

ADOPTED

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association adopts the black letter of the *ABA*
- 2 *Standards for Criminal Justice: Monitors*, dated August 2015.

1 THE AMERICAN BAR ASSOCIATION
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3 STANDARDS FOR CRIMINAL JUSTICE: MONITORS
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6 Presented by the
7 CRIMINAL JUSTICE SECTION
8 for Adoption by the House of Delegates
9 Annual Meeting, Chicago, IL
10 August 2015
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71 **INTRODUCTION**

72 Monitors, known by a variety of names including external compliance officers and
 73 Independent Private Sector Inspectors General (IPSIGs), have become a common judicial,
 74 regulatory, and conflict resolution tool. In most instances, a Monitor is installed by agreement
 75 between a company or other public or private entity (referred to in these standards as the Host
 76 Organization) and a state or federal government department or agency (The Government). The
 77 agreement between the parties (the Agreement), often resulting from some concern about fraud,
 78 misconduct, or regulatory violation, often enables the host organization to mitigate, suspend or
 79 avoid government actions or penalties, such as debarment, administrative charges, or indictment,
 80 through the host organization's commitment to perform the actions enumerated in the
 81 Agreement.

82 In some cases, the Monitor may be imposed by a court as a condition of probation or as
 83 part of a civil remedial action or settlement. Typically, the Host Organization will enter into an
 84 Engagement Letter (Engagement Letter) with the Monitor setting forth the responsibilities and
 85 authorities of the Monitor and obligations of the Host Organization.

86 Once in place, a Monitor may serve a variety of functions. These frequently involve
 87 remedial measures within the Host Organization's corporate compliance and ethics program, but
 88 vary greatly in accordance with the underlying issues giving rise to the Agreement. For
 89 example, the Monitor may advise an organization on the implementation of a compliance
 90 program, audit the organization's compliance with its Agreement with the Government,
 91 investigate the organization's compliance with law, as well as acting to reduce waste, abuse, and
 92 fraud and increase the Host Organization's economy, efficiency, and effectiveness. In some
 93 cases, the efforts of Monitors may be intended to result in a change to the Host Organization's
 94 cultural environment.

95 Although Monitors may serve these and other functions, they have certain central
 96 features in common, including being independent of both the Government and the Host
 97 Organization, and having an obligation to report to the court, the Government, or both,
 98 concerning the Host Organization's conduct. These Standards provide guidance both to court-
 99 ordered Monitors and to Monitors installed by Agreement between the Government and the
 100 monitored entity, distinguishing between the two circumstances as appropriate.

101 A host organization may also voluntarily enter into an Engagement Letter with a Monitor
 102 in order to ensure or measure the host organization's compliance with laws, regulations, and
 103 codes of conduct. While these standards will almost always be applicable to a Monitor engaged
 104 voluntarily, the lack of an Agreement with the Government or a Court Order technically takes
 105 such a situation outside the definitions as used herein.

106

107 **I. DEFINITIONS**

108 For purposes of these standards:

109 A. "Agreement" means an agreement between the Host Organization and the Government in
 110 which the Host Organization agrees to utilize the services of a Monitor and which
 111 establishes the scope of the monitorship.

112 B. "Compliance Program" means the system of policies and procedures implemented by the
 113 Host Organization to encourage ethical behavior and to reasonably prevent, detect, and
 114 respond to misconduct by employees or agents of the organization.

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- 115 C. “Court Order” means an administrative or court order that provides for the Host
116 Organization to utilize the services of a Monitor.
- 117 D. “Engagement Letter” means the contract between the Host Organization and the Monitor
118 entered into in connection with the Agreement or Court Order.
- 119 E. “Financial Interest” means any material financial interest that could potentially be
120 affected by the financial decisions of, or the successes or failings of, the Host
121 Organization, whether held directly or indirectly or by a family member. The interest is
122 material if it is of sufficient value that a reasonable person might believe it has the
123 capacity to affect one’s judgment in serving as a Monitor.
- 124 F. “Government” means (1) a public department or agency; or (2) any other entity that has
125 oversight over the Host Organization due to regulatory authority, contractual agreement,
126 or court order.
- 127 G. “Host Organization” means the organization that engages the Monitor.
- 128 H. “Monitor” means a person or entity:
- 129 • Engaged by a Host Organization pursuant to a Court Order or an Agreement and
130 Engagement Letter;
 - 131 • Who is independent of both the Host Organization and the Government;
 - 132 • Whose selection is approved by the Government or ordered by a court; and
 - 133 • Whose responsibilities and authority are established by Court Order or by the terms
134 of the Agreement and the Engagement Letter.
- 135 I. “Monitorship Team” means those individuals or organizations engaged by, and operating
136 under the authority and supervision of, the Monitor in assisting in the discharge of the
137 duties of the Monitor as described in the Court Order or the Agreement. The Team
138 includes, inter alia, employees, subcontractors, and consultants engaged by the Monitor.
- 139 J. “Work Plan” means a written analysis of the responsibilities and authority of the Monitor
140 and how the Monitor intends to fulfill those responsibilities and exercise that authority.
141 To the extent possible, the Work Plan should outline the specific tasks to be undertaken
142 and a realistic timeline for each to be completed.

143

144 **II. MONITOR SELECTION**

145 **A. General Principles**

146 The Government, Host Organization, and court, for Monitors appointed subject to a
147 Court Order, should consider what qualifications are necessary for a Monitor to effectively
148 conduct the monitorship based on the specific facts and circumstances of the matter. The
149 Monitor selection process should ensure that the Monitor is a highly competent person or entity
150 for the specific assignment and that the Monitor possesses the qualifications set forth under these
151 standards. Absent extraordinary circumstances, both the Host Organization and the Government
152 should be allowed to have a significant role in the selection process.

153

154 **B. Candidate Pool**

155 The selection process should encourage consideration of a broad range of Monitor
156 candidates that should not be artificially limited by demographic, professional, and geographic
157 factors. When possible, the Government should announce the decision to select a Monitor so
158 that appropriate persons or entities may submit indications of interest.

159

160 **C. Pre-qualified Monitor Pool**

161 It may be appropriate for the Government to establish, and update on a regular basis, a
 162 pre-qualified pool of Monitors who are capable of handling an expected Monitor role where:

- 163 1. The Government expects the Monitors to have substantially similar assignments;
- 164 2. The Government expects that the timely selection of a Monitor will be of
 165 significant importance; or
- 166 3. The Government determines that there is a need to be able to provide names of
 167 potential Monitors to Host Organizations when requested.

168 **D. Selection Criteria**

169 When determining the necessary qualifications of the Monitor and when reviewing
 170 Monitor candidates, the following factors should be considered:

171

172 **1. Qualifications**

- 173 a) The integrity, credibility and professionalism of the Monitor.
- 174 b) The expertise or experience in the industry or specific subject matter of the
 175 monitorship.
- 176 c) The relevant skills and experience necessary to discharge the duties of the
 177 Monitor as described in the Court Order or the Agreement.
- 178 d) The expected structure of the Monitorship Team and the ability of the Monitor to
 179 access and deploy resources as necessary to discharge the duties of the Monitor as
 180 described in the Court Order or the Agreement.
- 181 e) The commitment to serving as the Monitor for the entire monitorship term.

182 **2. Costs**

- 183 a) The Monitor's cost structure for the Monitorship Team.
- 184 b) The Monitor's projected costs to discharge the duties of the Monitor as described
 185 in the Court Order or the Agreement.
- 186 c) Any other costs expected to be imposed on the Host Organization by reason of a
 187 particular Monitor's selection.

188 **3. Mandatory Exclusions**

189 The following persons should not be permitted to serve as Monitors:

- 190 a) Former Government employees who, while employed by the Government, were
 191 involved in the matter giving rise to the monitorship.
- 192 b) Any person who was involved in, supervised persons involved in, or otherwise
 193 had responsibility over the activity giving rise to the monitorship.
- 194 c) Any person who was involved in structuring, reviewing, supervising, or providing
 195 advice regarding the Compliance Program or the internal controls related to the
 196 wrongdoing and in place at the time of the wrongdoing, where an objective
 197 review of that Compliance Program or system of internal controls pursuant to the
 198 Monitor's mandate might reasonably call into question the efficacy and value of
 199 that work or the implementation thereof.

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- 200 d) Any person who provided non-monitoring legal or other professional services to
201 the Host Organization relating to the activity giving rise to the monitorship.
202 e) Any person who has a Financial Interest related to the Host Organization.
203

204 4. Potential Exclusions

205 When determining the severity of the following potential conflicts of interest and
206 the extent to which each could impair, or be perceived to impair, the Monitor's
207 judgment or independence, as balanced against the qualifications of that Monitor, the
208 following factors should be considered:

- 209 a) Prior, non-Monitor work with the Host Organization that was unrelated to the
210 activity, or the investigation of the activity, giving rise to the monitorship, with
211 appropriate consideration given to the significance and nature of the work, and the
212 time period during which the work occurred.
213 b) Prior Monitor work for the Host Organization, including independent monitoring
214 work initiated by the Host Organization in response to the discovery of the
215 wrongful acts that gave rise to the monitorship or work as a private sector
216 inspector general.
217 c) Prior affiliation with a firm that provided legal or other professional services to
218 the Host Organization during the time of that affiliation.
219 d) Any other factor that could bias or impair, or be perceived to bias or impair, the
220 Monitor's judgment, objectivity or independence.

221 E. Duty to Disclose

222 The Monitor should ascertain whether it, or any member of the Monitorship Team, has
223 any potential conflicts of interest. The Monitor should disclose any identified conflicts of
224 interest to the Government, Host Organization, and court, within adequate time for those
225 parties to consider whether the potential conflict requires or warrants exclusion under these
226 standards.
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231 III. ESTABLISHING THE MONITORSHIP

232 A. General Principles

234 The Court Order or the Agreement and the Engagement Letter should clearly
235 define the responsibilities and authority of the Monitor, Host Organization, and
236 Government, and the goals and scope of the monitorship. The Court Order or the
237 Agreement should state a length of time and projected resources necessary for the
238 monitorship, which should be adequate to achieve its goals. The Government, Host
239 Organization, and Monitor should commit, for the duration of the monitorship, the time
240 and resources required by the monitorship.
241

242 **B. Modifications**

243 **1. Monitorships Imposed by Court Order**

244 Monitorships imposed by Court Order may be modified, extended, or terminated
 245 early to the extent permitted by the court, after hearing from the Government, the Host
 246 Organization, and the Monitor.

247

248 **2. Monitorships Established by Agreement**

249 **a) Substantive Modifications**

250 When the monitorship is established by Agreement, the Agreement should
 251 provide that any modifications should be in writing and agreed to by the
 252 Government, Monitor, and Host Organization. The Agreement should specify the
 253 process and conditions, under which the Host Organization, the Government and
 254 the monitor may seek modifications of the scope or nature of the monitorship,

255 **b) Extensions**

256 The Agreement may allow for extensions to the monitorship. The
 257 Agreement should state the criteria for determining when an extension is
 258 appropriate, state how to determine when those criteria are met, require that there
 259 is a clearly articulated reason for the extension, and create a process for resolving
 260 any objections by the Host Organization.

261 **c) Early Termination**

262 The Agreement should allow, and state the criteria for, a Monitor to
 263 recommend granting an early termination and for the Host Organization to apply
 264 for early termination. The Agreement should require that the Monitor or Host
 265 Organization provide a clearly articulated reason for early termination before it is
 266 granted. If the Agreement does not address early termination, and the Monitor or
 267 Host Organization believes that the monitorship is no longer beneficial to the Host
 268 Organization and that the Host Organization has met its obligations under the
 269 terms of the Agreement, then the Monitor may recommend early termination or
 270 the Host Organization may apply for early termination.

271 **C. Monitor Work Plan**

272 1. The Court Order or the Agreement ordinarily should require that the Monitor
 273 create a Work Plan at the outset of the monitorship, and that it be developed in
 274 consultation with the Host Organization and Government.

275 2. When the Monitor is required to make material changes to the Work Plan,
 276 either due to changing circumstances, new information, or modifications to the Court
 277 Order, the Agreement, or the Engagement Letter, the Monitor should disclose the
 278 changes to the Government, and, if appropriate, to the Host Organization.

279 3. If disclosure of the Work Plan, or any subsequent changes to it, to the Host
 280 Organization would hinder a Monitor's ability to effectively perform its duties under the
 281 Agreement, then selected aspects of the Work Plan may be disclosed to the Government
 282 only.

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D. Monitor Compensation and Billing

1. Estimates of Fees and Expenses

During the selection and approval process, prospective Monitors should provide a reasonable estimate of fees and expenses, including the use of third party resources, expected to be incurred to achieve the objectives of the monitorship.

2. Reasonable Fees and Expenses

a) The Monitor should incur only costs that are reasonably necessary for carrying out the monitorship. Where appropriate, the Monitor should look to utilize the Host Organization's resources to reduce costs.

b) During the course of the monitorship, if fees and expenses are expected materially to exceed estimates, and if appropriate and practicable, the Monitor should inform the Host Organization before incurring those expenses. If the increase in fees and expenses is due to investigative aspects of the monitorship and the Monitor determines it is not appropriate to disclose these changes to the Host Organization, then the Monitor should consult with the Government, and if appointed pursuant to Court Order, the court, as soon as practicable.

c) The Court Order or Engagement Letter should provide for payment to the Monitor for its reasonable costs and time if the Monitor is required to testify or perform some other function related to the monitorship not otherwise addressed.

3. Invoices

a) The Monitor should maintain records that accurately reflect the work performed and the fees and expenses incurred.

b) The Monitor should prepare and issue invoices to the Host Organization that are sufficiently detailed to provide an understanding of the type of work performed and the expenses incurred, unless the parties agreed otherwise or disclosure of detailed invoices would hinder a Monitor's ability to effectively perform its duties under the Court Order or the Agreement.

4. Disputing Fees and Expenses

For Monitors appointed subject to a Court Order, the Order should provide that any dispute over fees and expenses will be resolved by the court. For Monitorships established by Agreement, the Agreement and/or the Engagement Letter should set forth a dispute resolution process to resolve disputes over fees and expenses that takes into account the Government's interest in the secrecy of investigations and the Host Organization's interest in the protection of proprietary or confidential information.

5. Fund to Cover Future Fees and Expenses

Where appropriate, The Court Order, the Agreement, or the Engagement Letter may provide for the creation of a replenishing fund that would cover expected periodic fees and expenses of the Monitorship Team.

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328 **E. Public Disclosure of Fees and Expenses**

329 Unless otherwise required by law, the Host Organization should have discretion not to
 330 disclose to the public the Monitor's fees and expenses incurred during the monitorship.

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332 **IV. CONDUCTING THE MONITORSHIP**

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334 **A. Professionalism**

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335 **1. Independence**

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337 The Monitor is independent of both the Host Organization and the Government.
 338 To be independent, the Monitor should be impartial and objective in all of its activities,
 339 and avoid any conduct that may impair, or appear to impair, the Monitor's impartiality
 340 and objectivity. The Monitor should not allow the prospect of future monitorship
 engagements or other economic considerations to influence its independence.

341

342 a) Except for reasonable fees and expenses, the Monitor should not accept
 343 anything of value from the Host Organization, unless the value is nominal or
 it mitigates costs to the Host Organization.

344

345 b) The Monitor should agree not to provide, or offer to provide, any services
 346 to the Host Organization for a period of at least one year from the date the
 347 monitorship is terminated, other than serving in a monitoring role not
 348 objected to by the Government. During the course of the monitorship, the
 349 Monitor and Host Organization may not discuss the possibility of future
 employment, including serving in a monitoring role.

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351 c) Any expansion of the Monitor's duties that increases the compensation of
 352 the Monitor should be in compliance with the Court Order or the Agreement
 as modified under these Standards.

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354 **2. Professional Codes**

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356 Each member of a Monitorship Team should be familiar with and responsive to
 357 the professional codes, rules and/or governing legislation of its profession; should comply
 358 with such, and should promptly seek professional guidance when a compliance question
 arises.

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360 **3. Supervision**

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362 The Monitor should take reasonable measures to ensure that members of the
 363 Monitorship Team comply with the relevant provisions of these standards.

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364 **B. Access to Records, Persons and Information**

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365 **1. Obligations of the Host Organization**

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367 a) The Monitor should have access to all information that is reasonably necessary
 to fulfill the duties of the Court Order or the Agreement, as determined by the Monitor.

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368 b) The Court Order or the Agreement should clearly state the types of information
369 and records to be made available to the Monitor, and how and under what circumstances
370 the Host Organization is required to give access to certain individuals for interviews with
371 the Monitor, including, among others, employees, past employees, vendors, and
372 subcontractors.

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2. Proprietary and Confidential Information

375 a) Notwithstanding subsection (1), the Host Organization should not be required
376 to disclose information that is subject to the attorney-client privilege or the attorney
377 work-product doctrine, or the disclosure of which would otherwise be inconsistent with
378 applicable law.

379 b) Monitors should respect the Host Organization's proprietary and confidential
380 information and take reasonable measures to protect that information. The Monitor
381 should not use the Host Organization's proprietary and confidential information for
382 personal gain or for any purpose beyond the scope of the monitorship.

383 c) The Engagement Letter should specify the process, at the termination of the
384 monitorship, for the Monitor to return to the Host Organization any confidential
385 information that is the property of the Host Organization and is not required to be
386 maintained by the Court Order or the Agreement, by applicable law, or by any other
387 provision of these standards.

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3. Dispute Resolution

390 For Monitors appointed subject to a Court Order, the order should specify that the
391 court will resolve any dispute as to the Monitor's access to information. For
392 Monitorships established by Agreement, the Agreement and/or Engagement Letter should
393 specify a process for resolving any disputes as to the Monitor's access to information that
394 takes into account the Government's interest in the secrecy of investigations and the Host
395 Organization's interest in the protection of proprietary or confidential information.

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4. Interviewing Employees

398 a) The Court Order, the Agreement, or the Engagement Letter should address
399 issues of employee rights that may arise during the monitorship, including, but not
400 limited to, privacy rights and the right to counsel. In addition, Monitors should
401 familiarize themselves with rights of employees of the Host Organization that may not
402 have been addressed in the Agreement or the Engagement Letter.

403 b) Unless such disclosure would hinder the Monitor's ability to effectively
404 perform its duties under the Court Order or the Agreement, the Monitor should fully
405 disclose its identity during interviews, and if appropriate have available documentation
406 that establishes the Monitor's status and authority. The Monitor should inform the
407 interviewee why it is collecting the information, and what the Monitor is authorized or
408 required to do with the information.

409 c) Monitors should respect a represented employee's right to counsel, and if the
410 employee, whether represented or unrepresented, is a subject or target of a Monitor's
411 investigation, the employee should be made aware of this status and should be provided

412 the opportunity to have counsel present at the interview. Monitors should not suggest to
413 the Host Organization that the employee should receive any adverse treatment solely as a
414 consequence of the employee's decision to have counsel present during the interview.

415 This provision does not apply if the employee is not aware that the Monitor is
416 interviewing the employee, such as during the course of an undercover investigation.

417 d) The Court Order or the Agreement should afford the Monitor sufficient
418 authority to collect information confidentially, or otherwise protect the identity of persons
419 providing information, as deemed appropriate by the Monitor.

420 e) The Monitor should inform employees of the level of confidentiality afforded
421 them, if any, when providing information to the Monitor and that:

422 i) Statements given to the Monitor do not constitute notice to the Host
423 Organization on those matters;

424 ii) Statements given to the Monitor are not privileged communications; and

425 iii) Statements given to the Monitor may be disclosed to the Government.

426 **C. Scheduled Reports and Other Reports and Communications**

427 **1. Scheduled Reports**

428 a) The Court Order or the Agreement should require the Monitor to submit to the
429 Government and the court, for Monitors appointed subject to a Court Order, scheduled,
430 written reports that state the Monitor's findings, conclusions, and recommendations.

431 b) The Court Order or the Agreement should specify the form and frequency of
432 the Monitor's written reports. The requirements on frequency should balance the
433 Government's need to be informed against the costs of creating the reports or otherwise
434 impairing the efficiency of the monitorship.

435 c) The Court Order or the Agreement should state if, and when, the Host
436 Organization may receive a copy of the final written report, as well as any preliminary
437 drafts of the report.

438 d) The Monitor is responsible for the report. Unless otherwise stated in the Court
439 Order or the Agreement, or otherwise inappropriate, the Monitor may allow the Host
440 Organization and the Government to make suggested changes to the report or produce
441 evidence that challenges the Monitor's preliminary findings, but neither the Host
442 Organization nor the Government has or should be given the authority to modify the
443 Monitor's report.

444 **2. Other Written Reports and Communications**

446 a) The Court Order or the Agreement should authorize the Monitor to
447 communicate freely with the Government for purposes of discussing any aspect of the
448 monitorship.

449 b) Notwithstanding subsection (a), due to the time and expense necessary to draft
450 formal, written reports, the Monitor should produce interim reports only if the Court
451 Order or the Agreement provides for them.

452 c) The Court Order or the Agreement should specify the types of communications
453 that must be disclosed to the Host Organization.

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455 **3. Reporting Misconduct**

456 a) The Court Order or the Agreement should specify the types of observed or
457 discovered wrongdoing that the Monitor should report and specify when and how the
458 wrongdoing should be reported to the Host Organization, the Government, or both.

459 b) The Monitor should have the discretion to determine whether observed or
460 discovered misconduct that is not specified in the Court Order or the Agreement, and is
461 unrelated to the subject matter of the monitorship, should be reported to the Government,
462 the Host Organization, or both.

463 464 **4. Confidentiality of Monitor Reports**

465 a) The Court Order or the Agreement should state whether the Monitor's report is
466 to be confidential or whether it is to be made available to the public, in part or in whole.
467 For reports that are to remain confidential, the Government may decide whether other
468 government agencies or departments may have access to the report, unless the Court
469 Order or the Agreement provides otherwise. Any government agency or department that
470 receives the report should keep it confidential. Unless the Government objects or the
471 Court Order or the Agreement provides otherwise, the Host Organization should have
472 the right to disclose to third parties any written report it receives.

473 b) If a written report may be publicly disclosed or provided to third parties, the
474 Monitor should consult with the Government and Host Organization, or if appointed by
475 a court, the court, for purposes of protecting against the disclosure of sensitive or
476 disparaging information concerning individuals who may be named in the report, and
477 the disclosure of proprietary, confidential, or competitive business information.

478 479 **5. Basis of Findings and Conclusions**

480 The Monitor's findings and conclusions should be determined fairly, objectively
481 and impartially, and based on relevant evidence. The Monitor should state the factual
482 basis of all findings and conclusions, and maintain records sufficient to show that factual
483 basis, including any material facts that do not support the Monitor's findings and
484 conclusions.

485 486 **6. Curing of Reporting Errors and/or Inaccuracies**

487 If after issuing a report the Monitor determines that it contains material errors or
488 inaccuracies, then the Monitor should formally notify all recipients of the report.

489 490 **D. Monitor Recommendations**

491 **1. Appropriateness and Impact**

492 The Monitor's recommendations should be pragmatic, reasonable, and designed
493 to achieve the objectives of the Court Order or the Agreement. When developing
494 recommendations, the Monitor should, as appropriate, consider such factors as the
495 length of time required to implement the recommendations, costs, existing internal
496 controls and Compliance Programs, the culture of the organization, the likelihood of the
497 recommendations to be sustainable post-monitorship, and their impact on the Host
498 Organization's operations.

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2. Responsiveness to Host Organization

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Absent exceptional circumstances, the Monitor should work cooperatively with the Host Organization in developing recommendations. The Monitor should consider the Host Organization's existing plans, recommendations, and concerns. The Monitor should consider any reasonable changes proposed or made by the Host Organization, and if rejecting a proposal, the Monitor should articulate the reasons for the rejection.

3. Disputes

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The Court Order or the Agreement should specify a process by which the Host Organization or Government may challenge any of the Monitor's findings, conclusions, or recommendations. The Monitor should in good faith attempt to resolve any differences with the Host Organization or Government on the necessity of implementing any of the Monitor's recommendations.

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E. Indemnification

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The Court Order, Agreement, or Engagement Letter should specify the conditions under which the Host Organization must indemnify and hold harmless the Monitor from claims arising from the Monitor's performance of its duties under the Court Order or the Agreement.

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F. Withdrawal

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1. The Court Order, Agreement, or Engagement Letter should address the circumstances under which the Monitor could or should withdraw from the monitorship. The Engagement Letter should address the withdrawal process, notice, timing, disclosure, and other implications of withdrawal, including financial matters.

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2. If during the course of the monitorship, the Monitor develops or discovers a Financial Interest or any other conflict of interest that impairs the Monitor's independence, the Monitor should provide full disclosure. Following full disclosure, the Monitor should begin the withdrawal process unless the conflict of interest is cured, or is waived by the Host Organization and the Government, and where appropriate the waiver is approved by the court.

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3. The Monitor should begin the withdrawal process if the Monitor determines that it does not have and cannot obtain the expertise, resources, or ability necessary to conduct the monitorship effectively and within the appropriate time frame.

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4. The Monitor may begin the withdrawal process if the Host Organization fails to compensate the Monitor in compliance with the Court Order, the Agreement, or the Engagement Letter, or the Host Organization acts in a manner that prevents the Monitor from appropriately fulfilling its obligations under the Court Order or the Agreement.

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5. The Monitor should confer with the Government and the Host Organization, and provide the reasons for the proposed withdrawal.

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6. The Court Order or the Agreement should state the process for selecting a new Monitor in the event that the existing Monitor withdraws. That process should seek to minimize the costs to the Host Organization and the disruption of the monitorship.

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541 **G. Removal of the Monitor**

542 **1. Monitors Appointed by Agreement**

543 a) Where a Monitor has been appointed subject to an Agreement, the Agreement
544 should give only the Government the power to remove a Monitor.

545 b) The Agreement should establish a process for the Government to raise any
546 concerns about the performance of the Monitor with the Host Organization and the
547 Monitor before initiating the removal process. The process should allow the Host
548 Organization and the Monitor to respond to any performance concerns and, where
549 appropriate, allow the Monitor to cure any performance deficiencies before removing the
550 Monitor.

551 c) The Government may require removal of the Monitor if the Monitor fails to
552 conduct the monitorship effectively, fails to comply with the Agreement or these
553 standards, , or is no longer qualified.. The Government's exercise of discretion should not
554 be arbitrary, capricious, or otherwise an abuse of discretion. The Government should
555 consider any negative impacts the removal or threat of removal would have on the Host
556 Organization or on the independence of the Monitor.

557 d) The Agreement should establish a process for the Host Organization to raise
558 concerns about the performance or qualifications of the Monitor to the Government.

559 e) The Agreement should state the process for selecting a new Monitor in the
560 event that the existing Monitor is removed. The process should seek to minimize the
561 costs to the Host Organization and the disruption of the monitorship.

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563 **2. Monitors Appointed by Court Order**

564 Where the Monitor has been appointed subject to a Court Order, only the court
565 may remove the Monitor, on its own motion or pursuant to an application by the
566 Government or the Host Organization. The court's removal determination should be
567 guided by the considerations in subsection G (1).
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569 **H. Evaluation of Monitorships**

570 1. The Government should evaluate the effectiveness of each of its ongoing monitorships
571 on a regular basis, and should meet separately with both the Monitor and the Host Organization
572 to discuss concerns or suggestions for improvement.

573 2. The Government should compare similar ongoing monitorships on a regular basis to
574 explore the possibility of common issues that it should address or best practices it can share.

575 3. At the conclusion of a monitorship, the Government should evaluate the effectiveness
576 of the monitorship, including the performance of the Monitor. The results of that analysis should
577 be used in the consideration of that Monitor for future assignments and by the Government in
578 designing future monitorships.

REPORT

History of the ABA Standards for Criminal Justice

The idea of developing the *ABA Standards for Criminal Justice* was formulated in 1963. The various chapters in the first edition of the Standards were approved by the ABA House of Delegates between 1968 and 1973. They were described by Chief Justice Warren Burger as the “single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history.”

Beginning in 1978, the ABA House of Delegates approved revisions to the Standards. Publications of its second edition occurred in 1980. Since that time, periodic changes have been made to the Standards and publication of these Prosecution Function and Defense Function Standards would begin the Fourth edition of the Standards.

The Criminal Justice Section urges prompt consideration of the proposed Standards by the House due to the ABA’s continuing obligation to see to it that the *ABA Standards for Criminal Justice* reflect current developments in the law.

Definition and Role of Monitors

For the purpose of this set of Standards a monitor is defined as a person or entity who is engaged by a host organization pursuant to a court order or an agreement and engagement letter; and who is independent of both the host organization and the government, whose selection is approved by the Government or ordered by a court; and whose responsibilities and authority are established by court order or by the terms of the agreement and the engagement Letter.

A monitor may serve a variety of functions. These frequently involve remedial measures within the host organization’s corporate compliance and ethics program, but vary greatly in accordance with the underlying issues giving rise to the agreement. For example, the monitor may advise an organization on the implementation of a compliance program, audit the organization’s compliance with its agreement with the government, investigate the organization’s compliance with law, as well as acting to reduce waste, abuse, and fraud and increase the host organization’s economy, efficiency, and effectiveness. In some cases, the efforts of monitors may be intended to result in a change to the host organization’s cultural environment. These Standards serve to give guidance to those who are appointed as monitors, as well as those working on behalf of a host organization or the government.

Background

The proposed black letter standards in these chapters emerge from an effort of more than two years, begun with the work of a task force in October 2012 charged with the job of creating draft Standards. The Task Force was appointed by the Criminal

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Justice Standards Committee, a Standing Committee of the Criminal Justice Section. The Task Force first met in October 2012 to chart direction. After several meetings the Task Force submitted a draft to the Criminal Justice Section Standards Committee in Summer 2014. After a Standards Committee meeting, the draft was submitted to the Criminal Justice Section Council for review at the Fall 2014 Meeting. After two Council meetings the Criminal Justice Section Council approved these revised Standards at its April 2015 meeting.

The final proposed standards are, accordingly, the result of careful drafting and extensive review by representatives of all segments of the criminal justice system – judges, prosecutors, defense counsel, court personnel and academics active in criminal justice teaching and research. Circulation of the standards to a wide range of outside expertise also produced a rich array of comment and criticism which has greatly strengthened the final product.

Conclusion

The Criminal Justice Section urges that the House of Delegates adopt the proposed *Monitors Standards* as part of the Fourth Edition of the *ABA Standards for Criminal Justice*.

Respectfully submitted,

Jim Felman and Cynthia Orr, Chairs

Criminal Justice Section

August 2015

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: James Felman and Cynthia Orr., Chairs

1. Summary of Resolution(s). The Criminal Justice Section recommends that the ABA adopt the black letter standards, dated August 2015, of the *American Bar Association Standards for Criminal Justice: Monitors*.
2. Approval by Submitting Entity. This resolution was approved by the Criminal Justice Section Council at its Spring meeting on April 25, 2015.
3. Has this or a similar resolution been submitted to the House or Board previously? No similar resolution has been previously submitted.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? No existing Association policies are relevant to this Resolution
5. If this is a late report, what urgency exists which requires action at this meeting of the House? Not applicable.
6. Status of Legislation. (If applicable) Not applicable.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The policy will be distributed to various criminal justice stakeholders as a tool to offer guidance on the role of Monitors. The policy will also be featured on the Criminal Justice Section website and in Section publications.
8. Cost to the Association. (Both direct and indirect costs) No cost to the Association is anticipated.
9. Disclosure of Interest. (If applicable) None
10. Referrals.
At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2014 Annual Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

Standing Committees

Ethics and Professional Responsibility

Federal Judiciary

Governmental Affairs

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Sections, Divisions

Administrative Law
Business Law
Dispute Resolution
Government and Public Sector Lawyers Division
Individual Rights and Responsibilities
Judicial Division
Litigation
Public Contracts
State and Local Government Law
Young Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY1. Summary of the Resolution

The Criminal Justice Section recommends that the ABA adopt the black letter standards, dated August 2015, of the *American Bar Association Standards for Criminal Justice: Monitors*.

2. Summary of the Issue that the Resolution Addresses

This set of Standards will outline best practices for the appointment and retention of monitors. It will also detail best practices for conducting a monitorship from creation through withdrawal. This set of standards is designed to serve as a guide for monitors, judges, prosecutors, defense attorneys and academics interested in these issues.

3. Please Explain How the Proposed Policy Position will address the issue

The proposed Standards provide a framework through which monitors, legislatures, courts acting in their supervisory capacity, and administrative agencies can make the difficult decisions regarding the development and implementation on a monitorship.

4. Summary of Minority Views

None are known.