

THE MONITOR-“CLIENT” RELATIONSHIP

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INTRODUCTION

CORPORATE compliance monitors are everywhere. From Foreign Corrupt Practices Act (“FCPA”) violations to securities fraud to general violations of federal law—compliance monitors are a constant in today’s society. When a federal or state governmental entity determines that a corporation has engaged in wrongdoing or violated federal law, it often enters into an agreement with the corporation requiring the corporation to retain a corporate compliance monitor.¹ Despite its name, a monitor is often not charged with “monitoring compliance.” Instead, a monitor, oftentimes a lawyer but sometimes an accountant or other highly skilled professional, is retained to investigate the compliance failure that resulted in the legal or regulatory violation, assess the cause of the

¹ Monitors are known by many different names, including independent consultant, independent compliance consultant, and corporate compliance monitor, amongst others. 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, 322 n.2 (2011). See generally Memorandum from Craig S. Morford, Acting Deputy Att’y Gen., for Heads of Dep’t Components and U.S. Att’ys (Mar. 7, 2008) [hereinafter *Morford Memorandum*], available at <http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf> (outlining principles to consider when selecting and using a corporate monitor).

compliance failure, and analyze the company’s unique business structures against the legal and regulatory requirements.² This allows a monitor to provide an individualized set of recommendations for the corporation to implement.

There are a variety of reasons why monitorships are utilized when a compliance failure occurs within a corporation. Monitorships shift the costs of enforcement from the government and the public to the corporation. They are also an added assurance of future legal and regulatory compliance by a corporation that has been deemed untrustworthy as a result of the prior compliance failure. To date, academic inquiry regarding corporate compliance monitors has focused primarily on when it is appropriate to appoint a monitor;³ the optimal scope of a monitor’s authority;⁴ the common features of monitorships, like the length of monitorships and the number of reports a monitor is required to provide the government;⁵ how monitorships work in practice;⁶ and whether monitors should owe fiduciary duties to shareholders.⁷ The goal of this research has focused on (1) suggesting mechanisms for “enhancing the potential of corporate monitors to serve a useful deterrent and law enforcement function without being unduly burdensome on corporations”;⁸ and (2) advocating “a monitorship process that incorporates some of the learning that has emerged from compliance professionals about the importance of organizational culture.”⁹ There has not, however, been a sys-

² This is essentially a form of root-cause analysis. See *infra* Part I.

³ Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 Mich. L. Rev. 1713, 1713, 1715–20 (2007) (providing “descriptive [and] normative analyses of the role and scope of corporate monitors” that include an examination of “when it is desirable to appoint monitors and what powers and obligations they should have”); see also Christie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. Corp. L. 679, 732–34 (2009) (discussing the difficulties inherent in being a corporate monitor); D. Daniel Sokol, *Policing the Firm*, 89 Notre Dame L. Rev. 785, 788–90 (2013) (suggesting mechanisms for improving criminal antitrust enforcement, including the use of monitors in the criminal antitrust context). See generally Vikramaditya Khanna, *Reforming the Corporate Monitor?*, in *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* 226, 238–41, 244 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (discussing possible reforms for corporate monitors).

⁴ Khanna & Dickinson, *supra* note 3, at 1715–20.

⁵ *Id.*; see also Ford & Hess, *supra* note 3, at 682–83; Warin, Diamant & Root, *supra* note 1, at 347–48.

⁶ Ford & Hess, *supra* note 3, at 715–24; Warin, Diamant & Root, *supra* note 1, at 345–58.

⁷ Khanna, *supra* note 3, at 233–36.

⁸ Khanna & Dickinson, *supra* note 3, at 1715.

⁹ Ford & Hess, *supra* note 3, at 737.

tematic analysis of whether corporate compliance monitors are providing a function beyond that as an agent of the government and whether the current monitorship structure facilitates all of a monitor's functions.

This Article begins to fill a gap in the academic literature regarding the role of monitorships. Specifically, this Article will undertake a systematic analysis of the role of the corporate compliance monitor in an effort to determine the function provided by a monitor and discern whether the common mechanisms for structuring the monitorship relationship ensure the monitored corporation's future ethical, regulatory, and legal compliance. This analysis will conclude that a corporate compliance monitor is providing a distinct role from other actors in the corporate compliance framework.

For example, gatekeeping, an important component of the corporate governance process, occurs prior to wrongdoing and is an assurance that investors and the public should trust that the corporation being assessed is acting within appropriate ethical, regulatory, and legal bounds. A corporate compliance monitor is not a gatekeeper. A gatekeeper lends its reputational capital to the corporation as a mechanism for signaling to investors and the public that the corporation is truthful in its disclosures.¹⁰ The gatekeeper is able to fill this role because it is uniquely positioned within the corporate compliance framework to "prevent wrongdoing by withholding necessary cooperation or consent."¹¹ In contrast, a monitor appears *after* the compliance failure has occurred to investigate the scope of an already identified compliance failure. A monitor is not charged with preventing anything directly. It is charged with either recommending changes the corporation can implement to help prevent future misconduct or determining the scope of the identified misconduct and the appropriate compensation to those harmed. This function provided by a monitor also demonstrates why a monitor's role is dissimilar to that of a probation officer. The government does not provide a monitor with a neat list of requirements the corporation must fulfill during the monitorship term. Instead, a monitor must investigate the wrongdoing identified in the agreement between the government and the corporation and make an independent determination regarding what the corporation should do to ensure compliance going forward. A monitor creates a

¹⁰ John C. Coffee, Jr., *Gatekeepers: The Professions and Corporate Governance* 2 (2006).

¹¹ *Id.*

unique set of recommendations based on the corporation’s business operations and the applicable legal and regulatory requirements.

This Article proceeds as follows. Part I will provide an overview of the traditional use of monitors in the legal system—monitors as agents of the court—and the new use of corporate compliance monitors—monitors as agents of the government. It will then compare corporate compliance monitors to other actors within the corporate compliance framework to determine what role a monitor is serving. Part II will look at the manner in which the relationship structure of monitorships has changed over time, demonstrating that a corporate compliance monitor may maintain a relationship with a monitored party while also serving in its role as government enforcer. The Part next will use recent cases to demonstrate the lack of enforceable rules for the parties engaged in monitorships.

This leads to the thesis of this Article, which will be discussed in Part III: Corporate compliance monitorships would be more effective if structured in a manner that recognizes that one important component of a monitor’s function is to act as a legal counselor, and that the legal counseling would be more effective within the confines of a relationship with binding rules, as opposed to ad hoc standards, regarding confidentiality and information sharing amongst the monitor, corporation, and government. The Part will lay out one suggestion for providing just such a rule via the creation of a statutory privilege that protects communications amongst the monitor, corporation, and government, allowing the monitorship structure to be reframed as a “monitor-‘client’ relationship.” The Part will conclude by discussing the benefits of the proposed framework. Part IV will address drawbacks and continued concerns associated with the Article’s proposals.

I. THE MONITOR’S ROLE IN THE LEGAL SYSTEM

For good or for ill, monitors are utilized in a variety of ways within the legal system. The traditional role of a monitor is probably best defined as an agent who ensures compliance of a third party on behalf of a principal. Essentially, the traditional monitors within the legal system have acted as agents of the court by ensuring the parties to the court action complied with the relevant court order and corresponding legal and regulatory requirements. Corporate compliance monitors are, however, a new, different kind of monitor within the legal system.

A corporate compliance monitor is currently perceived as an agent of the government who assists the government in its efforts to achieve corporate compliance.¹² But a comparison of the functions provided by a corporate compliance monitor and those of other actors in the corporate compliance framework demonstrates that corporate compliance monitors are also providing a service to the corporations they “monitor.” This is because the corporate compliance monitor is not charged only with monitoring the corporation’s compliance with a predetermined set of requirements. Instead, the corporate compliance monitor is also engaged in root-cause analysis.

The goal of a root-cause analysis is to answer the following questions: (1) What happened? (What, exactly, was the ultimate outcome?); (2) Why did it happen? (What causal factors contributed to the outcome?); and (3) What can you do to prevent it from happening again? (What system changes can be put in place to anticipate and intervene in the errors that inevitably occur in human activities?).¹³

Root-cause analysis “is intended to counter the tendency among both regulators and companies to individualize responsibility.”¹⁴ Instead, root-cause analysis attempts to systematically determine the cause of the structural failure within the firm, so that the firm can implement the policies and procedures necessary to prevent a similar subsequent failure. To effectuate this analysis, the government and the corporation agree by providing their express consent to enter into a relationship with the corporate compliance monitor who is charged with conducting this analysis.

This Part begins by providing examples of the original role of monitors as agents of the court meant to ensure specific performance of court orders. The Part then provides a basic overview of a corporate compliance monitorship. It next distinguishes corporate compliance monitors

¹²The Morford Memorandum states that the monitor is not an “agent of the corporation or of the Government.” Morford Memorandum, *supra* note 1, at 4. Despite this language in the Department of Justice (“DOJ”) guidance, the monitor is still perceived by the public and the corporation as the government’s agent and the monitorship agreements are structured to facilitate a monitor’s role as governmental agent. See *infra* Part II.

¹³Charles M. Key, *Toward a Safer Health System: Medical Injury Compensation and Medical Quality*, 37 U. Mem. L. Rev. 459, 464 (2007).

¹⁴William H. Simon, *Where Is the “Quality Movement” in Law Practice?*, 2012 Wis. L. Rev. 387, 397; *id.* at 395 (noting that “[m]ention of . . . root cause analysis is rare in the legal literature on quality management”); see also Ford & Hess, *supra* note 3, at 734–35.

from gatekeepers, internal investigators, and court-ordered corporate probation.

A. The Original Monitors

For many, the description of corporate compliance monitors will remind them of “special masters.”¹⁵ For example, in 1981, after it concluded that the Texas Department of Corrections had engaged in cruel and unusual punishment of inmates, the U.S. District Court for the Southern District of Texas appointed a special master and “several monitors” to assist the special master.¹⁶ The special master was responsible for “seeing that the district court’s decree [wa]s implemented, and empower[ed] him to hold hearings, find facts, and make recommendations to the district court concerning [the department’s] compliance with the decree.”¹⁷ In affirming the appointment, the U.S. Court of Appeals for the Fifth Circuit noted that a special master should be appointed “only upon a showing that some exceptional condition requires’ the appointment.”¹⁸ It went on to explain that “[t]he power of a federal court to appoint *an agent to supervise the implementation of its decrees* has been long established” and that “[s]uch court-appointed agents have been identified by ‘a confusing plethora of titles: receiver, Master, Special Master, master hearing officer, monitor, human rights committee, Ombudsman,’ and others.”¹⁹ Other examples of courts using special masters abound, particularly in the context of school desegregation plans²⁰ or in

¹⁵ See Khanna & Dickinson, *supra* note 3, at 1715 (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); see also Ford & Hess, *supra* note 3, at 683.

¹⁶ *Ruiz v. Estelle*, 679 F.2d 1115, 1159 (5th Cir. 1982) (internal quotation marks omitted); *id.* at 1128 n.13.

¹⁷ *Id.* at 1159.

¹⁸ *Id.* at 1160 (quoting Fed. R. Civ. P. 53(b) (amended 2003)). Note that Rule 53 allows for the appointment of a special master to perform duties consented to by the parties under three circumstances: (1) “some exceptional condition”; (2) when there is a “need to perform an accounting or resolve a difficult computation of damages”; or (3) to “address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.” Fed. R. Civ. P. 53(a)(1)(B)–(C).

¹⁹ *Ruiz*, 679 F.2d at 1161 (emphasis added) (quoting Robert E. Buckholz, Jr. et al., Special Project, The Remedial Process in Institutional Reform Litigation, 78 Colum. L. Rev. 784, 826 (1978)) (internal quotation marks omitted).

²⁰ See, e.g., *Fisher v. United States*, No. 74-90 TUC DCB, 2011 U.S. Dist. LEXIS 104315, at *5–7 (D. Ariz. Sept. 13, 2011) (appointing a special master to monitor Tucson United School District’s desegregation efforts); *Diaz v. San Jose Unified Sch. Dist.*, 633 F. Supp. 808, 823–25 (N.D. Cal. 1985) (imposing a “compliance monitor” to assist in desegregation

general efforts to ensure parties comply with court-ordered injunctions.²¹

For others, the description of monitors will prompt comparisons to the child welfare system. Courts sometimes impose a monitor as part of a consent decree requiring a child welfare system to cure deficiencies.²² In other circumstances, a court may order the appropriate child welfare agency to monitor a child when the parent regains custody.²³ For example, in Texas a state statute governs “Monitored Return[s] of Child[ren] to Parent[s].”²⁴ When a monitored return occurs, the court enters a temporary order requiring the child welfare agency “to continue to serve as temporary managing conservator of the child” after the child is returned to the parent and to “monitor the child’s placement to ensure that the child is in a safe environment.”²⁵ And in other circumstances, courts order a guardian ad litem to monitor the court’s orders regarding child custody arrangements to ensure the parties’ continued compliance with the order.²⁶

In the above scenarios, the monitor is acting as an agent of the court by ensuring that the parties adhere to the court order. A monitor does not appear to have any concrete duties to the parties other than to report truthful and accurate information regarding the parties’ compliance with the court order. Because a court-ordered monitor is an agent of the court,

efforts and describing at length the role of the compliance monitor, including how one should be chosen and precisely what the monitor’s duties should be). In *Reed v. Cleveland Board of Education*, 607 F.2d 737 (6th Cir. 1979), the court appointed an attorney to act as the special master and appraise and observe the progress of a school desegregation plan. Because the lawyer had no previous experience in the field, experts were appointed to assist him. *Id.* at 747–48. When the school board argued that the special master’s fees were unreasonable, the court reduced his hourly rate. *Id.* at 744–46.

²¹ See, e.g., *Nat’l Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 542–45 (9th Cir. 1987); *FTC v. John Beck Amazing Profits*, No. 2:09-cv-4719-FMC-FFMx, 2009 WL 7844076, at *15–16 (C.D. Cal. Nov. 17, 2009).

²² See, e.g., *LaShawn v. Fenty*, 701 F. Supp. 2d 84, 87 (D.D.C. 2010). The court-appointed monitor, the Center for the Study of Social Policy, “kept the Court apprised of the [District of Columbia’s] progress and related developments.” *Id.* In addition, the monitor “assisted the parties with negotiations of proposed consent orders and implementation plans.” *Id.*

²³ See, e.g., *In re Tex. Dep’t of Family & Protective Servs.*, 348 S.W.3d 492, 495 (Tex. App. 2011) (citing Tex. Fam. Code Ann. § 263.403 (West 2008)).

²⁴ Tex. Fam. Code Ann. § 263.403 (West 2008). Monitorships are not, however, universally governed by statutory provisions.

²⁵ *Id.* § 263.403(a)(3)–(4).

²⁶ See, e.g., *Buggy v. Buggy*, No. FA054005647S, 2010 WL 4723213, at *20 (Conn. Super. Ct. Oct. 25, 2010) (stating that “[c]lose attention to the implementation of these [child custody] orders will be monitored by the Guardian ad Litem”).

it is important for a monitor to maintain boundaries between itself and the monitored parties.²⁷ It needs to preserve the same sort of independence that its principal, the court, maintains when dealing with the parties.

B. Corporate Compliance Monitors

A corporate compliance monitor is an outsider, most often a lawyer but not always, retained after the corporation has been found to have engaged in improper conduct.²⁸ Instead of being imposed on the corporation like a court-ordered monitor, the government and the corporation enter into an agreement that requires the corporation to retain a monitor. A corporate compliance monitor serves as an enforcement agent of the government.²⁹ But a corporate compliance monitor is also responsible for: (1) investigating the extent of the wrongdoing already detected and reported to the government; (2) discovering the cause of the corporation's compliance failure; and (3) analyzing the corporation's business needs against the appropriate legal and regulatory requirements. A monitor then provides recommendations, to both the corporation and the government, meant to assist the corporation in its efforts to improve its legal and regulatory compliance.³⁰ As explained above, this function is analogous to root-cause analysis. Both the government and the corporation give consent, per the terms of the agreement, for a corporate compliance monitor to engage in this analysis.

Thus, modern-day corporate compliance monitors are clearly not agents of the court.³¹ In fact, courts often have no participation at all in

²⁷ See, e.g., *Diaz v. San Jose Unified Sch. Dist.*, 633 F. Supp. 808, 824 (N.D. Cal. 1985) (describing the compliance monitor as “an arm of the court” and “not the agent of either party”).

²⁸ See generally Morford Memorandum, *supra* note 1 (providing guidance regarding the utilization, selection, and scope of a monitorship when used in connection with a deferred prosecution or non-prosecution agreement).

²⁹ The monitor's reports are typically provided to both the government and the monitored corporation and include (1) “the monitor's activities” and (2) “whether the [organization] is complying with the terms of the agreement.” *Id.* at 6.

³⁰ The monitor's reports also provide any recommended “changes that are necessary to foster the [organization's] compliance.” *Id.*

³¹ Other scholars studying compliance monitors have included court-ordered monitors within their analyses. See Ford & Hess, *supra* note 3, at 684–89. This was certainly part of the progression to today's corporate compliance monitor that results from settlement agreements without formal court involvement, but a court-ordered monitor appears to fulfill a dis-

the process resulting in the retention of a monitor. If a monitorship is the result of a non-prosecution agreement, it never comes before the court. And usually the court maintains only cursory approval over monitorships resulting from deferred prosecution agreements.³² It is, however, easy to conceive of a monitor as an agent of the government.³³ When the government finds that a corporation has failed in its self-policing duties, the government often introduces the retention of a corporate compliance monitor as one of the terms of the settlement agreement between the corporation and the government to ensure the corporation's future compliance with the law.

Depending on the scope of the investigation into the organization, a monitor will often employ a large staff to complete the day-to-day investigation.³⁴ This staff will often interview individual employees to determine the status quo within the organization in terms of generally accepted conduct and culture. A monitor's team will then utilize the gathered information to make an assessment regarding the scope, nature, and cause of the misconduct within the organization. For example, the cause could be a pervasive scheme to systematically bribe foreign officials.³⁵

Once a monitor determines the cause of the misconduct, it turns its attention to recommending mechanisms for the corporation to put in place to deter and prevent future misconduct or provide compensation to the victims.³⁶ At a minimum, it appears a monitor should ensure that the or-

tinct role from those that are not the result of a court order, so I have purposefully excluded them from the scope of monitorships this Article discusses.

³² See, e.g., *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at *6 (E.D.N.Y. July 1, 2013) (retaining supervisory power over the deferred prosecution agreement and noting the novelty of this step by the court).

³³ Corporate criminal misconduct is often difficult to detect. See Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, in *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct*, supra note 3, at 62, 70. But it is even more difficult for the government to detect misconduct within a corporation. See Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 *Am. Crim. L. Rev.* 53, 72 (2007).

³⁴ Warin, *Diamant & Root*, supra note 1, at 370 (noting the importance of hiring a monitor who will utilize a team with prior expertise as opposed to a team of novices).

³⁵ *Id.* at 331 (detailing "a decade-long scheme of paying bribes to foreign government officials to obtain contracts with government customers for the purchase of Daimler vehicles" at three Daimler AG subsidiaries, and reporting the retention of an independent compliance monitor for a three-year term).

³⁶ See, e.g., Criminal Div., U.S. Dep't of Justice & Enforcement Div., U.S. Sec. & Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act 33* (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> (explaining that the government "may

ganization has policies and procedures in place that (1) “exercise due diligence to prevent and detect criminal conduct” and (2) “otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”³⁷

While the above sets out the most basic parameters of modern-day monitorships, the precise terms of a monitorship are detailed in the settlement agreement between the corporation and the government.³⁸ In theory, this allows the government and corporation to tailor the terms of the monitorship as necessary to effectuate optimal compliance with the law and ethical behavior. Moreover, a monitor’s charge to provide recommendations that will assist the corporation in its efforts to achieve regulatory and legal compliance allows a monitor to provide business-specific recommendations that are tailored to ensure each individual corporation’s success in its compliance efforts.³⁹

C. Functional Comparison of Compliance Actors

The idea that a monitor is functioning as something more than a governmental agent is supported by language in the settlement agreements, which suggests that the government intends for the monitor and the corporation to *work together* in their efforts to ensure a more effective compliance regime that will deter and decrease future wrongdoing. For example, in May 2013, the Department of Justice (“DOJ”) and Total S.A. (“Total”), a French oil and gas company with several U.S. subsidi-

impose a monitorship to ensure that the bribery has ceased and a compliance program is developed to prevent future misconduct”).

³⁷ See U.S. Sentencing Guidelines Manual § 8B2.1(a)(1)–(2) (2011). These are the factors set out in the U.S. Sentencing Commission’s Organizational Guidelines (“Organizational Guidelines”) for determining if an organization has an effective compliance and ethics program that adequately prevents and deters criminal conduct. Thus, the Organizational Guidelines set the floor for what is required of corporations, despite not being directly applicable to monitorships entered into as a result of deferred or non-prosecution agreements between the corporation and the government that occur in a setting where the Organizational Guidelines do not apply.

³⁸ See Warin, Diamant & Root, *supra* note 1, at 345–46. Monitorships can also be imposed as part of a guilty plea. *Id.* at 329–33 (detailing several specific instances where this was the case).

³⁹ See Lawrence Cunningham, *Deferred Prosecution and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 Fla. L. Rev. 1, 4 (2014) (explaining the importance of “prosecutorial consideration of governance when deciding how to proceed against a business” and revealing “that prosecutors fail to appreciate how formal uniformity in corporate governance regulation masks considerable substantive variation and how this failure can be costly”).

aries, entered into a three-year deferred prosecution agreement (“Total Agreement”) after it was found that Total participated in a scheme to make unlawful payments for the benefit of an Iranian official in an effort to secure contracts to develop oil fields.⁴⁰ Total agreed to pay a monetary penalty in the amount of \$245.2 million and to retain a “corporate compliance monitor” for a three-year term.⁴¹ The Total Agreement explains that in undertaking the monitorship:

[T]he Monitor is to rely to the extent possible on available information and documents provided by Total. *It is not intended that the Monitor will conduct its own inquiry* into those historical events. . . . [T]he Monitor is encouraged to coordinate with Total personnel, including auditors and compliance personnel. To the extent the Monitor deems appropriate, *it may rely on Total processes, on the results of studies, reviews, audits, and analyses conducted by or on behalf of Total, and on sampling and testing methodologies.* The Monitor is not expected to conduct a comprehensive review of all business lines, all business activities, or all markets.⁴²

So the questions become: What is it that a monitor gives the corporation that other professionals do not, and what, if anything, does a monitor give the government beyond its role as an enforcement agent? In an effort to discern the function that monitors are providing to the monitored corporation, this Part compares the role of a corporate compliance monitor to the roles of other individuals whose functions are, at least in part, utilized to ensure long-term compliance: (1) gatekeepers, (2) internal investigators, and (3) court-ordered corporate probation programs akin to probation officers.

1. Gatekeepers

While it is not necessarily the case that a corporate compliance monitor has undergone formal legal training—as evidenced by the fact that

⁴⁰ Press Release, U.S. Dep’t of Justice, French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme (May 29, 2013), <http://www.justice.gov/criminal/fraud/fcpa/cases/totalsa/2013-05-29-total-press-release-final.pdf>.

⁴¹ *Id.*

⁴² Deferred Prosecution Agreement attachment D para. 4, United States v. Total, S.A., No. 1:13-CR-239 (E.D. Va. May 29, 2013) [hereinafter Total Agreement] (emphasis added), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/totalsa/2013-05-29-total-dpa-filed.pdf>.

non-lawyers are sometimes utilized as monitors⁴³—a corporate compliance monitor, much like a corporate attorney, compliance personnel, and many times a financial auditor, provides legal, regulatory, and business advice. The settlement agreements dictating the terms of monitorships typically require the selected monitor to have expertise in the relevant legal and regulatory area.⁴⁴ In addition, a monitor must be able to understand the monitored corporation’s business in order to provide the best counsel as to how the corporation can prevent future improper conduct while conducting its business operations.⁴⁵ Thus, a corporate compliance monitor is providing many of the same services that traditional gatekeepers provide.

The position of a monitor, however, differs from that occupied by a gatekeeper. A gatekeeper must be able and willing to “prevent misconduct reliably, regardless of the preferences and market alternatives of wrongdoers.”⁴⁶ The gatekeeper must remain abreast of what the corporation is doing so that it can actively prevent wrongdoing, and the gatekeeper must be willing to alert others when misconduct is found.⁴⁷ As Professor Sung Hui Kim has demonstrated, certain gatekeepers are better situated to prevent wrongdoing than others and certain gatekeepers are likely more willing to sound the alarm to wrongdoing. For example, in-house counsel is better situated to actively observe the business activities that could result in legal or regulatory violations than outside counsel because in-house counsel is actively engaged in the day-to-day

⁴³ For example, the Securities and Exchange Commission (“SEC”) required Total to retain a monitor, specifically referred to in SEC documents as an “independent compliance consultant,” who was either a French national, law firm, or accounting firm “with demonstrated ability in helping companies comply with the FCPA.” Total, S.A., Exchange Act Release No. 69,654, [2013 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,307, at 85,532 (May 29, 2013).

⁴⁴ See, e.g., Total Agreement, *supra* note 42, at attachment D para. 1 (dictating that Total “agrees to engage an independent compliance monitor . . . with demonstrated expertise in helping companies comply with the [FCPA] . . . and other applicable anti-corruption laws”); see also Khanna & Dickinson, *supra* note 3, at 1736 (noting that “monitors . . . are chosen primarily for their expertise in law compliance”).

⁴⁵ Warin, Diamant & Root, *supra* note 1, at 370 (“It is important for any lawyer to understand the business of his or her corporate client, but the relevance of this element of an effective legal representation is significantly amplified in the monitorship context.”).

⁴⁶ Sung Hui Kim, Gatekeepers Inside Out, 21 *Geo. J. Legal Ethics* 411, 416 (2008) (quoting Reinier H. Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy, 2 *J.L. Econ. & Org.* 53, 61 (1986)).

⁴⁷ *Id.* at 416–17.

decision making at the corporation.⁴⁸ In-house counsel is, however, more vulnerable to being resistant to alerting others to wrongdoing because alerting others may have repercussions for the in-house counsel's own work environment.⁴⁹ And both in-house and outside counsel must carefully balance their obligations to report misconduct with their obligations to their clients, which may create a situation where private attorneys err on the side of not reporting when close calls occur.⁵⁰ An auditor-gatekeeper is able to both actively observe and sound an alarm without the conflicts lawyers face because auditors are by necessity considered independent from the corporation.⁵¹

A monitor, however, is largely free from a gatekeeper's limitations. A corporate compliance monitor knows wrongdoing has already occurred; the goal of a monitorship is not to find additional wrongdoing,⁵² but to provide counsel to the corporation on how to avoid future wrongdoing. As such, a monitor is not concerned with being fired as a result of reporting a violation, and the monitorship is structured in a way that provides a monitor full access to the corporation for the duration of the monitorship term. Thus, a monitor has the benefit of constant interaction with the corporation's members and intimate familiarity with its business operations. However, a monitor is also subject to some of the limitations associated with auditor-gatekeepers in that personnel within the corporation may be hesitant to volunteer information to an actor known not to (1) owe confidentiality obligations to the corporation nor (2) operate under the shield of privilege.

⁴⁸ *Id.* at 417, 451.

⁴⁹ *Id.* at 418, 439–41.

⁵⁰ See Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 Fla. L. Rev. 129, 132–33 (2011).

⁵¹ But see *id.* at 140–41 (discussing how some lawyers argue that accountants are “too close to business and not sufficiently independent from client influence” while the bar characterized “accountants as independent ‘public watchdogs’ during the debates over Sarbanes-Oxley § 307”).

⁵² That is not to say that the monitor will hide wrongdoing if it is discovered. The monitor is typically required to report any additional violations found to the government, but the monitor is not supposed to be looking for those violations. See Warin, Diamant & Root, *supra* note 1, at 354 (discussing an instance where a monitor discovered potential wrongdoing and alerted the DOJ to its findings).

2. *Internal Investigators*

A monitor’s function also differs from that of a lawyer charged with conducting an internal investigation. It is relatively common for a corporation to run its own internal investigation when it finds that wrongdoing may have occurred.⁵³ Such investigations are often led by a team of in-house and outside counsel and increasingly involve compliance personnel as well. The purpose of the investigation is almost always to provide legal advice to the corporation, which places the investigation within the bounds of the attorney-client privilege.⁵⁴ And when an investigation is undertaken for the express purpose of determining the scope and nature of wrongdoing, attorneys do not have a reporting obligation, either within (for example, up-the-ladder reporting) or outside (for example, reporting to the government) the organization, under the Model Rules of Professional Conduct (“Model Rules”).⁵⁵ The primary purpose of an internal investigation is to provide legal advice on how to deal with the legal or regulatory failure. Assuring future compliance with the law is a secondary concern. Such corporate internal investigations are “regarded by the law as private employment matters in which the government has no part, [and thus] they are essentially unregulated by legal protections and unmonitored by courts as they occur.”⁵⁶

⁵³ See, e.g., Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 Va. L. Rev. 1775, 1785–86 (2011) (noting that the board of directors for “Siemens Aktiengesellschaft (‘Siemens’), a German multinational corporation, . . . decided to conduct a massive internal investigation [with] Siemens spen[ding] over \$500 million investigating the case,” including “hundreds of millions of dollars” spent on outside counsel).

⁵⁴ See Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. Rev. 73, 75–76 (2013) (“[L]awyers are often an integral part of the internal investigation because their participation enables the corporation to claim attorney-client and work-product protections for the results of the investigation.”).

⁵⁵ See Model Rules of Prof’l Conduct R. 1.13(d) (2013); see also Barry R. Temkin & Ben Moskovits, *Lawyers as Whistleblowers Under the Dodd-Frank Wall Street Reform Act: Ethical Conflicts Under the Rules of Professional Conduct and SEC Rules*, N.Y. St. B.A. J., July/Aug. 2012, at 10, 17–18 (“Under ABA Model Rule 1.13, a corporate lawyer with knowledge of wrongdoing that poses a substantial risk of injury to the organization must report the violation up the corporate ladder. . . . If the corporation’s board fails to address in a timely and appropriate manner an action, . . . that is clearly a violation of law. If the lawyer reasonably believes that the violation is ‘reasonably certain to result in substantial injury to the organization,’ then the lawyer may (but is not obligated to) report outside the corporation . . . but only to the extent necessary to prevent substantial injury to the organization.”).

⁵⁶ Green & Podgor, *supra* note 54, at 77.

In contrast, a monitor most often arrives after an internal investigation has occurred—after the scope of improper conduct has been fully investigated and confirmed as part of the process necessary to obtain an agreement between the government and the corporation. A monitor is not charged with providing legal advice regarding the prior violation and how best to deal with it. Instead, a monitor counsels the corporation on how to ensure that its future business conduct complies with legal and regulatory requirements. Unlike lawyers conducting an internal investigation, a monitor provides advice that is both outside the bounds of the traditional attorney-client relationship and under the auspices of government mandate and control.

3. Court-Ordered Corporate Probation

Under the U.S. Sentencing Commission's Organizational Guidelines ("Organizational Guidelines"), a court may impose probation on a corporation that pleads guilty to legal violations.⁵⁷ As the Organizational Guidelines explain, sanctions are imposed upon organizations to ensure "just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."⁵⁸ "[P]robation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct."⁵⁹ If imposed, the probation term is typically one to five years and includes the condition that the organization not commit another crime during the probation term.⁶⁰ The sanction must also include either restitution or community service,⁶¹ and it may include other conditions that the court believes "are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization" and "in-

⁵⁷ See U.S. Sentencing Guidelines Manual § 8D1.1 (2012); Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of Citizens United*, 65 U. Miami L. Rev. 1, 15–18 (2010). If the conduct is egregious enough, the corporation could be sanctioned under § 8C1.1, which requires the dissolution of the organization. See Warin, Diamant & Root, *supra* note 1, at 334.

⁵⁸ U.S. Sentencing Guidelines Manual ch. 8, introductory cmt. (2012).

⁵⁹ *Id.*

⁶⁰ *Id.* §§ 8D1.2(a), 8D1.3(a).

⁶¹ *Id.* § 8D1.3(b).

volve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing.”⁶²

Thus, a corporation is at the mercy of court-ordered probation if it has pleaded guilty to the violation and probation is needed to prevent the organization from future wrongdoing.⁶³ This is very similar to the reasons for which the government agrees to the corporation’s retention of a monitor. Both a corporate probation program and a monitorship are concerned with ensuring the corporation’s long-term legal and regulatory compliance.⁶⁴ The major difference is the court’s involvement. A corporate probation program necessitates court involvement and functions on behalf of the court. In contrast, a corporate compliance monitor often has little to no interaction with the court and serves as an agent of the government.

Court-ordered corporate probation does not include engaging in the same sort of root-cause analysis that a corporate compliance monitor provides. While court-ordered probation merely places the corporation on watch to see if it complies with legal and regulatory requirements, a

⁶² Id. § 8D1.3(c).

⁶³ If a corporation is a recidivist, the Organizational Guidelines state that a “court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.” Id. § 8F1.1. The commentary to § 8F1.1 states that “[i]n the event of repeated violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.” Id. § 8F1.1 cmt. n.1. Note, however, that a master or trustee would seem to have more control over the corporation’s actions than a court-ordered monitor similar to the corporate compliance monitors utilized in agreements between the government and corporation. The trustee or master could actually force the corporation to take certain actions, while the court-ordered monitor would be imposed to ensure the corporation is complying with the terms of probation as outlined by the court’s order. In 2010, the U.S. Sentencing Commission issued proposed amendments to the Organizational Guidelines that would have required the appointment of an independent corporate monitor as a condition of probation for the organization, but this requirement was not incorporated into the final version. See Proposed Amendments to the Sentencing Guidelines, 75 Fed. Reg. 3534, 3535 (Jan. 21, 2010); Sheyn, *supra* note 57, at 16–18 (discussing proposed amendments to the Organizational Guidelines, including the requirement of an independent corporate monitor). Despite the rejection of this proposed amendment, the Organizational Guidelines continue to allow the court to engage “experts” to assist the probation officers and the courts in determining whether the corporation is complying with the terms of probation. U.S. Sentencing Guidelines Manual § 8D1.4(b)(5) (2012).

⁶⁴ I have purposefully left court-ordered monitors outside my definition of a corporate compliance monitor because I think there is a substantive difference between a monitor imposed upon a corporation and a monitor the corporation agrees to retain. The distinction is, admittedly, subtle in that the government arguably has strong coercive powers that enable it to induce the corporation to agree to the monitorship, but I believe it is still a distinction worth preserving for the purposes of this Article.

corporate compliance monitor *assists* the corporation in these efforts. A portion of a monitor's role is as a partner to the corporation in its efforts to ensure long-term compliance.

II. THE MONITORSHIP'S STRUCTURE AND LIMITATIONS

Whether a corporate compliance monitor actually necessitates complete independence from the monitored party to effectuate the goals of monitorship remains an open question. Instead, it may be the case that a monitor is serving as an agent to both the government and the monitored corporation, which is permissible if both coprincipals—in this case the government and the monitored corporation—consent.⁶⁵ A review of monitorship structures over time suggests that a corporate compliance monitor may maintain a relationship with the monitored party while also serving in its role as government enforcer.

A. Monitorship Relationship Structures over Time

As explained above, each monitorship has the potential to be entirely unique because the overarching structure and parameters of a monitorship are determined by the terms of the agreement between the government and the corporation. This creates a challenge in attempting to provide a generic description of monitorships. This Section uses FCPA agreements as an illustration of how monitorship structures have changed. The FCPA is a valuable case study because, for the past ten years, monitorships have routinely been a part of agreements between the DOJ and corporations found to have engaged in behavior violating the FCPA.⁶⁶ Thus, this context, at a minimum, provides constants in terms of one of the parties—the DOJ—and the underlying violation—an illegal payment under the FCPA—which allow relatively consistent points of comparison across monitorship terms.

When the DOJ began its aggressive enforcement of the FCPA in 2004, it was not unusual for the agreements to anticipate a situation in which a monitor and the corporation might enter into a privileged relationship. If a privileged relationship did occur, the settlement agreement

⁶⁵ See Restatement (Third) of Agency §§ 3.14(b), 3.16, 8.06(2) (2006).

⁶⁶ Lee G. Dunst, *Avoiding and Navigating Compliance Monitorships*, Anti-Corruption Committee News (Int'l Bar Ass'n Legal Practice Div., London, U.K.), Sept. 2013, at 50, 50, available at <http://www.gibsondunn.com/publications/Documents/Dunst-IBA-Newsletter-Compliance-Monitorships.pdf>.

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required that the corporation waive the privilege as to the government and that the sharing of such communications would not prevent the corporation from asserting its right of privilege against third parties attempting to access the information.

For example, in 2004, the DOJ entered into a non-prosecution agreement with InVision Technologies (“InVision”).⁶⁷ The InVision non-prosecution agreement stated:

It shall be a condition of the Monitor’s retention that the Monitor is independent of InVision and that no attorney-client relationship shall be formed between them. If InVision, the Monitor or any other party or tribunal asserts or determines that communications between the Monitor and InVision are protected by the attorney-client privilege or that documents created or reviewed by InVision or the Monitor in connection with the Monitor’s work are protected by the work product doctrine, then InVision shall waive only as to the DOJ and the SEC any protections afforded to such communications and documents. Any revocation of these waivers shall constitute a breach of this Agreement. The sharing of such communications by the Monitor with the DOJ and the SEC is not intended to constitute a waiver of any privilege under any federal or state law that would shield from disclosure to any other third party any such communications.⁶⁸

Interestingly, this agreement, like others reached during this time period, started with the premise that the monitor would remain independent, but the monitor was required to be a “law firm” per the language of the agreement.⁶⁹ As such, it would seem the government might have foreseen that the law firm would provide *legal* advice to the corporation, which was required to “retain and pay” for the firm per the terms of the agreement, as well as the possibility that an attorney-client relationship

⁶⁷ See Non-Prosecution Agreement (as to InVision Technologies, Inc.), In re InVision Techs. (Dec. 3, 2004), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/invision-tech/12-03-04invisiontech-agree.pdf>. InVision’s agents or distributors in Thailand, China, and the Philippines paid or offered money to foreign officials in connection with the sale of InVision’s airport security screening machines. Id. para. 1.

⁶⁸ Id. para. 11.

⁶⁹ See, e.g., Non-Prosecution Agreement para. 11, In re Micrus Corp. (Feb. 28, 2005), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/micrus-corp/02-28-05micrus-agree.pdf> (including language similar to the InVision agreement about the lack of an attorney-client privilege between the monitor and the company).

might be understood to follow.⁷⁰ The government appeared concerned primarily with its ability to access the material provided to and created by the monitor and less concerned, at least in theory, with the corporation and the lawyer-monitor engaging in a privileged relationship. But the idea of selective waiver has been widely rejected by courts and eventually disappeared from the settlement agreement language.⁷¹

Over the next few years, different types of monitorship structures were evidenced in settlement agreements between the government and corporations found to have engaged in violations of the FCPA. First, the agreements regularly stated that a condition of the retention of the monitor was that “no attorney-client relationship shall be formed between them.”⁷² Second, the agreements provided detailed instructions regarding the development of the work plan for the monitorship. If disputes arose regarding the work plan—the plan for conducting the monitorship process—they were to be elevated to the DOJ for its determination as to how the monitorship should proceed. For example, the deferred prosecution agreement in *United States v. Statoil* (“Statoil Agreement”)⁷³ states the following:

In order to conduct an effective initial review and to fully understand any existing deficiencies in controls, policies and procedures related to the FCPA, the [Monitor’s] initial work plan shall include such steps as are necessary to develop an understanding of the facts and circumstances surrounding the violations described in the attached Statement

⁷⁰ *Id.*

⁷¹ The federal courts of appeals have been split for over two decades regarding the efficacy of selective waiver when done as part of voluntary cooperation with a government investigation. See Geoffrey C. Hazard, Jr., et al., *The Law and Ethics of Lawyering* 320–22 (5th ed. 2010). In addition, attempts to revise the Federal Rules of Evidence to include a provision permitting selective waiver failed. See Liesa L. Richter, *Corporate Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver*, 76 *Fordham L. Rev.* 129, 129, 133–34 (2007).

⁷² See, e.g., *Deferred Prosecution Agreement* para. 11, *United States v. Statoil*, ASA, No. 06-CR-960 (S.D.N.Y. Oct. 11, 2006) [hereinafter *Statoil Agreement*], available at <http://www.justice.gov/criminal/fraud/fcpa/cases/statoil-asa-inc/10-09-06statoil-agree.pdf>. As demonstrated by *SEC v. American International Group*, 854 F. Supp. 2d 75 (D.D.C. 2012), rev’d, 712 F.3d 1, 5 (D.C. Cir. 2013), however, the government sometimes makes attempts to keep the contents of monitorships confidential. See *infra* Section II.B. But these assurances of confidentiality, even when guaranteed by court order, are anything but definitive.

⁷³ *Statoil* allegedly paid more than \$5 million to an Iranian official to access one of the world’s largest natural gas fields. *Statoil Agreement*, *supra* note 72, at app. A at 1.

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of Facts. Any disputes between STATOIL and the [Monitor] with respect to the work plan shall be decided by DOJ in its sole discretion.⁷⁴

But the agreements between the DOJ and the corporations deferred much of the decision making and authority to the monitor. For example, the Statoil Agreement stated that: “STATOIL shall cooperate fully with the [Monitor]. The [Monitor] shall have the authority to take such reasonable steps, in the [Monitor’s] view, as necessary to be fully informed about the operations of STATOIL within the scope of his or her responsibilities under this Agreement.”⁷⁵ Obviously, this created a situation where the corporation became subject to the monitor’s direction and instruction. And, in subsequent years, the monitor’s power was memorialized in even stronger terms.⁷⁶ For example, in the deferred prosecution agreement between the DOJ and Aibel Group (“Aibel”), the agreement continued to state that disputes between the monitor and the corporation “with respect to the work plan shall be decided by the [DOJ] in its sole discretion,”⁷⁷ but it also provided the monitor with an ability to make sweeping decisions regarding the ultimate recommendations that the corporation must implement going forward.

With respect to any recommendation that [Aibel] consider[s] unduly burdensome, impractical, or costly, [Aibel] need not adopt that recommendation within that time but shall propose in writing an alternative policy, procedure or system designed to achieve the same objective or purpose. As to any recommendation on which [Aibel] and [the monitor] do not agree, such parties shall attempt in good faith to reach an agreement within thirty (30) calendar days after [Aibel] serve[s] the written advice. *In the event [Aibel] and [the monitor] are unable to agree on an alternative proposal, [Aibel] shall abide by the determinations of [the monitor].*⁷⁸

⁷⁴ Id. para. 12.

⁷⁵ Id. para. 11.

⁷⁶ It is not clear what caused this change, although the time in which monitorships were becoming more onerous corresponded with the government, in 2006, having to scale back its aggressive stance on requiring corporations to waive privilege to obtain leniency. See *infra* note 132.

⁷⁷ Deferred Prosecution Agreement para. 13, *United States v. Aibel Grp.*, No. 07-CR-005 (S.D. Tex. Feb. 6, 2007), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/aibelgrp/02-06-07aibelgrp-agree.pdf>.

⁷⁸ Id. para. 15 (emphasis added).

This language provided the monitor with even greater authority over the corporation and largely left the corporation without recourse if it disagreed with the monitor's recommendations.⁷⁹ Perhaps unsurprisingly, it appears that granting this level of authority to the monitor was unsuccessful. A little over a year into the three-year monitorship, Aibel ceased the monitorship and entered a guilty plea.⁸⁰ The monitorship agreements entered into between the DOJ and corporations for FCPA violations since Aibel entered its guilty plea no longer contain language requiring the corporation to adhere to the monitor's recommendations,⁸¹ and the Morford Memorandum, which was issued after the Aibel guilty plea, memorialized a corporation's right to choose not to adopt the monitor's recommendations.⁸²

For example, the recent Total Agreement states:

With respect to any recommendation Total considers unduly burdensome, inconsistent with local or other applicable law or regulation, impractical, unduly expensive, or otherwise inadvisable, Total need not adopt that recommendation . . . but shall propose in writing to the Monitor an alternative policy, procedure, or system designed to achieve the same objective or purpose. As to any recommendation on which Total and the Monitor do not agree, the parties shall attempt in

⁷⁹ Professors Khanna and Dickinson would likely classify these types of monitorship structures as more "influential monitors," or monitors "more similar to the top management of a firm." Khanna & Dickinson, *supra* note 3, at 1731. These monitors had a great deal of decision-making power.

⁸⁰ Plea Agreement para. 1, *Aibel Grp.*, No. 07-CR-005, available at <http://www.justice.gov/criminal/fraud/fcpa/cases/aibelgrp/11-21-08aibelgrp-plea.pdf>. Aibel agreed to pay a fine of \$4.2 million and serve a two-year term of organizational probation. Under the terms of probation, Aibel agreed not to commit another crime, to submit written reports to the court if required, and to pay a mandatory special assessment to the clerk of court. *Id.* para. 19.

⁸¹ Thus, the agreements after the Aibel plea no longer look like the more "influential monitors" as described by Khanna and Dickinson. See *supra* note 79. The Aibel plea noted that Aibel had entered into a deferred prosecution agreement with the DOJ that required the company to "(1) establish a Compliance Committee of its Board of Directors; (2) engage outside compliance counsel to monitor its duties and obligations under the [deferred prosecution agreement]; and, (3) establish and effectively implement a compliance program." Plea Agreement, *supra* note 80, para. 20(a). The agreement noted that "[Aibel] has committed substantial time, personnel, and resources to meeting the obligations of the [deferred prosecution agreement]. Despite that fact, [Aibel] has failed to meet its obligations." *Id.* This language, when looked at in light of the future agreements that lessened the authority of monitors, suggests that the corporate compliance monitor retained by Aibel created a monitorship that was too onerous for the company to continue to engage in and it instead decided to enter a guilty plea.

⁸² Morford Memorandum, *supra* note 1, at 6.

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good faith to reach an agreement *In the event Total and the Monitor are unable to agree on an acceptable alternative proposal, Total shall promptly consult with the [DOJ], which will make a determination as to whether Total should adopt the Monitor’s recommendation or an alternative proposal, and Total shall abide by that determination. During the time period in which a [DOJ] determination is pending, Total shall not be required to implement any contested recommendation.*⁸³

Currently, the government continues to prohibit a privileged relationship between the corporation and a monitor, and the most recent agreements have expanded the prohibitory language outside the traditional confines of the attorney-client privilege.⁸⁴ The Total Agreement states that “[t]he parties agree that the retention of the Monitor does not establish an attorney-client, auditor-client, or similar relationship between Total and the Monitor.”⁸⁵ In addition, the agreements often state that a monitor must have “sufficient independence from [the corporation] to ensure effective and impartial performance of the Monitor’s duties as described in the Agreement.”⁸⁶ But the newer agreements also attempt to maintain a great deal of confidentiality regarding a monitor’s investigation, similar to the confidentiality the government attempted to achieve in the case involving American International Group (“AIG”). The Total Agreement attempts to keep the monitor’s reports confidential, stating:

The [Monitor’s] reports will likely include proprietary, financial, confidential, and competitive business information. Moreover, public disclosure of the reports could discourage cooperation, impede pending or potential government investigations and thus undermine the objectives of the Monitorship. For these reasons, among others, *the reports and the contents thereof are intended to remain and shall remain non-public, except . . . to the extent that the [DOJ] determines in its sole discretion that disclosure would be in furtherance of the [DOJ]’s discharge of its duties and responsibilities or is otherwise required by law.*⁸⁷

⁸³ Total Agreement, *supra* note 42, at attachment D paras. 5–6 (emphasis added).

⁸⁴ See Warin, Diamant & Root, *supra* note 1, at 353–54.

⁸⁵ Total Agreement, *supra* note 42, at attachment D para. 2.

⁸⁶ *Id.* para. 10(d).

⁸⁷ *Id.* at attachment D para. 3 (emphasis added).

Looking at the monitorship structures as set out in the settlement agreements over time reveals three insights. First, the government wants unfettered access to the information gathered by the monitor. Second, the government is relatively ambivalent as to whether others have access to this information. The government wants a monitor to provide it with enough information so that the government is assured that wrongdoing will not occur in the future, but it has traditionally acknowledged that public dissemination of these reports is not an integral part of the process of decreasing future wrongdoing. Third, the monitorship structure is determined on an ad hoc basis without enforceable rules governing items such as the nature of the relationship between the monitor and the corporation and whether the monitor's reports will remain confidential. Interestingly, court-ordered confidentiality is similarly lacking in clear rules for parties engaged in a monitorship.

B. Limitations with Current Monitorship Structure

The above review of monitorship structures found in FCPA settlement agreements demonstrates that monitorships currently function under a system of ad hoc standards that may vary from agreement to agreement. There is a debate on whether deferred and non-prosecution agreements are properly considered contracts, regulation, or a mechanism of prosecutorial discretion.⁸⁸ Regardless of their classification, however, they do not qualify as bright-line rules that provide parties entering into monitorships a binding set of norms upon which they can rely. Interestingly, when parties to a monitorship attempt to protect their agreed-upon understanding of the terms of the monitorship, even court-ordered protection is insufficient under the current system.

For example, in 2004, the U.S. District Court for the District of Columbia was asked by the Securities and Exchange Commission ("SEC") and AIG to enter a consent order issuing a final judgment against AIG regarding improper accounting and financial reporting.⁸⁹ As part of the terms of the consent order, AIG agreed to "retain an independent consultant . . . to review . . . policies and procedures as well as all transactions that AIG entered into between January 1, 2000, and the date of the Final Judgment and that had 'a primary purpose of enabling a Reporting

⁸⁸ See Cunningham, *supra* note 39, at 41–49.

⁸⁹ SEC v. Am. Int'l Grp., 854 F. Supp. 2d 75, 77–78 (D.D.C. 2012), *rev'd*, 712 F.3d 1, 5 (D.C. Cir. 2013).

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Company to obtain an accounting or financial reporting result.”⁹⁰ The purpose of the review was to determine whether past transactions “were used or designed to permit counter-parties to violate generally accepted accounting principles (‘GAAP’) or rules promulgated by the SEC.”⁹¹ Once the independent consultant concluded his review, he was required to provide reports of his findings (“Monitor Reports”) to the SEC, the DOJ, and AIG’s internal audit committee. Any reasonable recommendations made by the independent consultant were to be implemented by AIG. On June 14, 2006, the SEC and AIG filed a motion to have the Monitor Reports prohibited from being subject to public dissemination.⁹² The rationale was that the parties intended the information provided by AIG to the independent consultant to be kept confidential from anyone other than the entities identified in the consent decree—in other words, only the SEC, DOJ, and independent consultant were to have access to the information provided by AIG. The court granted the motion, thereby leading the parties to believe that their communications would remain confidential.⁹³

Five years later, in January 2011, a reporter tried to gain access to the Monitor Reports. The reporter first filed a Freedom of Information Act (“FOIA”) request with the DOJ, which stated that it could not locate the Monitor Reports.⁹⁴ The reporter then tried to obtain the Monitor Reports from the SEC, which referred the reporter to the court’s order restricting dissemination of the Monitor Reports. Ultimately, the reporter filed a “Motion to Intervene for Access to Monitor’s Reports,” arguing that the Monitor Reports must be made publicly available based on “(1) a First Amendment right of access to judicial proceedings and (2) a common law right of access to judicial records.”⁹⁵ On April 16, 2012, the same district court that had issued the order granting confidentiality to the Monitor Reports determined that: (1) the reports were judicial records; (2) the interests of the public weighed in favor of requiring disclosure of the reports; and (3) redacted Monitor Reports must be made available to the public.⁹⁶

⁹⁰ Id. at 78.

⁹¹ Id.

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id. at 79.

⁹⁶ Id. at 81–83.

Now imagine the implications of a ruling like the one just described for the corporation and the lawyers in the case. The corporation intended for the information to remain confidential and may have been advised by its representative-lawyer that the confidentiality would likely be upheld after the court order in June 2006. But confidentiality does not have the gravitas of an evidentiary privilege and the reporter was able to make relatively simple arguments to overcome the order of confidentiality by the district court. Thus, from the perspective of the corporation, the advice from its representative-lawyer now looks to be suspect. Furthermore, the monitor in the case was an attorney,⁹⁷ and he likely believed that his actions and reports were to remain confidential. But attorneys acting as monitors are not engaged in an attorney-client relationship—again, no evidentiary privilege applies.⁹⁸ Moreover, a lawyer's duty of confidentiality applies only to "clients," and since AIG was not properly considered a client of the monitor, no ethical duty attached despite the parties' intent and attempt to formalize the confidential relationship. In other words, the lawyers in this case intended a confidential relationship in 2004 and believed they were involved in a confidential relationship in 2006, only to have that belief shattered by legal maneuvering in 2012.

The district court's decision was ultimately overturned by the D.C. Circuit, which found that the reports were "not judicial records subject to the right of access because the district court made no decisions about them or that otherwise relied on them."⁹⁹ Unfortunately, the D.C. Circuit's opinion provides little comfort to those hoping for predictability regarding confidentiality when entering monitorships because the opinion was quite fact-specific. Moreover, a district court recently approved a deferred prosecution agreement with the appointment of a compliance monitor but retained supervisory power over the agreement's implementation and directed the government to furnish quarterly reports to the

⁹⁷ The first independent consultant in the case was James Cole, now Deputy Attorney General of the United States, and the second independent consultant was Therese Pritchard, a partner at Bryan Cave. See Brief for the Appellee at 7, *SEC v. Am. Int'l Grp.*, 712 F.3d 1 (D.C. Cir. 2013) (No. 12-5141).

⁹⁸ At best, the lawyer-monitor would likely be classified as engaging in "third-party neutral" conduct under the Model Rules, which provides little guidance regarding how attorneys must comport themselves when undertaking matters of this type. Model Rules of Prof'l Conduct R. 2.4(a) (2013).

⁹⁹ *Am. Int'l Grp.*, 712 F.3d at 3–4. The court distinguished AIG's monitor from that of a court-ordered monitor. *Id.* at 4. The opinion explained that "nothing in the record suggests the district court cared a whit about the results of the independent consultant's investigation as long as AIG in fact initiated the investigation." *Id.*

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court over the five years that the case will be pending.¹⁰⁰ The order likely makes the reports judicial records, which would be subject to public dissemination. Because there are no binding rules governing monitorships, the court was well within its authority to issue this ruling even while it “recognize[d] that the exercise of supervisory power in this context is novel.”¹⁰¹ Thus, corporations and the government may come into future agreements regarding the nature and scope of a monitorship, but may encounter a judge who believes, quite possibly rightly, that the court has a responsibility to oversee these sorts of agreements. This could very well cause the parties’ agreements to be put aside in favor of the individual judge’s wishes.¹⁰²

C. Standards Are Not Enough

The upshot is that the parties faced with retaining a corporate compliance monitor—who provides services to both the corporation and the government—are forced to take a major gamble in a world without rules governing monitorships. Assurances of confidentiality, or even the terms of monitorship, are worth very little under the current monitorship structure, which is based on unenforceable standards found in agreements between the government and corporation. Given the increased use of monitorships over the past decade and the likelihood that they will remain an important part of corporate compliance frameworks, it would seem appropriate to develop a set of enforceable rules regarding the nature of the relationship amongst the monitor, government, and corporation that will allow parties considering the retention of a corporate compliance monitor, as well as the lawyers involved in monitorships, the ability to enter into a monitorship with an informed sense of what the monitorship will entail and what potential risks and liabilities are associated with retaining a corporate compliance monitor.

¹⁰⁰ See *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at *1 (E.D.N.Y. July 1, 2013).

¹⁰¹ *Id.* at *6.

¹⁰² There are scholars, like Professor Brandon Garrett, who would very much like to see courts overseeing all monitorships. See Morford Memorandum Morphed: Who Picks the Corporate Monitors?, *Corp. Crime Rep.*, Jan. 7, 2013, at 7, 8, available at <http://www.corporatecrimereporter.com/news/200/whopicksthemontiors01012013/>.

III. THE MONITOR-“CLIENT” RELATIONSHIP

As currently structured, monitorships are not designed to maximize the success of all aspects of a monitor’s role. A monitor provides a unique function within the corporate compliance framework and monitorships need a specified system of rules that parties subject to monitorships can rely upon when making the decision to enter into a monitorship. This Article is not suggesting that these rules need to be expansive. In fact, it may be that overly expansive rules would harm one of a monitorship’s greatest assets—the flexibility to provide company-specific counseling on the steps the monitored corporation should implement to ensure long-term legal and regulatory compliance.¹⁰³

Instead, this Article argues that because corporate compliance monitors are engaged in what is essentially *legal counseling* when they provide recommendations to the corporation, the structure of monitorships should take into account the best mechanisms for facilitating this legal counseling.¹⁰⁴ A monitor is a highly skilled individual who has primary responsibility for counseling the monitored corporation about the legal ramifications of its business decisions. Regardless of professional status or title, a monitor at a minimum provides legal counsel to the monitored corporation.¹⁰⁵ Yet a monitor’s role as a legal counselor has been undervalued by the emphasis placed on a monitor’s role as a governmental enforcement agent. Instead, a monitor’s dual functions should be assigned equal importance in an effort to achieve the actual goal of a monitorship—which is ensuring future legal and regulatory compliance over the long term.

This Part argues that structuring monitorships so that the monitor enters into a formal relationship with both the government and the corpora-

¹⁰³ See generally Cunningham, *supra* note 39, at 1 (arguing that “[i]ntegrating the role of corporate governance into prosecutions would promote public confidence in prosecutorial decisions to *broker firm-specific governance reforms* currently lacking and increase their effectiveness” (emphasis added)).

¹⁰⁴ See Khanna & Dickinson, *supra* note 3, at 1731 (noting that “monitors may inform management that certain plans are not compliant with the law and others are”).

¹⁰⁵ There is an inherent tension here regarding the provision of legal counsel by an individual who is not a lawyer and whether that would constitute the unauthorized practice of law. The reality is, however, that the legal counseling provided by the monitor is not pure legal advice. It is advice that takes into account both the corporation’s business realities and the relevant legal and regulatory requirements and then provides what is essentially a mix of business and legal advice as to the policies and procedures the monitored corporation should implement going forward. This makes parsing the legal and business advice provided by the monitor incredibly difficult.

tion is necessary due to the monitor’s role as a legal counselor to both parties. The Part next proposes a new framework for conceptualizing and designing monitorships and explains why adopting a statutory privilege protecting the monitor-client relationship would be a beneficial strategy for establishing predictable rules governing monitorships. The Part then discusses benefits associated with the proposed framework, including increased stability for the private lawyers involved with monitorships as well as more consistent norms within corporate compliance efforts.

A. Monitors as Legal Counselors

To understand the concept of being a legal counselor, it may be helpful to think about two of the traditional roles that lawyers undertake on behalf of clients. One role is that of an advocate and the other is that of an advisor. The now-superseded Model Code of Professional Responsibility distinguished the two roles as follows: “In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships.”¹⁰⁶ In other words, an advocate makes an argument on behalf of a client’s position.¹⁰⁷ An advocate assists the client in asserting a course of conduct that the client believes to be beneficial. As such, the lawyer as advocate typically has an adversary—someone on the other side arguing in favor of the contrary position.

But an advisor is someone who looks prospectively—who attempts to advise the client as to the best course of action. In his work discussing the lawyer’s role as a counselor, Professor Thomas Morgan argued, in part, that a lawyer acting as counselor should provide “professional judgment and advice to a client” that “reflect the empathy, respect, and practical wisdom that the lawyer would offer a good friend.”¹⁰⁸ Similarly, the Model Rules explain that an advisor is to provide “straightforward advice expressing the lawyer’s honest assessment.”¹⁰⁹ The lawyer

¹⁰⁶ Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 Fla. L. Rev. 439, 440–41 (1990) (quoting Model Code of Prof’l Responsibility EC 7-3 (1980)).

¹⁰⁷ Thus, a lawyer seeking an exemption from the SEC on behalf of a client would be considered an advocate. That same lawyer might be acting as an advisor when discussing the ramifications of requesting such an exemption with the client.

¹⁰⁸ *Id.* at 445.

¹⁰⁹ Model Rules of Prof’l Conduct R. 2.1 cmt. 1 (2013).

acting as an advisor does not advocate a particular position and is not paired up against an adversary; the lawyer as advisor is providing a client wise counsel.

A monitor is charged with providing a similar type of advice as the lawyer-advisor. Once a monitor has completed its investigation—its root-cause analysis—a monitor is charged with providing recommendations to both the corporation and the government regarding the changes the corporation needs to incorporate into its compliance efforts to improve future legal and regulatory compliance. These recommendations are tailored to the specific needs of the corporation's business, but they are based on legal and regulatory compliance. Yet, as currently structured, monitorships provide no mechanism of enforceable protection that encourages "full and frank" communications amongst the monitor, corporation, and government.¹¹⁰ The attorney-client relationship encourages candid discussions via the attorney-client privilege, but monitorships have been provided no enforceable means of protecting communications. As a result, a monitor's ability to fulfill the role of legal counselor is hamstrung by the lack of predictable norms governing the monitorship.

Because a monitor engages in a role with dual functions, the monitor owes unfettered, honest advice to both of the monitor's "clients"—the government and the corporation. The monitor must provide the corporation with recommendations that will ensure that the corporation's business decisions going forward will result in improved legal and regulatory compliance. The monitor also owes the government an independent assessment of the challenges facing the corporation in achieving long-term compliance, plus the monitor's best efforts in recommending the most effective compliance regime. As part of the responsibilities to both "clients," the monitor has a duty to advise both parties when they are engaged in a course of conduct that stymies the goal of the monitor's representation. In some instances, this will require the monitor to develop the most effective set of recommendations possible to ensure long-term compliance, and in other instances it will also include recommendations regarding the scope of the corporation's culpability.¹¹¹ That

¹¹⁰ Cf. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (stating that the attorney-client privilege is intended "to encourage full and frank communication between attorneys and their clients").

¹¹¹ In a traditional attorney-client relationship, this type of joint representation would be rife with conflicts that could result in the preclusion of the lawyer representing the two cli-

means an effective monitor should object if the government imposes requirements onto a monitorship that may result in inefficiencies that stifle the monitorship’s goals. Similarly, an effective monitor should object if it is determined that the corporation is failing to be forthcoming and cooperative in the monitor’s investigation efforts. A monitorship lacking binding confidentiality may not be able to effectuate these goals because the parties will be on guard when interacting with one another.

It is important to remember that the goal of a monitorship should not be thought of solely as a penalty.¹¹² A monitorship also should not be thought of as probation, which is a separate and distinct penalty that the government may pursue as part of a formal adjudicatory proceeding. Instead, the goal of a monitorship is that the corporation, monitor, and government work together to ensure that the corporation does not engage in future improper conduct. To minimize or inhibit a monitor’s responsibility to provide legal counsel to the corporation and insist on a false sense of “pure monitor independence” creates a monitorship structure that is unnecessarily adversarial between the monitor and the corporation wherein the monitor is perceived as simply a governmental advocate or agent. Indeed, monitorships involve highly complex, intertwined relationships that cannot fairly be characterized within any adversarial or “us-versus-them” paradigm.¹¹³

ents. Joint representation is, however, typically allowed “so long as the lawyer gets informed consent from all parties.” Hazard et al., *supra* note 71, at 443; see Model Rules of Prof’l Conduct R. 1.7 cmts. 26–33 (2013). Similarly, the law of agency allows “[t]wo or more persons . . . as coprincipals [to] appoint an agent to act for them in the same transaction or matter” with the coprincipals’ consent. See Restatement (Third) of the Law of Agency §§ 3.16, 8.06(2) (2006). The consent in both contexts requires the lawyer or the agent to disclose all material facts so that the joint clients or coprincipals are fully informed regarding the scope of any potential conflicts, and the drawbacks and benefits associated with the relationship.

¹¹² Remember, the corporation has paid a significant penalty through monetary restitution. Moreover, the Morford Memorandum states that a monitor’s responsibility is “not to further punitive goals.” Morford Memorandum, *supra* note 1, at 2.

¹¹³ Admittedly, the relationship between a criminal offender and a probation officer is also multifaceted in that the probation officer assists the offender in obtaining necessary services while also ensuring that the offender does not commit additional crimes. See Bureau of Labor Statistics, U.S. Dep’t of Labor, Occupational Outlook Handbook, 2014–15 Edition, Probation Officers and Correctional Treatment Specialists (Jan. 8, 2014), <http://www.bls.gov/ooh/community-and-social-service/probation-officers-and-correctional-treatment-specialists.htm#tab-2>. Yet the fact that corporate crimes are conducted by agents of the corporation creates a different set of considerations than those associated with crimes committed by an individual. The corporation’s agents charged with entering into the agreement with the government on behalf of the corporation and cooperating with the monitorship are likely not the same corporate agents that engaged in the underlying legal violation. These corporate agents,

Adversarial monitoring relationships have been demonstrated to decrease compliance. For example, Professor Milton Regan has explained that, within firms, “aggressive compliance monitoring can have an unfavorable effect on the motivation of agents to comply with rules.”¹¹⁴ Thus, a highly monitored employee “regard[s] supervision as unreasonably pervasive and intrusive.”¹¹⁵ This can lead to the development of “an adversarial attitude toward the company, its supervisors, and the rules themselves.”¹¹⁶ Employees “may come to attribute their own compliance as motivated by coercion, rather than by their own desire to act properly.”¹¹⁷ “When this perception emerges, the result ultimately may be lower rates of compliance than would exist in the absence of close monitoring and visible penalties.”¹¹⁸ Analogizing these findings to the monitor-mentorship context helps to explain why it is important to encourage a cooperative relationship among the monitor, corporation, and government. Framing the mentorship as primarily providing legal counseling to the corporation and the government permits the corporation to view the monitor as a partner, which allows the corporation to maintain its own view of compliance as emanating from the corporation’s motivation to engage in ethical and legal conduct, as opposed to the corporation’s motivation to adhere to the terms of the settlement agreement.

Thus, a mentorship should be re-conceptualized as a cooperative relationship among the monitor, corporation, and government where the monitor is providing legal counsel to both the corporation and the government. Of course, merely stating that the corporation and its monitor have a cooperative relationship is insufficient. Trusted relationships are not formed so easily, which is why effectuating this change in mentorship structure requires drawing concrete and reliable boundaries that outline the scope of the mentorship relationship, as well as adopting clear protections associated with it. Toward this end, this Article suggests that the monitor’s “clients,” both the corporation and the government, would benefit from the protections provided by a statutory privilege.

who are individually innocent of wrongdoing, have a whole host of other duties to the corporation and shareholders that affect their decision making when engaged in a mentorship.

¹¹⁴ Milton C. Regan, Jr., *Risky Business*, 94 *Geo. L.J.* 1957, 1970 (2006).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

B. A Protected Monitor-Client Relationship

As demonstrated by the work of Professors Ian Ayres and John Braithwaite, compliance strategies that rely solely on the imposition of penalties “undermine the good will of regulated actors who do have a desire to act ethically.”¹¹⁹ Thus, it is important to create regulatory structures that “have the capability of activating both economic rationality and the desire to act ethically.”¹²⁰ By encouraging the monitor, corporation, and government to work together, the corporation becomes a partner to the monitor in the efforts to achieve greater compliance. Instead of framing the monitor as an adversary to be bested, the monitor is framed as a partner with whom to cooperate to achieve a better long-term outcome for the corporation. The hope is that the partnership, as opposed to the adversarial framework, will encourage a desire to act ethically on the part of the corporation and its internal agents. Thus, mechanisms must be put in place allowing the corporation to begin to see the monitor as more of a partner and less of an adversary. This Part suggests that this could be done by providing a statutory privilege that would protect the communications amongst the government, corporation, and monitor during the monitorship term.

This Section begins by briefly explaining the traditional attorney-client privilege,¹²¹ the related work product doctrine, why the protections are provided, and what they do not protect against. It then explores the manner in which privilege has been extended and rejected as to corporations and how monitorships would likely be treated. It next explores statutory grants of privilege to accountants and statutory privilege waivers provided to corporations making disclosures to financial regulators. It concludes by arguing in favor of a new statutory privilege governing monitorships.

¹¹⁹ Id. at 1968 (citing Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* 24–25 (1992)).

¹²⁰ Id. (citing Ayres & Braithwaite, *supra* note 119, at 47).

¹²¹ The attorney-client privilege finds its origins in sixteenth-century English common law, and it has developed in the United States through the common law and statutory enactments into a sacrosanct concept within the U.S. legal system. See Hazard et al., *supra* note 71, at 258. The privilege was not fully accepted by the English courts until after 1800. Id.

1. Scope and Purpose of the Attorney-Client Privilege and Work Product Doctrine

Only “(1) communications (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client” are entitled to the attorney-client privilege.¹²² It is seen as encouraging “open communication between clients and their lawyers.”¹²³ This open communication ensures that clients receive effective representation and serves the interests of the public more broadly by providing clients with advice regarding the legality of possible conduct and effective representation in our adversarial court system. Information found to be subject to the attorney-client privilege cannot be compelled from the attorney or client, leaving the communications between the two completely private. In other words, those communications are protected against intrusion from those outside the attorney-client relationship, unless the client decides to waive the privilege and disclose the content of communications between the client and attorney.¹²⁴ The privilege belongs to the client. It is important to remember that the privilege protects only the communications, not the underlying facts discussed in the communications, which may be subject to disclosure to third parties.¹²⁵

The work product doctrine protects “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, [etc.]).”¹²⁶ The work product doctrine does not protect materials that a lawyer creates for reasons other than to prepare for litigation. It is concerned with protecting the possession of lawyer-generated information that could reveal the lawyer’s thinking on how best to advocate for the client’s interest if litigation ensues. The work product doctrine is not, however, given the same sort of absolutist protection as that provided the traditional attorney-client privilege; an opposing party can obtain the material by demonstrating a “substantial need for the material[]” and an

¹²² Restatement (Third) of the Law Governing Lawyers § 68 (2000).

¹²³ Hazard et al., *supra* note 71, at 258.

¹²⁴ *Id.* at 305 (“A client loses the privilege with respect to a particular communication either by consent or by conduct inconsistent with maintaining the privilege. Consent usually takes the form of disclosure of a privileged communication in an unprivileged setting; conduct inconsistent with maintaining the privilege includes a failure to object to an attempt by another to obtain or provide evidence of a privileged communication.” (citation omitted)).

¹²⁵ *Id.* at 260.

¹²⁶ Fed. R. Civ. P. 26(b)(3)(A).

inability “without undue hardship, [to] obtain [the] substantial equivalent” of the material “by other means.”¹²⁷

For example, if a lawyer instructs a client to gather all of the documents that might demonstrate that the client improperly engaged in insider trading, the opposing side typically is not permitted to ask that the neat stack of all potentially damning documents be provided to them. They have a right to access each and every document through regular discovery processes, but the opposing party will have to find the documents through independent investigation. But if the client, after providing the attorney a neat stack of documents, were to then destroy the originals making the copies provided to the attorney *the only* evidence of those documents, the opposing party would be able to access the documents by establishing “substantial need” and “undue hardship.” Notably, even when the documents typically protected as work product are required to be provided to the opposing party, the corresponding communications between the attorney and client discussing legal advice retain their privileged protections under the attorney-client privilege.

The attorney-client privilege and work product doctrine are not all-encompassing, all-protecting instruments. They are limited tools that protect certain types of communication and information to encourage robust discussion of the legal implications of facts and circumstances affecting the client. It is important not to conceive of the privileges as protecting more than they are able to protect.

2. Evidentiary Privilege and Corporations

Because evidentiary privileges interfere with information seeking on the part of litigants attempting to ascertain the truth, courts apply evidentiary privileges narrowly and are hesitant to recognize new privileges on their own.¹²⁸ When the courts have established new evidentiary privileges, they have often come as extensions from the traditionally accepted attorney-client privilege.

Arguably the most important extension for corporations came in 1981 when the U.S. Supreme Court decided that corporations could be considered clients for purposes of the attorney-client privilege.¹²⁹ In *Upjohn Co. v. United States*, the Supreme Court explained “that the best route to

¹²⁷ Fed. R. Civ. P. 26(b)(3)(A)(ii).

¹²⁸ Hazard et al., *supra* note 71, at 258.

¹²⁹ See *Upjohn Co. v. United States*, 449 U.S. 383, 389–90 (1981).

corporate compliance with the law is ‘full and frank communication between attorneys and their [corporate] clients.’”¹³⁰ The Supreme Court also recognized that full and frank communication will not occur between parties unless the parties are assured that their communications will remain private.¹³¹ The parties must know that they can give their lawyer enough information to ensure complete and accurate legal advice without worrying that the underlying information provided to the lawyer will result in liability for the corporation.

The Supreme Court’s grant of attorney-client privilege for corporations has resulted in a decades-long struggle with the government regarding the scope and nature of the privilege. When wrongdoing is discovered within the corporation, the government typically wants unfettered access to the corporation’s information regarding the underlying misconduct, including the details of any internal investigation conducted by the corporation. This usually requires a disclosure of documents protected by the attorney-client privilege and work product doctrine. The question, of course, is how the government can access this information, and the government typically needs the corporation to voluntarily comply.¹³² Thus, corporations and the government have at-

¹³⁰ David M. Zornow & Keith D. Krakaur, On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations, 37 Am. Crim. L. Rev. 147, 148–49 (2000) (alteration in original) (quoting *Upjohn*, 449 U.S. at 389).

¹³¹ *Upjohn*, 449 U.S. at 389.

¹³² The government has implemented a variety of policies and procedures over time that were meant to encourage organizations to voluntarily waive their rights under the attorney-client privilege and work product doctrine. See generally Lisa Kern Griffin, Compelled Cooperation and the New Corporate Criminal Procedure, 82 N.Y.U. L. Rev. 311 (2007) (discussing strategies adopted by the DOJ to investigate and prosecute corporate crimes). The height of this public struggle occurred during the mid-2000s when the DOJ issued instructions to prosecutors regarding how to conduct corporate criminal investigations and what factors a prosecutor should consider in determining leniency and similar items. In 2003, the DOJ issued what is known as the Thompson Memorandum, which is a charging guideline for federal prosecutors entitled “Principles of Federal Prosecution of Business Organizations.” *Id.* at 318. The Thompson Memorandum “directed prosecutors to consider an entity’s refusal to waive its attorney-client and work product protections as an indicator of noncooperation and therefore a factor weighing in favor of indictment.” *Id.* at 347 (citing Memorandum from Larry D. Thompson, Deputy Att’y Gen., to Heads of Dep’t Components and U.S. Att’ys, Principles of Federal Prosecutions of Business Organizations 3 (Jan. 20, 2003)). However, after coming under intense pressure—from interest groups, the American Bar Association, and former DOJ officials—as well as facing the threat of congressional action in the form of the proposed Attorney-Client Privilege Protection Act, the DOJ retreated and issued the McNulty Memorandum in December 2006. *Id.* at 345–52. The McNulty Memorandum deleted “the explicit reference to the willingness to waive privileges,” and prosecutors were required to “establish a ‘legitimate need’ for privileged information and seek DOJ

tempted to put forth a variety of arguments in favor of granting protections of privilege to what is essentially corporate material provided to the government as part of investigation and compliance efforts.

One of the first attempts to provide the government access to attorney-client privileged information while not waiving the privilege was through the use of selective waiver, which allows “corporations to share their confidential attorney-client communications” with the government “without having to waive the privileged status of these documents against other parties.”¹³³ Two approaches adopted by the federal courts are relevant for purposes of this Article. First, a few courts allow selective waiver whenever a corporation provides privileged material to the government.¹³⁴ Second, some courts permit selective waiver if, at the time the corporation provided the privileged information to the government, it expressed a clear intent to prevent further disclosures.¹³⁵ But the majority of circuit courts have rejected the concept of selective or limited waiver outright, arguing that any disclosure of privileged communications waives the privilege with respect to all future parties that may seek the disclosed information.¹³⁶ This rejection provides a rationale for corporations to resist providing attorney-client privileged material to the government for fear that unintended third parties would gain access to the documents.¹³⁷ The government, however, continues to make arguments that are essentially based on selective waiver.¹³⁸

Corporate attorneys and the government then attempted to obtain protection for privileged materials under the joint defense and common in-

approval before requesting it.” *Id.* at 351 (quoting Memorandum from Paul J. McNulty, Deputy Att’y Gen., to Heads of Dep’t Components and U.S. Att’ys, Principles of Federal Prosecution of Business Organizations 8 (Dec. 12, 2006), available at http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf).

¹³³ Beth S. Dorris, Note, The Limited Waiver Rule: Creation of an SEC-Corporation Privilege, 36 *Stan. L. Rev.* 789, 797 (1984); see also Hazard et al., *supra* note 71, at 320–22.

¹³⁴ See, e.g., *Diversified Indus. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977).

¹³⁵ See, e.g., *Teachers Ins. & Annuity Ass’n of Am. v. Shamrock Broad. Co.*, 521 F. Supp. 638, 644–45 (S.D.N.Y. 1981).

¹³⁶ See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 304 (6th Cir. 2002).

¹³⁷ This outcome may, however, have been avoided if the suggested change to the Federal Rules of Evidence, which would have permitted corporations to assert selective waiver, had been adopted. Some corporate counsel opposed the proposed adoption. See Richter, *supra* note 71, at 133–34.

¹³⁸ See Total Agreement, *supra* note 42, at attachment D para. 3. See generally Press Release, U.S. Dep’t of Justice, *supra* note 40.

terest privileges.¹³⁹ When two or more parties jointly retain a lawyer to represent them in a matter, the communications made by any of the joint clients to the lawyer for the purposes of seeking legal advice related to “the joint representation are privileged against the rest of the world, but not privileged against use by one joint client against another.”¹⁴⁰ Similarly, the common interest privilege permits parties with “common interests to coordinate their positions without destroying the privileged status of their communications.”¹⁴¹ The privilege is meant to facilitate cooperation between parties in either transactional or litigation contexts and does not require the parties to be on the same side. Opposing parties who happen to have a common interest may claim the privilege for “communications that serve the purpose of advancing the common interests.”¹⁴² The courts have also rejected these efforts. For example, the joint defense rationale was rejected by a district court, which found that the corporate defendant was “not engaged in a joint action with . . . the SEC or the district attorney. Instead, it has merely supplied documents that both agencies require for their own investigations.”¹⁴³ In *United States v. Massachusetts Institute of Technology*, the First Circuit found that

although MIT and the Defense Department’s Audit Agency, with whom MIT had shared privileged information, had a common interest in the performance of MIT’s defense contracts, this was not the kind of “common interest” that the privilege cases meant, i.e., it was not akin to co-parties presenting a common defense in litigation.¹⁴⁴

3. Extensions of Evidentiary Privilege Applied to Monitorships

Courts presented with the above arguments in favor of providing selective waiver, joint defense, or common interest privileges protections were presented with privileged material that the government was attempting to access as part of its investigation. It is, however, important to differentiate between work done by outside and internal counsel while conducting an internal investigation and work done by a monitor con-

¹³⁹ Hazard et al., *supra* note 71, at 321.

¹⁴⁰ *Id.* at 266.

¹⁴¹ *Id.* at 267.

¹⁴² *Id.*

¹⁴³ *In re Tyco Int’l Multidistrict Litig.*, No. MDL 02-1335-B, 2004 WL 556715, at *2 (D.N.H. Mar. 19, 2004).

¹⁴⁴ Hazard et al., *supra* note 71, at 321 (citing *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 685–88 (1st Cir. 1997)).

ducting an investigation to effectuate the terms of the monitorship. These are two distinct inquiries.

The internal investigation encompasses a traditional corporate attorney-client privileged relationship where the attorneys for the corporation are engaged in the investigation for the benefit of the client and, typically, in anticipation of litigation. Thus, the outputs of the investigation are properly provided attorney-client and work product protections. What has been rejected by courts are attempts to protect the fruits of these internal investigations, which were completed within the confines of the attorney-client privileged relationship, via the selective waiver, joint defense, and common interest privileges.

But the monitor's relationship with the corporation and the government is different than the role of the lawyer who conducts the internal investigation for the company and then negotiates an agreement with the government. As explained above, the monitor is actively engaged in responsibilities to and duties towards both the corporation and the government in tandem, because the monitorship arises out of an agreement between the corporation and the government. At no time does the monitor have a unitary relationship with either the corporation or government. The fruits of the monitor's efforts, its recommendations and reports, are items prepared for the benefit of the government and the corporation.

As a result, attempting to utilize selective waiver is not an appropriate option for the monitorship context. Because there is no separate relationship between the monitor and the corporation, the government is a party to the relationship due to its participation in the settlement agreement, so there is no need to selectively waive the monitorship documents when producing them to the government. The selective waiver option is really of primary interest to those attempting to provide the results of an internal investigation to the government without waiving privilege protections. Additionally, the joint defense privilege would not work in the monitorship context, because there is no “joint defense.” The monitor is not representing the government and the corporation in a legal proceeding against another party.

In theory, the common interest privilege could apply to the monitorship relationship. Essentially, the corporation and the government enter into an agreement that requires the retention of a monitor. A monitor provides reports and recommendations to both the corporation and the government and is providing a service to both parties. The goals of the

corporation and the government are aligned in that they hope to enter into a monitorship that will assist the corporation in its efforts to improve long-term regulatory and legal compliance. It seems unlikely, however, that a court would approve of a common law privilege in this circumstance, because courts have been highly reluctant to provide extensions to the attorney-client privilege. This reluctance can be seen in the courts' rejections of the Secret Service privilege¹⁴⁵ and the parent-child privilege,¹⁴⁶ as well as the divergent court rulings regarding the self-critical analysis qualified privilege, which "allows individuals or businesses to candidly evaluate their compliance with regulatory and legal requirements without creating evidence that may be used against them in future litigation."¹⁴⁷

These are all situations where there were serious public policy considerations weighing in favor of providing a mechanism of protection so that the parties to these communications would be incentivized to enter into candid conversations and analysis regarding future courses of conduct. Based on these rejections, it seems very unlikely that a protection of privilege for monitorships will emanate from the courts. This is, however, ironic in that the courts are seemingly comfortable with providing court-ordered confidentiality, as was demonstrated by the initial district court order in the AIG case. This may be a problem of semantics and degree—a court may feel more comfortable entering a one-time confidentiality order as opposed to taking the step of providing a common law evidentiary privilege. Regardless of the motivation, the courts are unlikely to provide the rules needed to offer monitorships the predictability required to facilitate a monitor's role as a legal counselor. Thus, any rules provided will need to come via statute.

4. Extensions of Privilege via Statute

Because courts are reluctant to provide extensions beyond the traditional attorney-client privilege paradigm, statutory tools have been uti-

¹⁴⁵ *In re Sealed Case*, 148 F.3d 1073, 1074 (D.C. Cir. 1998) (per curiam) (rejecting the "protective function privilege" for Secret Service agents called to testify regarding the President's activities).

¹⁴⁶ 2 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* § 501.02[9] (10th ed. 2011) ("[C]ourts have refused to provide privilege . . . protection for the parent-child relationship."); see also *In re Grand Jury*, 103 F.3d 1140, 1149 (3d Cir. 1997) (noting that privileges are to be strictly construed because they are in derogation of the search for truth).

¹⁴⁷ 6 James Wm. Moore et al., *Moore's Federal Practice* § 26.48[2] (3d ed. 2008).

lized to obtain additional protections in certain situations. Two such statutes dealing with privilege outside the confines of the traditional attorney-client relationship are relevant for purposes of this Article.

First is the privilege provided to relationships between accountants and taxpayers. Accountants are allowed privileged communications provided those communications would be privileged if between a taxpayer and an attorney.¹⁴⁸ This is a privilege created by federal statute; it is not a common law evidentiary privilege like the attorney-client privilege. The privilege applies only to “noncriminal tax matter[s] before the Internal Revenue Service” or “noncriminal tax proceeding[s] in Federal court brought by or against the United States.”¹⁴⁹ Before this privilege was enacted, to obtain a privileged conversation between a tax accountant and a client, the client had to retain a lawyer who then retained the tax accountant to assist the lawyer, thereby allowing the tax accountant the benefit of the attorney-client privileged relationship as an agent of the lawyer. Congress, however, allowed for a statutory privilege protecting conversations between tax accountants and taxpayers seeking advice, which eliminated the need for this legal maneuvering. Congress understood that facilitating conversations between tax accountants and taxpayers allowed taxpayers to ask the questions needed to ensure that they complied with the applicable tax laws.

Congress has also allowed, via federal statute, three odd exceptions to the traditional norms regarding corporate attorney-client privilege in the context of banks, as recently explained by Professor Bruce Green. For the first exception, “federal banking agencies, including both the prudential bank regulators and the recently established Consumer Financial Protection Bureau . . . assert that [under 12 U.S.C. § 1828(x)] they have the legal authority selectively to compel banks and other financial institutions they supervise to disclose attorney-client privileged information.”¹⁵⁰ Second, “when banks disclose privileged material to bank regulators, even if voluntarily, [the] banks retain the privilege with respect to third parties pursuant to specific federal statutory authority.”¹⁵¹ In the third exception, “under agency policy, once bank regulators obtain

¹⁴⁸ See I.R.C. § 7525(a)(1) (2006).

¹⁴⁹ Id. § 7525(a)(2).

¹⁵⁰ Bruce A. Green, *The Attorney-Client Privilege—Selective Compulsion, Selective Waiver and Selective Disclosure: Is Bank Regulation Exceptional?*, 2013 J. Prof. Law. 85, 86 (footnotes and citation omitted).

¹⁵¹ Id. at 87 (citing 12 U.S.C. § 1828(x) (2012)).

privileged information from a bank, whether through compulsion or voluntarily, the regulators reserve the right to share the information with any other agency, including federal law enforcement and tax authorities and state attorneys general, notwithstanding the selective waiver statute.”¹⁵²

There are two important takeaways based on these statutory treatments of privilege for purposes of this Article. First, Congress has already recognized that a privileged relationship can be granted to a highly skilled professional who is providing legal advice and who is not a lawyer. Thus, it would not seem too far afield to grant this type of privilege to a monitor providing legal counsel to the government and a corporation during the course of a monitorship. Second, Congress has recognized the value in allowing regulators access to privileged material while still permitting the corporation to retain its attorney-client privilege over the material. Thus, Congress understands that the government’s enforcement efforts are often promoted by providing a clear set of rules that protect communications between the corporation and the government as well as between the corporation and its lawyers.

5. A Privilege Protecting the Monitor-Client Relationship

Thus far, this Article has demonstrated that monitors are providing a unique service to both the corporation and the government by providing a root-cause analysis followed by a legal counseling function in the form of recommendations and reports. It has also explained that this legal counseling function is stifled by a lack of predictable norms surrounding monitorships, as evidenced by the ad hoc structure of monitorship agreements over time, as well as the unpredictable outcomes of recent court decisions. The monitorship has, however, become a common tool utilized by the government in its efforts to achieve greater corporate compliance and self-policing. The lack of predictable rules governing these relationships appears to be problematic for those deciding whether to enter into a monitorship prior to knowing what rules will ultimately govern the monitorship. This Article has also demonstrated that it is un-

¹⁵² Id. at 87–88 (citing 12 U.S.C. § 1821(t) (2012)). This exception is obviously a significant run around the corporate attorney-client privilege that seems inconsistent with the concepts surrounding the protections of privilege. Moreover, the potential of government overreach under this statute is quite high. It is not at all clear to me that this type of expansive statute is the ideal to strive for or even that this statutory framework should continue.

likely that the courts will provide the concrete set of rules needed in this context. Thus, it is time for Congress to step in and provide some clear boundaries through the enactment of a statutory privilege that can be relied upon by the government, private parties, monitors, and courts when monitorships arise.¹⁵³

The statutory privilege provided for a monitorship relationship should largely track the protections provided by the attorney-client privilege and work product protection. In other words, the privilege attached to the monitor-client relationship should protect: (1) communications made amongst the monitor, government, and corporation, in confidence for the purpose of obtaining or providing legal counseling to the corporation and the government; and (2) documents and tangible things that are prepared by a monitor to fulfill the goals of the monitorship.

The standard provided generally tracks the protections provided by the attorney-client privilege and is based on a similar rationale—full and frank discussion between a monitor and its “clients” will be best effectuated if the communications occur within the confines of a privileged relationship. The standard provided is, however, more expansive than what would be protected by the work product doctrine. As is explained above, the work product doctrine protects only those documents and tangible things prepared in anticipation of litigation.¹⁵⁴ The suggested statutory privilege would protect all documents and tangible things pre-

¹⁵³ This proposal is purposely broad so that the benefits associated with monitorships that are individually tailored to effectuate the best recommendations for each company remain. This broad proposal does, however, leave two open questions. The first is what precise duties the monitor has and to whom it owes those duties. At a minimum, it would seem obvious that the monitor owes the corporation duties of care and loyalty. Khanna and Dickinson recommend “a fiduciary duty akin to that of attorneys or any profession to their client” for monitors serving in an advisory role. Khanna & Dickinson, *supra* note 3, at 1740. The Morford Memorandum, which is internal DOJ guidance that applies only to criminal matters, states that the “monitor is not responsible to the corporation’s shareholders.” Morford Memorandum, *supra* note 1, at 5. But see Khanna & Dickinson, *supra* note 3, at 1737, 1739–40 (advocating for reforms targeted at “influential monitors,” or monitors with “the ability to fire employees or make operational decisions,” including (1) “develop[ing] fiduciary duties for monitors,” (2) drafting deferred prosecution agreements to “specify[] what the monitor’s duties and powers are,” and (3) allowing the appointing agency “some supervisory role over monitors”).

The second question is whether those acting as monitors should be limited to members of regulated professions, like lawyers and auditors. There may be a concern that monitors who are not members of self-regulating professions may be less constrained. Both of these questions appear ripe for further research.

¹⁵⁴ See *supra* Subsection III.B.1.

pared by a monitor to effectuate the goals of the monitorship. This expansion is necessary for two primary reasons.

First, a monitor's reports are not prepared in anticipation of litigation. The reports contain more than a monitor's recommendations (for example, legal counseling); they also provide the government information regarding the actions the monitor undertook that led the monitor to conclude on the set of recommendations provided. The government has a strong interest in having full information and knowledge regarding this process, which requires the report in its entirety to be provided a protection of privilege.¹⁵⁵ Protecting the report, however, would not protect the underlying facts that formed the basis of the report. Thus, the underlying facts would still be available for third parties to obtain through the regular civil litigation discovery process.

Second, a monitor's recommendations are a mix of business and legal advice. The confluence of business and legal advice is a cause of consternation for many members of the legal profession given the current complexities associated with modern-day business transactions.¹⁵⁶ And in the context of a monitorship, the legal advice and the business advice provided by a monitor are intertwined. The mix of legal and business advice is necessary to develop a set of recommendations for the corporation and the government that will ensure long-term legal and regulatory compliance.

The proposed statutory privilege would not, however, need to be inviolate. Just as a client can waive the attorney-client privilege, the corporation and the government would be able to waive the privilege if that is the intent of the parties when entering into the settlement agreement. They would need to specify the waiver in the settlement agreement, which expresses the intent of the parties going forward. This would allow for monitorship documents to be made publicly available when appropriate while allowing the default relationship to be one of privilege. Currently, parties have no ability to contract for the privilege. Under the

¹⁵⁵ When the government enters into an attorney-client privileged relationship, "government documents protected by the attorney-client privilege are generally exempt from production under [FOIA]." Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* § 5.18, at 358 (5th ed. 2012). The government privilege, however, "is recognized only for communications that are made and kept in confidence by the governmental entity." *Id.* at 359. Thus, allowing for a monitor's privilege will also require considerations on how expanding another governmental privilege will be affected by FOIA.

¹⁵⁶ See, e.g., *id.* § 5.16, at 349–50 (discussing the difficulties of applying attorney-client privilege due to corporate lawyers' involvement in both business and legal decisions).

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proposal, a monitorship would get the protections of privilege, but the corporation and the government retain the ability to waive, or contract around, the privilege protection provided by statute. Additionally, if a party were able to demonstrate that it is actually unable to access the underlying documents and facts that served as the basis of the monitor's reports, the party would be able to access the monitor's reports under a theory of "undue hardship" in much the same way the exception works for material falling under the traditional work product protection.¹⁵⁷ For example, if, after a monitor's reports have been submitted, the corporation shreds all of the underlying documents relied upon by the monitor, that would be grounds for claiming undue hardship and obtaining access to the monitor's reports.

Providing these protections of privilege is a modest expansion of the types of common law and statutory privileges already in place and will yield the concrete set of rules needed to give parties a sense of normalization when entering into a monitorship.

*C. Benefits to a Monitor-Client Relationship**1. A Privileged Monitor-Client Relationship Provides Needed Stability for Private Lawyers*

Providing for a privileged monitor-client relationship will create a certain level of predictability and concrete sets of expectations that will aid three sets of private lawyers actively involved in monitorships: (1) the representative-lawyer who is responsible for negotiating the agreement that results in a monitorship with the company; (2) the lawyer-monitor who is a lawyer acting as a monitor; and (3) the lawyer acting as counsel to the non-lawyer-monitor, like the auditor-monitor. Monitorships as currently structured create a variety of pitfalls for these individuals.

The representative-lawyer negotiates the agreement between the government and the corporation that results in the retention of a monitor. A good representative-lawyer will attempt to negotiate and draft a settlement agreement detailing a monitorship that is narrow in scope and length of time, but there are no guarantees under the current ad hoc regime of structuring monitorships, leaving representative-lawyers unable to provide concrete guidance to clients. Even when relatively explicit

¹⁵⁷ See supra Subsection III.B.1.

terms are contained in the settlement agreements, they are often entered into prior to the selection of a monitor and are, by necessity, entered into prior to the monitor's development of a detailed work plan.¹⁵⁸ In addition, the representative-lawyer aids the company in drafting the terms of the monitor's contract or retention agreement, but again, under the current monitorship framework, there is little guaranteed protection for the corporation even when explicitly negotiated by the representative lawyer.

For example, in the *AIG* case, the representative-lawyer attempted to guarantee confidentiality of the information *AIG* provided to the monitor by working with the SEC to obtain an order preventing the dissemination of the Monitor Reports.¹⁵⁹ Assuming the representative-lawyer was clear in communicating to the client that there were no guarantees associated with confidentiality, one would assume that the only consequence to the representative-lawyer would be an unhappy client who might terminate the representation. But in the *AIG* case, it is possible that the client might have attempted to bring a legal malpractice action against the representative-lawyer if the district court's decision had been upheld by D.C. Circuit. This is because the district court relied heavily on the fact that the parties came back approximately eighteen months after the court initially granted the consent order to clarify the parties' intent that the Monitor Reports not "be disseminated or available to anyone outside of the entities identified in the Consent."¹⁶⁰ If the client perceived this delayed request as a result of the representative-lawyer's malpractice, the court's decision to deny confidentiality could have resulted in more serious harms to the representative-lawyer.

Similarly, the lawyer-monitor entering into the monitorship relationship is typically left in largely uncharted waters because there is a dearth of guidance regarding the appropriate manner for conducting the monitorship, other than the broadly worded terms of the contractual agreement establishing the monitorship. The scope of a lawyer-monitor's duties to the monitored entity and government is hard to determine because

¹⁵⁸ The monitor, corporation, and government develop an agreed upon work plan, which requires the monitor's involvement. That is not to say the representative-lawyer cannot participate in the process, but the agreement requiring the retention of the monitor would typically have already been memorialized.

¹⁵⁹ *SEC v. Am. Int'l Grp.*, 854 F. Supp. 2d 75, 77–78 (D.D.C. 2012), rev'd, 712 F.3d 1 (D.C. Cir. 2013). See generally *supra* text accompanying notes 89–102.

¹⁶⁰ *Id.* at 78.

the lawyer-monitor is not engaged in a formal attorney-client relationship, yet the lawyer-monitor remains subject to certain professional norms and standards. Because many of the Model Rules are specifically limited to duties to “clients,” lawyer-monitors may be able to engage in conduct during a monitorship that would be inappropriate in an attorney-client relationship without risking sanction from the court or bar. Moreover, the lawyer-monitor may feel uncomfortable providing legal advice on how to ensure compliance with the law outside the confines of a privileged relationship. Additionally, this lack of privilege may effectively stifle the corporation’s willingness to ask questions or raise issues that it believes will cause the lawyer-monitor concern, which would impede the lawyer-monitor’s ability to provide the best possible advice and counsel. The government’s attempts to provide protections via confidentiality agreements in settlement agreements, like in the Total Agreement,¹⁶¹ are laudable but likely would not withstand challenge in court. Privilege cannot be contractually achieved and confidentiality is essentially a poor man’s version of privilege. If a court compels disclosure, the confidentiality guarantees are worth very little.

Finally, the lawyer representing the non-lawyer-monitor is in an equally difficult position. For example, if Acme Corp. is required to retain Big Four accounting firm as its monitor, Big Four may need to, in turn, retain an attorney to assist it in its monitorship efforts. Big Four will likely rely on the attorney to provide Big Four with the legal expertise necessary to develop the recommendations being provided to Acme Corp. But what is the scope of the “privileged” information between Big Four and its attorney? In this case, the attorney-client relationship is one relational level away from a monitorship relationship. Would the attorney’s work that is utilized by Big Four to develop recommendations be subject to privileged protections? If Big Four were a lawyer-monitor, that information would not appear to be entitled to any evidentiary privilege under the terms of the current monitorship agreements, so it would seem strange to allow privileged protections to attach to work done by the monitor’s agents if it is not allowed when the monitor completes the work. Moreover, would Big Four’s attorneys be allowed to speak directly to Acme Corp.? Would that confuse Acme Corp. as to whether the conversations with Big Four’s attorneys are privileged even when Acme Corp. knows its conversations with Big Four are not entitled to privi-

¹⁶¹ Total Agreement, *supra* note 42.

lege? In short, the lawyer representing the non-lawyer-monitor has a minefield of potential pitfalls to dodge in its efforts to provide legal advice to the non-lawyer-monitor who is then responsible for providing legal counsel to the monitored corporation. It is doubtful that any private lawyer would feel comfortable guaranteeing protections of privilege when facing this sort of scenario even while it is likely that the non-lawyer-monitor would expect just those sorts of privileged protections.

The above are just a few of the many concerns private lawyers involved with modern-day monitorships are forced to confront. Allowing for a privileged monitor-client relationship solves many of these problems and uncertainties. At a minimum, the private lawyers would have comfort when they advised their client or undertook the monitorship that when they said something would be “privileged,” it would actually be provided the protections of an evidentiary privilege. Eliminating the various uncertainties currently surrounding who can access information from the monitorship, what can be accessed, and how the information gathered during the scope of monitorships will be utilized by the monitor or disclosed would greatly assist private lawyers responsible for interacting with the monitorship process.

2. A Privileged Monitor-Client Relationship Creates Consistent Norms

Instead of suggesting a privileged monitor-client relationship, this Article could have argued that only lawyer-monitors should be allowed to enter into privileged relationships with monitored corporations. The earliest settlement agreements within the FCPA context, which required the retention of independent law firms, understood that the role of a lawyer-monitor could result in the belief by some that a formal attorney-client relationship would ensue. Moreover, proposed language in the Accountability in Deferred Prosecution Act, which was proposed in both 2008 and 2009 but died in committee, has been characterized as containing a requirement for “potential monitors to have experience in criminal and civil litigation,” which might suggest that monitors need to be attorneys.¹⁶² It is an easier argument from both a practical and analytical perspective because there are a variety of extensions to the traditional attorney-client privilege paradigm provided to lawyers who provide legal

¹⁶² See Khanna, *supra* note 3, at 238 (citing Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. (2009); Accountability in Deferred Prosecution Act of 2008, H.R. 6492, 110th Cong. (2008)).

advice in other contexts. Offering lawyers an additional extension to privileged protections would be an easier incremental step than the argument made here, which suggests a privileged monitor-client relationship be made available for all corporate compliance monitors, even those who are not lawyers. But that seemingly easier argument would result in strange outcomes given the current reality surrounding the retention of corporate compliance monitors, where accountants are sometimes utilized as monitors. Whether a monitored corporation is entitled to a privileged monitorship would hinge upon whether the corporation was able to retain a lawyer or non-lawyer as its monitor, which would provide an incomplete solution to the current problems facing monitorship structures that lack clear rules regarding the enforceable confidentiality associated with a monitor’s reports.

More importantly, allowing for a privileged monitor-client relationship will allow for consistent norms across similar *investigations*, and this will likely provide greater clarity to the individuals within corporations responsible for responding to a monitor’s requests for information. For example, a corporation that discovers wrongdoing will often conduct an internal investigation prior to reporting the violation to the government.¹⁶³ The investigation often requires obtaining documents and information from individual employees within the corporation. If an individual employee provides an internal document entitled to attorney-client privilege to the outside attorney conducting the internal investigation, the individual employee would not have waived any privilege on behalf of the corporation by providing the document to the outside attorney conducting the investigation. Under the current monitorship structure, however, if an individual employee provided that same internal document to a lawyer-monitor, the privilege would be destroyed, despite the fact that under the monitorship terms, the monitored corporation is not required to waive its protections provided by the attorney-client privilege or work product doctrine. It seems reasonable to believe that employees within the corporation may have difficulty parsing the distinctions and protections available when dealing with the outside lawyer engaged to conduct an internal investigation and the outside lawyer engaged to conduct the investigation associated with the monitorship.

Moreover, the investigation associated with the monitorship may have even more significant ramifications for an individual employee’s liabil-

¹⁶³ Green & Podgor, *supra* note 54, at 90–91.

ity. Professors Bruce Green and Ellen Podgor have recently argued that the current mechanisms for conducting internal investigations often lead to abuses in that “individuals with little or no legal training, and unaware of the ramifications and personal consequences, readily cooperate in providing information to corporate lawyers conducting internal investigations,” often to the individuals’ detriment.¹⁶⁴ They argue that the requirements in the Model Rules that “lawyers . . . take steps to prevent or correct individuals’ erroneous beliefs that the corporation’s lawyers represent them . . . do not overcome all expectations developed by employees who have grown accustomed to turning to corporate counsel when an issue with legal implications arises.”¹⁶⁵ But at least the employees get a guaranteed, concrete warning in the context of the internal investigation that has the potential to alert them to the possibility of individual liability. In the context of a monitorship, a lawyer-monitor should give a similar warning to explain to the unrepresented employee that the lawyer-monitor is not representing the employee. But it is not clear that the non-lawyer-monitor would provide a similar warning, although one would hope that a warning would be required. The upshot is that, to the extent one might worry that a legally unsophisticated employee would not clearly understand the ramifications of interacting with outside counsel, the concerns should be equal if not greater when the legally unsophisticated employee is left to interact with a corporate compliance monitor.

Allowing a privileged monitor-client relationship should mitigate at least a portion of these concerns by allowing the individual employees to interact with the monitor conducting the investigation in the same manner in which the individual interacts with outside counsel conducting the internal investigation.

IV. DRAWBACKS AND UNRESOLVED CONCERNS

This Part outlines some of the drawbacks and unresolved concerns associated with the proposed monitor-client relationship. This Part addresses two objections: first, that allowing a privileged monitor-client relationship will provide the corporation with a vehicle to hide misconduct and block the public’s ability to access information; and second, that this proposal will decrease the deterrent value of monitorships and

¹⁶⁴ *Id.* at 75.

¹⁶⁵ *Id.*

result in monitor capture. The Part then addresses two concerns that corporations would continue to have regarding monitorships even under the Article’s proposed framework: the high costs of monitorship and the potential for the discovery of new liabilities by the monitor.

A. Drawbacks to a Monitor-Client Relationship

Despite the many benefits associated with the proposed monitor-client relationship, the proposal does require making tradeoffs. The increased effectiveness of the monitorship may be at the expense of (perceived) monitor independence and public dissemination of information gleaned during the course of the monitorship. But even with these possible marginal costs, if the proposal results in more effective monitorships and increased long-term legal and regulatory compliance, it would benefit not only the corporation, monitor, and government, but also the public and society at large.

1. A Privileged Monitor-Client Relationship May Sacrifice the Independence of the Monitor and Result in the Monitor Shielding Corporate Misconduct

Some may fear that allowing a privileged relationship between the monitor and the corporation will allow the corporation to shield improper conduct behind the privileged relationship.¹⁶⁶ For example, in 1998, it was discovered that attorneys for tobacco companies had grossly abused the attorney-client privilege by encouraging the tobacco companies to utilize the “privilege to conceal deception.”¹⁶⁷ The confidential industry documents revealed that for over thirty years, tobacco companies were concerned about whether nicotine was addictive and whether the ingestion of tars correlated with cancers.¹⁶⁸ The companies did not want to conduct scientific research that might become discoverable to other parties, so they had “their ‘scientific’ research conducted under the close consultation, and sometimes under the management, of their lawyers. The idea was that bad findings could be held back as lawyer-client con-

¹⁶⁶ See Lawton P. Cummings, *Globalization and the Evisceration of the Corporate Attorney-Client Privilege: A Re-Examination of the Privilege and a Proposal for Harmonization*, 76 *Tenn. L. Rev.* 1, 29–30 (2008) (citing Stuart Taylor Jr., *Tobacco Lawyers and the Case for Cover-up Reform*, 33 *Nat’l J.* 388, 388–89 (2001)).

¹⁶⁷ Geoffrey C. Hazard, *Tobacco Lawyers Shame the Entire Profession*, *Nat’l L.J.*, May 18, 1998, at A22.

¹⁶⁸ *Id.*

fidences, whereas good findings could be described as the product of scientific inquiry.”¹⁶⁹ Some may fear that allowing a privileged monitor-client relationship could result in similar scandals and harm to the public, such that only complete monitor independence can protect against possible misuses of the monitor-client relationship.

These types of fears are largely misplaced. The lawyers who assisted the tobacco companies in committing this massive fraud upon the public were not acting within the bounds of their ethical obligations. A lawyer is to advise a client, not assist a client in wrongdoing. The Model Rules explicitly prohibit this type of conduct. One applicable rule states that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client.”¹⁷⁰ A monitor, like a lawyer, is not engaged to assist the corporation in wrongdoing and a monitor’s knowledge of wrongdoing does not prevent the misconduct from being discovered. If a monitor were to assist the corporation in improper misconduct, the monitor would be subject to independent legal and criminal sanctions.

Moreover, in the context of the monitorship there is an additional check on the relationship that will deter collusion between the monitor and the corporation—the government. The three-party relationship amongst the monitor, corporation, and government makes it quite difficult for the corporation to hide its wrongdoing behind the guise of the privileged relationship because the government is a party to that relationship. The government will be alerted to the potential wrongdoing of the corporation, making it virtually impossible for the corporation to run from criminal sanctions. If a monitorship uncovers additional misconduct that results in criminal sanctions, those sanctions would be subject to public disclosure just as the initial violation prompting the monitorship was disclosed to the public.

2. Lack of Public Disclosure

There will be some who will lament the lack of public disclosure associated with the proposed monitorship structure. They would be in favor of the dissemination of a monitor’s reports to the public at large, so that people, like the reporter who intervened in the AIG case, would be

¹⁶⁹ *Id.*

¹⁷⁰ Model Rules of Prof’l Conduct R. 1.2(d) (2013).

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able to accurately convey the scope and nature of corporations' misconduct.

There is certainly something helpful, and in some instances cathartic, about bringing what was once hidden out into the light of day. This can often be seen in instances where what could be termed “public monitors” provide an investigatory function that allows the public to determine the extent of wrongdoing. An example of a public monitor can be found in the role of “Louis J. Freeh, the former federal judge and director of the F.B.I., who spent . . . seven months examining the [Jerry] Sandusky scandal at Penn State.”¹⁷¹ When the news of the child abuse scandal broke, it became incredibly important for the public, and for the reputational capital of the university, to have the matter fully investigated and disclosed so as to allow for healing to begin and the scandal to come to a conclusion. Given the nature of the scandal, a public investigation was needed by an individual considered above reproach so that the university would not suffer years of additional innuendo and suspicion regarding the scope of the misconduct.¹⁷²

A corporate compliance monitor is not a public monitor. A corporate compliance monitor is engaged to ensure corporate compliance. This Article does not mean to suggest that public awareness of wrongdoing has no deterrent effect on conduct within corporations—it does. Yet the deterrent effect of allowing the public and investigative journalists full access to a monitor's reports must be balanced against the goal of encouraging a monitorship relationship that will result in the best recommendations for the corporation going forward, which will hopefully increase the effectiveness of future compliance efforts at the corporation. As demonstrated by the AIG case, AIG would not have consented to the monitorship if the information in the monitor's reports were to have been made public.¹⁷³ The public's interest in having full access to

¹⁷¹ Ken Belson, *Abuse Scandal Inquiry Damns Paterno and Penn State: Fear of Publicity Cited in Effort to Conceal*, N.Y. Times, July 13, 2012, at A1.

¹⁷² Ironically, the importance of providing a full, public report quickly to ensure prompt resolution has resulted in additional controversy regarding the legitimacy of the Freeh report. See Genaro C. Armas, *Paterno Family Issues Report, Challenges Freeh's Findings*, Wash. Times (Feb. 10, 2013), <http://www.washingtontimes.com/news/2013/feb/10/paterno-family-issues-report-challenges-freehs-fin/?page=all>.

¹⁷³ Brief for the Appellant at 20–21, *SEC v. Am. Int'l Grp.*, 712 F.3d 1 (D.C. Cir. 2013) (No. 12-5141) (“AIG's willingness to make such complete disclosures to the [Independent Consultant], and the SEC's ability to achieve the remedial and prophylactic relief obtained in the Consent, depended on the understanding that the [Independent Consultant] Reports would be kept confidential.”).

the monitor's reports must be balanced against the possibility that there is a class of companies—some of which have the ability to effect substantial changes on the U.S. economy—who will balk at the imposition of a corporate compliance monitor without assurances of confidentiality.

This proposal is not suggesting that wrongdoing be hidden from the public. The question is not whether there is an all-or-nothing disclosure of wrongdoing—under this proposal the wrongdoing and any additional misconduct discovered would be disclosed to the public. The monitor-client privilege is simply meant to protect the communications among the monitor, corporation, and government, which includes keeping the monitor's reports under the protections of privilege.

One alternative to withholding a monitor's reports in their entirety would be to provide the reports to the public but redact sensitive information.¹⁷⁴ For example, when a corporation repeatedly engages in unfair or deceptive practices or acts in a manner that disregards fair competition, the Federal Trade Commission ("FTC") often imposes, via consent order, a twenty-year biennial external audit, which requires an independent third party to monitor and evaluate an offender.¹⁷⁵ By statute, the FTC has a great deal of leeway in determining how much information it will release regarding a consent order, but it is not allowed "to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential."¹⁷⁶ The FTC treats the "assessment reports" completed by the individual conducting the biennial audit as confidential, and, when responding to FOIA requests, the FTC retains the right to designate large portions of the report, including information shared between the auditor and the company, withheld from the public record.¹⁷⁷

¹⁷⁴ Khanna, *supra* note 3, at 244 (explaining that "it is possible that certain parts of the monitors' reports may not be essential to enhance the chances of reducing wrongdoing or alerting victims, but rather may be more embarrassing to the firm as a whole or may undermine its competitive position").

¹⁷⁵ E.g., Facebook, Inc., FTC File No. 092-3184, Docket No. C-4365, at 6 (July 27, 2012), <http://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf>.

¹⁷⁶ 15 U.S.C. § 46(f) (2006).

¹⁷⁷ See, e.g., Letter from Dione J. Stearns, Assistant Gen. Counsel, FTC, to Ginger McCall, Electronic Privacy Information Center ("EPIC") (Sept. 25, 2012), available at <http://www.epic.org/privacy/ftc/googlebuzz/FTC-Initial-Assessment-09-26-12.pdf> (responding to EPIC's FOIA request for Google's Initial Privacy Assessment and producing a redacted version of that document).

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A similar set of norms could be duplicated in the monitor context and might be a good potential avenue to pursue.¹⁷⁸ One could allow for a monitor-client privilege and still allow for the public dissemination of a monitor’s reports as long as the “privileged” information was redacted and kept confidential. This sort of resolution is, however, unlikely to quell the concerns of those who believe that public disclosure is needed.

Negotiating the concerns of the public, the government, and the corporation is a complicated exercise. Here, instead of full public disclosure or a completely confidential monitorship that withholds even wrongdoing on the part of the corporation, this Article suggests a statutory privilege that facilitates a more effective monitorship. Again, the public will still be made aware of the misconduct, just not the minutia.

3. Inhibiting Private-Party Litigation

Others may argue that allowing public dissemination of a monitor’s reports will assist private-party litigation, which serves as a deterrent to corporate wrongdoing. There are some that will criticize the use of a monitor-client privilege because it will require duplicitous work on the part of plaintiffs’ attorneys. They will argue that it is more efficient to allow for public dissemination of a monitor’s report, so that the attorneys do not have to reproduce the investigation performed by the monitor. Private-party litigation provides a benefit to overall compliance efforts because it serves as yet another deterrent to corporate wrongdoing. Moreover, it allows for parties harmed by the corporate wrongdoing to receive compensation, which does not always occur as a result of the government investigation.

These concerns are valid and the benefits of private-party litigation are not to be discounted. But those benefits, again, must be weighed against the interest in encouraging corporations to freely enter into relationships with corporate compliance monitors that result in the full and frank discussions necessary to develop the most effective set of recom-

¹⁷⁸ Note that this is essentially what the district court judge in the AIG case had planned to provide to the reporter—redacted versions of the monitor’s report—although the suggested redactions do not appear to have been as extensive as those utilized in the FTC context. *SEC v. Am. Int’l Grp.*, 854 F. Supp. 2d 75, 81 (D.D.C. 2012), rev’d, 712 F.3d 1, 5 (D.C. Cir. 2013).

mendations for the corporation's compliance efforts.¹⁷⁹ Corporations have concerns regarding greater dissemination of monitor reports, including a fear that it may provide plaintiffs' attorneys with grounds for filing lawsuits, which would result in large litigation costs for the corporation and potential damage to the value of the shareholders' interest in a public corporation.¹⁸⁰ If corporations believe there will be open disclosure of monitors' reports, it could, as argued by AIG, "negatively impact the free flow of proprietary and privileged information that is currently enjoyed by consultants and monitors, hindering the reliability of the reports utilized by the SEC and other government agencies to fulfill oversight obligations within severe budget constraints."¹⁸¹ Again, the privilege suggested here would not prevent private-party litigation; instead, it would set up rules that facilitate the monitorship's goals without also facilitating private-party litigation.

B. Potential Concerns for Regulators

Regulators may be hesitant to embrace this proposal for fear of decreasing the effectiveness of monitorships. The biggest concern for regulators is likely that allowing a privileged relationship between the monitor and the corporation may decrease the deterrent value of the monitorship. In addition, regulators may be concerned that encouraging a friendlier relationship between the monitor and corporation may result in monitor capture, making the monitor less apt to take an independent, skeptical viewpoint when dealing with the corporation.

1. A Privileged Monitor-Client Relationship May Decrease the Deterrent Value of Monitorships

Allowing for a more cooperative relationship between the monitor and the corporation, while consistent with the goals of monitorship, may decrease some of the deterrent effect of monitorships. Monitorships are often perceived as penalties by corporations and, like any rational actor,

¹⁷⁹ See Ford & Hess, *supra* note 3, at 703 ("[T]he advantages of opening the process to a wider group of stakeholders may be outweighed by the potential chilling effect on the corporation's complete participation in the negotiations and the monitorship process.").

¹⁸⁰ This is especially problematic if the information in the monitor's report is not required to be included in the public company's annual disclosures to the SEC.

¹⁸¹ Brief for the Appellant, *supra* note 173, at 16.

the corporation will prefer to avoid the penalty.¹⁸² By structuring the monitorship in a less penalizing and more cooperative fashion, corporations may not feel as strong an incentive to avoid monitorships, thereby decreasing the deterrent value of monitorships.

While it is true that the monitorship structure proposed here is less unpleasant, and purposely so, for the monitored corporation, the potential for superior disclosure by corporations to the monitors charged with providing recommendations for improving long-term compliance seems to outweigh that benefit. Why punish for the sake of punishment when long-term adherence to legal and regulatory frameworks can be achieved through less adversarial means? Again, this is an issue of balancing the deterrence benefit provided by including the retention of a compliance monitor as part of the terms of a settlement agreement with the possibility of structuring the monitorship in a manner that is more likely to improve the future compliance of the corporation.

2. Encouraging a Relationship Between the Monitor and Corporation May Result in Monitor Capture

Encouraging a formalized relationship between the monitor and the corporation may also lead to “monitor capture,” a similar phenomenon to the much-examined “regulatory capture.” “Capture refers to an extremely close relationship between regulators and industry.”¹⁸³ And while not all scholars believe that capture is problematic,¹⁸⁴ it is accepted that capture could lead to “sympathy to industry (implying excessive sympathy), identification with industry’s interest, and (unduly) lax enforcement.”¹⁸⁵ Similarly, there are some who may argue that this Article’s proposal could lead to monitor capture, which would not increase the effectiveness of the monitorship. Indeed, if the ills associated with regulatory capture were to be translated into the monitorship relationship, this Article’s proposal would likely decrease the effectiveness of monitorships.

¹⁸² See Khanna & Dickinson, *supra* note 3, at 1727–28 (explaining how “more influential monitors” are similar to sanctions).

¹⁸³ Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 *Wake Forest L. Rev.* 569, 570 (2012).

¹⁸⁴ *Id.* at 569–72 (noting the benefits associated with industry and regulators working together).

¹⁸⁵ *Id.* at 578–79 (citing Toni Makkai & John Braithwaite, *In and Out of the Revolving Door: Making Sense of Regulatory Capture*, 12 *J. Pub. Pol’y* 61, 64, 66 (1992)).

There is, however, a check in this Article's proposed framework that should diminish the likelihood of monitor capture—the government. As envisioned, the proposed framework creates a relationship amongst the monitor, corporation, and government. A monitor is an agent of both the corporation and the government and must act in the best interests of both parties at all times. In addition, the government has full access to the activities and the communications between the monitor and the corporation—nothing is hidden from the government in the proposed framework. Thus, the proposed framework builds in a significant check that should curb the incidents of negative monitor capture while allowing for the benefits of collaboration associated with monitor capture.¹⁸⁶

C. Remaining Concerns for Corporations

As demonstrated by the above discussion, adopting a new framework for monitorships designed around a privileged “monitor-‘client’ relationship” has many benefits for corporations and the long-term increased effectiveness of monitorships. There are, however, two concerns for corporations that will remain even if this Article's suggestions are implemented: (1) increased monitorship costs and (2) the possibility of additional liability arising out of the monitorship.

1. High Monitorship Costs

Corporations are currently and will continue to be scared of the costs of monitorships, which can very quickly rack up millions of dollars in monitorship fees.¹⁸⁷ The most famous fee scandal, which put monitorships squarely in the public eye, is probably the monitorship undertaken by former Attorney General John Ashcroft. Zimmer, Inc. and Zimmer Holdings, Inc. (collectively “Zimmer”), a company manufacturing hip and knee surgical implants, was one of five companies that paid financial inducements to surgeons in violation of a federal anti-kickback stat-

¹⁸⁶ See generally *id.* at 569–90 (discussing the benefits of collaboration associated with regulatory capture).

¹⁸⁷ See Transparency and Integrity in Corporate Monitoring: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 46–48 (2009) (statement of Eileen R. Larence, Director, Homeland Security and Justice, Government Accountability Office) (detailing corporations' concerns with “the overall cost of . . . monitorship”).

ute in an effort to have their products used.¹⁸⁸ Ashcroft, with no public notice or bidding, was awarded an eighteen-month contract, valued at \$28 to \$52 million, to serve as a monitor to Zimmer.¹⁸⁹ The fees associated with the monitorship were considered to be a boondoggle for Ashcroft, the former boss of the federal prosecutor handling the case, and resulted in “an internal inquiry into the department’s procedures for selecting outside monitors to police settlements with large companies.”¹⁹⁰

The extreme nature of the costs of monitorship is in part due to the weak negotiating power corporations have with prospective monitors, and changing the nature of the monitorship relationship will not fix this problem.¹⁹¹ The potential monitor knows that the corporation has a limited set of individuals that the government is likely to approve to run the monitorship, thus the monitor has little incentive to offer a reduced rate or flat fee billing. Changing the structure of the relationship between the monitor and the corporation will not diminish the reality that those deemed qualified to act as monitors will often be able to demand a premium in fees and that the corporation facing the retention of a monitor will be forced to pay this premium.¹⁹²

¹⁸⁸ See Press Release, U.S. Dep’t of Justice, Five Companies in Hip and Knee Replacement Industry Avoid Prosecution by Agreeing to Compliance Rules and Monitoring (Sept. 27, 2007), <http://www.justice.gov/usao/nj/Press/files/pdffiles/Older/hips0927.rel.pdf>; see also 42 U.S.C. § 1320a-7b(b)(2) (2006) (making it a felony to exchange anything of value in an effort to induce the referral of federal health care program business); Corporate Integrity Agreement Between the Office of the Inspector General of the Department of Health and Human Services and Zimmer, Inc. (Sept. 27, 2007), available at <http://www.justice.gov/usao/nj/Press/files/pdffiles/Older/ZimmerCIA92707.pdf> (detailing Zimmer’s voluntary five-year-long compliance program undertaken as a condition of its deferred prosecution agreement).

¹⁸⁹ Philip Shenon, Ashcroft Deal Brings Scrutiny in Justice Dept., N.Y. Times, Jan. 10, 2008, at A1.

¹⁹⁰ Id.

¹⁹¹ The Morford Memorandum sets out a variety of factors governing the selection of monitors, evidencing the several layers of approval that a prospective monitor must go through. See Warin, *Diamant & Root*, supra note 1, at 346 (citing Morford Memorandum, supra note 1, at 3). This extensive approval process makes it difficult for the corporation to enter into aggressive negotiations with potential monitors, because the class of people eligible to serve as monitors is quite small.

¹⁹² I am limiting this discussion to the costs charged by the monitor and any professionals assisting the monitor, but the monitorship has a variety of other associated costs, like costs the company incurs consulting with the corporation’s separate counsel, the loss of employee productivity, etc.

There are a few possible solutions to this concern, although a robust analysis of these issues is beyond the scope of this Article.¹⁹³ First, the payment structure of monitorships could be modified in a manner that would incentivize the government to take a more active role in negotiating a lower fee arrangement. Currently, the agreements resulting in the retention of monitors require the monitored corporation to take sole responsibility for the costs of monitorship. If one is truly concerned with the high costs of monitorship, then requiring the government to bear the burden in total, or at least split the costs of the monitorship, would appear to aid in providing the government with an incentive to assist the monitored corporation in finding a mutually agreeable monitor who will provide services at a competitive rate. The government could utilize a portion of the fines paid by the corporation as part of the settlement agreement to offset the costs of the monitorship, lessening the burden on public resources. And as one of the main functions of the monitorship is to provide the government with an additional enforcement agent, it would seem plausible that the government should bear at least some of the enforcement costs associated with the monitorship.

Another alternative is increased judicial oversight of monitorships, so that an independent adjudicator is able to assess and review the monitor's fees. For example, in major bankruptcy cases, courts commonly use fee examiners to ensure "the reasonableness of the work billed and the cost of [the] work."¹⁹⁴ Employing this process ensures that the party subject to bankruptcy is not charged excessively high fees. In theory, a similar process could be employed for monitorships that are subject to court approval, but many monitorships are entered into without any court involvement. Even when courts are involved in approving the agreement establishing the monitorship, when the agreement comes in the form of a deferred prosecution agreement or consent order, courts typically do not attempt to participate in the selection process or review the terms of the agreement between the corporation and the government entity that requires the monitorship. In fact, the agreements approved by

¹⁹³ There was also the possibility of a congressional fix to the problem of excessive monitorship fees, but the bill died in committee in 2009 and has not been reintroduced. See Khanna, *supra* note 3, at 236 (citing Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. (2009); Accountability in Deferred Prosecution Act of 2008, H.R. 6492, 110th Cong. (2008)).

¹⁹⁴ Lois R. Lupica & Nancy B. Rapoport, Best Practices for Working with Fee Examiners, 32 *Am. Bankr. Inst. J.* 20, 20 (2013).

the courts typically state that a monitor is required to be retained, but the monitor and the monitor’s fee structure are not identified to the court. There has been at least one instance where this drew criticism from a court.¹⁹⁵ If courts charged with approving agreements requiring the retention of monitors took a more active role in scrutinizing the terms of the monitorship and fee structures, it might help bring down the costs or curb fee abuse on the part of monitors.

A third, more limited alternative would be to require lawyer-monitors to adhere to the fee obligations under the Model Rules when entering into monitorship arrangements. Under Model Rule 1.5, lawyers are not allowed to charge clients excessive fees.¹⁹⁶ And if an excessive fee is charged, the client can file a complaint with the relevant state bar disciplinary authority or file a civil action against the attorney. The problem, of course, is that not all monitors are lawyers, leaving a whole swath of potential monitors outside the ambit of this solution.

Unfortunately, none of these solutions are particularly helpful if the monitorship work plan is structured in a manner that belies efficient success. If the government regulator or the monitor establishes a work plan that is destined to fail or that is too onerous, the costs of the monitorship could skyrocket even if the “fee structure” is deemed “reasonable.” The only real protection against that possibility would likely be a flat fee arrangement for monitorships, but a flat fee arrangement may have its own set of disincentives for the monitor to engage in the robust investigation needed to ensure its recommendations are sufficiently tailored to the unique needs of the corporation.¹⁹⁷

In short, there do not appear to be any easy solutions for bringing down the costs of monitorships, and the monitorship’s high costs are going to continue to cause corporations to balk at the idea of retaining a monitor. This may just be the price the corporation has to pay for “allowing” the compliance failure leading to the monitorship.

¹⁹⁵ See Peter J. Henning, *When Judges Refuse to Be Rubber Stamps*, N.Y. Times DealBook (Mar. 22, 2010, 12:33 PM), <http://dealbook.nytimes.com/2010/03/22/when-judges-refuse-to-be-rubber-stamps>.

¹⁹⁶ Model Rules of Prof’l Conduct R. 1.5 (2013).

¹⁹⁷ See, e.g., Khanna, *supra* note 3, at 240 (“The core problem with a flat fee structure is that it treats each expert’s time as if it is fungible. This does not seem likely to be generally true.”).

2. *Discovery of New Liabilities*

Corporations will also remain concerned that a monitor, who is given largely unrestricted access to the corporation's records and personnel, may stumble upon, or go looking for, additional improper conduct that could result in increased liability for the corporation. Under the current regime, the monitor alerts the company and the government if other types of misconduct are found during the course of the monitorship. For example, a monitor retained by Willbros Group discovered "incidents" that the monitor "found to be significant," which led to the monitor and the corporation meeting separately with the DOJ.¹⁹⁸ The company reported that these incidents could result in further investigation from the DOJ.¹⁹⁹ The potential liability as a result of such revelations goes beyond government sanctions and could result in reputational harm and additional private actions brought by enterprising plaintiffs' attorneys.²⁰⁰

To the extent that new liabilities are a concern for corporations, they seem like part of the price the corporation must pay for allowing the misconduct to occur. Moreover, if additional wrongdoing were to be found, the corporation itself would likely have a duty to disclose the newly discovered improper conduct to the government. At a minimum, corporations are already subject to a variety of statutorily imposed reporting obligations when misconduct is discovered.²⁰¹ And many settlement agreements build upon this statutory requirement by requiring the corporation to report wrongdoing that is discovered during the term of the monitorship.²⁰² Essentially, the agreement requires disclosure of sim-

¹⁹⁸ See Warin, Diamant & Root, *supra* note 1, at 354 (quoting Willbros Grp., Current Report (Form 8-K), exhibit 99.2 (May 20, 2010)).

¹⁹⁹ *Id.*

²⁰⁰ See, e.g., Green & Podgor, *supra* note 54, at 86–87 ("The possibility of shareholder derivative actions or other third-party civil claims looms in the background and complicates both the investigation and the corporation's response.").

²⁰¹ See *id.* at 89 (discussing incentives corporations have to conduct internal investigations into corporate wrongdoing to avoid or mitigate liability under numerous federal laws).

²⁰² For example, in the deferred prosecution agreement settling alleged FCPA violations between the DOJ and Diebold, Inc., the company agreed to pay a \$25.2 million penalty and retain an independent compliance monitor for eighteen months. See Deferred Prosecution Agreement paras. 6, 10, 12, *United States v. Diebold, Inc.*, No. 5:13-CR-464 (N.D. Ohio Oct. 22, 2013), available at http://www.justice.gov/criminal/fraud/fcpa/cases/diebold/combined_dpa.pdf. In addition to these requirements, Diebold committed to "continue to cooperate fully with the [DOJ] in any and all matters relating to corrupt payments and related false books and records and inadequate internal controls, subject to applicable law and regulations" and to "cooperate fully with other domestic or foreign law enforcement authori-

ilar criminal misconduct to that which led to the non-prosecution agreement in the case, which could lead to further penalties imposed upon the company. Given that misconduct at the corporation has already been discovered, it is not surprising that the government requires the company to disclose at least certain categories of misconduct.

CONCLUSION

Corporate compliance monitors have become a constant in today's compliance-driven legal and regulatory state. This Article makes three contributions to the academic discourse regarding corporate compliance monitorships. First, it distinguishes the role of corporate compliance monitors, who are not charged solely with “monitoring” the corporation's conduct, from the role of traditional gatekeepers, who are responsible for monitoring the corporation in an effort to stop wrongdoing and alert the proper authorities when wrongdoing occurs. In contrast, a corporate compliance monitor is responsible for identifying the compliance failure, determining why the failure occurred, and providing recommendations on how to prevent future compliance failures. Second, the Article determines that monitors are performing a dual function. They are serving as agents of the government, but they are also serving as legal counselors to the corporation by providing legal advice on how to improve future legal and regulatory compliance. A monitor's responsibility as a legal counselor has not been fully appreciated when structuring monitorships. Third, the Article argues that a monitor's legal counseling function would be better facilitated if the monitorship operated under a set of bright-line rules that provided predictability for corporations and monitors regarding the nature of the relationship between them. The Article suggests that monitorships would be more effective if provided a statutory privilege that protects communications amongst the monitor, corporation, and government. Providing this privilege will encourage the monitor, corporation, and government to enter into a new type of relationship—the monitor-“client” relationship.

ties and agencies . . . in any investigation of the Company, its affiliates, . . . or any other party, in any and all matters relating to corrupt payments.” *Id.* para. 5.

