney objects to the admissibility of such statements on hearsay grounds?

**ANSWER:** In order to properly rule on a hearsay objection to a third party statement contained in a GAL report, the court must first determine:

- 1) is the statement being offered actually ‘hearsay’ and therefore not admissible unless it falls under a recognized hearsay exception (rule 803, 804, 807), or
- 2) is the statement being offered ‘non-hearsay’ and therefore admissible as long as it is ‘relevant’ (rule 401-402) and not ‘unduly prejudicial’ (rule 403)?

**To answer those questions there are five (5) steps the court should follow:**

### STEP ONE – DO THE RULES OF EVIDENCE EVEN APPLY?

**YES** (see Rule Minn. R. Evid. 1101) – The Rules of Evidence apply to “all actions and proceedings in the courts of this state.” There are only 10 exceptions to this rule:

- 1) Preliminary questions of fact under rule 104(a); 2) Grand Jury proceedings; 3) Extradition or rendition proceedings; 4) Probable cause hearings; 5) Sentencing hearings; 6) Granting or revoking probation hearings; 7) Issuance of warrants for arrest or Criminal summonses; 8) Search warrants; 9) Proceedings with respect to release on bail or otherwise; 10) Contempt proceedings in which the court may act summarily.

**NOTE: WHAT ABOUT ‘INFORMAL’ PROCEEDINGS?** The rules are clearly applicable to adversary trials. However, applying ‘strict’ rules of evidence, which were developed in the context of jury trials, to informal proceedings such as conciliation court or many juvenile court hearings (delinquency or child protection), would be inappropriate. See 11 Minn. Prac., Evidence § 1101.01 (4<sup>th</sup> ed.); See also Minn. R. Evid. 102 (in the search for truth the rules provide for a great deal of flexibility and discretion).

**NOTE: WHAT ABOUT TEMPORARY FAMILY COURT HEARINGS?** Although the Rules of Evidence do apply at temporary family court hearings, as long as the order issued by the court is a temporary order (i.e. reserving final determination for trial) they do not require ‘findings of fact’, are not ‘final orders’ and therefore are not appealable. As a result, in the search for truth, the court has great discretion on how strict the rules are to be applied. See *J.W. ex rel. D.W. v. C.M.*, 627 N.W.2d 687, 696 (Minn.App.2001); See also Rule of Evid. 102.

### **STEP TWO: ARE GUARDIAN AD LITEM (GAL) ‘REPORTS’ ADMISSIBLE IN EVIDENCE?**

**YES** - Once the court appoints a GAL, M.S 518.165, subd. 2a (5) provides that the guardian ad litem “shall” make “written reports on the child’s best interests” including “recommendations and the facts upon which they are based.” GAL reports made for the purpose of a court ordered evaluation are admissible as business records under Minn. R. Evid. 803(6) as long as the parties are given an opportunity to cross-examine the author of the report. *J.W. ex rel. D.W. v. C.M.*, at 697. See also ‘Public Records Exception’ Rule 803 (8).

**Note: What About Court Ordered Custody Evaluations?** Court ordered custody evaluations are statutorily admissible in evidence pursuant to Minn.Stat. 518.167, subd 1 and 4.

### **STEP THREE – DOES THE ‘RULE AGAINST HEARSAY’ APPLY TO GAL REPORTS?**

**YES** - However, many hearsay objections can be summarily resolved by first applying the definition of hearsay to the statement in question to determine if the statement is actually hearsay or non-hearsay. On close examination, in many cases, statements that initially appear to be hearsay actually are not.

**Note:** Parties may object to the content of a GAL report. Juv. Ct. Rule 38.04, 38.05, subd 4.

### **STEP FOUR – DEFINITION OF HEARSAY: ‘OUT OF COURT STATEMENTS’:**

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to “prove the truth of the matter asserted.” Minn. R. Evid. 801 (c). If the statement is offered for some other relevant purpose such as to prove knowledge, notice or the declarant’s state of mind, it is not hearsay. For example:

1. **NON-HEARSAY:** If the child’s out of court statement is not being offered to prove that daddy actually hit mommy, but instead is being offered to establish the child’s ‘state of mind’ (i.e. the child’s belief, knowledge or perception of mom and dad, etc.) then the statement is not hearsay. In child custody or CHIPS cases the non-hearsay statement is relevant because it doesn’t matter if the statement is true or not, the mere fact the child made the statement is relevant to the “best interest of the child” analysis.
2. **HEARSAY:** If the statement is being offered to prove that the assertion is true (i.e. that daddy actually hit mommy) then the statement is hearsay. Hearsay statements are not admissible unless a recognized hearsay exception applies pursuant to statute or Rule of Evidence 803, 804, 807.

**STEP 5 - APPLY THE FOOL-PROOF HEARSAY TEST:**

1. Ask the question whether the relevant purpose for offering the out-of-court statement is its truth, if the answer to that question is “yes,” the out-of-court statement is hearsay.
2. If the answer to the question is not clearly “yes,” ask this next question:
3. Must the content of the out-of-court statement be believed in order to be relevant? If yes, the statement is hearsay. If no, the statement is non-hearsay.

**SAMPLE SCRIPT FOR GUARDIAN AD LITEMS****HEARSAY OBJECTION AND GAL RESPONSE****1. OBJECTION BY ATTORNEY:**

Your Honor, I object to the admission of the child’s statement on page 3 of the GAL’s report, which states (e.g. I saw daddy punch mommy in the face), on the ground that it constitutes inadmissible hearsay.

**2. GAL OR ATTORNEY RESPONSE:**

- a. Your Honor, the statement in question is NOT hearsay;
- b. It is NOT being offered to prove the truth of the matter asserted. (i.e. it is NOT being offered to prove that daddy actually punched mommy in the face);
- c. The statement is offered for the limited purpose of establishing the child’s state of mind (i.e. child’s perception of the family; child’s knowledge and/or what the child believes; child’s love for or dislike of certain parents, etc.);
- d. The statement is ‘relevant’ because it doesn’t matter if the content of the statement is true or not, the fact the child made the statement is what makes it relevant, because in a custody (or CHIPS proceeding) assessing the child’s ‘state of mind’ is a crucial factor in the courts ‘best interest of the child’ analysis;
- e. The GAL respectfully requests the objection be overruled and the court receive the statement into evidence for that limited non-hearsay purpose.

**OBJECTION OVERRULED – STATEMENT WILL BE RECEIVED AS NON-HEARSAY**

**Resource: “Rulings on Evidence” by Judge Gordon Shumaker (Ret.), Minn. CLE. 2013.**

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