

Setting Standards for Post-Disciplinary Oversight

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The Challenges We Face

- Professional discipline is a balancing act
- What course best serves public interest ?
- Rising use of negotiated remedial outcomes
- Problems with current oversight models
 - Questions about impartiality, conflicts of interest
 - Board staff – do they have needed expertise?
 - Board members – recusal issues?
 - Licensee chooses monitor - quality of oversight?
 - Board review and approval – criteria for decision?

US Dept. of Justice Memorandum - Origins

- **Increased use of settlements – DPAs & NPAs**
 - **Similar in many ways to Board consent orders**
 - **Both require ongoing oversight**
- **Increased concerns re: monitor neutrality**
- **Nine principles announced**
- **“Internal DOJ guidance only”, but**

US Dept of Justice Memorandum

Principles 1 & 2 – Monitor Selection Criteria

- **Monitor must be properly qualified**
 - Parties should discuss needed skills beforehand
 - Necessary skills/expertise may vary with case
- **Monitor must be impartial**
 - No relationship with respondent if reasonable person would question impartiality
 - No relationship with respondent for one year after monitoring ends

US Dept of Justice Memorandum
Principle 2 – Monitor Selection Process

- No one selection process preferred
- No unilateral choice by prosecutor
- Nominate three candidates for each case
- Use review committee to make selections

US Dept of Justice Memorandum

Principles 3 and 4 – The Role of the Monitor

- Should be clearly defined
- Evaluate efforts to prevent recurrence of misconduct
 - Compliance with corrective action requirements?
 - Internal controls to prevent future problems?
- Does not “further punitive goals”
- Should be “no broader than is necessary to prevent recurrence of misconduct”

US Dept of Justice Memorandum

Principles 5–9 - Reporting & Duration

- Need open communication with both parties
- Monitor provides periodic progress reports
 - Even-handed – reports positives and negatives
 - Identifies problems, makes recommendations
- Identify what monitor must report
- Allow “reasonable time “ to make changes
- Duration of monitoring
 - Factors to consider
 - Allow both extension and early termination

One Board's Experience

Massachusetts - 2010

- **Criteria for selection – follows DOJ except**
 - Bars relationships between monitor and respondent's family
 - Board may allow respondent to employ monitor after monitoring ends
- **Committed to use of external monitors**
- **Different selection process**
 - Created roster of “pre-approved” monitors
 - Licensee submits 3 names from list – Board picks

Establishing Monitor Selection Criteria

- **Define case objectives clearly**
- **Ensuring monitor is qualified**
 - What skills are needed for this case?
 - Is specialized expertise needed?
- **Ensuring impartiality and objectivity**
 - What kinds of relationships with either party might reasonably impair neutrality?
 - Are potential future relationships between monitor and licensee okay?

Defining the Monitor Selection Process

- **How is selection made?**
 - **Role of the parties (need agreement?)**
 - **Does licensee submit multiple candidates?**
 - **Role of the Board**
- **Should we create a “pre-approved” roster?**
 - **Is the roster open to companies/organizations?**
 - **May be helpful in avoiding negotiating problems**

Define the Monitor's Role and Responsibilities

- Be specific about what is to be evaluated
- Think carefully about scope and frequency
 - Sample size on record reviews
 - Frequency of visits? Frequency of reports?
- What must the monitor report?
- Effect of monitor's recommendations
 - The value of mentoring
 - Timetable for implementation?
 - Effect of failure to implement?

Other Issues to Address

- **Duration – consider both extension and early termination options**
- **Conflicts between monitor and respondent**
 - **Can respondent challenge the monitor's findings?**
 - **What is Board's role in resolving conflicts?**
- **Costs of monitoring – who pays?**
- **Protection of monitor and reports**

THANK YOU FOR YOUR ATTENTION!!

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