

**GUIDELINES CONCERNING COURT APPOINTMENTS
OF DECISION-MAKERS PURSUANT TO C.R.S. 14-10-128.3**

I. INTRODUCTION.

The following policy is adopted to assist the administration of justice by providing guidelines for the appointment, qualifications and training of decision-makers appointed under 14-10-128.3, C.R.S. (2005).

House Bill 05-1171 passed by the General Assembly during the 2005 session created statutory authority for parenting coordinators and decision-makers, and clarified the existing statutory provision concerning arbitrators set forth at C.R.S. 14-10-128.5.

As set forth in the statute, the objective of the appointment of a highly qualified domestic relations decision maker is to assist high conflict parties by granting to the decision maker binding authority to resolve disputes between the parties as to implementation or clarification of existing orders concerning the parties' minor or dependent children, including but not limited to disputes concerning parenting time, specific parental decisions, and child support. A decision-maker shall have the authority to make binding determinations to implement or clarify the provisions of a pre-existing court order in a manner that is consistent with the substantive intent of the court order.

The purpose of these guidelines is to provide guidance to decision-makers, the courts who are approving the agreement of the parties for the appointment of a decision-maker, and to the parties who are agreeing to the appointment of a decision-maker as to the responsibilities of each when such an appointment is made in order to better serve the families of Colorado. These guidelines and the model appointment orders set forth in these guidelines have been drafted with the knowledge that these roles may be filled by people from different professions and backgrounds. The standards for arbitrators are not addressed here but are set forth in detail in the Uniform Arbitration Act, part 2 of article 22 of title 13, C.R.S.

The guidelines should be interpreted with reference to the purpose of a decision-maker as defined by the statute. These guidelines, do not, however, exhaust the ethical and professional considerations that should guide decision-makers in his or her duties. The violation of a guideline should not in and of itself give rise to a cause of action nor should it create any presumption that a legal duty has been breached or that a professional ethical violation has occurred. The comments set forth with each guideline explain and illustrate the meaning and purpose of the guideline, and are intended as a guide to that interpretation.

II. **STATUTORY AUTHORITY**

- A. C.R.S. 14-10-128.3 provides for the appointment of a decision-maker at any time after the entry of an order concerning parental responsibilities and upon written consent of the parties. The role of the decision-maker is to resolve disputes as to implementation or clarification of existing orders concerning the parties' minor or dependent children. A decision-maker has the authority to make binding determinations. Payment of the decision-maker's fees shall be apportioned between the parties, and the state shall not be responsible for the payment of the fees of a decision-maker.
- B. These guidelines include a comprehensive set of standards for and responsibilities of appointing courts for all decision-makers appointed pursuant to section C.R.S 14-10-128.3.
- C. The standards and responsibilities for arbitrators appointed pursuant to Section 14-10-128.5, C.R.S. are set forth in part 2 of article 22 of title 13, C.R.S.

III. DECISION-MAKER (DM) GUIDELINES

1. THE DECISION-MAKER SHALL HAVE AUTHORITY TO MAKE BINDING DECISIONS TO IMPLEMENT OR CLARIFY PROVISIONS OF AN EXISTING COURT ORDER.
2. THE DECISION-MAKER'S PROCEDURES FOR MAKING DECISIONS SHALL BE IN WRITING AND APPROVED BY THE PARTIES.
3. DECISION-MAKERS SHALL ACT PROFESSIONALLY.
4. DECISION-MAKERS SHALL MAINTAIN OBJECTIVITY.
5. DECISION-MAKERS SHALL BE QUALIFIED THROUGH EDUCATION AND TRAINING AND SHALL MAINTAIN COMPETENCE THROUGH APPROPRIATE TRAINING.
6. DECISION-MAKERS SHALL ACKNOWLEDGE WHEN AN ISSUE IS BEYOND HIS OR HER COMPETENCE.
7. DECISION-MAKERS SHALL HAVE NO PRIVATE OR *EX PARTE* COMMUNICATION WITH THE COURT.
8. DECISION-MAKERS SHALL REVIEW COURT ORDERS.
9. DECISION-MAKERS SHALL MAINTAIN CONFIDENTIALITY.
10. DECISION-MAKERS SHALL NOT SERVE DUAL ROLES EXCEPT AS AUTHORIZED BY STATUTE.

GUIDELINE 1

THE DECISION-MAKER SHALL HAVE AUTHORITY TO MAKE BINDING DECISIONS TO IMPLEMENT OR CLARIFY PROVISIONS OF AN EXISTING COURT ORDER

A decision-maker shall have binding authority to resolve disputes between the parties concerning parenting time, specific parental decisions and child support.

COMMENT

A decision-maker must be careful to assure both fairness and the appearance of fairness, allowing the parties relatively equal and comparable opportunities to present their perspectives. Depending on the case, the decision-maker may need information from collateral sources such as teachers or therapists; may need to review school, medical, or other records; may need to check criminal histories or obtain drug testing; or may require other case-specific information or evaluations.

GUIDELINE 2

THE DECISION-MAKER'S PROCEDURES FOR MAKING DECISIONS SHALL BE IN WRITING AND APPROVED BY THE PARTIES

The decision-maker shall develop procedures for making determinations and submit those procedures in writing to the parties for approval before the decision-making process begins.

COMMENT

When first appointed, a decision-maker should provide the parties with written information that sets forth his or her procedures, including the nature and scope of the services to be provided to the parties. The initial information should describe the decision-maker's policies, procedures, qualifications, and reporting obligations, as well as how a party can contact the court should a concern or complaint about the decision-maker arise. The information shall include the nature of the services provided, the DM's qualifications, where complaints should be directed, fees and billing procedures, how communication will be handled, how sensitive information will be handled, and the DM's reporting obligations. For example, the DM should detail the DM's policies regarding phone calls and e-mail communication, *ex parte* communication with parties and/or counsel, interviewing children, contacting collaterals or other professionals in the case, setting appointments, time-frame for entry of decisions, etc. Before beginning a case, the DM and the parties should execute the written agreement of the DM, acknowledging the acceptance by the parties of the DM's procedures. In the event a party is unable or unwilling to agree to the DM's procedures and does not accept the DM's procedures and does not execute the written agreement, the DM shall request permission of the Court to withdraw.

It is also the responsibility of a DM to provide specific information to the parties regarding fees, billing policies, and procedures used if there is non-payment of fees. A DM should provide periodic billing statements to the parties, listing all services performed and detailing the time spent and the charges incurred.

GUIDELINE 3 DECISION-MAKERS SHALL ACT PROFESSIONALLY

DM's shall comply with any chief justice directives and any other practice or ethical standards established by rule, statute, or licensing board that regulates his or her specific profession.

COMMENT

The DM's primary responsibility is to assist parties to resolve disputes concerning parental responsibilities. In meeting this responsibility, DM's should understand that they are working with high conflict families and should attempt to establish a positive and constructive professional working relationship with family members.

DM's should be mindful of the diverse nature of families and respect cultural, individual, and role differences, including those based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, and socioeconomic status and consider these factors when working with a family. They should be sensitive to the separate interests, rights, wishes and concerns of the parents and other parties in a case. They must remember that they are in – and are viewed as being in – a position of great influence over a family's future.

GUIDELINE 4 DECISION-MAKERS SHALL MAINTAIN OBJECTIVITY

DM's shall strive to maintain objectivity and independence. If either become aware of an insurmountable bias or prejudice in dealing with a case s/he shall request the court to terminate the appointment with proper notice to the parties.

COMMENT

A DM's decisions are to be based on his or her independent evaluation and review of a case. The DM should guard against being unduly influenced by the conclusions of other professionals who are working on or have worked on the case.

DM should not serve in a matter that presents a clear conflict of interest. The DM should disclose potential conflicts of interest as soon as practical. This includes, but is not limited to, disclosure of any financial or personal interest in the outcome and any current or previous relationship with any party, counsel, witness, etc. After appropriate disclosure the DM may continue to serve if the parties agree. However, if a conflict of interest clearly impairs a DM's impartiality, the DM shall withdraw regardless of the express agreement of the parties.

There are times when objectivity is difficult to maintain and the DM, through no fault of his or her own, simply cannot set aside a bias or feelings that occasionally develop when working with challenging parties or high conflict families. When this occurs, the DM should request removal from the case.

GUIDELINE 5

DECISION-MAKERS SHALL BE QUALIFIED BY EDUCATION AND TRAINING AND SHALL MAINTAIN COMPETENCE THROUGH APPROPRIATE TRAINING

Decision-makers shall accept appointments only after attaining a level of competence that includes an understanding of both the legal and psychological/social issues that are typically present in dissolution or parenting cases and shall maintain and regularly update their training in relevant areas.

DM's shall have substantial training in relevant areas prior to accepting appointments.

Attorneys and mental health professionals and other members of the community who are working as DM's shall maintain continuing education in relevant areas.

COMMENT

DM's achieve competence through some combination of education, specialized training, supervision, consultation, and professional experience. They have a responsibility to develop and maintain a working familiarity with the applicable law and the professional standards that govern their duties and participation in legal proceedings. Areas in which DM's should demonstrate experience, education or skills may include the following:

- Family mediation and arbitration;
- Parenting coordination techniques;
- Dynamics of high conflict divorce;
- The effects of divorce, single parenting, and remarriage in children, adults, and families;
- Family dynamics and dysfunction, domestic violence and substance abuse;
- Child development, including cognitive, personality, emotional and psychological development;
- Child and adult psychopathology;
- Child abuse;
- Interviewing techniques;
- Available services for the child/ren and parties including medical, mental health, educational, and special needs;
- Diversity issues; and

The legal standards applicable in each case in which the DM is appointed.
Colorado Child Support Guidelines if child support determination or modification is an issue.

DM's should maintain current, accurate records of training and on-going education and provide those records to the court upon request.

GUIDELINE 6
**DECISION-MAKERS SHALL ACKNOWLEDGE WHEN AN ISSUE IS BEYOND HIS
OR HER COMPETENCE.**

Decision-makers have a duty to recognize and inform the parties and the court when an issue falls outside of his or her training or expertise.

COMMENT

When a DM recognizes that an issue falls outside of his or her area of expertise, the parties should be informed and a referral should be made to an appropriate professional. They should inform the court and request that the order of appointment be amended.

GUIDELINE 7
**DECISION-MAKERS SHALL HAVE NO PRIVATE OR *EX PARTE* COMMUNICATION
WITH THE COURT**

Decision-makers shall have no private or *ex parte* communications with the court.

COMMENT

An *ex parte* communication is any communication in which at least one party does not have notice and an opportunity to participate in the communication.

A DM shall have no contact with the court during the course of his or her appointment except for the following reasons: to obtain information from the court concerning the order of appointment or applicable legal standards, to inform the court of the refusal of a party to participate or to pay, to report harm or the potential for harm to the child/ren, or to file agreements of the parties with the Court or written decisions of the DM, or for confirmation of decisions as Court Orders.

GUIDELINE 8
DECISION-MAKERS SHALL REVIEW COURT ORDERS

Upon appointment, the DM shall review the court's order of appointment and ask for clarification or modification of the order when necessary.

COMMENT

A DM must ensure that there is a properly executed court order of appointment prior to providing services. If there is a conflict between the requirements of the order and the DM's professional ethical constraints or obligations, then s/he should take steps to ensure that the conflict is resolved. If, for example, the order requires the DM to act beyond the scope of his or her competence,

or to perform contradictory multiple roles, then the court and counsel should be informed. If the conflict cannot be resolved then the DM should request removal from the case.

If the order sets fees and retainer amounts that conflict with the DM's business practices, s/he should inform the court and request modification of the order or withdrawal from the case. These issues should be addressed immediately upon notice of appointment and before beginning any work on the case.

**GUIDELINE 9
DECISION-MAKERS SHALL MAINTAIN CONFIDENTIALITY**

A. Confidentiality:

In a judicial proceeding, administrative proceeding or other similar proceeding between the parties, a DM may not be required to produce records or to testify as to any statement, conduct, or decision that occurred during the DM's appointment.

B. Exceptions to Confidentiality:

- 1. A DM may produce records if such production is necessary to determine a claim of the DM against a party or the claim of a party against the DM.**
- 2. The parties may agree in writing to authorize the DM to testify.**
- 3. In cases in which the DM suspects or knows that the child/ren are being neglected or abused, the DM shall take the steps required to ensure that the court and law enforcement and/or the department of social services is informed, and shall take whatever additional steps are believed necessary to protect the children.**
- 4. All decisions made by the DM shall be in writing and filed with the Court as required by statute. Findings of fact may be included in such written decisions.**

COMMENT

The DM shall inform the parties of the confidentiality and limitations on confidentiality in the decision-making processes. The underlying notes, records and other materials of a DM shall not be disclosed in any proceeding except as required by statute. The DM shall file all decisions in writing with the Court and should include findings of fact and rationale for the decision, if appropriate. In doing so, the DM will refrain from quoting information learned from various professionals involved with the family, such as a child's or parent's therapist, school teacher, etc., to the extent necessary to protect the integrity of the professional relationship.

The DM shall not share information outside of the decision-making processes except for legitimate and allowed professional purposes. A DM shall maintain confidentiality regarding the sharing of information outside of the scope of the decision-making process which is obtained by the DM except as provided by court order or by written agreement of the parties.

GUIDELINE 10

THE DECISION-MAKER SHALL NOT SERVE DUAL ROLES EXCEPT AS AUTHORIZED BY STATUTE

The DM may have served as the child and family investigator, mediator or med-arbiter. In some cases a CFI (formerly known as special advocate), a mediator or a med-arbiter may agree to move to the separate role of DM after all of his or her duties as CFI, mediator or med-arbiter are completed and the appointment has been terminated by the court. This move should only occur with the informed consent of both of the parties and the CFI, mediator or med-arbiter. The CFI, mediator or med-arbiter who accepts an appointment as a DM shall not be appointed as a CFI, mediator, or med-arbiter in the same case in the future.

COMMENT

A DM should avoid multiple relationships which could reasonably be expected to impair objectivity, impartiality, competence or effectiveness. Prior therapeutic relationships, for example, will be compromised, and pre-existing alliances and loyalties that a therapist or attorney or other professional have established will impair objectivity and impartiality.

At the conclusion of the CFI's investigation for the court, and the entry of orders related to the parental responsibility issues before the court, a high conflict family may have ongoing needs for assistance from a third party, or may in the future require assistance related to parenting disputes. Some parties may find that the CFI's prior investigation and familiarity with the family's dynamics could assist them in resolving outstanding or new issues. The familiarity of the mediator or med-arbiter could have the same benefits. A CFI, mediator or med-arbiter may be appointed to the role of DM with the agreement of the parties and the professional by a new appointment order clearly outlining the new duties of the DM.