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# Constraining Monitors

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# CONSTRAINING MONITORS

*Veronica Root**

## INTRODUCTION

In 2016, Herbalife, a global nutrition company, which once boasted net sales of $4.8 billion, entered into a negotiated settlement with the Federal Trade Commission to resolve allegations that it engaged in deceptive business and marketing practices.[1] The Federal Trade Commission alleged "that the multi-level marketing company's compensation structure was unfair because it rewards distributors for recruiting others to join and purchase products in order to advance in the marketing program, rather than in response to actual retail demand for the product, causing substantial economic injury to many of its distributors."[2] The nature of the allegations brought against Herbalife sparked debates about whether Herbalife, a large, publicly traded company, was actually a pyramid scheme and resulted in Herbalife agreeing to pay $200 million to compensate consumers and settle charges brought by the Federal Trade Commission.[3]

Additionally, Herbalife agreed to "pay for an Independent Compliance Auditor (ICA) who will monitor the company's adherence to [the court ordered settlement provisions] requiring restructuring of [Herbalife's] compensation plan" for a period of seven years.[4] A monitor is "(i) an independent, private outsider, (ii) employed after an institution is found to have engaged in wrongdoing, (iii) who effectuates remediation of the

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1. *See* Press Release, FTC, Herbalife Will Restructure Its Multi-Level Marketing Operations and Pay $200 Million for Consumer Redress to Settle FTC Charges (July 15, 2016) [hereinafter Herbalife Press Release], https://www.ftc.gov/news-events/press-releases/2016/07/herbalife-will-restructure-its-multi-level-marketing-operations [https://perma.cc/Q6PP-5WAN]; *see also* Frank Partnoy, *Is Herbalife a Pyramid Scheme?*, ATLANTIC (June 2014), http://www.theatlantic.com/magazine/archive/2014/06/wall-streets-6-billion-mystery/361624/ [http://perma.cc/7JQF-Y2U4].
2. Herbalife Press Release, *supra* note 1.
3. *See* Partnoy, *supra* note 1; Herbalife Press Release, *supra* note 1.
4. Herbalife Press Release, *supra* note 1.

institution's misconduct, and (iv) provides information to outside actors about the status of the institution's remediation efforts."[5]

Monitorships are highly sought-after engagements, and the Herbalife monitorship is no exception. The Federal Trade Commission issued a public "Request for Applications to Serve As Independent Compliance Auditor for Herbalife" and received at least twenty-six applications.[6] The majority of the applicants were lawyers and law firms, but applications were also sent from financial companies and consulting agencies.[7] In large part, monitorships are prized engagements because they are, traditionally, very profitable. One firm estimated that its monitoring costs of Herbalife would be approximately $15.7 million over the life of the seven-year term, while another indicated a range from $7.8 to $11.5 million.[8]

As the Herbalife monitorship demonstrates, there are strong financial incentives for parties to pursue monitorships. For example, the individual appointed as "the monitor" can often charge in excess of $1,000 an hour for her work alone.[9] Individuals who serve as monitors also have strong incentives to be repeat players in the monitorship game. In part, this is because monitorships are engagements entered into for finite periods and are associated with cooling-off periods before the monitored organization can employ the monitor in another capacity.[10] Thus, to guarantee long-term sources of revenue, individuals and organizations attempting to serve as monitors must pursue other representations.

Monitors have these strong financial motivations while also having been granted an enormous amount of responsibility to ensure remediation efforts are properly undertaken at the embattled firm. In some instances, this oversight is engaged in to ensure that organizations adhere to U.S. policy concerns, like the United States's position that bribery is an illegitimate method of obtaining certain business opportunities.[11] But in others, monitors are utilized to ensure that everyday citizens are awarded proper compensation for large-scale corporate misconduct, such as when banks improperly entered into foreclosure proceedings against thousands of homeowners.[12]

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5. Veronica Root, *Modern-Day Monitorships*, 33 YALE J. ON REG. 109, 111 (2016).

6. C. Ryan Barber, *So You Want to Be the Herbalife Compliance Monitor?: Join the Crowd*, NAT'L L.J. (Sept. 1, 2016), http://www.nationallawjournal.com/id=1202766554985/So-You-Want-to-be-the-Herbalife-Compliance-Monitor-Join-the-Crowd [https://perma.cc/4HL5-3MJW].

7. *Id.*

8. C. Ryan Barber, *Big Law Firms Reveal Rates in Pitches for Herbalife Monitor*, LAW.COM (Sept. 6, 2016), http://www.law.com/sites/almstaff/2016/09/06/big-law-firms-reveal-rates-in-pitches-for-herbalife-monitor/ [https://perma.cc/USK9-2NYR].

9. *Id.*

10. *See* F. Joseph Warin, Michael S. Diamant & Veronica S. Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321, 347–48, 354–55 (2011).

11. *See* Veronica Root, *The Monitor-"Client" Relationship*, 100 VA. L. REV. 523, 533–34 (2014) (discussing a monitorship arising out of an alleged scheme to make unlawful payments to foreign officials to secure contracts).

12. *See* Root, *supra* note 5, at 124–25 (discussing monitorship that arose out of the "National Mortgage Settlement").

As a result, the stakes are quite high, and it is important that monitors effectuate their duties properly and completely. One might think there are official guidelines governing monitors and monitorships when one considers that what are essentially private citizens are given an immense amount of responsibility for effectuating remediation efforts that are of significance to the public. There are not. The power of the court to intervene in monitorships is very much in flux. Statutory schemes aimed at governing monitorships have stalled and guidance issued by the American Bar Association is nonbinding and of little use for nonlawyer monitors. The primary factor that appears to govern behavior across all monitorships is the monitor's own interest in maintaining her good reputation. This reliance on reputation persists despite (i) conflicts regarding the disclosure of monitor reports,[13] (ii) concerns regarding cronyism in the monitor appointment process,[14] and (iii) worries about the limited systems for sanctioning monitor misconduct.[15]

Part I of this Article explains the failure of recent attempts by courts and legislators to constrain monitor behavior. Part II then argues that one reason for the lack of monitorship regulation lies in the reluctance of bar associations to oversee quasi-legal behavior. It then explains why reputation appears to be the primary factor reigning in monitor behavior today. Part III discusses implications of this Article's findings. Specifically, it discusses concerns regarding the disclosure of information, the boundaries of the relationship between a monitor and other parties, and the ways a monitor's identity might be utilized as a sanctioning mechanism. Monitors and those who utilize them confront these challenges every day without formal regulatory guidance.

## I. DIFFICULTY WITH CONSTRAINING MONITORS

The competition to serve as Herbalife's monitor was quite fierce. The winner of this competition was Affiliated Monitors, Inc.[16] Affiliated Monitors is neither an accounting nor law firm. Rather, it is an organization that provides "independent integrity monitoring, compliance/best practice programs, auditing, assessments, and other services across a wide range of regulated industries."[17] In its application, Affiliated Monitors noted that it has "provided independent monitoring on behalf of both federal and state agencies," including the Federal Communications Commission, the Department of Justice, the Department of Labor, state attorneys general, and

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13. *See infra* Part I.A.

14. *See infra* note 116 and accompanying text.

15. *See infra* Part III.C.

16. C. Ryan Barber, *FTC and Herbalife Snub Big Law for Consulting Firm as Compliance Monitor*, NAT'L L.J. (Sept. 23, 2016), http://www.nationallawjournal.com/home/id=1202768427209/FTC-and-Herbalife-Snub-Big-Law-for-Consulting-Firm-As-Compliance-Monitor?mcode=1202617074964&curindex=0&slreturn=20160825110859 [https://perma.cc/U46H-KNUN].

17. AFFILIATED MONITORS, INC., PROPOSAL OF AFFILIATED MONITORS, INC. IN RESPONSE TO THE REQUEST FOR APPLICATIONS TO SERVE AS THE INDEPENDENT COMPLIANCE AUDITOR FOR HERBALIFE 1 (2016) [hereinafter AFFILIATED MONITORS PROPOSAL], https://www.ftc.gov/system/files/documents/public_statements/982603/affiliated_monitors.pdf [https://perma.cc/38GE-YLNR].

various U.S. military organizations.[18] As such, Affiliated Monitors has overseen numerous remediation efforts employed by private firms at the behest of governmental agencies, regulators, and prosecutors for over a decade.[19] Yet, Affiliated Monitors operates in a space devoid of formal oversight, leaving very little to constrain the behavior of the monitoring firm itself. Part I.A begins by discussing the challenges associated with empowering courts to oversee monitorships. Part I.B then describes failed statutory initiatives and limited prosecutorial guidance.

### *A. Challenges with Court Oversight*

Courts often utilize judicially appointed agents to assist them in their adjudication efforts and have done so for decades.[20] Monitors are one type of court-appointed agent. "After a finding of liability, [a monitor is] often appointed at the remedial stage of complex cases to aid in formulating the decree, assist the court in implementing it, and monitor compliance."[21] Over time, however, monitorships have evolved and expanded outside the confines of the traditional role as court-appointed agents.[22]

For instance, regulators and prosecutors utilize "enforcement monitorships," like that used for the Herbalife settlement, when entering into negotiated settlement agreements to ensure that the monitored organization adheres to the terms of the agreement.[23] In an enforcement monitorship, the monitor acts as an agent of the government,[24] instead of an agent of the court, and ensures that the monitored organization complies with the government's specifications.[25] The negotiated settlement agreements that give rise to enforcement monitorships are sometimes entered into after formal proceedings against a corporation for alleged misconduct have been brought.[26] In these instances, the agreement, often termed a deferred prosecution agreement, is negotiated by the regulator or prosecutor and the

18. *Id.*

19. *Id.*

20. Root, *supra* note 5, at 116 ("Courts have used independent, private outsiders—court-appointed agents—to assist courts in their adjudication efforts for decades. These individuals are referred to by a number of terms often used interchangeably, including master, special master, receiver, trustee, or monitor.").

21. Ellen E. Deason, *Managing the Managerial Expert*, 1998 U. ILL. L. REV. 341, 352 (discussing courts' ability to appoint an outsider to assist the court under Federal Rule of Civil Procedure 53).

22. *See* Root, *supra* note 5, at 120–23.

23. *Id.* at 124–27.

24. Guidance to Department of Justice attorneys regarding the use of monitors in negotiated agreements states that the monitor is to be independent from and not an agent of the government. *See* Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys 4–5 (Mar. 7, 2008) [hereinafter Morford Memo], http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf [https://perma.cc/8942-WS7R]. Despite this, in enforcement monitorships, the monitor functionally acts as an agent of the government in a manner that looks quite similar to when a monitor is formally acting as an agent of the court. *See* Root, *supra* note 11, at 528 n.12.

25. *See* Root, *supra* note 5, at 124.

26. *Id.*

corporation.[27] The parties then request that the court enter the agreement in lieu of pursuing the normal adjudication schedule.[28] The involvement of the court in these instances has raised questions about the scope of the court's authority to oversee negotiated settlement agreements and the monitorships they often require.

For example, a line of cases in the D.C. Circuit appears to suggest that courts have little power over monitorships and negotiated settlement agreements. In 2012, a D.C. district court determined that reports prepared by a monitor were judicial records subject to the common law right of access and ordered that the reports be disclosed publicly.[29] On appeal, the D.C. Circuit reversed the judgment of the district court, thereby halting the public release of the monitor's reports.[30] The D.C. Circuit explained that the records were not pertinent to monitoring judicial conduct, because the monitor's reports

> do not record, explain, or justify the court's decision in any way—nor could they. They did not exist yet, and nothing in the record suggest[ed] the district court cared a whit about the results of the [monitor's] investigation as long as [the company] in fact initiated the investigation.[31]

In 2015, a D.C. district court held that a court could choose to accept or reject a deferred prosecution agreement pursuant to its supervisory powers.[32] When rejecting the agreement, the court provided several reasons for why it found the agreement to be deficient, including its failure to require the appointment of an independent monitor to verify that the company remained in compliance with the terms of the deferred prosecution agreement.[33] On appeal, the D.C. Circuit vacated the judgment of the district court and remanded the case for further proceedings.[34] The D.C. Circuit concluded that the district court had no authority to make substantive assessments regarding

27. *See* Warin, Diamant & Root, *supra* note 10, at 348–49.

28. Because deferred prosecution agreements involve the formal initiation of criminal charges within the judicial system, the agreements trigger the Speedy Trial Act's time limits for the commencement of a criminal trial. *See, e.g.*, United States v. Fokker Servs. B.V., 818 F.3d 733, 737 (D.C. Cir. 2016). The Speedy Trial Act specifically allows a court to suspend the running of the time within which to commence a trial for any period during which the government defers prosecution under a deferred prosecution agreement. *Id.* Thus, parties wishing to enter into a deferred prosecution agreement must go to the court to have the time within which to commence trial suspended. *See* Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 U. CHI. L. REV. (forthcoming 2017) (manuscript at 6), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2833902 ("Under a [deferred prosecution agreement], the prosecutor[] files charges but agrees not to seek conviction.") [https://perma.cc/DUV6-A9L2].

29. SEC v. Am. Int'l Grp., Inc., 854 F. Supp. 2d 75, 80 (D.D.C. 2012), *rev'd*, 712 F.3d 1 (D.C. Cir. 2013).

30. *Am. Int'l Grp.*, 712 F.3d at 2–3.

31. *Id.* at 4.

32. United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160, 164 (D.D.C. 2015), *vacated and remanded*, 818 F.3d 733 (D.C. Cir. 2016).

33. *Id.* at 166.

34. *Fokker Servs. B.V.*, 818 F.3d 733.

the terms included in a deferred prosecution agreement, including monitorship provisions.[35]

By contrast, however, in 2016, the Eastern District of New York maintained that the court had authority to approve or deny a deferred prosecution agreement and ordered the public release of the associated enforcement monitor's reports despite the vigorous objections of the government, the monitor, and the monitored organization.[36] The case is now on appeal before the Second Circuit.[37]

Assuming the Second Circuit finds that courts have the power to make decisions regarding deferred prosecution agreements and monitorships, the decision would be limited in that it would not be applicable to all negotiated settlement agreements. If prosecutors or regulators choose to pursue a different type of negotiated settlement agreement, like a nonprosecution agreement, which does not require any court involvement, it is not at all clear that those types of negotiated settlement agreements would be subject to court oversight or involvement. There are scholars who argue that monitorships, whether arising out of deferred or nonprosecution agreements, should be subject to court oversight,[38] but as of yet, the issue remains unsettled, as evidenced by the recent D.C. Circuit decisions.

Even if courts were to come to the conclusion that all monitorships arising out of negotiated settlement agreements between regulators or prosecutors and corporations should be subject to the same type of court oversight as court-ordered monitorships, the use of monitors has evolved beyond the enforcement monitorship context into other areas where court involvement appears wholly inappropriate.[39] For example, a public relations monitorship is sometimes employed by an organization on a completely voluntary basis, without the involvement of any regulatory or governmental body, to investigate "the scope of organizational wrongdoing" and to provide "a public accounting of the investigation, along with suggestions for remediation measures."[40] "The monitorship is meant to remediate the underlying organizational misconduct, but it is also meant to heal the damaged relationship between the monitored organization and the public through the monitorship's deliverable—the public monitorship report."[41] Because the monitorship is entered into on a completely voluntary basis, "it

35. *Id.*

36. *See* United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *5 (E.D.N.Y. July 1, 2013); HSBC Letter in Support of Filing under Seal at 5, *HSBC Bank USA, N.A.*, No. 12-CR-763 (June 1, 2015) [hereinafter HSBC Letter].

37. Jody Godoy, *Public Entitled to HSBC Monitor Report, 2nd Circ. Told*, LAW360 (Oct. 20, 2016), https://www.law360.com/articles/853062/public-entitled-to-hsbc-monitor-report-2nd-circ-told [https://perma.cc/FX8E-YHBE].

38. *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 176–77, 192 (2014) (discussing the need for more robust court oversight of all monitorships that are the outgrowth of a deferred or nonprosecution agreement).

39. *See* Root, *supra* note 5, at 137–42 (discussing public relations monitorships).

40. *Id.* at 137.

41. *Id.*

does not appear that robust court oversight . . . would be appropriate" in this setting.[42]

The upshot is that while the use of monitors originated in the courts,[43] their use has evolved beyond traditional judicial settings.[44] This evolution makes it difficult to rely on courts alone to ensure that monitors are accomplishing their oversight duties in a proper and ethical manner. Additionally, because monitorships now arise in a variety of settings and contexts, it may be that different types of constraints are needed to address the particular challenges individual monitorships present.[45]

### *B. Failed Statutory Attempts and Limited Prosecutorial Guidance*

The Accountability in Deferred Prosecution Act was proposed in the House of Representatives in both 2008[46] and 2009,[47] but it died in committee each time. The proposed legislation (i) required monitors to be selected from a public national pool of prequalified candidates, (ii) granted final monitor selection approval to a judge, (iii) dictated that the monitor selection process be "an open and competitive one where the monitor's powers should extend no further than the compliance concerns at the [monitored] firm," and (iv) required monitors to receive payments based on a flat- and fixed-fee structure.[48] It appears the Accountability in Deferred Prosecution Act arose, at least in part, due to concerns raised by a monitorship undertaken by former Attorney General John Ashcroft in the fall of 2007.[49]

When Chris Christie served as the federal prosecutor in New Jersey, he turned to his former boss, John Ashcroft, to serve as a monitor to Zimmer Holdings, a medical supply company in Indiana.[50] The monitorship was awarded without public notice or bidding and was worth $28 million to $52 million for eighteen months of work.[51] The contract was considered by some to be "evidence of political favoritism in the Bush administration's long-embattled Justice Department," and it prompted an internal Department of Justice review that resulted in formal guidelines to prosecutors in the selection and use of monitors.[52] These formal guidelines are contained in what has colloquially been termed the "Morford Memo."

42. *Id.* at 147.
43. *See id.* at 116–18.
44. *See id.* at 118–23.
45. *See id.* at 142–54.
46. Accountability in Deferred Prosecution Act of 2008, H.R. 6492, 110th Cong. (2008).
47. Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. (2009).
48. *See* Vikramaditya Khanna, *Reforming the Corporate Monitor*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 226, 238 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).
49. Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. TIMES (Jan. 10, 2008), http://www.nytimes.com/2008/01/10/washington/10justice.html?_r= [https://perma.cc/X7BL-UWGW].
50. *Id.*
51. *Id.*
52. *Id.*

The Morford Memo provides guidance to all Department of Justice employees regarding the selection and use of monitors in deferred and nonprosecution agreements with corporations.[53] The memorandum contains nine "principles" that provide standards for monitor selection, independence, responsibilities, communication, recommendations, reporting obligations, and duration.[54]

The proposed legislation and the Morford Memo were designed to provide greater clarity and accountability in the utilization of monitorships. Unfortunately, each of these initiatives is relatively narrow in scope because they apply to a limited subset of monitorships. The restrictions put forth in the proposed legislation and in the Morford Memo would not, however, apply to the Herbalife monitorship, as it is not a result of a deferred or nonprosecution agreement.[55] Instead, it is the product of a negotiated settlement agreement between the Federal Trade Commission and Herbalife that took the form of a stipulated order for permanent injunction and monetary judgment.[56] Additionally, the Herbalife monitorship is not subject to the Morford Memo because the Morford Memo "does not apply to agencies other than the Department of Justice"; the Federal Trade Commission is independent of the Department of Justice.[57] Moreover, neither the proposed legislation nor the Morford Memo would govern public relations monitorships.[58]

Thus, attempts to constrain monitorships through statutory intervention and prosecutorial guidance, like the use of court oversight, appear to be ill suited to tackle the full scope of challenges that arise when confronting monitorships.[59] Because monitorships are utilized in a variety of contexts by a diverse group of regulators, prosecutors, and private parties, attempts to constrain monitorships have proven quite difficult.

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53. *See generally* Morford Memo, *supra* note 24.

54. *Id.* at 3–8.

55. *Cf.* Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. (2009) ("A bill [t]o regulate certain deferred prosecution agreements and nonprosecution agreements in Federal criminal cases.").

56. *See* Stipulation to Entry of Order for Permanent Injunction and Monetary Judgment, FTC v. Herbalife Int'l. of Am., Inc., No. 2:16-cv-05217 (C.D. Cal. July 15, 2016) [hereinafter Herbalife Agreement].

57. Morford Memo, *supra* note 24, at 2–3.

58. *See supra* Part I.A.

59. Other tactics can be utilized to provide standards and norms to govern the behavior of various compliance actors. For example, "[l]awyers appearing and practicing before federal [administrative] agencies . . . are often subject to additional ethical rules promulgated by the agencies." George M. Cohen, *The Laws of Agency Lawyering*, 84 FORDHAM L. REV. 1963, 1963 (2016). Some agency rules apply to lawyers only, while others apply "to any person appearing in a representative capacity before an agency." *Id.* at 1964. Thus, it would seem possible for agencies to develop their own set of rules governing monitor behavior; but because monitors are used in so many diverse contexts and before so many different regulators and prosecutors, any attempt to use this tactic to regulate monitorships would necessarily be limited in scope and breadth.

## II. Professionalism's Failures and Reputation's Limitations

The explanation provided in Part I is consistent with previous scholarship and accepted understandings regarding the evolution of monitorships and the difficulties associated with creating a regime of oversight to govern monitor behavior.[60] It is, however, incomplete.

When private actors are charged with performing certain actions on behalf of the public, there are often mechanisms put into place to ensure that the private actors execute those duties responsibly. For example, lawyers are required to adhere to certain standards of professional conduct promulgated by state bar associations that can discipline attorneys who violate those standards.[61] Similarly, certified public accountants must adhere to specific state licensure requirements to practice public accounting.[62] Further, individuals who serve as brokers for, or dealers to, third parties in the sale of securities are required to register with the Securities and Exchange Commission, join a self-regulatory organization, and adhere to state requirements for a person conducting business as a broker-dealer within that state.[63] Monitors are not all that different from these individuals.

Monitors are private actors who manage the largely public function of overseeing remediation efforts at dozens, if not hundreds, of organizations every day. They are not, however, subject to licensing, registration, or formal regulatory requirements, but they could be. Part II.A begins by explaining how bar associations view their regulatory role in a narrow fashion, which has allowed quasi-legal functions to operate outside of formal oversight. Part II.B then discusses a potential fix proposed by the bar, which is, at best, quite limited. Finally, Part II.C concludes by turning to the main factor that appears to serve as a constraint on monitor behavior: reputation.

### *A. The Bar's Failure*

Lawyer conduct is regulated by state bar associations, which promulgate rules of professional conduct.[64] Current rules, while sometimes referred to as ethical norms, are more regulatory in nature than true expositions

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60. *See, e.g.*, Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 683 (2009); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1715 (2007) (discussing the historical underpinnings of corporate monitors and relating corporate monitors to the use of special masters, which dates back to the early sixteenth century); Root, *supra* note 11, at 526.

61. *See* GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 13–18 (4th ed. 2005).

62. *See CPA Licensure*, AM. INST. CPAS, https://www.aicpa.org/BECOMEACPA/LICENSURE/Pages/default.aspx (last visited Mar. 25, 2017) (discussing CPA licensure requirements and providing state information on specific state requirements) [https://perma.cc/7QPW-P6JU].

63. *Guide to Broker-Dealer Registration*, SEC, https://www.sec.gov/divisions/marketreg/bdguide.htm#II (last visited Mar. 25, 2017) [https://perma.cc/DN5H-4ZUK].

64. HAZARD, JR. ET AL., *supra* note 61, at 13–14.

regarding proper ethical behavior.[65] The rules' "appeal is not to conscience, but to sanction. It seeks mandate rather than insight."[66] This view of the role of the bar as a mere regulatory mechanism, however, was not always the case. Fifty years ago, understandings of professionalism

> conceive[d] of the professions as groups of individuals who have mastered an area of knowledge through special training. Because they gain[ed] their power through knowledge—not wealth or political prestige—professionals [were considered] uniquely suited to ascertain what is best for the public as a whole and to suppress their own immediate interest in achieving it.[67]

Indeed, the "government and society in general turned to the well-trained expert," like a lawyer, "to help preserve fairness, justice, and progress in an increasingly complex industrial world."[68] In particular, lawyers were conceived of as intermediaries between the interests of the state and society.[69] Lawyers' fidelity to the rule of law as officers of the court required them to pursue justice over self-motivated interests. Additionally, lawyers "were considered critical not only for their understanding of complex facts, but also for their ability to use those facts to envision a new and better community."[70]

Yet, by the 1970s and 1990s lawyers abandoned this role "in favor of new roles straddling law and business."[71]

> The organized bar was once intent on drawing sharp distinctions between law and business, but the rise of the regulatory state changed the playing field. As regulation came to pervade society, new kinds of work and roles proliferated. Law and business grew together, and a murky and ambiguous boundary zone replaced the once-crisp demarcation between the two. Today's quasi-legal roles, embraced by many lawyers and encouraged by the organized bar, exist in this broadened and blurred boundary zone in which legal training and licensure are valuable but professional ethical obligations are unclear.[72]

The role of monitors and the function they provide to society exists in this murky, quasi-legal boundary zone.[73]

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65. Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 963 (1987).

66. *Id.*

67. Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 651 (2016).

68. *Id.* at 650.

69. *Id.* at 652; *see also* Dana A. Remus, *Out of Practice: The Twenty-First-Century Legal Profession*, 63 DUKE L.J. 1243, 1247 (2014).

70. Roiphe, *supra* note 67, at 660–61.

71. Remus, *supra* note 69, at 1247; Roiphe, *supra* note 67, at 663, 672–73; *see also* ANTHONY T. KRONMON, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 1–4 (1993) (discussing the decline of the "lawyer-statesman" ideal).

72. Remus, *supra* note 69, at 1246.

73. Other similar disputes have occurred regarding what accounts for the practice of law. For example, mediation services undertaken by nonlawyers have been seen as similarly suspect conduct. *See generally* Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235–36 (2002) (explaining the "blurred boundaries between the legal profession" and nonlawyer mediators and arguing that mediation practice "often slides into the practice of law").

Monitors are not in an attorney-client relationship with the organizations they monitor, even when the monitor is, as is often the case, an attorney. As was the case in the Herbalife monitorship, the development of a formal attorney-client relationship during the course of a monitorship is either strictly prohibited[74] or purposefully avoided.[75] This is despite the fact that at least part of the service monitors provide looks very similar to the service lawyers often provide to clients when in a formal attorney-client relationship—advising clients on whether their activities conform to legal and regulatory requirements. Monitoring relationships, however, are treated as outside the bounds of attorney regulation. In part, this is because the monitor's legal advice is almost inextricably intertwined with what would qualify as oversight of the routine development of business strategies and practices. This secondary piece is what causes standard regulation by bar associations to be inapplicable to monitorships because the bar has chosen to provide one "single, broadly applicable code of conduct"[76] in lieu of a more complex regulatory system.

Recognizing the problem of a unitary system of attorney regulation, legal academics in the early 1990s promoted the use of "context-specific rules [that would] govern different practice areas."[77] The original context-specific rules proposed by legal academics in the early 1990s were suggested, at least in part, because "lawyers need more leeway to advocate zealously for clients when litigating than when offering advice and guidance in a nonadversarial context."[78] Like lawyers operating outside of a litigation setting, a monitor is not in a role that requires advocacy. Instead, the monitor is charged with overseeing a company's remediation effort and, when necessary, assisting the monitored firm in making the adjustments necessary to ensure success. The monitor provides this service to the monitored company, but it is also serving a public function. Yet, even the context-specific rules advocated in the early 1990s failed to "account[] for one of the most significant sources of change and ethical tension facing the profession today—the emergence of a robust but ambiguous boundary zone between law and business."[79]

The bar could have responded to the proliferation of new, quasi-legal roles "by working to extend its jurisdiction and ethical rules to cover additional work sites," but, instead, "bar leaders declined to act definitively, neither bringing quasi-legal work clearly within, nor excluding it clearly from, the profession's jurisdiction."[80] As a result, in most states, "lawyers who offer

74. *See, e.g.*, Herbalife Agreement, *supra* note 56, at 18.

75. *See* Root, *supra* note 5, at 138–39.

76. Remus, *supra* note 69, at 1245.

77. *Id.* Today, academics continue to recognize the utility in adopting legal ethics rules that are of a more specialized nature, whether through formal rules of professional conduct or through the adopting of rules by courts. *See, e.g.*, Bruce Green, *Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers?*, 29 GEO. J. LEGAL ETHICS 527 (2016).

78. Remus, *supra* note 69, at 1255 (citing David Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1183–84 (1993)).

79. *Id.* at 1256.

80. *Id.* at 1260.

law-related services without also engaging in the practice of law are not bound by" the rules of professional conduct.[81]

Thus, a lawyer can be a member of the bar, market his legal expertise and prowess, be awarded a monitorship, and then operate the monitorship with almost no fear of reprisal from the bar should the lawyer-monitor engage in inappropriate conduct. For example, in Affiliated Monitors's application to serve as Herbalife's monitor, it notes that its proposed team members include individuals with experience as "government and private practice attorneys."[82] It also indicates that the monitoring team would be led by two specific individuals, one of whom has significant past legal experience and current, active involvement in the American Bar Association and the National Association of Former U.S. Attorneys.[83] Yet, as is noted in the application, "[o]ne distinguishing characteristic of Affiliated Monitors is that monitoring is [its] business; it is not a sideline to *legal* or consulting services."[84] Because of the bar's decision to omit quasi-legal conduct from attorney regulation, Affiliated Monitors's business activities and the activities of the lawyers they employ will largely proceed without formal, independent oversight.[85]

### *B. The Quasi Fix*

Despite the limitations of the bar's unitary system of regulation, it has acknowledged the need for monitor guidance. Because the bar chose not to formally regulate quasi-legal roles, however, its options were limited. On August 4, 2015, the American Bar Association's House of Delegates approved black letter "ABA Standards for Criminal Justice for Corporate Monitors."[86] The standards were described as "for the first time—provid[ing] a framework through which corporate monitors, legislatures, courts and administrative agencies can make decisions on developing and implementing an organization's corporate compliance and ethics program."[87] The standards are, necessarily, nonbinding and advisory in nature for both lawyers and nonlawyers.[88] Their goal is not to provide formal regulation but

81. *Id.* at 1261.

82. *See* AFFILIATED MONITORS PROPOSAL, *supra* note 17, at 2.

83. *Id.* at 15–16.

84. *Id.* at 2 (emphasis added).

85. In part, this is because the vast majority of the rules of professional conduct apply only within the context of an attorney-client relationship and are therefore inapplicable to contexts when a lawyer serves as a monitor to an organization. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2016). Moreover, the lawyer-monitor is often expressly precluded from entering into an attorney-client relationship with the monitored organization. *See, e.g.*, Root, *supra* note 11, at 541. As such, lawyers serving as monitors are typically subject to sanction only for violation of catchall provisions, which prohibit activity like "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PROF'L CONDUCT r. 8.4(c).

86. *ABA Adopts Best Practices to Guide Corporate Monitors*, A.B.A. NEWS (Aug. 4, 2015, 6:00 PM), http://www.americanbar.org/news/abanews/aba-news-archives/2015/08/aba_adopts_best_prac.html [https://perma.cc/J94J-LM5A].

87. *Id.*

88. Work remains underway to provide commentary to accompany the "black letter" standards. *Monitors Standards*, A.B.A., http://www.americanbar.org/groups/criminal_justice/

instead to provide guidance to individuals—lawyers and nonlawyers alike—who undertake monitorships.

From a substantive perspective, the standards appropriately provide a high-level overview of the types of concerns and issues that monitorships raise. The standards discuss issues for parties to consider in the selection of monitors, the development of a work plan, and the setting of fees and compensation.[89] They also provide a strong set of recommendations for how to analyze potential conflicts of interest within the monitoring relationship.[90]

The standards, however, do not engage in an in-depth consideration of a variety of issues that are of common concern regarding monitorships. For example, the standards explain that the order or agreement resulting in the monitorship "should state whether the Monitor's report is to be confidential or whether it is to be made available to the public," but it does not provide any guidance on when a report should remain confidential or how to ensure such confidentiality.[91] Thus, while the standards are certainly helpful, they do not appear to wrestle with some of the thornier issues that arise during the course of today's monitor engagements.

### *C. Reliance on Reputation*

As monitorships evolved outside the context of formal adjudication, the monitoring relationship began to form between the monitor and monitored organization through what are essentially private contracts. These private contracts do not look all that dissimilar from the contracts between attorneys or auditors and their clients. For example, Affiliated Monitors and Herbalife will enter into an agreement for Affiliated Monitors to provide monitoring services on behalf of Herbalife, and Herbalife will agree to pay Affiliated Monitors for its services.[92] The terms of the monitorship agreement, at least in part, are predetermined based on the negotiated settlement agreement entered into between Herbalife and the Federal Trade Commission,[93] but that does not erode the reality that contractual terms control the relationship between Herbalife and Affiliated Monitors. Because (i) attempts to oversee monitorships via the courts are limited in scope, (ii) legislative efforts have failed, and (iii) the bar has chosen not to regulate quasi-legal conduct, these private contractual terms govern the conduct of the individual monitors who are charged with overseeing remediation efforts at organizations involved in misconduct.[94]

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standards/MonitorsStandardsFourthEdition-TableofContents.html (last visited Mar. 25, 2017) [https://perma.cc/PEG6-NAWV].

89. *Id.*

90. *Id.* Standards 24-2.4(4), 24-2.5, 24-4.6(2).

91. *Id.* Standard 24-4.3(4).

92. Herbalife Agreement, *supra* note 56, at 18; Barber, *supra* note 16.

93. Herbalife Agreement, *supra* note 56, at 18–23.

94. The contractual terms governing the monitorship must, however, adhere to any restrictions set forth by a court or negotiated settlement agreement. For example, a negotiated settlement agreement may state that (i) the monitor is not permitted to enter into an attorney-client relationship with the monitored organization or (ii) certain procedures must be followed

As evidenced by the numerous applications filed to serve as Herbalife's monitor, individuals and entities are eager to enter into monitoring agreements. As such, they work hard to make themselves look like attractive candidates to serve as a corporation's monitor. Because the monitored organization is typically unable to discharge the monitor if it is displeased with the monitor's work,[95] monitored organizations that are able to provide input on the identity of a monitor take the selection process quite seriously. In many instances, however, the external monitor must also market themselves to a party outside the monitoring contract, whether that be a regulator, prosecutor, or the public at large. For example, the Federal Trade Commission and Herbalife selected the monitor via mutual agreement.[96] As such, the monitor must often also meet what can be very exacting standards of third parties with a vested interest in the monitoring engagement. These unique features of monitorship relationships and agreements make the monitor's reputation of incredibly high value.

"Reputational capital is the value of [a] contractor's reputation in the relevant marketplace."[97] As demonstrated by the proceeding discussion, it appears that a monitor's reputational capital is quite important in its pursuit of monitorship engagements. If a monitor develops a bad reputation with either monitored firms or interested third parties, such as regulators, the monitor will likely find it difficult to obtain future engagements. Research has demonstrated that, when self-enforcing contracts are involved, "the party with significant reputational capital would think long and hard before violating unstated contractual norms and damaging her valuable reputation," making the party "more trustworthy than a transactor whose reputation has little value."[98] The majority of monitoring contracts do not appear to be self-enforcing,[99] but the overarching principle does appear applicable in the monitoring context, where, unlike in the context of the traditional attorney-client relationship, there are very limited options to exit the monitoring agreement. Monitors, while not subject to governance from courts, formal standards, or formal rules, are thought to be unlikely to engage in unethical or inappropriate behavior because they maintain a high interest in preserving the value of their reputational capital.[100] Thus, the monitor's interest in

in the event of a dispute between the monitor and the monitored organization. Root, *supra* note 11, at 541, 544–45.

95. *See, e.g.*, Herbalife Agreement, *supra* note 56, at 22–23.

96. *Id.* at 18.

97. Alex Raskolnikov, *The Cost of Norms: Tax Effects of Tacit Understandings*, 74 U. CHI. L. REV. 601, 671 (2007).

98. *Id.*

99. A self-enforcing contract is an agreement or contract between two parties that is enforced only by those two parties; a third party is not able to enforce or interfere with the agreement. Most monitoring contracts do have third parties that are able to interfere with the agreement—the regulator, prosecutor, or court. *See, e.g.*, Herbalife Agreement, *supra* note 56, at 21 (explaining that if the monitor determines that the company is not in compliance with the negotiated settlement terms the monitor will notify the regulator).

100. Peter B. Oh, *Gatekeeping*, 29 J. CORP. L. 735, 748–50 (2004) (explaining that when actors are "'paid to verify another party's information' by 'signal[ing] [that information's] value through their individual reputations,'" they do so in part by relying on their reputational capital (alterations in original) (footnote omitted) (first quoting Ronald J. Gilson, *Value*

maintaining positive reputational capital serves to constrain the monitor's behavior.

And yet, while reputational capital has a variety of benefits, it also has certain drawbacks. Reputational capital makes it important for monitors to manage their conduct within the marketplace of entities that utilize monitoring services, but this incentive is inherently self-interested on the part of the monitor who wants to obtain additional monitorship engagements. Scholars have expressed concern about the use of reputational capital to restrain behavior in similar settings. For example, financial intermediaries, like monitors, rely heavily upon their reputations. Indeed, "many economists and other academics have long argued that the value of a good reputation should ensure that intermediaries generally act honestly and place their clients' interests above their own."[101] Recent scholarship, however, explains that "a series of scandals . . . suggest investment bankers, credit rating agencies, accountants, and other intermediaries regularly prioritize their short-term interests in fee maximization, even when doing so is contrary to their clients' best interests."[102] This concern is

> exacerbated when a class of intermediaries is entrenched and new entry difficult, as the value of reputation in such settings tends to be determined on a relative basis. When a party has no choice but to rely upon a particular type of intermediary, the business will go to the intermediaries whose reputations are relatively untarnished, no matter how far from shiny that might be.[103]

Thus, a monitor has a strong incentive to carefully manage her reputation in an effort to ensure that she will be chosen for future monitorships, but reliance on reputational capital is inherently limited in its effectiveness.

## III. IMPLICATIONS

As explained in Parts I and II, monitors, like Affiliated Monitors, enter into monitorship agreements every day without the benefit of concrete rules governing their conduct. In turn, the remediation effort that the monitor is meant to oversee for the protection of those harmed by corporate misconduct—like the consumers and employees who entered into transactions with Herbalife—is plagued by structural weaknesses that could undermine the monitorship's long-term effectiveness. Additionally, a monitor's reputational capital alone has proven insufficient to address these potential problems, as it does not provide guidance on many difficult policy issues relevant to monitorships.

In an effort to begin to address these issues, this part outlines three potential areas where additional research would be beneficial in attempting to discern appropriate regulatory mechanisms for governing monitorships.

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*Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 289 (1984), then quoting Ronald J. Gilson & Reiner H. Kraakman, *The Mechanics of Market Efficiency*, 70 VA. L. REV. 549, 613–21 (1984))).

101. Kathryn Judge, *Fee Effects*, 98 IOWA L. REV. 1517, 1522 (2013).

102. *Id.*

103. *Id.*

First, the difficulties associated with determining when, how, and to whom information gathered by a monitor should be disseminated is a challenging issue that could benefit from additional scholarly attention. Second, the concept of monitor independence would benefit from more analysis and scholarly inquiry. Third, strategies for better utilizing a monitor's identity as a sanctioning mechanism should be considered and assessed.

### *A. Information Disclosure*

> *Developing a strong, deeply ingrained compliance culture is no simple task, and poses particular challenges to HSBC Group in light of the depth of the cultural deficiencies that fostered the intentional criminal conduct that led to the [deferred prosecution agreement] and the size and scope of the Bank's operations. Although the Bank has taken many positive steps during the past year, the fact remains that it has moved too slowly and made too little progress toward instilling the type of culture it will need in order to build an effective [anti-money laundering] and sanctions compliance program—and to maintain that program when it is no longer subject to the Monitor's supervision.*[104]
>
> –HSBC Monitor's Report

Should statements like the above be public and, if not, how can the public be assured that a company will take the actions necessary to assure similar misconduct does not reoccur? Those questions appear to be at the center of a several-year feud involving the judiciary, government regulators and prosecutors, corporate entities, private attorneys, reporters, and the public at large about the proper regulation and oversight of the use of monitors.

For example, HSBC failed to enhance its anti-money laundering compliance, which created a deficient anti-money laundering program. As a result, "at least $881 million in drug trafficking proceeds, including proceeds of drug trafficking by the Sinaloa Cartel in Mexico . . . were laundered through HSBC Bank USA without being detected."[105] Ultimately, HSBC entered into a deferred prosecution agreement with the Department of Justice and agreed to retain a monitor for a five-year term.[106] The monitor's mandate, in part, was to "mak[e] recommendations reasonably designed to improve the effectiveness of HSBC Group's program for ensuring compliance with anti-money laundering laws as well as HSBC Group's implementation and adherence to [certain] remedial measures."[107] To facilitate its mandate, the monitor "conduct[ed] an initial review and prepare[ed] an initial report, followed by at least four (4) follow-up reviews and report[s]."[108] One of these required reports has sparked the latest high-

104. Stephen Dockery, *U.S. Judge Sends Parting Shot to HSBC over Compliance Report*, WALL ST. J.: RISK & COMPLIANCE J. (Mar. 10, 2016, 4:31 PM) (first alteration in original), http://blogs.wsj.com/riskandcompliance/2016/03/10/u-s-judge-sends-parting-shot-to-hsbc-over-compliance-report/ [https://perma.cc/SL4Q-ZBXB].

105. Deferred Prosecution Agreement attachment A at 3, United States v. HSBC Bank USA, N.A., No. 1:12-cr-00763-ILG (E.D.N.Y. Dec. 11, 2012) [hereinafter HSBC 2012 DPA].

106. *Id.* attachment B at B-1 to -2.

107. *Id.* attachment B at B-5 to -6.

108. *Id.* attachment B at B-4 to -5.

profile debate regarding the appropriate set of rules and standards for governing monitorships.

The question of whether monitor reports should be made public is not an easy one. The monitor himself, despite criticizing HSBC in the report, argued against its public disclosure:

> I believe that maintaining the confidentiality of the First Annual Follow-Up Review Report is in the interest of an effective monitorship because it is clear to me that confidentiality encourages cooperation from the employees of HSBC Group. Much of my work as Monitor depends on full, open, and candid cooperation from employees at all levels of the Bank, and thus far, I have enjoyed an appropriate level of such cooperation from employees of HSBC Group. I believe, however, that releasing this report publicly would have a chilling effect on those employees, and the level of cooperation and candor that I would receive could decrease substantially. The employees might well become concerned that they would suffer negative repercussions from their statements, or information they have provided, being made public. The result would be that I would have less information with which to make my findings and recommendations, which ultimately would not be to the benefit of the public or the Bank.[109]

The monitor's claims create a bit of a conundrum. The public has an interest in knowing whether HSBC has taken steps to ensure that it will not launder the money of Mexican drug cartels in the future. Yet, if the public's detailed knowledge of the remediation process will deter cooperation by HSBC employees with the monitor, public disclosure may actually harm HSBC's efforts toward remediation. Relying on reputational capital to govern monitorships cannot solve this quagmire.

Thus, a full inquiry is needed into the set of rules and standards that might balance these competing interests, and this analysis may need to acknowledge that different rules could be needed for different monitorship contexts. Moreover, because monitorships, as noted above, are utilized by dozens of state and federal regulators to oversee and assist in remediation efforts across a variety of regulatory areas, the stakes are quite high.

### *B. Monitor Independence*

Concerns regarding monitor independence almost always focus on the monitor's independence from the monitored institution. The general requirement that a monitor be independent of the monitored institution is likely a result of (i) concerns regarding monitor capture[110] and (ii) a relatively simple conflict of interest analysis.[111] The requirement is viewed as relatively uncontroversial, and a review of management literature suggests that the use of an independent, private outsider is likely a sound decision.

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109. Affidavit of Michael G. Cherkasky at 3, United States v. HSBC Bank USA, N.A., No. 1:12-cr-00763-ILG (E.D.N.Y. June 1, 2015).

110. Root, *supra* note 11, at 579–80.

111. *See, e.g.*, *Monitor Standards*, *supra* note 88, Standard 24-4.1.

For example, the institution is more likely to get an untainted assessment from someone without a strong, prior affiliation with the monitored institution.

> [A] study of accountants has demonstrated that the entity an accountant works for has a significant impact on the accountant's findings. In one study, "139 professional auditors employed full-time by one of the Big Four accounting firms in the United States" were given auditing problems to assess. "Half of the participants' materials told them that they had been hired as the external auditor for the firm in question." The other half were told "that they were working for an outside investor considering investing money in the firm." The study hypothesized, and proved, that "participants would be more likely to conclude that the accounting behind a firm's financial reports complied with [GAAP] if they were working for the firm rather than for an outsider investor." This study confirmed opinions that . . . had [been] expressed [by others]. Specifically, that "[i]ndependence is necessary to prevent auditors from biasing their opinions in favor of their clients." . . . [T]his study demonstrate[s] the importance of maintaining a strong level of independence when attempting to evaluate an institution's compliance with legal and regulatory requirements.[112]

Thus, the insistence that monitors remain completely independent of the monitored organization should likely reassure regulators, prosecutors, and the public that the monitorship is likely to result in appropriate remediation efforts.[113]

Despite the clear benefits of requiring the monitor to remain independent of the monitored organization, there are at least two additional concerns that may be preventing the monitor from achieving true monitor independence. First, monitors, while unable to turn a monitored organization immediately into a client after the conclusion of the monitorship, can typically begin to do work for the monitored organization one or two years after the conclusion of the monitorship.[114] This relatively short "cooling-off" period may create the

112. Root, *supra* note 5, at 155 (fifth alteration in original) (footnotes omitted) (first quoting Don A. Moore, Lloyd Tanlu & Max H. Bazerman, *Conflicts of Interest and the Intrusion of Bias*, 5 JUDGMENT & DECISION MAKING 37 (2010), then quoting Max H. Bazerman & Don Moore, *Is It Time for Auditor Independence Yet?*, 36 ACCT. ORG. & SOC'Y 310 (2011)).

113. That is not to suggest that there may not be some efficiencies lost by requiring monitor independence. For example, it may be that allowing a firm that previously worked with a company in addressing issues related to the underlying misconduct to serve as the monitor would eliminate some redundancies of work. Additionally, allowing a firm with a prior relationship to oversee a monitorship might result in a more cooperative relationship during the course of the monitorship. In general, however, it appears that the concerns regarding capture and conflicts of interest are perceived to outweigh the benefit of the efficiencies gained by employing a monitor who is not independent of the monitored organization.

114. *See* Warin, Diamant & Root, *supra* note 10, at 354–55; *VDP Protocol 8: Participant Hires a Compliance Monitor*, WORLD BANK, http://siteresources.worldbank.org/INTVOLDISPRO/Resources/2720448-1300821628018/VDP_Proctocol_8.pdf (last visited Mar. 25, 2017) [https://perma.cc/S73K-ULSP].

same incentive that the external auditor felt to ensure a "good" outcome on behalf of the audited institution.[115]

Second, there has likely been insufficient attention paid to the importance of employing a monitor that has significant independence from a previous role as an employee of the government or a regulator.[116] For example, "half of all corporate monitors appointed in Justice Department deferred prosecution and non-prosecution agreements with corporate defendants since 2001 are former prosecutors."[117] The use of former prosecutors and high-ranking government officials, in some instances shortly after the individuals depart government service, may result in the monitor's failure to take a truly "independent" perspective when conducting the monitorship. Instead, the monitor may still be viewing information from her role as a prosecutor, which could affect her assessment of the activities being undertaken by the firm. For example, a recent hire by a prominent monitoring firm stated that, "[c]oming from the government, I understand the regulator's perspective, and I'm well positioned to help companies reform their practices to meet regulators' expectations."[118] This perspective may very well be important, but the reliance on former government attorneys to serve as monitors does raise a variety of questions regarding whether monitors are truly acting as independent, objective evaluators.

The upshot is that additional research into the appropriate boundaries of monitor independence is needed and this too is something that cannot be answered by relying on the constraint of reputational capital. It may be that requiring a more robust independence requirement for monitors may serve to improve the effectiveness of monitorships. Additionally, an independence requirement could possibly address concerns of both regulators and institutions alike regarding the monitor's ability to effectively oversee the monitored organization's remediation efforts.

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115. The appropriate response to this potential detriment to independence is not clear. The knee-jerk reaction would likely be to extend cooling-off periods, but recent scholarship examining concerns regarding independence of individuals who move back and forth between the private and public sectors has suggested that concerns regarding the conflicts of interests created by the "revolving door" may be overblown. *See generally* David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507; Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265 (2015).

116. There have been many instances where criticisms have arisen out of the selection of a monitor with strong ties to the Justice Department. Those concerns were generally related to issues of cronyism. *See, e.g.*, Shenon, *supra* note 49.

117. Alison Frankel, *DOJ Should End Secret Selection Process for Corporate Watchdogs*, REUTERS (July 14, 2014), http://blogs.reuters.com/alison-frankel/2014/07/14/doj-should-end-secret-selection-process-for-corporate-watchdogs (discussing research findings of Professor Brandon Garrett) [https://perma.cc/D8VJ-BJVN].

118. Ben Protess, *Guidepost Solutions, a Corporate Monitor, Hires State Regulator*, N.Y. TIMES: DEALBOOK (Sept. 12, 2016), http://www.nytimes.com/2016/09/13/business/guidepost-solutions-a-corporate-monitor-hires-state-regulator.html?_r=0 [https://perma.cc/V8ZJ-GNMW].

### *C. Identity as a Sanctioning Mechanism*

As is explained above, the primary check on monitor behavior is the monitor's own concern with her reputation. Risking one's own reputation when taking on an engagement can serve as a powerful motivator, and it may be enough to serve as an effective check on the conduct of most monitors. Therefore, it may be sensible to require any use of a monitor to publicly name a person—not an entity—who is responsible for overseeing the monitorship. An actual person should take ownership of the monitorship, thereby risking her own reputation if the monitorship fails.

For example, the "Independent Foreclosure Review"[119] demonstrates what can happen when a monitorship occurs without requiring an individual to take personal responsibility for the monitorship. As part of the Independent Foreclosure Review, the Office of the Comptroller of the Currency and the Federal Reserve required banks to retain independent consultants to oversee the banks' efforts to remediate the harm caused by the banks' failures to comply with their own policies and procedures. The independent consultants selected were not individuals who could be held personally responsible for mistakes or inappropriate conduct; they were large entities, like Big Four accounting firms such as PricewaterhouseCoopers and Deloitte.[120] As such, when they failed to detect relatively routine issues—like conflicts of interests—there was no individual person to hold responsible. There was just an entity to fine or fire.

People can hide within entities; they can blame mistakes or wrongdoing on other employees, unclear guidance, or a myriad of other excuses. But if monitors were required to identify, explicitly and publicly, an actual person to be held responsible for ensuring that the monitorship is functioning properly, it could serve as a way to facilitate a sanction for inappropriate monitor behavior.

In turn, if monitors were individually identified, it may provide an opportunity to rely on existing professional standards as a way to encourage appropriate monitor behavior. If, for example, monitors were named individually and were members of a regulated profession, it may provide an opportunity for sanctioning monitors who engage in inappropriate behavior, albeit in very narrow contexts. For example, if monitors were required to be attorneys and, thus, were members of the legal profession, it is likely that a catchall provision like Model Rule of Professional Conduct 8.4(c)—which makes it professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"[121]—could serve as a basis for personally sanctioning monitors engaged in inappropriate behavior. During

119. *See, e.g.*, *What You Need to Know: Independent Foreclosure Review*, BD. GOVERNORS FED. RES. SYS. (May 12, 2014), https://www.federalreserve.gov/consumerinfo/independent-foreclosure-review.htm [https://perma.cc/9MHU-ENPT].

120. Francine McKenna, *Another Conflicted Foreclosure Review: PricewaterhouseCoopers and Ally/ResCap*, FORBES (June 25, 2013), http://www.forbes.com/sites/francinemckenna/2013/06/25/another-conflicted-foreclosure-review-pricewaterhouse coopers-and-allyrescap/ [https://perma.cc/UY9K-2BZ4].

121. MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2016).

the Independent Foreclosure Review, several of the accounting firms retained as independent consultants failed to properly identify and disclose relevant conflicts of interest.[122] In some instances, this resulted in sanctions to the general institutions retained as monitors, but there were no formal personal consequences levied as a result of this failure. If an individual lawyer were retained as the monitor instead, it would allow for potential personal, reputational consequences as well as the possibility, even if unlikely, of pursuing professional sanctions specifically against the individual. In short, the ability to obtain an official sanction that could impact the individual monitor's livelihood would likely create a strong, personal incentive for the monitor to engage in robust ethical conduct. The best mechanisms for achieving a sanction for monitors, however, require more thought, research, and analysis.

## CONCLUSION

Monitors are charged with overseeing an institution's effort to address misconduct within its walls, while the monitor herself acts without formal oversight or technical restraint. This Article adds to the understanding of monitorships in three important ways. First, this Article demonstrates how the lack of regulation governing monitorships is, in part, the result of the bar's resistance to regulate quasi-legal positions undertaken by lawyers. Second, it shows that the primary constraint on a monitor's behavior is the monitor's own interest in her reputation. Third, and most importantly, this Article highlights several limitations of reputational capital as a constraining mechanism on monitor behavior and long-term monitorship policy, thereby demonstrating the need for more robust and careful research into several areas of potential concern for monitorships.

122. *Id.*