Using special masters to reduce excessive caseloads: innovation in Montana's Fourth Judicial District.

Bernard A. Jacobs

The University of Montana
USING SPECIAL MASTERS TO REDUCE EXCESSIVE CASELOADS:
INNOVATION IN MONTANA'S FOURTH JUDICIAL DISTRICT

By
Bernard A. Jacobs
B. A., University of Montana, 1988

Presented in partial fulfillment of the requirements
for the degree of
Master of Public Administration
University of Montana
1990

Approved by

Chairman, Board of Examiners

Dean, Graduate School

Date
Dec. 10, 1991
TABLE OF CONTENTS

Introduction

PROBLEM STATEMENT .......................................................... 2
  Previous Attempts to Resolve
  the Problem.......................................................... 3
  Another Proposed Resolution of
  the Problem.......................................................... 4
  Purpose and Preview of this Report.............................. 5

Chapter One

THE RESEARCH .......................................................... 7
  The Local Bar.......................................................... 8
  The Flathead and Gallatin County
    Special Master Programs.................................... 11
  The National Center for State
    Courts (NCSC)................................................ 15
  Review of the Legal Literature................................. 18

Chapter Two

ANALYSIS OF RESEARCH FINDINGS ..................................... 22
  The Local Bar Group and Statutory
    Authority for the Proposal.................................. 23
  Flathead and Gallatin Counties................................. 27
  The NCSC data........................................................ 29

Chapter Three

THE ROLE OF THE SPECIAL MASTER .................................. 34
  Pending Cases....................................................... 35
  Newly Filed Cases................................................ 37
  Structure and Order of Proceeding............................. 39
  Administrative Implications
    of the Program.................................................. 42

Chapter Four

BUDGET AND IMPLEMENTATION STRATEGIES ......................... 46
  Judge McLean's Requirements..................................... 47
  Fiscal Realities Within
    Missoula County Government................................ 50
  Analysis and Budget Development.............................. 51
  Anticipated Funding Requirements............................. 55
  Strategies for Program
    Implementation.................................................. 56

Chapter Five

CONCLUSION .......................................................... 59
  Methods for Program Evaluation............................... 60
  Possibilities of Expansion..................................... 63

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
INTRODUCTION
During the past two or three decades the Judicial branch of government in this country has experienced a notable increase in its overall workload.\(^1\) One indicator of this is the call which Chief Justice Burger made in 1969 for the courts to use professionally trained administrators "to manage and direct the [court's] machinery so that judges can concentrate on their primary duty of judging."\(^2\) Increasing reliance by many courts across the country on various methods of Alternate Dispute Resolution also indicates recognition of this problem.

**Problem Statement**

The trend which is present throughout the rest of the country is also with us in Montana. In the Fourth Judicial District, for example, total cases per judge have risen from 490 in 1963 to 1,029 in 1988.\(^3\) The significance of this statistic is underscored when one considers that an additional judgeship was added to the Fourth District in 1979, and that Lake and Sanders counties were removed from

---

\(^1\) This fact is well documented by the following writers: Flango and Ito (1984), Marvel (1985 and 1987), and Neubauer (1986).

\(^2\) Quoted in *The Court Manager*, an undated publication of the National Association for Court Management, on page one.

\(^3\) Statistical information was provided by Hon. Jack Green during an interview on March 2, 1990. Judge Green's tenure on the bench began in 1963.
the district in 1984. Further, in the area of domestic relations cases alone, an evergrowing backlog of cases points out in real terms the dimensions of this problem. At the end of 1984 Missoula county had 904 such cases pending which were over one year old, as determined from the date of filing. By the end of 1989 that number had grown to 1,520. Other areas of civil litigation are also following this trend, albeit to a lesser extent.

**Previous Attempts to Resolve the Problem**

The district's judges recognized the development of this problem several years ago, and in 1985 hired a court administrator as a means of addressing it. As a result of the court administrator's efforts, a Public Defender's Bureau was established within county government in order to eliminate delays in bringing criminal cases to trial which were attributable to unavailability of counsel for indigents. Additionally, many of the services of the Clerk of Court's office were computerized, such as restitution and child support accounting methods, in order to make more time

---

4 The Fourth Judicial District is now comprised of Missoula, Mineral and Ravalli counties.

5 Statistics provided by Jane Hayden of the Administrator's office of the Montana Supreme Court, August 7, 1990.

6 Dr. Richard Vandiver was employed as Court Administrator between 1985 and 1987. Countywide budget problems eliminated funding for the position at the end of FY-86.
available to update existing case files and schedule newly filed cases.\(^7\) Word processing capabilities for the judges' secretaries were also enhanced during this period. However, as statistics from the Montana Supreme Court indicate, these efforts have not been sufficient to remedy the caseload problem which increasingly characterizes Montana's Fourth Judicial District.\(^8\)

Another Proposed Resolution of the Problem

Consistent with previous attempts to deal with increasing judicial caseloads in the Fourth district, the Honorable Ed McLean, who presides over Department One of the district, has recently offered another plan by which to address the problem of increasing caseloads. Specifically, Judge McLean proposes to begin using the services of a Special Master, at first only in his department but eventually throughout the other three departments in the district as well.

By appointing a master to handle a variety of cases which are assigned to his department, the judge believes two objectives will be achieved. First, the availability of a master to handle many of his cases should result in those cases moving more expeditiously through the system. This

\(^7\) Many of these services were also computerized after the Court Administrator's position was eliminated.

\(^8\) Supra, note 3.
will occur because the master will have the option of arranging pre-trial settlement conferences or conducting adversarial hearings. In either instance, the litigants will have their day in court much sooner than if they had to wait for the judge alone to handle their cases. This system should also reduce the financial costs to those involved in litigation because a vast majority of cases will be settled before lengthy pre-trial maneuvers are begun in earnest and before attorneys appear in court for actual trials.

Secondly, the judge will have additional time available to spend on complex civil cases because the master will be assigned a portion of the judge's regular caseload. The judge estimates that as many as six to eight weeks may be re-allocated in this manner each year. In short, the entire judicial process in Department One should be expedited, not only for those who interact with the special master but also for those who do not.

**Purpose and Preview of this Paper**

When Judge McLean began serious consideration of a special master, he requested assistance in conducting research for producing a report which would give specific form to his plan. This paper is based on that research and describes the manner in which a special master will function.

---

9 Information provided by Judge McLean in a conversation on September 18, 1990.
as an adjunct to Judge McLean's court.

The first chapter of the paper will discuss the research in terms of the sources consulted and the information derived. Next, in the second chapter, the research findings will be analyzed from the perspective of the ultimate goals of a special master program. Also included here will be a discussion of the statutory authority for such a proposal.

Chapter three will propose specific functions and tasks for the master and, further, will discuss additional implications of the program within county government. Chapter four will present a consideration of the program's budget and will also offer strategies for implementation. The paper will conclude in chapter five by offering suggestions for evaluating the successes and failures of the program and for program improvement and/or expansion.
CHAPTER ONE

THE RESEARCH
Data were gathered for this project from four sources; 1. the local bar group, 2. court officials in Flathead and Gallatin counties (where similar programs exist), 3. the National Center for State Courts, and 4. a review of legal literature. Each offered different, yet complementary, perspectives relating to the special master proposal, and each provided varying amounts of useful information. The specifics of those data will be offered in the following four sub-sections.

The Local Bar Group

Initially, local attorneys were advised of Judge McLean’s plan in a letter which was mailed to approximately 200 individual attorneys and law firms. That letter outlined both the problem and the proposed use of a special master in alleviating it. Attorneys were asked to respond to the ideas expressed in the letter generally, but especially concerning the following topics: 1. criteria for review of the master’s findings and recommendations, 2. criteria for disqualification and replacement of the master, 3. pre-hearing mediation, 4. case scheduling, and 5. the hearing record. In addition, they were asked to advise the researcher of other such programs that they were familiar with, of their experience(s) with them, and of the effectiveness and shortcomings of those programs.

The responses that followed from this inquiry were
generally favorable and informative. Although only 20 actual answers were received, many were written on behalf of law firms which employed several attorneys. The largest of those, for example, employs twenty attorneys. Overall, the views of 80 to 100 attorneys were represented directly or indirectly by return correspondence. In general, all applauded the judge's recognition of the problem and his desire to address it. Indeed, some of the respondents asked to be kept apprised of the program's development and offered to assist in that effort.

Nearly all of those responding referred to Rule 53 of the Montana Rules of Civil Procedure, stating that compliance with that guideline was a primary concern. They advised that issues relating to disqualification of the master, review of his/her findings and recommendations, and the hearing record all were addressed by that document. Additionally, most suggested that local court rules would have to be modified or promulgated as part of the program's adoption. These changes would be necessary in order that all who interacted with the special master would be familiar with the operation of the program and of its particular requirements.

Other attorneys suggested various formats for selection of hearing or settlement masters, and there was unanimous

---

10 Rule 53 will be considered more fully in a subsequent section of this paper.
agreement that the person selected as a master should be an attorney. Ideally, many thought that a master should be selected from a panel of volunteers, but there was no consensus regarding whether the work should be done on a pro bono basis or not. One attorney, writing for a large firm, suggested that the initiation of this program should also be viewed as an opportunity to institute other changes such as standardized financial disclosure and discovery. He reasoned that these changes would also aid in expediting the judicial process in the Fourth District.

Two attorneys who responded indicated that they had previous experience acting as masters in contested marriage dissolutions, one case occurred in Montana and the other in New Hampshire. Both advised that the cases which they were appointed to oversee were very complex divorce matters, and that the respective judges referred these cases to special masters in order that the lengthy court time which they would have required could be re-allocated to other cases. These attorneys agreed that similar uses of special masters on a more expansive basis was possible and, if proven workable, could contribute significantly to reducing congestion in Judge McLean’s court. Indeed, many of the respondents were certain of the program’s likelihood of success and were hopeful that the program would eventually be implemented by the other judges within the Fourth Judicial District.
The Flathead and Gallatin County Programs

Due to problems with case backlogs that are similar to Missoula County's, two other Montana judicial districts - the Eighteenth in Gallatin County and the Eleventh in Flathead County - are currently using special masters as a means of reducing and/or managing their pending caseloads. In order to gain insights which could be applied in organizing Missoula's program, officials connected with the development and maintenance of those programs were contacted. The information they provided concerning the actual structure and functioning of those programs will be presented separately below.

Gallatin County

In Gallatin County a Special Master is utilized both as a mediator and as a hearings officer. The person who occupies that position is an attorney who is employed by the court, but who is not in private practice. In those instances where the judge assigns a case to the master, the attorneys in the case are contacted almost immediately by the master to see if they and their clients are interested in participating in the process.

All information concerning the Gallatin County program provided by Dorothy Bradley, special master to Hon. Joseph B. Gary. Despite numerous attempts to speak with her by telephone about this research, or to make an appointment to do so personally, the only information from this source was received in the form of correspondence from Ms. Bradley to Susan Leaphart, Judge McLean's assistant, dated November 12, 1988.
in mediation. If so, the master mediates the issue according to predetermined guidelines and on those issues which are set forth in advance by counsel. If mediation is ultimately unsuccessful, the case proceeds to trial as originally scheduled unless the parties are able to use the process of mediation as a tool to reach settlement beforehand. The district judge presides over the trial.

If mediation is not chosen, then the master hears the case and, following its culmination, presents findings of fact and conclusions of law to the judge, along with recommendations. This is done in accordance with Rule 53 (d) and (e) of the Montana Rules of Civil Procedure.

Mediation has been utilized in Gallatin county primarily in domestic relations cases, but cases which involve debt collections, simple contract matters, or uncomplicated evidence are also frequently heard by the master. Those who have been involved in the special master program in the Eighteenth District report that it is generally perceived as beneficial to all those involved, and that it has resulted in more efficient and effective caseload management.\(^\text{12}\)

\[^{12}\text{Ms. Bradley included this observation along with the other information she provided, indicating that it was an opinion shared by herself and Judge Gary.}\]
Flathead County

The use of Special Masters in the Eleventh District follows a much different format than in the Eighteenth. In Flathead County, three panels composed of ten volunteer attorneys each are available as Settlement Masters in the following specific areas of law: personal injury, domestic relations, and commercial. When they serve as masters, attorneys are paid by the parties at the rate of $50.00 per hour with each master receiving a flat one hour minimum for preparation, reading case materials, and travel time. The main idea in the Eleventh District is that the parties in these types of litigation must go through some sort of structured settlement conference with a neutral third party before going to trial. However, they do not have to use the court's program.

If they elect to do so, however, the court adopts an order appointing the attorney who was selected from the appropriate panel by the parties and their counsel as a Settlement Master. A settlement conference is then arranged which takes place in the courthouse and at which both parties and their attorneys must be present. The parties

---

13 All information provided concerning the Flathead County Program was provided by the following persons: I. James Heckathorn, Esq., personal conversation on June 26, 1990, and correspondence dated June 28, 1990; M. Dean Jellison, Esq., personal conversation on June 26, 1990, and correspondence dated July 16, 1990; personal conversation with Margaret Johnson, secretary to Hon. Bart Erickson, on June 26, 1990, and correspondence dated June 28, 1990.
typically meet jointly with the master, and then separately with him or her in order to discuss the case and its possibilities for settlement. These meetings are not recorded in any way because they are only part of a settlement process. Settlement statements which are submitted to the master in advance of the conference by counsel are not exchanged and, in fact, are returned to the parties at the end of the meeting.

As of July 1, 1990, 12 of the 18 cases which made use of this program since its inception nine months earlier were resolved as a result of settlement conferences. Of those which did not settle, four were domestic relations cases, and the other two were cases in which there was too much distance between the two positions for an acceptable compromise to be reached. Additionally, two other benefits have been realized. First, when settlement conferences are held well in advance of a tentative trial date, everybody involved acquires a good idea of whether the case is going to settle or not. Presumably, this knowledge is useful to all concerned in terms of caseload management. Second, many cases settle even before settlement conferences take place - as if the attorneys are choosing to talk to each other first rather than paying somebody else $50.00 an hour to discuss the issues with them.\footnote{Although no quantitative data was available to support this, Mr. Jellison (note 11) advised that many of those who are involved in the program share this observation based on}
The National Center for State Courts

In the early 1980s, the National Institute of Justice (NIJ) of the U. S. Department of Justice, approached the National Center for State Courts (NCSC) to study the use of lawyers as judicial adjuncts throughout the judicial branch of government in this country. The NIJ's interest was to discover systematic ways in which attorneys could be used by the courts as supplemental resources to eliminate or significantly reduce backlogs or delays in bringing cases before the bench. As a result, two studies were conducted by the NCSC in the mid-1980s which produced complementary reports on that topic. Those reports, which the NCSC made available, were found to be very applicable to Judge McLean's proposal and are discussed below.

Guideline for the Use of Lawyers to Supplement Judicial Resources; NCSC, 1984

After defining the term "judicial adjunct" as encompassing those attorneys who assist the court - at the court's request - on a pro bono basis or who receive only very limited compensation for doing so, this report set forth six ways adjuncts might typically be used. Among them were two that are germane to this project: 1. as mediators or facilitators of settlement conferences, and 2. as hearing masters. In the first example the NCSC observed that their day-to-day, before and after (the program) experiences in Judge Erickson's court.
adjuncts are used in settlement conferences to provide "the parties and their counsel with an evaluation of the case by a disinterested third party"(p.4). In referring to their use as hearing masters, the NCSC noted that these adjuncts typically are "granted power to compel testimony, hold hearings, and make recommended findings of fact and law to the supervising judge"(p.4).

Equally important, the report presented possible philosophical and political objections to adjunctory programs. These centered on the possible contravention of traditional procedural safeguards because adjuncts are selected outside of the normal judicial selection processes of election or screening by a commission. By contrast, the report also enumerated several potential advantages for adjunctory programs and ultimately concluded that those advantages, which follow below,\textsuperscript{15} outweighed the possible drawbacks:

1. Such programs enhance the ability of the courts to hear and dispose of more cases.

2. High quality decisions can typically be rendered by judicial adjuncts, with no apparent diminution in litigants' perception of the quality of justice dispensed.

3. Judicial adjunct programs provide training for participating attorneys in the sense that they allow them to view the trial process from the judges' perspective.

\textsuperscript{15} Items 1 through 4 are paraphrased from page 5 of the NCSC publication being reviewed.
4. Such programs create additional flexibility in the way in which judicial resources are structured.

This report also included a discussion of other pertinent topics, including: 1. Selection of Judicial Adjuncts, 2. Evaluation and Monitoring Procedures, and 3. Ethical Considerations.

Friends of the Court; Lawyers as Supplemental Judicial Resources; NCSC, 1986

This publication reports on a study, conducted by the NCSC over a 30 month period, which evaluated "six uses of lawyers as supplemental judicial resources" (p.xiii). The research which produced the report was conducted in six different trial court jurisdictions in six different areas of the country. Three of the sites, two in Oregon and one in Arizona, employed lawyers as Judges Pro Tempore. Additionally, lawyers were used as referees in a State Court in Connecticut, as arbitrators in the Fourth Judicial District in Minnesota, and as settlement masters in King County, Washington. Both qualitative and quantitative research was conducted, with standardized approaches being adhered to as much as possible in each setting.

Based on both research methods, the NCSC investigators concluded the following:16

16 These points are selected and condensed from twelve more lengthy conclusions that may be found on pages xiv and xv of the referenced publication.
1. Judicial adjuncts are useful in a wide range of programs.

2. The trial bar generally likes and supports the use of judicial adjunct programs which result in quicker resolution of cases, earlier trial dates, and/or reduction of existing backlogs.

3. The attitudes of litigants and their attorneys are generally supportive of judicial adjunct programs.

4. With few exceptions, neither litigating attorneys nor their clients discern any difference in the quality of adjudication in proceedings conducted by judicial adjuncts.

5. The fresh perspectives on and respect for judges' tasks and problems gained by judicial adjuncts result in increased support of the bench, and in making those adjuncts more effective advocates for their clients.

6. Few judges or lawyers expressed concern that the use of adjuncts might make it harder in the future to obtain needed full-time judgeships or other judicial support personnel.

7. Judicial adjunct programs involve new administrative responsibilities as well as both direct and indirect additional costs.

The main body of the report elaborates on these conclusions. In doing so, each chapter presents a general summary of the qualitative and quantitative data obtained and a review of the administrative lessons learned at each evaluation site. The chapters then discuss the implications of these findings for other courts which may be contemplating or designing judicial adjunct programs.

**Review of Legal Literature**

Two sources were consulted in initiating a search of legal literature dealing with the use of special masters:
The Index of Legal Periodicals and the Lexis computerized data base. Considerable overlap was discovered in the citations that were listed by each, although both offered different sources of information that were useful. That material is presented below, in summary form.

It was apparent at the onset of the review that a body of literature concerning the use of special masters has only begun emerging within approximately the last decade. Most of that writing, moreover, is specifically focused upon certain areas of the law. For example, a good deal has been written concerning the use of masters in highly complex litigation such as the Agent Orange dispute, or in highly technical areas such as conflicts over intellectual property rights. Until very recently, however, virtually nothing had been written concerning the use of special masters or other quasi-judges in resolving the types of cases which typically have been overwhelming trial courts across the country.

With the recognition that the workload of the judiciary has been expanding at unprecedented rates, a body of literature has begun developing which relates to the use of special masters as a means of alleviating the problems

17 All of the literature which was considered pertinent to this research was dated after 1986.

18 The term "quasi-judge" is not uncommonly used to describe a variety of judicial adjuncts such as special masters, mediators, settlement conference facilitators, arbitrators, etc.
Leading the way in that discourse are numerous works concerning methods of Alternate Dispute Resolution (ADR). Under the umbrella of this term is found a variety of judicial adjunct applications, most of which are concerned with domestic relations law. Also included are publications which suggest that judicial adjuncts may be useful in estate cases, contract disputes, or hearing appeals from courts of no record.

In reviewing this body of literature, two observations were predominant. First, there was widespread acceptance from the entire spectrum of applications that the use of judicial adjuncts was an idea whose time had come. Few authors took serious exception to the idea as a practical matter; instead, the occasional argument against the concept was mainly philosophical. Even then, the critical authors frequently offered counterpoints to their opposing viewpoints.

Second, support for the concept came from all quarters. Not only did judges and administrative personnel favor the idea of increased utilization of judicial adjuncts, but so did family law attorneys and legal scholars. In addition, it was suggested that non-court officials, such as county commissioners and other elected and/or appointed administrators, viewed the idea favorably because it meant

---

19 Typical articles will be cited in a selected bibliography.
increased service and/or lowered costs of litigation.

To summarize, four diverse sources of information were consulted as a preliminary step in designing a special master program as requested by Judge McLean. Each offered unique insights relating to that idea and, together, they began to suggest the most appropriate configuration for the Department One program. The next chapter of this report will analyze the information gained from these sources, with specific focus on the goals set forth by Judge McLean.
CHAPTER TWO

ANALYSIS OF RESEARCH FINDINGS
As noted in the introduction, the goals of the special master program are twofold: 1. to reduce the current backlog of cases pending in Department One and, 2. to provide quicker access to the court for litigants in newly filed cases. The purpose of this chapter is to analyze the previously reported research findings to determine how they relate to those goals. However, since the material reviewed in the legal literature provides no specific information regarding the creation of special master programs, nor any data that are not available from the other sources, it will not be analyzed separately in the following sections.

The Local Bar Group

One of the foremost considerations in designing a program such as this one is its statutory authority. As members of the local bar group indicated, this aspect of the project must be assigned the highest priority in determining what final form the program may take. They correctly advised that Rule 53 of the Montana Rules of Civil Procedure largely governs this process and, further, that Rules 16, 52(a), and 55(b) also pertain. Therefore, a review of those provisions is now warranted.

Statutory Authority

Rule 53 describes when and how masters may be appointed and compensated within Montana's judicial districts, and how
they are assigned cases. Further, the rule allows judges to stipulate what specific or general powers are granted to the master in each case that is assigned to him or her. The rule also sets forth time frames to which the master must adhere when not otherwise specified in the order of reference as well as the master's basic responsibilities for reporting back to the court. Specifically, subsection (c) of the rule states:

the order of reference...may direct [the master] to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix a time...for the filing of the master's report.\(^{20}\)

The following points condensed from Rule 53 are most salient in terms of this project:

1. Reference of a case to a master shall be the exception, not the rule.

2. Upon receipt of the order of reference, the master shall set a time and place for the first meeting of the parties and/or their attorneys. This meeting must be held within twenty days after the date of the order of reference unless otherwise specified, and the master shall notify the parties and/or their attorneys.

3. The master shall prepare a report and, if required by the order of reference to make findings of fact and conclusions of law, set them forth in the report.

4. The master shall file the report with the clerk of court in non-jury actions.

5. The master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits.

6. In non-jury actions, the court shall accept the master's findings of fact unless clearly erroneous.

7. Within ten days after being served with notice of the filing of the report, any party may serve written objections to the report upon the other parties.

8. Application to the court for action upon the report and upon objections to the report shall be made by motion and upon notice as prescribed in Rule 6(d).

9. The court after hearing may:
   a. Adopt the report; or
   b. May modify it; or
   c. May reject it in whole or in part; or
   d. May receive further evidence; or
   e. May recommit it with instruction.

10. When the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered by the judge who appointed the master.

11. Before filing the report a master may submit a draft to counsel for all parties for the purpose of receiving their suggestions.

In addition to Rule 53, two other Rules are relevant to this project. Rule 55(b) authorizes the court "to conduct such hearings or order such references as it deems necessary and proper." It is by the authority of this provision that the court may refer cases to a special master and the master may "conduct hearings" for the court.

Rule 52(a) states that "the findings of a master, to the extent the court adopts them, shall be considered as the findings of the court." This subsection is relevant because it reinforces the master's authority to act on


22 Ibid., page 794.
behalf of the court in finding the facts of the case. It implicitly emphasizes the need for the parties and their attorneys to present their best cases to the master, because it is the master's findings upon which the court will rely most heavily to reach its ultimate decision. In other words, once the court accepts the master's findings or a portion of them, they are no longer subject to review at the district court level. After the findings have been adopted by the court, they may be reviewed only upon appeal of the entire case to the Montana Supreme Court. This is especially significant because Rule 52(a) also states that "findings of fact shall not be set aside unless clearly erroneous...."\textsuperscript{23}.

Since this project anticipates that a master will conduct settlement conferences, Rule 16(c) also applies. It sets forth what subjects may be discussed at such meetings and requires that:

\begin{quote}
    at least one of the attorneys for each party participating in any conference before trial shall have the authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.\textsuperscript{24}
\end{quote}

After reviewing these statutes it becomes clear that the observations of the local bar group concerning the use of a special master were correct. The applicable sections

\begin{footnotes}
\item[23] Ibid.
\item[24] Ibid., page 750
\end{footnotes}
of the Montana Rules of Civil Procedure describe the operational guidelines to which this program must conform. The obligations and authority to act under Montana law, for both the appointing judge and the master, are made clear upon a reading of this material. In short, the legal requirements which must form the foundation of the proposed program are now apparent.

With these parameters established, it remains necessary to evaluate insights gained from the other sources that were consulted. The following sections will analyze the information obtained from the other two Montana districts which currently use masters, as well as the data received from the NCSC.

**Flathead and Gallatin Counties**

The Eleventh and Eighteenth judicial districts provide examples of the different ways special masters may be utilized within the state's existing legal framework. For example, in Gallatin County, a single master is employed by the county to assist the court in handling a variety of cases. By contrast, the Flathead County program features three panels comprised of ten volunteer masters each assisting the court at the expense of the litigating parties who use them. The duties of the masters also vary with their locations. In Gallatin County the master conducts both adversarial hearings instead of trials before the
judge, and pre-trial settlement conferences. In Flathead County, by contrast, the masters conduct only settlement meetings. Despite these dissimilar program designs, however, it is important to note that both districts are in compliance with the Montana Rules of Civil Procedure regarding their uses of special masters.

Two other factors are noteworthy concerning these programs: 1. they exist for the same reasons that the Department One program is being proposed and, 2. they are both successfully fulfilling those objectives. However, the size of the respective district's caseloads represents a significant difference between those two programs and the Missoula County situation. Both the Eleventh and Eighteenth Districts typically have far fewer cases filed in their jurisdictions than is common in the Fourth District. For example, in the Eleventh District at the end of 1989 there were 486 cases on file that had been pending for more than one year. This compares with 99 such cases in the Eighteenth District, while in the Fourth District there were 1,520. That difference suggests that satisfying program goals in Missoula county may require a more expansive program than those in use elsewhere in Montana.

The different approaches which the Gallatin and Flathead programs represent may also suggest that a hybrid form of the two programs is feasible. In these other

25 Supra, note three
districts where the caseloads are smaller than Missoula County’s, the use of masters is more streamlined than what may be necessary to accommodate the larger caseloads of the Fourth District. In Gallatin and Flathead Counties it is apparently sufficient for satisfying program objectives for the masters to assist the court by conducting either a settlement conference or a hearing. In Missoula’s case, by contrast, the greater demand for court services may require the master to be actively involved in both processes or to work in conjunction with a panel of volunteer masters from the local bar. Since both of the other districts differ in their successful use of special masters, the possibility of combining more than one use into Missoula County’s program may be worthy of serious consideration.

The NCSC Data

According to information supplied by the NCSC, there has been successful implementation of special master programs in other areas of the country. First, judicial adjuncts have been found very effective across the country in a wide variety of trial court jurisdictions and for many different purposes. They have been successfully utilized in both complex litigation and more routine matters. In fact, they are being increasingly employed as the inclination toward Alternate Dispute Resolution becomes more widespread as an answer to burgeoning judicial caseloads. Given this
rise in the use of judicial adjuncts nationally, the proposal to use a special master in Department One is consistent with a national trend. Indeed, the fact that other such programs have been successful bodes well for a similar acceptance in Judge McLean's court.

Secondly, attorneys who have been exposed to such programs across the country have been overwhelmingly supportive of them. Judicial adjunct programs have benefitted their clients by providing more prompt access to the court, thereby reducing the costs of litigation. In turn, attorneys' caseload management becomes more predictable because their cases move more quickly and continuously through the system when an adjunct is assigned to ensure that they receive timely attention. Moreover, as adjuncts develop specific areas of expertise - domestic relations law, for example - typical cases are expedited because less time is required for legal research. In view of both the large number of such cases filed in the Fourth District and of the existing backlog, local attorneys will likely be receptive of the special master program.

One troublesome finding of judicial adjunct programs which the NCSC described relates to their administration. The NCSC research showed that reliance on judicial adjunct programs typically creates additional administrative responsibilities for the courts because support personnel such as secretaries and clerks must be hired to assist the
adjuncts in preparing reports and/or scheduling conferences and hearings. In turn, these new personnel must have office space, supplies, employee benefits, and at least a minimal level of supervision.

Assuming the NCSC observation is correct, implementing a judicial adjunct program in the Fourth Judicial District becomes problematic for two reasons. First, the passage of Initiative 105 in Montana in 1986 has rendered Missoula County unable to hire additional personnel, and the county's present employees who are assigned to the district court are fully occupied. In fact, even if funds were available to employ additional people, there is no office space available for them to work.26

Secondly, since the Fourth District's office of court administrator was lost as a result of I-105, there is nobody to assume supervisory duties except Judge McLean. While he will, of necessity, interact with the master on a regular basis, for him to do so partially negates the intended effect of using a master. In other words, the judge will have to use part of the time which would be gained by appointing a master to oversee the master instead of attending solely to judicial matters. This time loss would be compounded if the judge must also supervise new personnel hired to provide clerical support for the master. Moreover,

26 Information and observations provided by Kathlene Breuer, Missoula County's Clerk of District Court, during an interview on August 2, 1990.
if the master is assigned those duties, the effect is essentially the same because part of his or her time would then be taken up by non-judicial matters.

As noted earlier in this report, the judge anticipates that as many as six to eight weeks may be gained in terms of additional time which he will have available for judicial matters because of the master's presence.\textsuperscript{27} Currently the judge supervises three people: a secretary, court reporter, and law clerk. This duty occupies very little of his time because he simply advises each of them what he expects from them in a particular context, and then relies on the training they have already received in their respective areas to ensure that they perform satisfactorily.\textsuperscript{28} Since he interacts with each of them on a daily basis, his awareness of their performance - good or bad - is constant. The addition to Department One of personnel who do not have daily contact with the judge, such as people who work only with the master, will not be conducive to this personalized form of administration. Since there is no information available concerning how much time the judge currently spends on personnel matters, there is no accurate way to estimate how much additional time he may have to use to oversee new employees. It is readily apparent, however,

\textsuperscript{27} supra, page four

\textsuperscript{28} Information provided by Judge McLean in an interview on February 21, 1990.
that the time saved by using a master will not be completely available to the judge for non-administrative matters until another person or method is in place to handle those affairs.

The NCSC did not view the addition of administrative responsibilities to the court as a problem. Rather, it was posed only as a situation commonly associated with reliance on judicial adjuncts at the trial court level. It is only the fiscal reality of Missoula County which makes the need for supervision a problem. It then becomes incumbent on those designing the Department One program to recognize and address this issue as the program is developed.

Despite this obstacle, potential benefits still could be realized by implementing a special master program in the Fourth District. Some long-term solution may appear later, but interim remedies can be incorporated into the program now. The next chapter of the paper will specifically describe the program under consideration, including strategies to address this administration problem.
CHAPTER THREE

THE ROLE OF THE SPECIAL MASTER IN DEPARTMENT ONE
Two types of cases which contribute to the demand for access to the court in Department One will be targeted by the special master program: 1. cases that have already been assigned to Judge McLean which are still pending and, 2. litigation that is filed after a master is appointed. In meeting the demand for court services by utilizing a special master, certain characteristics regarding each type of case must be taken into account as a specific program is designed. The following two sub-sections will: 1. discuss the features of each type of case and 2. describe, in outline form, the proposed special master program.

Pending Cases

When Judge McLean took charge of Department One in February, 1989, he acquired the caseload of his predecessor, Judge James Wheelis. Since then, additional cases have been assigned to Department One, and the overall caseload has continued to increase. As this growth has continued, so also have Judge McLean’s efforts to dispose of both the existing and newly filed cases. As a result, he has taken action on many of the cases which had not yet been disposed of and which could be assigned to the master for further action.

In the majority of such cases, Judge McLean has

---

29 Cases are assigned randomly to each of the District’s four judges by the Missoula County Clerk of District Court shortly after they are filed in that office.
conducted status conferences with the attorneys of record and directed that the discovery process be completed by certain dates. Many cases have also been the subject of settlement conferences conducted by one of the other three district court judges to avoid prejudicing Judge McLean, and those cases should they ultimately go to trial before him.  

Once these types of cases are referred to the master, his or her role will be limited by the actions that have already been taken. For instance, if settlement conferences have already occurred, then the only option left for the master is to conduct a hearing and report conclusions of law and findings of fact back to the judge - unless he instructed otherwise in his order of referral. If settlement conferences have not occurred, the master may conduct those meetings. But then the master would be precluded from conducting a hearing because he or she would have been prejudiced by the settlement conference.

---

30 The practice of the District's judges assisting each other in this fashion has been in place for some time and, while it is effective in preventing the judge of record from becoming biased, it also has the effect of involving the time of two judges in the same case. No data have been recorded concerning how much of a second judge's time is actually used in this manner, but the validity of the need is clear and undisputed. Moreover, it points out yet another role which a special master could play in assisting the court.

31 Judge McLean has advised that the orders of referral which he intends to issue in assigning a special master to various cases will be framed in very general terms so as to allow the master as much latitude as possible in moving cases effectively and efficiently through his department.
Consequently, if the master is to handle these cases in order to prevent them from consuming the judge's time in a trial, he or she will have to rely on a neutral third party, such as another judge or settlement master, to conduct settlement conferences. If those conferences are not successful in settling the issues before trial, the master will be able to conduct a hearing (in lieu of a trial before Judge McLean) without having been previously exposed to the cases. On the other hand, if a settlement conference has already taken place without resolving the issues in dispute, the master will be free to schedule and conduct a hearing. Following the hearing, the master will report to the judge as required by statute or by his instructions in the order of referral.

Newly Filed Cases

In contrast to the cases which were pending prior to the appointment of a master, newly filed cases that are referred to the master may typically be handled with fewer limitations. For instance, once a case is referred to the master, he or she will be able to hold a status conference with the attorneys of record to determine if the case is likely to benefit from a settlement conference or not. This may be done without discussing specifics of the case and, thereby, prejudicing the master. The settlement conference may also assign dates or deadlines by which discovery must
be completed or other pre-trial motions must be filed with the Clerk of Court, as well as set a date for a hearing.

If the attorneys desire a settlement conference, the master must choose between conducting that meeting or assigning the task to a neutral third party. Since the master's ultimate objective is to ensure that the full case does not have to come before the judge, the ability to hear the case and make recommendations regarding its disposition will remain paramount. This means that the master should rely on neutral third parties most of the time when cases do not go directly to a hearing.

In summary, consideration of these two types of cases has demonstrated that a master, by him or herself, will not be entirely capable of stabilizing or reducing Judge McLean's burgeoning caseload. The need to rely on neutral third parties for settlement conferences will continue to exist even after a master is appointed because it is Judge McLean's desire that, once he has referred a case to the master, he should spend no more of his time on it until he receives the master's report and recommendation for a final decision. Since it is also preferable that the other judges not be burdened with this "neutral third party" role (except on isolated occasions), it is apparent that an alternative pool of "neutral third parties" should be made available to assist the master. This need, in combination with
guidelines provided by the Montana Rules of Civil Procedure, has influenced the development of the following Special Master Program for Department One of the Fourth Judicial District.\footnote{The program is presented here in outline form for two reasons: 1. In the interest of brevity and, 2. because it only summarizes much of what has been previously discussed in narrative form.}

**Structure and Order of Proceeding: Special Master Program**

A. Order adopted pursuant to Rule 53, Montana Rules of Civil Procedure, appointing a Master for each case which the Judge deems appropriate.

1. Uncontested Domestic Relations cases
2. Contested Domestic Relations cases
   a. Judge may retain certain portions of these cases for his personal attention, usually custody matters.
3. Other areas
   a. probate, Justice Court appeals, debt collection, contract cases.

B. Special Master will ordinarily be an employee of the Court, not a private attorney serving in an adjunctory capacity.

1. Rationale
   a. Budgetary constraints\footnote{The budget implications of the program will be considered as a separate topic in Chapter Four of this report.}
   b. Close working relationship with the Judge, and familiarity with his views and philosophies, is preferable and most likely to occur with this arrangement.

C. Specific cases are referred to Special Master by the Judge

1. Special Master reviews case files and arranges STATUS CONFERENCES for each case.
a. STATUS CONFERENCE: counsel advise Master if case is susceptible to any form of Alternate Dispute Resolution, i.e., a settlement conference or private mediation; during this conference, counsel should be prepared to discuss the status of the litigation as well as the possibilities of settlement; a date for an adversarial hearing before the Special Master will be set at this conference - to be vacated later upon written stipulation of counsel if the matter settles; if any form of Alternate Dispute Resolution is rejected, the matter will proceed directly to an adversarial hearing before the Special Master; any objection to the appointment of a Special Master must be filed with the Clerk of Court within five (5) days of the Status Conference.

b. SETTLEMENT CONFERENCE: conducted by Settlement Master (selected according to section "E", sub-sections 1 and 2, of this outline); counsel required to provide summary letters to the Settlement Master ten (10) days prior to the conference which outline the precise matters at issue; specific financial disclosure is also to be completed at this time; if no settlement is reached, the matter will proceed to the adversarial hearing as previously arranged; any trial dates previously set before Hon. Ed McLean for this matter will be vacated in favor of the adversarial hearing date.

c. HEARING: conducted by the Master, replaces any trial date for the matter previously set before Hon. Ed McLean; is formal and tape recorded at county expense or reported at expense of the parties; conducted according to the same rules of procedure and evidence as if the Judge were presiding; Master produces written findings of fact (which are binding on the court unless clearly erroneous) and conclusions of law (which are much less binding) for review by the Judge; the Judge may issue a decree based upon the Master's report, may accept it in part and reject it in part, may recommit it with instructions, may receive further arguments, or may modify the report; parties may file written objections to the Master's report with the court which must be specific as to particular findings of fact or conclusions of law; application to the court
for action upon the objections shall be made by motion and upon notice pursuant to Rule 16(d); if the objections are overruled at this level, an appeal may then be advanced to the Montana Supreme Court; transcripts paid for by requesting parties.

D. Disqualification of the Special Master

1. Self-disqualification
2. For cause by one or both of the parties; same criteria that applies to disqualification of a Judge.

E. Procedure for Selection of Alternate Masters

1. A panel of family law attorneys (or perhaps non-family law attorneys—to reduce possibility of future conflicts) will be formed from those who are willing to volunteer for such work.
   a. Applicants to be screened by the Judge prior to placement on panel.
   b. Panel to be formed as an early part of program implementation.
   c. Panel members to serve on a yearly basis, to be reappointed annually on their respective anniversary dates.

2. The names of three alternate masters who are available will be selected from the panel by the judge and will be provided to the parties involved. Each side will strike one name, and the remaining person will be assigned the case. No further disqualification of settlement masters will ordinarily be allowed.
   a. This master then either conducts a settlement conference or hears a case, as circumstances require.
   b. Alternate master’s fee to be divided equally by the parties; fee to be the master’s normal billing rate.

In summary, this special master program synthesizes ideas and information gained from several sources into one coherent plan with the Montana Rules of Civil Procedure providing basic guidelines. It is apparent that the proposed program will require more than just the appointment
of a master in Department One. In addition, a panel of alternate masters will have to be formed and, especially if the program expands into other departments within the District, support personnel will have to be hired. The next section of this chapter discusses some administrative implications of the special master project.

Administrative Implications of the Program

As the special master program is implemented in Department One, a ripple effect may be anticipated throughout the Fourth Judicial District and other areas of county government. The District's other judges are keenly aware of the possibilities that the program offers in terms of making court services in Missoula County more efficient and available. If the program's use in Department One proves successful, two of the remaining three judges have indicated that they will also appoint masters for their departments, possibly as soon as FY-92.34

If this expansion occurs, a need for new administrative services would soon surface in the Fourth District (see the NCSC research findings as discussed in Chapter Two of this report). County government will then be challenged: 1. to provide funds to hire additional secretaries, law clerks, and to purchase office equipment and, 2. to provide

34 This information was provided in informal conversations with Judges Harkin and Henson during the months of July and August, 1990.
workspace for those personnel. Given Missoula County's current shortage of both money and space, it is likely that the District Court's special master program will not be enthusiastically supported by the Board of County Commissioners or other administrative officers of county government, particularly if it begins to expand. Instead, county officials may require that the District Court budget be reduced in other areas so that requests for more resources can be met within the present revenues budgeted for the Fourth District.\footnote{35} Since none of the judges believe it is possible to make cuts in the District Court budget and, further, since they are very much in favor of the special master concept, the implementation of this program could become increasingly controversial if it proves successful.

Another obstacle could be current court employees resisting efforts to establish a special master program throughout the District. Especially troublesome could be employees who are assigned additional tasks as a result of the program's implementation and who would be expected to perform them until new personnel could be hired. For

\footnote{35} The FY-91 budget, for example, anticipates that revenues equal to 10\% of the countywide levies will be allocated to the District Court Fund. This amounts to $1,643,794 and is divided among the District court judges, court reporters, the Clerk of District Court's office, Youth Court, the Public Defender's Bureau, and the Court Operations Fund. Further discussion of budget-related topics will be presented in Chapter Four.
example, in Department One both Judge McLean's secretary and clerk will be assigned additional duties in support of the master. Since neither person will receive additional pay for performing that work, it is reasonable to believe that they will not be eager to do so for a long period of time. Moreover, if the master produces a substantial amount of work, it is possible that the overall efficiency of the court will be affected because present employees will not be able to process the present levels of casework as quickly as they currently do.

The ability of "courtroom workgroups" to "evade, absorb or blunt reforms they do not feel are in their interest" is well documented\(^{36}\) and may soon come into play in the Fourth District unless provisions are made to accommodate the concerns of currently employed support personnel. At a minimum, these people - especially secretaries and clerks - should be consulted regularly as the program is implemented, and serious consideration should be given to their ideas. Some intrinsic reward could be available to affected employees if they are able to participate in program development and see their suggestions operationalized. In the short term this may offset the lack of extrinsic reward for the people who will have to shoulder additional responsibilities.

\(^{36}\) In his book, \textit{Sense and Nonsense About Crime}, Samuel Walker cites, on pages 32 and 33, studies by Feeley, Suffet and Mather which document this phenomenon.
This chapter has outlined a special master program which is designed to fit the needs of Department One in the Fourth Judicial District and incorporates relevant information and experience from a variety of sources. The chapter has also discussed potential obstacles which the program will have to address and, in doing so, has alluded to the fiscal problems which will have to be overcome. The next chapter will present a proposed budget for the special master program and offer strategies for program implementation.
CHAPTER FOUR

BUDGET AND IMPLEMENTATION STRATEGIES
Development of a budget plan for the special master project in Department One must be guided by two factors; 1. Judge McLean’s desire that the master be a full time employee of the court and, 2. the fiscal realities of Missoula County government. This chapter will discuss these topics first, followed by the presentation of a budget which can operate within those constraints. Finally, this chapter will suggest strategies for implementing the program.

Judge McLean’s Requirements

Throughout the development of the special master program, Judge McLean has required that provision be made for the master to be a full-time employee of the court. His rationale for this requirement is based on three factors. First, he believes that it would be unrealistic to rely continuously on private attorneys on a pro bono basis to conduct the work which he plans to assign the master. Second, the cost associated with hiring private attorneys at their normal rates to assist the court would be prohibitive for both the county and for litigants. Third, he believes that a more productive working relationship can be formed with a master who is permanently employed by the court than would be possible otherwise.

The difficulty for private attorneys to schedule pro bono hearings and conferences around their billable work
would probably result in too few attorneys making time available to the court for the project to accomplish its stated objectives (see Introduction and Chapter Two for discussions of those objectives). Even if sufficient attorneys volunteered to act as special masters, Judge McLean believes this approach would only be adequate in the short term. If the caseload continues to increase at its present rate, more and more attorneys will have to become involved in the project for the caseload to be maintained at an acceptable level. Additionally, the judge feels that reliance on members of the local bar increases the possibility of conflicts of interest and works against his desire to dispose quickly of cases which are assigned to the master. In short, he prefers to have a full-time master working on these cases to help ensure the program's long-term success and to avoid excessive imposition on the local bar.

Judge McLean pointed to one instance in 1989 when a private attorney was hired as a special master to conduct fact-finding in a marriage dissolution case. The cost of

---

37 The retention of a private attorney was necessary when Judge Wheelis resigned from the bench and a very complicated case was moving through Department One. When Judge McLean assumed control of that department he felt it would be too time consuming and difficult for him to review all of Judge Wheelis' actions and then continue with the case himself. The case had already been pending for an excessive period of time, and he believed it would be in everybody's best interests if a special master were to assume control of the case so that it could be disposed of more quickly. He convinced the county's commissioners to pay for this service out of a special reserve
this service was slightly in excess of $1,000.00. Judge McLean believes that such an expense would add unacceptably to the present costs of litigation. Moreover, if the county were asked to pay for these services two or three times per month, the cost would equal or exceed that of employing a full time attorney as a special master. The difference in having a full-time master would be that he or she could handle more than two or three cases each month and could assist the court in other ways as well. Furthermore, the judge feels that imposing these types of costs on the litigants would be grossly unfair and would defeat one projected benefit of the program - to provide less expensive access to the court.

Judge McLean is certain that eliminating the backlog of cases will be easier if only one master is working with him. There would be enhanced communication and expertise if he were to train and interact regularly with only one master. Then, the manner he prefers for handling and presenting cases would be consistently followed. Equally important, the master would be more readily available to the judge for consultation on cases or other matters if he or she had an office and regular hours in the courthouse. Attorneys representing litigants in cases assigned to the master would likewise benefit from this arrangement.

fund that was available for such unusual circumstances, and the case was soon brought to satisfactory resolution. This information was provided by Judge McLean on April 18, 1990.
Fiscal Realities Within Missoula County Government

Missoula County officials have advised Judge McLean that, while they feel the special master project is worthy of full funding, they are currently unable to provide any significant fiscal assistance because of the property tax freeze imposed on city and county governments in 1986 by Initiative 105. Since then Missoula County has been unable to increase taxes to pay for additional services. It is only because of careful fiscal management by the Board of County Commissioners and the county's budget team that funding is available for modest budget enhancements or cost of living raises for employees.

In addition to the shortage of money, county officials are also at a loss to provide office space and furnishings for a special master. The courthouse's entire third floor and half of the second floor are currently occupied by the district court and are overcrowded at present staffing levels. As an example, it is not unusual for the district's judges to conduct trials in the federal courthouse or at the

---

38 This information was conveyed to Judge McLean by John Devore, the county's administrative officer, in a private conversation in April, 1990. It was confirmed in a memo to Judge McLean from Mr. Devore on June 27, 1990.

39 The county budget team is comprised of various department heads from throughout county government. The team meets regularly to monitor and reconcile projected revenues and expenditures for all departments as a means of avoiding or limiting shortfalls which would ultimately affect all county offices. This concept was put into place after the county was forced to reduce its staff and levels of service due to budget problems that surfaced after I-105 passed in 1986.
University of Montana Law School because there are only enough courtrooms in the county courthouse to accommodate two of them at the same time. In short, the only way that office space could be provided for a special master is to deprive another court employee or county office of that space. This dilemma would be compounded if the master were also to require space for a secretary or court reporter.

Analysis and Budget Development

Judge McLean's requirement that the special master be a full-time employee presented the obvious problem of funding salary, benefits, and work space. A solution to this obstacle was offered by the judge when he suggested that his current law clerk, Susan Leaphart, be appointed as special master. This alternative reshaped the funding problems because it required only additional monies to be appropriated to increase the salary of a current employee. A salary adjustment could be justified because of the new duties that would be assigned to Ms. Leaphart as the master. No new costs would be incurred to pay for employee benefits because she is present receiving them, and an additional advantage would be realized because a productive working relationship currently exists between the judge and Ms.

---

40 Ms. Leaphart is a graduate of the University of Montana's law school and has been employed by the district court since 1983. This information was provided by Judge McLean on April 18, 1990.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
Leaphart. Equally important, she currently uses the services of Judge McLean's secretary and will be able to continue doing so, albeit at an increased level, during the initial stages of program implementation.41

The primary drawback to this arrangement is that Ms. Leaphart will have less time available to assist the judge by conducting legal research. While this will be an adverse impact, Judge McLean felt that it would be offset by a reduction in the backlog of cases which will result from the special master's efforts. Moreover, since that research often involved cases similar to those which the master would be assigned, it is reasonable to believe that she will continue to conduct much of the necessary research, but for herself instead of Judge McLean.

Although the above could be a way of funding a master, three problems remain: 1. providing a means to record testimony and evidence during adversarial hearings, 2. scheduling personnel from the Clerk of Court's office to take the minutes at the master's hearings, and 3. lack of office space.

The first problem can be resolved by one of two means: using a certified court reporter or tape recording the proceedings. Since the second option is obviously much less costly in terms of labor expenses and the need to provide

41 This also suggests that the secretary will have increased duties and, accordingly, should be given an increase in pay.
office space for a court reporter, it was the one preferred by Judge McLean. Selection of this option means that the program's budget will have to include a projected expenditure for the purchase of recording equipment.

The second problem was eliminated when the Clerk of Court, Kathlene Breuer, advised that she could make a deputy clerk available to the master in almost all instances.42 Ms. Breuer stipulated, however, that she would have to be involved in the master's case scheduling process in order to ensure that personnel would be available from her office as required.

The third problem, locating office space for the master, was less easily addressed. Given the turmoil that would be caused if the county's administrative officers were to reassign to the court space that is currently occupied by another county department, this option was viewed as unacceptable. Instead, two other possibilities were considered. The first involved reassigning solely to the master a small office in the courthouse which is currently shared by the district's four law clerks. While this displacement would probably cause minor inconveniences, they would be an acceptable cost since most of the law clerks' Ms. Breuer advised me on September 13, 1990, that a clerk would usually be available for the master because she has one clerk who fills in when one of the four regular clerks are not at work or when a judge from another district conducts a trial in Missoula County. Under normal circumstances the fifth clerk would be available for the master.
work is done in the law library at the University of Montana. The proposed reassignment would mean that the clerks would have to prepare their research reports at the school or at their residences.

The other alternative was for the special master to share Judge McLean's chambers. This was seen as unacceptable since it would then be virtually impossible for either the master or the judge to schedule private conferences without first checking the other's schedule. Additionally, the judge often conducts special hearings related to juvenile or sanity matters. Since this type of work normally requires the privacy of the judge's chambers, the master would be frequently interrupted if she were also attempting to work there. For them to share one telephone extension would also be problematic.

In view of these considerations, the only good solution to the problem of limited office space is the first option - to displace the law clerks. Selecting this alternative has the additional advantage of requiring no purchase of new office equipment since the office is already furnished. Similarly, a telephone extension from the county's switchboard is presently installed in that office.

This chapter has presented so far the budget-related problems which must be overcome if the special master project is to be implemented. Furthermore, it has offered tentative solutions to those problems. The remaining two
sections of the chapter will introduce the anticipated monetary costs associated with implementing the program and offer strategies for that implementation.

**Anticipated Funding Requirements**

With the problems of funding the position of master and finding usable office space resolved, the only remaining costs associated with paying for the special master program relate to increasing two salaries and purchasing tape recording equipment. Those projected costs are listed below:

- **Salary Increase (annual)** $3,000.00
  This reflects an increase of $1.40 per hour over Ms. Leaphart's current salary.

- **Salary Increase (annual)** $1,596.00
  This reflects an increase of $0.47 per hour over Judge McLean's secretary's current salary.

- **Tape Recording Equipment** $1,900.00
  This includes the following items:
  1. One 3-head portable cassette recorder
  2. One power mixer
  3. Four microphones
  4. Four microphone cables
  5. Four microphone stands
  6. One pair of headphones
  7. One equipment carrying case
  8. One transcription machine
  9. Twenty 90 minute blank tapes

  Except for item nine, these are one-time purchases.
Strategies for Program Implementation

Assuming that the proposed expenditures are funded by the Board of County Commissioners, implementation of the special master program should proceed at once. The first step in doing so should be an announcement\textsuperscript{43} to the local bar that a master has been appointed, who she is, and what her duties will be. Additionally, local attorneys should be informed of the program’s design and what is expected of them as they interact with the master instead of Judge McLean. Copies of the program outline that was presented in Chapter Three of this report would be helpful in this regard.

The next step in the implementation process would be utilizing the master to conduct status conferences on cases which the judge has referred to her. These cases may include a variety of legal issues, but all should be rather uncomplicated in order to allow the master to obtain a feel for the role without having to concentrate on complex litigation. Cases such as routine estate presently, uncontested marriage dissolutions, or requests for default judgments are examples of such matters. These matters could be heard by the master on any Friday of the month when none

\textsuperscript{43} This announcement should be accomplished by a letter to all local attorneys. In addition to introducing the program, the letter should advise that Judge McLean will present the program orally at the next regularly scheduled meeting of the Western Montana Bar Association meeting and respond to questions in that regard.
of the judges regularly uses the Law and Motion Courtroom. Then, the master would be able to hear the matters at hand as Judge McLean would, wearing a robe and presiding over a courtroom.

An additional benefit to be realized from this modest approach is that the procedures proposed in Chapter Three could be evaluated to determine if they are workable. If problems become apparent, changes can be made at this juncture more easily than if the program were assigned immediately with complex cases. Once the master is comfortable with her role, the local bar familiar with the new procedures, and any modifications made, the more complicated cases that are pending may be assigned to the master.

The availability of a Law and Motion courtroom on Fridays should allow the master to begin hearing long-standing cases on a weekly basis. She will also continue to handle newly filed cases which the judge refers to her. Having a courtroom available on a regular basis should mean that cases will flow quickly through Department One, for two reasons: 1. few delays should be encountered due to lack of facilities to conduct hearings, and 2. attorneys should begin to rely on the master's availability

"This is a small courtroom which is not designed to accommodate a jury. Instead, it is used by each of the four judges one day each week to receive and/or rule on a variety of motions or to conduct other non-trial types of business.
on Fridays to schedule matters before her. The master should be able to conduct one adversarial hearing each Friday and also attend to several other non-adversarial cases on the same day. This time and workspace will also be available for her to conduct settlement conferences for the other judges if they so request. Once the program reaches this stage - where the master is systematically taking action on both old and new cases - it may be considered fully implemented.

In conclusion, this chapter has presented a discussion of the fiscal problems facing the special master program, including methods for resolving or managing them. Projected expenditures necessary for program implementation have also been outlined, and strategies for implementation suggested. The next chapter will offer methods and standards by which the program may be evaluated and will conclude this report by discussing future expansion of the special master program.
CHAPTER FIVE

CONCLUSION
This paper has reported on efforts to establish a special master program in Department One of the Fourth Judicial District. After the problem of burgeoning caseloads in the Fourth District was introduced and discussed, the paper familiarized the reader with research that was conducted to determine what options were available to remedy this dilemma. The problem and the research findings were then analyzed within the context of Missoula County's fiscal situation and the requirements of Department One's presiding judge, Hon. Ed McLean. From that analysis a special master program was developed which meets budget and space constraints put forth by Missoula County's administrative officers. The program also satisfies the criteria set forth by Judge McLean. Finally, budgeting and implementation strategies have been offered. It now remains to propose methods for evaluating the successes and shortcomings of the program and to discuss the possibilities of future expansion.

**Methods for Program Evaluation**

The special master program should be evaluated both qualitatively and quantitatively. First, employees who participate directly in the program should be advised that their suggestions concerning ways to improve the program are
vital to its success. These people will include not only the master, but also deputy clerks and other personnel from the Clerk of Court's office and the secretarial staff. After a panel of settlement masters is formed, their suggestions should also be solicited. If such comment is sought from the initial stages of program implementation and continued, then a "fine tuning" process will ensure that the program remains sensitive to changes which may occur in the Fourth District. For example, future enlargement of the District's computer capabilities may allow more efficient or expanded use of the special master program.

The special master program may be evaluated from two quantitative perspectives. First, if the special master program is operating as intended, a reduction in Department One's backlog of cases should be apparent after a specified period of time as compared to the other three departments in the Fourth District. Since the effect of other variables

45 Since there is no court administrator in the Fourth District, Judge McLean will be the person who receives these suggestions - unless he delegates that responsibility to the master or his secretary. Ultimately, under the present circumstances, he will be the person who must decide when and if any changes are to be made as a result of employees' observations.

46 The Clerks of Court in each of Montana's counties are required to report bi-annually to the Montana Supreme Court the numbers and types of cases that are pending in their respective counties, as well as similar information concerning those cases which have reached final disposition. As a result, this type of data is routinely recorded and should be available for each of the District's departments in the Clerk of Court's office.
can be accounted for, measurable changes in the backlog over a specific period of time should be easily attributable to the master’s work in Department One.

Newly filed cases should also reach final disposition sooner in Department One than in the other departments. This could be measured by monitoring the average elapsed time between the filing and disposition dates for cases assigned to each of the four departments. If the special master program is effective, there should be less time elapsed between those two dates for cases assigned to Department One after the special master program is implemented than is observable in the other departments. The impact of the master could also be measured by comparing elapsed time averages only within Department One. If the program is effective, there should be less time elapsed after the special master is employed than there was prior to her being utilized.

Since the Clerk of Court reports these data to the Montana Supreme Court Administrator’s Office every six months, the same reporting period should be used to determine the impact of the special master in Department One. Beginning with the first full reporting period after the special master program is formally introduced, elapsed time data which compare Judge McLean’s department with the entire Fourth District, and with the other departments separately, should be gathered. A comparison should then be
made for both previously pending litigation and for newly filed cases. It should also compare only marriage dissolution cases and probate cases since these two types of litigation will occupy most of the master's work time.

If these comparisons show the master's efforts are producing the intended results, they will serve as justification to expand the program into the other departments. If the data show that the special master program is not living up to expectations, they will provide a useful starting point for identifying and correcting shortcomings. In either instance the accumulation of this type of information should be ongoing as long as the special master program exists. It should prove most useful as annual budgets are prepared and submitted to the county's budget team and Board of Commissioners. Even if the program fails or loses funding, the data may be useful at some point in the future.

Possibilities of Expansion

If the special master program proves successful in eliminating the backlog of cases in Department One, it is a virtual certainty that the district's other judges will request budget enhancements for similar positions in their departments. These requests will be justified in terms of increased service to the public, but they will be very problematic for the same reasons that were presented in
Chapter Four of this paper. This does not mean the special master program will be unable to expand but, that any expansion will have to be limited. For example, all four judges may have to share two masters, and split the costs among the four departments. Courtroom and office space may also have to be shared and innovative solutions found for other problems before any expansion can be undertaken. It also seems unlikely that more than two special masters will be able to function in the Fourth District until plans to expand the county courthouse come to fruition.

The following observation will conclude this report: Montana’s Fourth Judicial District is fast approaching a crisis for two reasons. First, litigation is being brought before this district’s courts more frequently than in any other district of the state. Second, because of I-105 there is no workable, long-term way to provide the timely access to the court sought by this increased number of litigants. Even though short-term funding may be found to implement programs like the one suggested by this report, long-range

47 At least two plans have been formulated in the last five years to expand the courthouse so that additional jail space and law enforcement offices can be provided. When this eventually happens it is most likely to also include the construction of sufficient office space to allow other departments to expand into the areas that were formerly occupied by the Sheriff’s Department offices and jail. Before these plans can become a reality, however, the county’s voters will have to approve a sizable bond issue; something they have been reluctant to do to date.
solutions are needed that must be based on comprehensive and professionally administered plans. Until county officials are able to fund this sort of full-time court administration, there is little hope that the problem of unmanageable caseloads will be correctly addressed.

48 Professional court administration would also be able to deal with similar problems in other areas which the District Court must oversee, such as Youth Court or the Public Defender's Bureau.
SELECTED BIBLIOGRAPHY

Books


Booklets

2. *Friends of the Court: Lawyers as Supplemental Judicial Resources*, National Center for State Courts, 1984
3. *Guidelines For the Use of Lawyers to Supplement Judicial Resources*, National Center for State Courts, 1986

Articles


Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.


Interviews


2. Green, Jack (Hon.). Missoula County Courthouse, Missoula, MT, March 2, 1990


