NATIONAL GUIDELINES FOR POLICE MONITORS

BY

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THE POLICE ASSESSMENT RESOURCE CENTER (PARC)

The Police Assessment Resource Center (PARC) is a national nonprofit founded in 2001 with funding from the Ford Foundation. PARC is dedicated to the advancement of effective, respectful, accountable, and constitutional policing. PARC provides nonpartisan, independent, and evidence-based counsel, advice, and research to law enforcement agencies, cities and counties, mayors, city councilpersons, and community groups. Based in Los Angeles, PARC serves as a provider of information accessible to all who may be interested in police oversight and reform throughout the United States. PARC publishes the Police Practices Review, a quarterly newsletter that is widely read across the nation by police executives and those involved in police oversight and accountability. Merrick Bobb serves as PARC's President and Executive Director.

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TABLE OF CONTENTS AND OUTLINE OF RECOMMENDATIONS

Introduction and Executive Summary

These guidelines are the result of sustained collaboration between monitors, law enforcement agencies subject to monitoring, public and private plaintiffs in civil rights litigation, and senior police executives. Since the early 1990s, police monitors have become increasingly common. In the litigation context, monitors report on compliance by law enforcement with voluntary settlements and court-ordered police reform. In the context of municipal governance, monitors perform or review investigations of alleged police misconduct. It is hoped that the principles and commentary set forth below, crafted over the past six years, will constitute a reasoned guide to the ethical and pragmatic aspects of monitoring law enforcement agencies.

The guidelines are also an attempt to respond to the need of police executives for greater precision and clarity throughout the monitoring process. Just as monitors' reports make transparent what before have been opaque police processes, these guides provide greater transparency and predictability for police executives struggling to understand how their law enforcement agencies will be judged and evaluated under monitoring. The guidelines set forth here attempt to provide a common language, lexicon, and measuring stick. As importantly, these guidelines address many of the ethical, legal, and pragmatic issues a monitor and a monitored agency may experience. They are one part of an effort to establish the foundations for an emerging profession—monitoring of law enforcement agencies.[1]

Police monitoring, a profession unknown until the early 1990s, has grown rapidly in various parts of the United States. Some monitors were appointed at the instance of federal, state, and local government and private plaintiffs as part of settlements of civil rights litigation and will be identified in this document as "litigation-initiated monitors." These monitors typically serve for a fixed period, generally five to seven years, to report upon compliance with consent decrees and other settlement agreements. These

[1] Law enforcement agencies include federal, state and local police departments and sheriff's departments. For convenience sake, these law enforcement agencies will be collectively referred to as "police" at various places in this document.

appointments end upon dissolution of the consent decree or by agreement of the parties and hence are temporary, as distinct from permanent, police oversight functions.

In recent years, the appointment of monitors has become a growing phenomenon at the municipal level, particularly on the West Coast. Unlike the monitors described above, these monitors were not the direct result of litigation but rather of voluntary municipal action. These monitors will be referred to as "municipal action monitors." These monitorships are intended to provide ongoing (as contrasted to temporary) oversight.

LITIGATION-INITIATED MONITORS

Litigation-initiated monitors at the federal level came about from expanded powers given to the Department of Justice. Congress in 1994 granted power to the Attorney General under the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. §14141) to seek relief in federal court for patterns or practices of unconstitutional police conduct. Pursuant to that authority, the Civil Rights Division of the Department of Justice (DOJ) has entered into federal consent decrees and memoranda of agreement or understanding (collectively, “Settlement Agreements”) that require, among other things, the appointment of a monitor to test and report upon a jurisdiction's efforts to achieve, maintain, and sustain constitutional policing.

Federal litigation-initiated monitors are currently at work in several jurisdictions throughout the United States. All of these monitorships are temporary appointments. The first such monitor served in Pittsburgh from 1997 to 2002. The monitor in Steubenville, Ohio served from 1997 to 2005. A number of these federal monitors work or have worked in large cities, such as Cincinnati, Los Angeles, Washington DC, and Detroit or, in one instance involving New Jersey, at the state level. Others are responsible for monitoring police departments in smaller communities.

Litigation-initiated monitors have come into existence through means other than lawsuits brought by the Civil Rights Division. Consent decrees in lawsuits by the Attorneys General of California and New York led to the appointment of monitors in Riverside,

California and Wallkill, New York. From 1996 until 2004, Philadelphia had a monitor pursuant to a consent decree arising from private litigation. In August 2003, a federal court in the Bay Area approved the appointment of a monitoring team pursuant to the provisions of a negotiated settlement agreement between private plaintiffs and the city of Oakland, California.

The core mission of the litigation-initiated monitor is to assess and evaluate whether the law enforcement agency in question is in compliance with a Settlement Agreement. The Settlement Agreement defines with precision the duties of the monitor. More generally, compliance can be viewed as constituting three broad phases— initial, middle, and end.

1. Initial or basic compliance phase

Compliance in the initial stages of implementing a Settlement Agreement, or basic compliance, generally requires the monitor to consider whether:

- all changes to existing policies, procedures, orders, directives, and protocol ("rules") have been made, submitted to the monitor and, if applicable, to DOJ, and they have received final approval;
- all new rules have been drafted, submitted to the monitor and, if applicable, to DOJ, and they have received final approval;
- all training materials relating to new or changed rules have been drafted, reviewed, and received final approval as necessary;
- all relevant personnel throughout the chain of command have been trained and tested on their understanding of new or changed rules;
- all systems for the capture of new or existing data required by the Settlement Agreement are functioning and consistently supplying all relevant data required by the monitor, the court, and the parties;
- all routine and special audits required by the Settlement Agreement have been performed to date in a manner satisfactory to the monitor, court, and parties; and
- all deadlines have been met or formally postponed or eliminated.

A monitored agency cannot achieve basic compliance if in the view of the court, monitor, or parties, the monitored agency is not in compliance with any material provision of the

Settlement Agreement. Accordingly, if a given key provision has not been implemented, the monitored agency will not have reached basic compliance with respect to that provision.

2. Intermediate phase

The middle phase of compliance requires the monitor to consider whether:

- police personnel in the field, in administrative positions such as internal affairs, and throughout the chain of command are actually implementing and complying with the requirements of the Settlement Agreement;
- the monitored agency is producing fair, thorough, complete, and reasonable internal investigations and reviews as contemplated by the Settlement Agreement and has adequate audit and oversight mechanisms to detect and correct lapses therein;
- the monitored agency thoroughly identifies, investigates, and corrects all material instances of unconstitutional policing or other noncompliance;
- the monitored agency is actively and effectively managing risk of unconstitutional policing;
- the monitored agency's adjudicatory and disciplinary systems are producing fair and reasonable results reinforcing new rules and punishing noncompliance when retraining or other nondisciplinary options have been tried or are not appropriate given the gravity of the noncompliance; and
- objective evidence demonstrates that constitutional policing is being maintained.

3. The final or substantial compliance phase

The final phase is substantial compliance. In general, substantial compliance means that the requirements of the Settlement Agreement have been fully adopted as policy, effectively incorporated into training, and routinely and consistently applied in actual practice for a sustained period of time. A Settlement Agreement arises from allegations of a pattern or practice of unconstitutional police conduct. The formal Agreements set forth a set of tasks for the monitored agency to accomplish. In broad brush, these Agreements require the monitor to assess:

- whether the monitored agency has the capacity, will, internal control mechanisms, and competence to sustain compliance and to identify and correct noncompliance during the life of the Agreement and thereafter; and
- if the parties so decide or the court desires, whether the goals and objectives of the Agreement have been met and constitutional policing has been restored, maintained, and sustained.

Settlement Agreements usually require substantial compliance to be maintained for two years before the monitoring period can come to an end. In the consent decree context, the court will likely consider whether implementation is serving the ultimate goal of amelioration of unconstitutional conduct and the sustained maintenance of constitutional policing.

MUNICIPAL ACTION MONITORS

Monitors appointed pursuant to voluntary municipal action usually will not have a settlement agreement to chart their mission; nonetheless, in common with litigation-initiated monitors, these monitors must assess the police department's performance as required by the governing ordinance or municipal code from which they derive their authority and with reference to accepted standards and best practice in law enforcement. The core mission of these monitors typically is to provide ongoing assurance that internal investigations by law enforcement are thorough, fair, and unbiased and that police practices in this regard are transparent. Some monitors have the ability to conduct or direct independent investigations, as in Denver and Los Angeles, for example. Municipal action monitors vary in their power to make or recommend adjudications or disciplinary decisions.

The first municipal action monitors came into being in the early 1990s. In 1992, the Los Angeles County Board of Supervisors appointed a monitor to report on the implementation of recommendations from the Kolts blue-ribbon report on the Sheriff's Department. San Jose, California created an office of the monitor in 1993. The Office of Inspector General for the Los Angeles Police Commission, advocated by the Christopher

Commission, came into being in the mid-1990s. There are currently monitors in California in Davis, Los Angeles, Los Angeles County, Oakland, Richmond, Sacramento, San Jose, and Santa Cruz. In Oregon, there are monitors in Portland and Eugene. In Washington, Seattle and Spokane have civilian oversight. Elsewhere in the West, there are monitors in Boise, Idaho; Tucson, Arizona; Denver, Colorado; and Austin, Texas. There are or have been monitors in Omaha, Chicago, Washington, DC, and Philadelphia.

Municipal action monitors have various titles: Special Counsel, Independent Monitor, Auditor, Integrity Officer, Ombudsman, Inspector General, Chief Attorney, Director, and so on. These monitors have varying powers and authority depending upon the jurisdiction in question and the manner in which they were appointed. In the case of Los Angeles, the city charter was amended to create an office of Inspector General within the LA Police Commission. The Independent Police Review Division in Portland was created by the city code and charter. The office of the Independent Monitor in Denver was created by a city and county ordinance.

Local ordinances, municipal code provisions, or executive orders appointing monitors are generally less explicitly prescriptive than Settlement Agreements and are designed to build mutual trust and cooperation between the police and the community and foster greater transparency, integrity, and accountability by the police. Local monitors are usually appointed for an undefined term and have a broader mandate. Local monitors engage in one or more of the following tasks:

- review completed internal investigations for thoroughness, fairness, and completeness;
- participate in ongoing internal investigations or perform independent investigations, in part through issuance of subpoenas and the holding of public hearings if permitted by law;
- engage as an ombudsman, mediator, or facilitator of dialogue, communication, mutual understanding, and cooperation between the police and the community;
- perform audits as required by Settlement Agreements or local law;
- perform the duties and responsibilities of an inspector general;

- identify systemic issues impacting the integrity, fairness, and effectiveness of internal procedures to identify and deal with corruption, excessive force, dishonesty, and constitutional or statutory violations by the police;
- identify police practices and procedures that produce unnecessary or avoidable risk of death or serious injury to police officers, suspects, and third parties; and
- make recommendations and issue uncensored public reports about the foregoing.

MEASURING COMPLIANCE AND CHANGE

As of 2009, the litigation-initiated and municipal action monitors have produced more than 200 reports detailing compliance by police departments. Over the last few years, as the reports have proliferated, and as monitors have proceeded on an *ad hoc* basis to formulate ways to test compliance and performance, the need has grown for uniform national guidelines and for dialogue between and among the monitors, the monitored, and the government authorities that appoint or have a voice in the monitor's selection.

Federal, state, and local Settlement Agreements and municipal ordinances require substantial changes in police department policies, training, analytical rigor, accountability, performance, attitude, approach to discipline, and culture. They require that data be created, carefully analyzed, and actively utilized by police management to put an end to an alleged pattern or practice and to better manage the risk of police misconduct. A monitor’s report at regular intervals charts progress toward that end.

Often, Settlement Agreements contain elaborate tests and audits the monitor must perform. In other instances, litigation-initiated federal monitors, often in consultation with DOJ's Civil Rights Division, and local monitors, as in Oakland, must fill in the outlines of a settlement and develop monitoring techniques and audit routines by themselves. Monitors appointed pursuant to a municipal code or ordinance nearly always must develop the substance and methodology of monitoring on their own. At times, the matrices, audit routines, and forms take on a life of their own and the forest is lost in an

examination of the trees. It is therefore critically important that monitors not lose sight of the overall mission.

The instruments for measuring compliance and change must be invented and devised; there is not a ready made set to take off the shelf. The instruments that the law enforcement agency uses to test its own performance may not suffice for measuring change. Although police departments are adept at measuring change in the crime rate or in the number of arrests, they are often inexperienced at measuring civil rights performance and accountability for it. In fashioning a Settlement Agreement, the plaintiff must take care that the police department generates data which bears upon change in civil rights performance and accountability. That data should be generated at the very beginning of the monitoring period so that change can be measured using trend analysis based upon an established baseline.

It is impossible to scrutinize every single contact between the police and the citizenry to determine whether change is occurring. Accordingly, it is necessary for monitors to invent indirect tools and tests. Trend analysis, among others, may be such a tool. Given the variety of methods to measure change, it is critical for the monitor, parties, and, if applicable, the court to confer and discuss upon how change will be gauged. Equally important, the Settlement Agreement must require the law enforcement agency in question to collect the necessary data in a form that assists the monitor in making this assessment. In the local context, monitors often have to negotiate their access to data and police personnel reasonably necessary for the monitors to perform their tasks competently.

Monitoring reports are generally available to the general public and to the media. The monitor, then, has the additional burden of writing reports that are clear, succinct, jargon-free, and explanatory. The reports must make internal police process transparent and understandable to interested readers. Thus, in addition to informing the federal court and the parties, the monitors' reports assist policymakers, opinion makers, and the general

public in becoming conversant and capable of reaching informed judgments about the performance of law enforcement.

The monitoring guidelines proposed herein are for the benefit of all monitors, whether appointed pursuant to litigation or otherwise. They are also applicable, at least in substantial part, to other forms of civilian oversight of law enforcement agencies, including police commissions and civilian review boards. Although other police oversight professionals may not be dealing with a Settlement Agreement, they often have a set of recommendations that the monitored agency must implement. The federal consent decrees largely encapsulate what is considered best practice in managing the risk of police misconduct and can serve as guidelines for all police oversight professionals. These guidelines, therefore, in combination with the provisions of Settlement Agreements, should assist in further professionalizing all forms of civilian oversight. Monitors should look to consent decrees and settlements for guidance as to best practice while keeping in mind that best practices for a highly troubled law enforcement agency might be more prescriptive or burdensome than necessary to resolve issues in local jurisdictions.

Litigation-initiated monitors themselves are not so much change agents but rather serve to measure the degree to which implementation and compliance bring about change. To do so, a monitor must find ways and tests that measure the fact and the pace of change. Monitors appointed by municipal ordinance, on the other hand, may indeed serve as change agents, particularly where the monitor has a direct role in the investigation of a police officer or in the adjudicatory and disciplinary proceedings that follow.

DEFINITIONS

Agreement or Settlement Agreement: a consent decree, memorandum of understanding, or memorandum of agreement at a federal, state, or local level.

Audit: methodical review, examination, and critical analysis of police practices and procedures resulting in a report, often containing recommendations for change and noting deviations from best practices.

Best practices: police policies or practices representative of the best thinking the field at a given point in time that have resulted, or should likely result, in enhanced professionalism and effectiveness. Best practices result in effective, accountable, and constitutional policing for all members of the community.

Compliance team: group of police department officials serving as liaison to the monitoring team. Some police departments have created consent decree bureaus responsible for managing the agency's compliance requirements.

Consent decree: a negotiated written agreement between the parties that becomes a federal court order enforceable by the court's contempt power.

Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU): a written out-of-court settlement between parties in a dispute enforceable by an independent suit for breach of contract and specific performance.

Monitor: in the case of a litigation-initiated monitor, a person or group of persons engaged to measure progress toward substantial compliance with an Agreement and produce reports thereon for the benefit of the court and parties. A municipal action monitor is appointed pursuant to municipal governmental authority with his or her duties, rights, and authority defined by local ordinance, executive order, or municipal code.

These monitors are sometimes called auditors, inspectors general, or Independent Monitors. For some, civilian oversight has become a profession and career.

Monitoring team: a team of individuals who work under the direction of the monitor.

Parties: individuals, groups, or organizations that are formally bound by and are signatories to the terms of an Agreement. As used herein, the monitored police agency is considered a party even if it is not separately named.

Public complaint: a complaint from a member of the public expression of dissatisfaction with police conduct or service. The term is analogous to "citizen's complaint."

Stakeholders: individuals, groups, or organizations who are not formally bound by or signatories to the agreement but nevertheless have an interest or stake in the issues that the agreement addresses. In this document, police rank and file, responsible community and civic organizations, elected and appointed officials, police unions, the press and electronic media, and civil rights and civil liberties organizations are considered stakeholders.

Substantial compliance: a formal determination by the court, the parties, or a designated reasonable, objective observer that an Agreement's requirements have been fully adopted as policy, effectively incorporated into training, and routinely and consistently applied in actual practice for a sustained period of time.

I. PRACTICAL AND ETHICAL GUIDELINES FOR THE SELECTION OF THE MONITOR AND THE FORMATION OF THE MONITORING TEAM.

1.1 *A monitor must have intelligence, intellectual curiosity, excellent judgment, wisdom, clarity of thought and reasoning, credibility, objectivity, pragmatism, equanimity, and reasonableness.*

Commentary

A monitor may or may not have prior law enforcement experience or exposure. Although it is undeniably beneficial and preferable for a monitor to have it, other qualities and attributes are also important and influential in the monitor's success.

A monitor must possess an understanding of law enforcement, knowledge of the nature of independent monitoring, an understanding of organizational dynamics, and an ability to conduct organizational assessments. A monitor must already enjoy or have the skill to cultivate a reputation for credibility and honesty in the jurisdiction to which a monitor is assigned. A monitor must be capable, if or when appropriate, of providing, either personally or through others, technical advice to parties. A monitor should be a skilled negotiator and mediator. A monitor should understand and be equipped to respond to the complexities of institutional change and the implementation of reform. A monitor must appreciate how police leadership can best build a consensus, encourage progress, overcome resistance, and institutionalize new policies and practices. A monitor must understand the pace and extent to which changes in institutional culture can be accomplished.

1.2 *In discharging their professional responsibilities, monitors must possess and maintain the highest degree of integrity, objectivity, and independence.*

Commentary

Integrity

The concept of integrity incorporates notions of honesty, incorruptibility, soundness of ethical and moral judgment and behavior, trustworthiness, candor, and reliability. It connotes the ability to separate the personal and professional. Integrity means that monitors must be punctilious in the use of information acquired in the course of their duties. They must not use such information for any personal gain and must respect the confidentiality of information when required by law or otherwise. Integrity can accommodate the inadvertent error and the honest difference of opinion; it cannot accommodate deceit or subordination of principle. (American Institute of Certified Public Accountants (AICPA) Standards of Professional Conduct §54, Article III, "Integrity").

When reporting the results of their work, monitors are responsible for disclosing all material or significant facts known to them which, if not disclosed, could mislead, misrepresent, or conceal. Monitors may not unilaterally modify an agreement (or local ordinance, municipal code, or executive order), overly emphasize or downplay any item within those documents, or expand or contract their scope.

Objectivity

Objectivity suggests logical and pragmatic judgments that are grounded in fact and not distorted by partisanship, ideology, rigidity of outlook, preconceptions, or assumptions. Monitors must be objective and pragmatic when establishing scope and methodologies for their work, determining the tests and procedures to be performed, conducting the work, and reporting the results. As the United States General Accountability Office Generally-Accepted Auditing Standards (GAGAS) provides, objectivity connotes professional skepticism—"an attitude that includes a questioning mind and a critical assessment of evidence. [Monitors] use the knowledge, skills, and experience called for

by their profession to diligently perform, in good faith and with integrity, the gathering of evidence and the objective evaluation of the sufficiency, competency, and relevancy of evidence. Since evidence is gathered and evaluated throughout the assignment, professional skepticism should be exercised throughout the assignment." (GAGAS, 3.36). Professional skepticism requires that monitors neither assume honesty and good faith nor dishonesty and bad faith.

Independence

Independence connotes freedom of action, ability to withstand compulsion or pressure, and the absence of significant constraints on how the monitor does the job. Monitors must not subordinate their judgment to others. Monitors have a responsibility to maintain independence so that opinions, conclusions, judgments, and recommendations will be impartial and will be viewed as impartial by all parties and stakeholders. Monitors must avoid situations that could lead reasonable third parties with knowledge of the facts and circumstances to conclude that the monitors are not able to maintain independence and thus are not capable of exercising objective and impartial judgment on all issues associated with their monitoring tasks.

Monitors need to consider personal, external, and organizational impairments to independence. If one or more of these impairments affects an individual monitor's capability to perform the work and report results impartially, that monitor should decline to accept a position as monitor or resign from the position if the impairment occurs after the assignment has begun (Adapted from GAGAS). Monitors and staff must avoid relationships and beliefs that might cause them to limit the extent of the inquiry, limit disclosure, or weaken or slant findings in any way (GAGAS, 3.07).

Monitors must avoid being "deterred from acting objectively and exercising professional skepticism by pressures, actual or perceived, from management and employees of the [monitored] entity" or by the parties and stakeholders (GAGAS, 3.19). Circumstances that may constitute such deterrence include, among others:

- external interference or influence that could improperly or imprudently limit or modify the scope of an audit or threaten to do so, including pressure to reduce inappropriately the extent of work performed in order to reduce costs or fees;
- external interference with the selection or application of monitoring procedures or in the selection of transactions to be examined;
- unreasonable restrictions on the time allowed to complete an audit or issue the report;
- unreasonable restrictions on funds or other resources provided to the monitoring team that adversely affect its ability to carry out its responsibilities; and
- authority to overrule or to inappropriately influence the monitor's judgment as to the appropriate content of the report (GAGAS, 3.19).

In connection with the latter, monitors' reports bear upon the management of long-term and short-term risk of liability for police misconduct. What a monitor has to say might raise the prospect of liability of the jurisdiction in pending matters and thus may cause short-term increases in the settlement value of cases. City attorneys and others defending the jurisdiction, as well as mayors and city councils, may for this reason prefer that monitors be reticent on pending or anticipated litigation scenarios. Long-term risk managers may hold an opposing view, believing that future liability and repetition of error can be avoided by action taken today even if there are short-term consequences on pending litigation.

Monitors must be cognizant of the foregoing and understand the interplay of short-term and long-term considerations and their political implications. Nevertheless, a monitor must not self-censor because of them. Pending and anticipated litigation scenarios may be germane to compliance matters and therefore appropriate for comment by litigation-initiated monitors. Likewise, municipal action monitors often are called upon to evaluate internal investigations of events that are or will become the subject of litigation, such as officer-involved shootings and other uses of force.

Either for purposes of a single report or in general, a jurisdiction may attempt to explicitly limit a monitor from public comment on events that are or reasonably can be expected to be the subject of litigation. Monitor must carefully consider whether such limitations hamstring the monitor's efforts such that resignation is in order. A monitor must understand in advance of accepting the job whether and to what degree there may be limitations on the monitor's freedom to report publicly on such matters. If such limitations cannot be negotiated away, the monitor should decline the proposed assignment.

1.3 *A monitor and a monitoring team member must not present any conflicts of interest or the appearance of their existence so as to ensure against any perception of bias.*

Commentary

Conflicts of interest impede the impartial, effective performance of monitoring duties and undermine parties' and stakeholders' confidence in the monitoring process. Where such conflicts are real, the internal capacity of the monitoring team to function effectively is impaired. Where the conflicts are only perceived, the effective functioning of the monitoring process may be hindered nonetheless by a lack of confidence on the part of stakeholders. Monitoring team selection and role-assignment decisions should be made so as to avoid the creation of such conflicts.[2]

Full disclosure of any possible conflicts is required of the monitor and, if the monitor utilizes a monitoring team, all such team members. Although many actual or potential conflicts can be intelligently waived by the parties or the court, some may too severely injure the independence and objectivity of the monitor such that they should not be waived. Although a wide range of situations could amount to a conflict of interest or an appearance of such, the following are some, but not all, examples of situations in which potential conflicts of interest should, at the least, be fully disclosed and consideration given to the appropriateness or not of a waiver:

- an individual with present or former relationships with or stances for or against the agency being monitored (*e.g.*, former employee of that agency, employee

[2] GAO's Government Auditing Standards, 2003 revision, also referred to as generally accepted government auditing standards (GAGAS). p. 13**,** section 1.19.

See also AICPA standards on integrity and objectivity: "In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others." ET Section 102, as adopted January 12, 1988.

from a neighboring agency, persons who have sued or defended the agency for misconduct),

- a personal friend of agency executives,
- a member of the selection group that interviewed and hired the chief,
- a close friend or relative of an officer on the force of the agency being monitored,
- an expert who has testified often or recently for or against the police,
- an active member of an advocacy group critical of the police or supportive of the police,
- a substantial prior business relationship to the city or police department,
- an attorney who has often or recently represented clients suing the agency to be monitored for police misconduct, or
- an attorney who has often or recently defended the city or law enforcement agency in question in such cases.

The parties and a potential monitor should agree, preferably in writing, on a procedure for disclosure and resolution of conflicts of interest.

Monitors are professionals compensated for their services. Monitors, like doctors and lawyers and other professionals, differ from other businesses or occupations because of an explicit duty and ethical obligation to elevate the interests of the person to whom services are rendered above self-interest. Accordingly, a monitor must subordinate his or her pecuniary and other personal interests to the best interests of the persons or entities to whom services are being rendered. Thus, a litigation-initiated monitor must set aside considerations of any potential financial gain by prolongation of monitoring when rendering advice regarding substantial compliance. Likewise, a municipal action monitor must set aside considerations of job security when formulating opinions and recommendations. Similarly, a monitor must take great care when reviewing or evaluating the results of the monitor's own recommendations or advice. It may compromise the monitor's objectivity and independence, particularly if the party in question spurns the monitor's advice.

In the litigation-initiated context, a monitor may be asked questions privately by one or the other parties. Both may seek private counsel or advice. Provision of advice or recommendations outside of the public monitoring report is problematic, particularly when one party seeks advice on the tactics and strategy for dealing with the other. It is better practice for the monitor not to respond to these requests. It may create conflicts of interest.

1.4 *A monitoring team should include one or more persons with policing expertise, experience, or exposure and a knowledge of organizational dynamics.*

Commentary

A sound understanding of or willingness to learn police culture, operations, and procedures is essential to deal with the complex issues at stake in the monitoring process. Since policing is a multi-dimensional, nuanced endeavor, informed monitoring of technical aspects of police work may require participation by individuals with specialized expertise. A monitor should have a good understanding of organizational dynamics, appreciating that organizations are not monolithic and mechanical, such that when one thing moves, everything else moves in unison. A monitor should understand that organizational changes often come unevenly and require differing lengths of time for new policies to take hold and behaviors to change.

It is beneficial and preferable for monitors to have previous experience with law enforcement (see Guideline 1.1). Where the monitor is able to utilize a monitoring team, that team should, similarly, include members or engage experts with sufficient police experience or exposure to enable the team to understand and communicate to others—including parties, stakeholders, and the general public—a rounded view of contemporary policing and the issues at stake. Such members or experts should have prior experience or exposure to, and a contemporary understanding of, the specific issues addressed by an Agreement —for example, racial profiling, use of force, or early intervention systems. They should also possess a sound understanding, or ability to gain rapidly such an understanding, of national best practices in relation to those issues. While former members of the law enforcement agency being monitored may have valuable in-depth knowledge of the agency, monitors should generally refrain from employing those persons on the monitoring team to avoid an appearance of bias in favor of or against the police department and the community. Ideally, a monitoring team should include experts whose experience and exposure are appropriate to the specific size and other attributes of law enforcement agency being monitored

Although the deployment of a multi-member monitoring team is commonplace in large jurisdictions, the monitor of a smaller agency may not have the resources necessary to employ a team. While the scale of a monitoring operation in a smaller jurisdiction may allow individual monitors to perform a broad range of tasks, it may be the case that an individual, or a monitor with a minimal staff, will not possess the full range of expertise and experience necessary to effectively perform the varied tasks and analyses typically required of a monitor.

Monitors who cannot assemble self-sufficient teams should consider engaging or consulting appropriate individuals for advice on issues that fall beyond the bounds of their own expertise. The monitors should not hesitate to seek pro bono assistance from law firms, accounting firms, colleges and universities, professional oversight organizations, non-profit organizations, and other outside experts when additional personnel or logistical support is required. In the selection of such individuals, care must be taken to avoid conflicts of interest or the appearance of the same (see Guideline 1.3).

1.5 *A monitor should make use of persons appropriately skilled in data analysis, either as part of a monitoring team or as the monitoring tasks require it.*

Commentary

Unquestionably, a monitor must organize and analyze large amounts of information. The collection, creation, sampling, extraction, and analysis of quantitative, statistical, and comparative data are essential tasks for a monitor, and many monitors find trend analysis an important tool in assessing changes in practice and performance over time.

The specific data analysis skills required will vary from agreement to agreement. Persons familiar with the science of statistics as well as law enforcement-related risk management protocols and data are often vital members of a monitoring team. Because a monitor of a large department cannot review every file, statistical expertise is useful in the creation of sample sizes, sampling methods, and levels of confidence and reliability.

Accordingly, if a monitor utilizes a monitoring team, it is often helpful for that team to include one or more persons with the skills required to conduct data analysis and draw meaningful conclusions. If a monitor does not utilize such a team, the monitor should not hesitate to make use of outside experts when monitoring tasks require collection and analysis of data.

Because police departments subject to monitoring rarely have data at hand to measure and manage the risk of unconstitutional patterns or practices of police misconduct, some agreements require the police department to create and capture new data. Other agreements do not. The monitor, therefore, must have the ability to identify data deficiencies that are critical to the monitoring task and to require the police department to collect the data. By the same token, the monitor needs to be able to distinguish variables that influence the data but which have little to do with the impact of new policies.

All monitors must have full, complete, and unfettered access to all documents, information, personnel, and data relevant to their duties and responsibilities. (See

Guideline 1.6) In analyzing such data, the monitor and staff must be capable of identifying data provided by the monitored police department that are missing, incomplete, or inaccurate. When such incomplete reporting by the department is suspected, the monitor should raise the issue with the appropriate party, be it the parties to an agreement, the federal court, or both.

If the monitor is called upon to evaluate computerized databases for the early identification of problematic and potentially problematic employees, then the monitor or a member of the team must have available the technical skill to judge the power and effectiveness of such systems and to test whether they are being used in an active and productive way.

1.6 *Monitors must have full and direct access to such data, facilities, documents, and personnel of a law enforcement agency and the jurisdiction as is reasonably necessary to perform the monitoring duties.*

Commentary

It is common for Agreements to guarantee full and unrestricted access by the monitor to information and personnel reasonably related to the monitoring duties. Yet not infrequently, there are categories of data to which a monitor is not given access, such as intelligence about terrorism or attorney-client communications and attorney work product. Those seeking to become a monitor should carefully examine such provisions to assure themselves that they can fully and competently perform their duties under such provisions and, if not, seek greater access from the parties and the court. Monitors should also evaluate whether procedures for gaining access are speedy and free from undue burden. Monitors similarly should assure themselves that there is adequate provision for the resolution of any disputes that may arise concerning the scope of the monitor's access. Some files and records, such as open criminal investigative files and certain litigation and personnel files, may be confidential or otherwise non-public. A monitor should be amenable to reasonable safeguards to protect such information which do not unduly restrict the monitor's access. A monitor should decline to accept a job or later resign if there are or remain material impediments to access.

It is similarly important that local ordinances and municipal codes establishing a monitorship similarly guarantee full and unrestricted access along the lines described above. To the extent that a local ordinance or municipal code does not have detailed provisions on these subjects, the monitor should negotiate an engagement or side letter that fully covers these issues. For example, if a monitor is to report on the thoroughness, fairness, and objectivity of shooting and serious use of force reviews, the monitor should then take care that he or she has the necessary access to crime scenes, evidence, and witnesses to adequately perform that review. If asked to make adjudicatory or disciplinary recommendations to the Chief or other final decision maker, a monitor

should then take care that he or she has the necessary access to personnel and disciplinary files germane to the inquiry.

1.7 *A monitoring team benefits from the inclusion of one or more persons with exposure to constitutional issues arising in the police context, including having a working knowledge of Fourth, Fifth, Eighth, and Fourteenth Amendment issues and remedies.*

Commentary

For a litigation-initiated monitor, a good working knowledge of constitutional issues and remedies in the police context produces monitoring reports that more cogently address and better track compliance. While the court and parties themselves will likely possess expertise, a monitor risks losing neutrality and independence of judgment if he or she is completely dependent on the parties themselves for guidance in these areas. In this regard, having a trained prosecutor, defense lawyer, or a retired judge familiar with the relevant constitutional and civil rights law either on the monitoring team or otherwise available to the monitor is beneficial—as long as it is understood that the court and parties control all legal issues, including the ultimate determination of substantial compliance. In the selection of such individuals, care must be taken to avoid conflicts of interest or the appearance of the same. See Guideline 1.3.

Municipal action monitors will also find it helpful to engage an individual with knowledge of constitutional issues arising in the police context either as part of the monitoring team or on a case-by-case basis as monitoring tasks dictate.

1.8 *The monitor and team should be or become familiar with the monitored agency and local conditions, politics, and frictions.*

Commentary

Independent, outside monitoring of police agencies usually occurs in communities where police-community relations have eroded considerably. A monitor should be an impartial and objective person, having or obtaining knowledge of evolving local conditions from a historical perspective, being or capable of becoming credible with all segments of the community, and having an arms length but trusted relationship with local leaders, stakeholders, and the local press.

In some circumstances, the monitor may possess excellent credentials but come from elsewhere and consequently lack such knowledge of local conditions. In such cases, a person with a nuanced understanding of and sensitivity to local issues and conditions should be available to or become part of the monitoring team. In the absence of such individuals, or as a useful adjunct to the monitoring process in any event, it may then be helpful for the monitor and the monitoring team to hold public meetings or community forums throughout the city to familiarize themselves with local conditions and to make the monitoring process understandable to the community. By the same token, the monitor and a monitoring team will benefit from attendance at precinct briefings and going on "ride-alongs" to familiarize themselves with the police personnel and their issues and to make the monitoring process understandable to them.

Likewise, monitors should consider meeting with officers of different ranks, attending briefings and roll calls, meeting with union leadership, and reading historical accounts, previous reports, and newspaper articles about the agency. Roll call appearances introduce the monitoring team to officers and provide opportunities to explain the monitor’s role.

It can be valuable, particularly for a municipal action monitor, to interview the district attorney, the public defender, the plaintiffs' civil rights bar, the city attorney's office,

judges in criminal courts, and others who work routinely with and have opportunities to observe the police.

Community meetings and forums provide similar opportunities. False or exaggerated expectations of the monitoring process can be corrected. In particular, for litigation-initiated monitors, it is important for government leaders and the general public to understand that the monitor is not an ombudsman and will not be handling individual cases or disputes. Similarly, members of the community need to be disabused of the notion that the monitor runs the police department.

The monitor must understand and respond to local mores and sensitivities and keep in mind that he or she is performing a public service. A monitor should adapt his or her style, billing practices, fees, and disbursements to be compatible with local practice in the community as long as doing so does not compromise the monitor's independence and freedom of action.

1.9 *A monitoring team must have credibility in all segments of the community.*

Commentary

Reports by litigation-initiated monitors strongly impact upon public perception of the police department. Not all segments of the community will have a uniform view of the police and the need for change. A monitoring team should strive to include members who will appreciate and be sensitive to the community's racial and ethnic demographics, language diversity, socioeconomics, and varying social and political perceptions. This does not require that the members of the team be of any particular racial, ethnic, or socioeconomic group. The important point is that members of the monitor team be able to view problems flexibly and communicate an understanding of the perspectives of all persons being policed by the agency in question.

It is unhelpful, however, to have a monitoring team that simply mirrors and brings with it all the tensions and frictions present in the community, or is constructed to be diverse for diversity's sake alone. Indeed, it is undesirable and inappropriate to construct monitoring team composed of advocates or individuals who represent one particular group or perspective. The monitor and the monitoring team must be above the fray.

However achieved, the overriding goal is to have a monitor, or a monitoring team, that is credible and trusted by the wider community. Done properly, the monitoring process can also be a healing one. Abraded relationships between police and various communities can begin to mend.

For municipal action monitors, it can be useful to establish alternative dispute resolution mechanisms, including mediation, negotiation, dialogue, and restorative justice techniques to strengthen police-community relationships and engender trust among all segments of a community.

1.10 *To the extent necessary, monitors and team members should receive training for their monitoring roles.*

Commentary

Although monitors and team members should possess subject matter expertise, police monitoring as a professional endeavor may nevertheless be novel to them. Although monitors and team members are typically accomplished in their fields, their experience and expertise alone may not always enable them to deal effectively with the challenges they will face as police monitors. Experienced monitors have encountered challenges in areas such as auditing, investigatory, and adjudicatory skills; the ability to mediate, reconcile, critically evaluate, or choose between differing judgments and points of view; and the art of drafting of public reports.

Effective monitoring performance depends upon monitors and team members bringing the appropriate skills and knowledge to bear upon their monitoring tasks. Monitors and team members should receive training as necessary to ensure that they are fully equipped to perform their roles. Training needs will vary according to the composition of the team, the characteristics of the jurisdiction to be monitored, and the characteristics of the agreement. Training programs should be tailored to meet those needs. Sources of training may include experienced monitors, professional organizations (such as NACOLE, PARC, and others), police professional organizations (such as PERF, IACP, NOBLE, and others), police academies, officer continuing education programs, and academic institutions. Experienced monitors should share "lessons learned," describing mistakes they have made and how they were successful or not in overcoming obstacles. Monitors and team members should receive training at the outset of the monitoring process, as well as throughout the monitoring period, as training needs are identified.

1.11 *A monitor should seek to establish credibility and trust with the monitored agency and the branches of local government.*

Commentary

The litigation-initiated monitoring process functions most effectively where there is mutual trust between the monitor and the parties to an Agreement. Impediments to mutual trust should be identified and resolved early in the monitoring process. The establishment of a trusting relationship does not necessarily mean that monitors will always agree with parties. Indeed, it should be anticipated that the monitor and parties will encounter disagreements. Disagreements, however, should not be allowed to undermine good professional relations. Trust is maintained by open lines of communication and transparency of operation. The same is true for municipal action monitors in their relationship with a monitoring agency.

Most monitors present drafts of reports to the parties or monitored agency for review and comment before publication. This practice can promote the accuracy of the report by having the parties, particularly the monitored agency, point out factual errors and incorrect numbers or statistics. It can promote fairness by eliminating surprise and by fostering a dialogue about findings and recommendations. This process should produce a greater likelihood that recommendations will be in fact implemented. In adopting this practice, however, monitors must not compromise their independence by bargaining over the report's content, permitting undue delay in the publication of the report, or giving occasions for the parties to improperly influence the findings and conclusions. A monitor must not subordinate his or her judgments to others.

The establishment of a good working relationship with the chief and other executives of the monitored agency can be particularly challenging. Often, the monitored agency will have actively resisted the imposition of the Settlement Agreement. The monitored agency may have negotiated and lost on various revisions of the final Agreement. The union and the rank-and-file may have a perceived interest in subverting the Agreement. The monitor may face passive resistance, perfunctory cooperation at best, foot dragging,

studied incompetence, missed deadlines, poor performance, and even open hostility and attempts to undermine the monitor's credibility and reputation. If monitors are facing active or passive resistance, then they must be free to remedy the situation. In the litigation context, it may be necessary to go to the court.

A municipal action monitor established outside the context of litigation may not have recourse to the courts. If faced with resistance from the monitored agency, the monitor may have to turn to the mayor, city manager, city council, or manager of safety. If there is inadequate political will to back the monitor and the monitoring process, then a monitor should resign if he or she reflects and reaches a considered judgment that the job no longer can be competently performed. Likewise, a mayor or city council may believe they can control the monitor. Political pressure can be brought to bear on the monitor. A monitor must endure the vicissitudes of local politics and personalities. If such pressures compromise the objectivity and independence of the monitor, resignation must be considered.

The monitor therefore must have the skill and ability to function in a highly challenging environment. It is here that a monitor's negotiating and facilitating abilities come to the fore. A firm but friendly manner is an asset, as is an ability to stay focused on the job at hand and to resist reacting personally and emotionally. A good monitor demonstrates that he or she means business and cannot be pushed around, while contemporaneously cultivating cordial professional relationships with the monitored agency and its chief officers. A good monitor uses opportunities to teach, inform, and articulate common goals; similarly, the monitor must be open to being taught and informed by others. A monitor must not be afraid to show honest humility or ignorance.

1.12 *Monitors should ensure that the costs incurred for their services are reasonable but not unduly constrained so as to adversely affect the monitor's ability to carry out his or her responsibilities.*

Commentary

The jurisdiction being monitored as result of litigation generally pays for the services of its monitor. This payment is in addition to the typically substantial expenditure required to work towards compliance with the terms of an Agreement. It is a wise practice that the monitor be reasonable in fees, costs, and expenses—for example, the monitor should have comfortable accommodations, travel, and meals but the monitor must not be profligate.

The monitor should not accept meals (except for catered sandwiches and soda at a working lunch or the like), gifts, or gratuities from anyone. It is wise for the monitor to be sensitive to local practice and mores about what activities are billable and what is considered fair compensation. The monitor should keep detailed records to justify all billings for time, supplies, and expenses.

There should not be unreasonable restrictions on funds or other resources provided to monitors which adversely affect their ability to carry out their responsibilities. The monitor should be paid and reimbursed in a timely manner. It is better for the city to pay upon presentation of the statement and then to audit afterwards.

A monitor at all times must be held to a high standard of fiscal accountability yet should also have reasonably wide discretion in how to spend money budgeted for monitoring. A monitor should resist efforts to engage specified experts or personnel or suppliers simply because they are cheap. A monitor must guard against:

- external interference or influence that could improperly or imprudently limit or modify the scope of an audit or threaten to do so, including pressure to reduce inappropriately the extent of work performed in order to reduce costs or fees;

- unreasonable restrictions on funds or other resources provided to the monitoring team that adversely affect its ability to carry out its responsibilities; and
- unreasonable or imprudent use of allocated funds on expenditures that may not be central to or necessary for the monitoring task.

Municipal action monitors should assure themselves before accepting an appointment that there are sufficient resources to perform the task and to engage others to assist as necessary. The ordinance, municipal code, or executive order should ensure, to the extent possible, that adequate funding be available in the current and future municipal budgets.

1.13 *The conduct of team members' activities should be effectively coordinated.*

Commentary

When monitoring teams are used, they typically consist of multiple members, some of whom may have limited contact with one another or with the lead monitor on a consistent basis. Nonetheless, monitoring teams must produce a coherent work product.

Monitoring teams who have relied upon an ad hoc approach to the coordination of individual team member's work have found that approach to be ineffective. Monitors should ensure that all members' activities are coordinated from the outset of the monitoring process in order to avoid unnecessary delay, disruption, or duplication in the performance of monitoring tasks.

1.14 *Monitors should ensure, to the extent possible, the protection of all confidential written and oral communications within the monitoring team and between the monitoring team and involved parties, including the monitor's work papers, drafts, and notes.*

Commentary

It is not uncommon for monitors to receive deposition or trial subpoenas for testimony and documents in private litigation alleging excessive force or other police misconduct. Exposure of confidential written or oral communications, memoranda, e-mails, work papers, drafts, and notes undermines the effectiveness of the monitoring process and may chill open, candid, and detailed communication.

Monitors under threat of a subpoena will be less forthcoming and open in pointing out problems and errors or suggesting corrective action. In many Agreements, monitors are explicitly prohibited from testifying about information acquired in the monitor's official capacity. In others, the Agreement is silent on the question. Unless there are strong countervailing considerations, an Agreement should explicitly exempt the monitor from the burden of testifying or producing documents. Local ordinances and municipal codes similarly should strive to protect the monitor and his or her work product from subpoenas. In instances where the monitor is a lawyer, thought should be given to whether application of the attorney-client privilege and the work product rule is feasible.

Drafters of Agreements, ordinances, and municipal codes should consider explicit reference to the typical statutory rule barring evidentiary use of subsequent remedial or corrective action and the conditional privilege recognized by some states barring disclosure of official information acquired in confidence where the public interest in disclosure is outweighed by the need for confidentiality.

1 15. *The monitor should be permitted to engage independent, conflict-free counsel of the monitor's choice in all instances where legal advice and counsel would be helpful.*

Commentary

Occasions will arise when monitors or members of the monitoring team will require confidential, independent legal advice. Among such instances are:

- At the inception of the monitoring process to draft, if necessary and desirable, an engagement agreement for the monitor covering compensation, billing practices, indemnification, and other issues not provided for in the Settlement Agreement or municipal ordinance or code.
- To establish rules and procedures for collecting documents, maintaining their security and confidentiality, and setting standards and limitations on the production, number, and use of copies.
- The establishment of document retention and document destruction policies and practices.
- When subpoenas for testimony or for the production of documents at deposition or trial are sought.
- If the monitor is the subject, in his official capacity as monitor, of a lawsuit or other legal proceedings.
- When the monitoring process ends and the disposition of drafts, notes, memoranda, and other work product is at issue.

In all such instances, the monitor should be free to engage counsel. The costs of such counsel should be provided for in the Agreement, or within the approved budget of the local monitor, or in a supplemental engagement letter drafted after the selection of the monitor. At times, the monitor may be able to arrange pro bono counsel. In any event, however, the monitor should not be subject to legal fees, expenses, or liability arising from performance in the ordinary course and scope of the monitor's duties, except for intentional misconduct.

1.16 *For monitors charged with ensuring compliance with a Settlement Agreement, the monitor should turn to the parties for interpretation of the Agreement and resolution of the ambiguities in it. If the parties cannot agree, the monitor should seek guidance from the court. Municipal action monitors must also be vigilant that the nature of their powers and access is understood clearly by all involved parties.*

Commentary

The monitor is not a party to a Settlement Agreement. The monitor cannot add to or subtract from or modify the Agreement. Hence, if the monitor believes that an interpretation of a provision is required, or if the language used is ambiguous, the monitor should so notify the parties of the issue, preferably in writing. Should the monitor choose to do so, he or she might offer a proposed interpretation or another way to resolve the particular ambiguity. Alternatively, a neutral third party could be selected by the parties for this purpose. It is nonetheless the obligation of the parties to confer and resolve the issues raised by the monitor. If they cannot or will not do so, the monitor should raise the issue with the court, either directly or by insistence that the parties seek such assistance.

Even better, Settlement Agreements should be drafted to make explicit the process to be followed in the event that parties reach impasse or will fail to cooperate in good faith with the monitor.

A monitor should be free to facilitate meetings of the parties if to do so will not compromise the monitor's independence and objectivity. A monitor may help by making certain that all necessary discussions take place. The monitor may be able to articulate and clarify what has been agreed to. In that way, a monitor can reduce present or future misunderstandings, conflicts, and disagreements, and confusion. A monitor should suggest ideas how to move forward on particular issues if the parties fail to offer reasonable solutions.

A municipal action monitor may face similar issues concerning the scope and interpretation of the ordinance under which he or she operates. The monitor may face refusals to fulfill the monitor's requests or court challenges to the monitor's authority. A monitor may or may not have the backing of the mayor or city council when push comes to shove. The greater precariousness of the municipal action monitors' position calls for them to have finely honed political judgment and diplomatic skills. Likewise, a municipal action monitor should negotiate an engagement letter or side letter with the city detailing the monitor's powers, providing for appropriate access, and setting forth a procedure for the resolution of disagreements between the monitor and the monitored agency.

1.17 *If permitted to render technical assistance by the Settlement Agreement or ordinance, the monitor should carefully weigh the advantages and disadvantages of doing so. If required to render technical assistance by the Agreement or ordinance, the monitor must do so without compromising objectivity and independence.*

Commentary

Sometimes, litigation-initiated and municipal action monitors have substantial expertise in drafting police policies and procedures, setting up early warning systems to track potential police misconduct, crafting internal review mechanisms to test the appropriateness of lethal and less than lethal uses of force, and constructing force tracking mechanisms. Litigation-initiated monitors and their teams, and municipal action monitors and their staff, often have substantial direct law enforcement experience or substantial exposure and expertise through academic work, prior consultation, or previous law enforcement monitoring experience.

Monitors, accordingly, may be sought after to give advice and assistance to the monitored agency. Whether a monitor can or should make that technical expertise available to a city and a law enforcement agency being monitored is a delicate question. Often, the Settlement Agreement will specify if technical assistance may be provided. So too may a municipal code provision or ordinance. In the absence of such a provision, the rendition of such assistance creates possible conflicts of interest and should be considered carefully.

The monitored agency may have an incentive to seek the monitor's advice in the hopes that following it will increase the chances that the monitor will find the agency in compliance or otherwise given a positive report. The risk for monitors is the loss of objectivity and independence if, in essence, monitors are reviewing implementation of their own advice and suggestions. In light of those risks, a monitor must carefully weigh the advantages and disadvantages.

An obvious advantage to provision of technical assistance is that the monitored agency can learn from and develop a harmonious working relationship with the monitor and perhaps make progress more rapidly. It lessens the burden and expense that the monitored agency would incur if it had to solicit and pay for others to render it such assistance. It promotes the notion that the federal or local government and the monitored agency are not necessarily antagonists but rather can work together, with the assistance of the monitor, to reach common goals. It offers more carrots and fewer sticks.

The disadvantages center on risks to the monitor's objectivity and independence. Few can resist the flattery implicit in having one's advice and assistance enthusiastically embraced. Likewise, few can avoid feeling disrespected or insulted when one's advice and assistance is spurned. In either case, the monitor is put in conflict with his or her objectivity. Moreover, there are monitored agencies that are actively antagonistic or passively resistant to the Settlement Agreement or municipal monitoring. In such circumstances, a monitor must be free from any constraint, psychological or otherwise, to cite the monitored agency for noncompliance. An independent stance is more difficult to maintain if the monitor is entangled in the provision of technical advice. Further, agencies may embrace changes more quickly or enthusiastically when a change is generated internally than when the same change is proposed by an outside agent who, depending on the unique relationship between the monitor and monitored agency, may be viewed with suspicion.

It goes too far, however, to draw a bright line and forbid the provision of technical advice unless required by the Settlement Agreement or local ordinance. The matter should be left to the sound discretion of the monitor to proceed with appropriate caution. Where required by the Settlement Agreement or ordinance, the monitor should provide technical assistance in ways that keep the monitor as independent as possible from the advice rendered. In some instances, it might be best for the monitor to facilitate or moderate a direct interchange between the monitored agency and an outside expert with the requisite technical expertise. In other instances, a monitor might render such assistance by calling upon other present or former monitors to share their thoughts on the issues at hand with

the monitored agency. Similarly, the monitor might put the monitored agency in touch with a previously monitored law enforcement agency which previously solved the dilemma for which the monitored agency needs technical assistance.

II. COMMUNICATION DURING THE MONITORING PROCESS.

2.1 *Monitors should provide the parties, stakeholders, and the general public with information clarifying the roles and responsibilities of the monitor.*

Commentary

The appointment of a monitor through litigation or by municipal action often occurs in times of turmoil and sharp differences of view throughout a city about the police. The insertion of the monitor as a new player in the mix may cause some to feel anxious and defensive and others to have unrealistic expectations. Police executives, the police union, and some politicians may have considerable stake in the status quo while other political leaders, along with civil rights and community organizations, may be seeking a wholesale change in police practice and management. Uncertainty or misperceptions about the actual role of the monitor complicate matters.

To reduce potential misunderstandings, resentment, or misplaced expectations, the parties, stakeholders, and the general public should be quickly and clearly informed at the outset of the role and responsibilities of the monitor. The monitor should set forth the nature and scope of the monitor's role and what the monitor will and will not do. The monitor should also affirmatively seek out and be introduced to the parties, stakeholders, and the general public. Although monitors must not seek undue attention, they should not work in obscurity. Monitors should be cognizant of the need to maintain open and free flowing channels of communication with all and construct their communications strategy accordingly.

2.2 *The monitor should formulate protocols for communication with stakeholders.*

Commentary

The monitor must establish rules governing communication within the monitoring team itself and between the monitoring team and stakeholders. For litigation-initiated monitors, these protocols will speak to communication with the involved parties to the Settlement Agreement and their representatives. For municipal action monitors, these protocols will speak to communication with local government and the community at large. Although the details of a communication plan will necessarily vary from case to case, the following basic elements constitute useful protocols:

- The monitor should identify who will serve as the designated person within the monitoring team to receive incoming and make ongoing communications. It is best that the monitor select one person of authority within the monitoring team to collect all incoming communications and requests and handle all outgoing communications and responses. The monitoring team and all parties must know the lines of authority and who is permitted to communicate, negotiate, and make commitments on behalf of the monitor.
- The monitor should require that the date, time, involved individuals, and the substance of all communications by team members with the parties or their representatives be memorialized in writing and saved.
- The monitor should assure that all agreements of substance with any of the parties are memorialized in writing and confirmed.
- The monitor should request that each party designate one or two individuals who will always be available to be contacted and receive communications or requests from the monitor and will be responsible for follow up. Likewise, each party should make clear who is authorized to speak for and make binding commitments on behalf of the party.
- To minimize duplication, confusion, and unnecessary burden and to provide timely notice and opportunity to respond, the monitor should designate an individual to collect and coordinate team requests for information, data,

interviews, visits, and meetings. That individual should keep a log of all requests and the progress and timetable for each.

- The monitor should schedule regular periodic meetings with the police department's chief executive and compliance team, if there is one, to discuss preliminary findings and ongoing issues and problems. Monitors should regularly meet with the parties and their representatives, particularly before and after publication of the monitor's periodic reports.

Monitors should share current, comprehensive information about the monitored agency with that agency on a consistent basis. A monitor should communicate regularly with the monitored agency to discuss the progress of the monitor's work and the monitor's findings as the monitor moves from project to project.

2.3 *The monitor should establish protocols for communicating with the general public and stakeholders.*

Commentary

The general public and stakeholders are likely to have considerable interest in the monitor's ongoing assessments of police performance. By the same token, a monitor needs to know how they view the police and evaluate progress. Monitors should regularly touch base with stakeholders and the general public, community groups, and their representatives.

Competing demands for the monitor's time and attention may require such interactions be restricted by time, place, content, and manner. It must be kept in mind that the monitor does not speak for or on behalf of anyone except him or herself. Accordingly, the monitor should carefully manage the frequency and content of communications with the stakeholders and public. The monitor should take care to disabuse the public when and if it articulates misperceived or exaggerated notions of the monitor's power and responsibilities. By the same token, the monitor can assist in educating the public and helping it to frame reasonable expectations of the police about what monitoring will accomplish. The monitor can also assist in educating the police.

Those in the general public who are the most alienated, distrustful, and angry at the police, and those within the police department and police union who are the most alienated, distrustful, and angry at police management or the monitoring process, present the greatest challenge. The monitor must demonstrate tact and diplomacy in such circumstances, but unless a Settlement Agreement or municipal ordinance so requires, the monitor should avoid taking on the responsibility for healing community wounds, becoming embroiled in management versus labor union strife, or becoming a lightning rod for all the antagonisms and anger loose in the city.

2.4 *Litigation-initiated monitors and the court should establish mutually satisfactory ways to communicate.*

Commentary

A consent decree is a federal court order enforceable by contempt. Certain settlements in private litigation, as in Oakland, have the same characteristic. Under most consent decrees, the federal judge appoints the monitor, selects the monitor from choices presented by the parties, or has discretion to approve or disapprove the parties' choice. The federal court and the monitor will likely have a close and confidential relationship. Some federal judges elect to be actively involved in the supervision of the consent decree; others prefer to remain uninvolved unless there is a dispute brought by the parties to the court for resolution. Under a consent decree, the monitor should be empowered to invoke the court's assistance when the parties prove recalcitrant, act contemptuously or in bad faith, or fail to perform as the decree requires.

A federal memorandum of understanding or memorandum of agreement differs from a consent decree. While a consent decree can be enforced by the federal court through its contempt power, MOAs and MOUs are enforceable by the parties through an action for specific performance or equitable relief. In such circumstances, the monitor stands in a different and more distant relationship with the court. It is the parties that must initiate proceedings to enforce the Settlement Agreement. The monitor's role generally is restricted to finding noncompliance. If the Civil Rights Division agrees, and the matter cannot otherwise be settled or negotiated, it will be DOJ that goes to court.

2.5 *The monitor should have protocols for dealing with the media.*

Commentary

It is inevitable that monitors will be subject to frequent inquiries and requests for interviews from the print and electronic media. It is important that the monitor carefully consider all options for dealing with the media. At times, the Settlement Agreement will provide guidance to the litigation-initiated monitor in dealing with the media or will bar any contacts with the media without prior clearance. In most instances, however, the monitor will not be so constrained and will have discretion about dealing with the media, keeping in mind that confidential, legally-protected information must never be released.

It is best practice for a litigation-initiated monitor not to initiate contact with the press but rather only respond to requests. Some monitors will speak with reporters only on an "off the record" or "background" basis. Other monitors avoid media contact altogether. Some monitors will speak with the editorial board of newspapers and others will not. Each monitor must consider whether contact with the media advances the purposes or otherwise assists the implementation of the Settlement Agreement. So too must monitors consider whether off the record or background contact with the media undermines the trust and confidence of the parties in the neutrality and discretion of the monitor and in the ability of the monitor to keep confidences.

Municipal action monitors, in contrast, may find it necessary, in the furtherance of their mission, to initiate press contact. These monitors have the responsibility to communicate with the public, and monitors may determine that the media is the best means of doing so. Monitors must be careful, however, to ensure against the perception that such media use is self-aggrandizing or personal advocacy. It is best if the ordinance or written engagement letter with the monitor address the circumstances under which a monitor may have dealings with the media.

If contacted, the monitor should consider first whether different rules should apply to the print media, in contrast to television and radio. In general, the monitor will have the

greatest ability to control and to shape what is presented in a newspaper. Similarly, a monitor has the least control in a live, on-air television or radio interview. The monitor has more control over the editing process in the print media than in the electronic.

It is not uncommon for monitors to respond to inquiries when input from the monitor may clarify or correct reporting of the monitoring process and the monitor's reports. It is best practice that no one on the team other than the monitor be authorized to speak. The provision of quotes or attributions should be negotiated and managed by monitors in order to preclude misleading reporting.

Because monitors may not have had extensive experience with reporters, they should become familiar with basic rules of interviews and sourcing. Monitors should learn as much as possible about types of attribution used by journalists and should negotiate with the reporter about them. Given the sensitive nature of the monitor's mission and issues at stake, misunderstandings about these terms could undermine a monitor's relationship with a journalist or media outlet. There are no standard or officially sanctioned definitions for the different types of journalistic sourcing. A monitor should affirmatively negotiate the terms under which a quotation or other information may be used. What follows is a rough guide to the meaning of commonly used journalistic terms: In *News Reporting and Writing*,[3] the terms are defined as follows.

- **On the record**: all statements are directly quotable and attributable by name and title to the person who is making the statement
- **On background**: all statements are directly quotable but they cannot be attributed by name or specific title to the person commenting. The type of attribution to be used should be spelled out in advance, "A White House official," "an administration spokesperson."
- **Off the record**: information is for the reporter's knowledge only and is not to be printed or made public in any way. The information also is not to be taken to another source in hopes of getting confirmation.

[3] Melvin Mencher, *News reporting and writing*, 9th edition, Boston: McGraw-Hill, 2003, p. 47.

Some monitors require that all quotes be read back to the monitor and approved prior to publication, and it is best practice to do so. Likewise, some monitors require that the entire story, or the portion in which the monitor is quoted, be read to the monitor prior to publication in order to test the appropriateness of the quotation in context. Monitors should be aware that some journalists refuse to do so and may refuse to accept off the record, background, or anonymous sources. The use of such sources is a matter of controversy among journalists. If a journalist declines to accept the monitor's terms, the monitor is best advised not to proceed with that reporter on that occasion.

Immediately after monitors issue a report, newspaper reporters, editorial boards, and radio and television news programs request comments or interviews. Handling those requests is covered at Guideline 5.10 below.

2.6 *Monitors should have protocols for communications with confidential or anonymous informants.*

Commentary

Individuals from within a monitored agency or knowledgeable about it may seek out the monitor and desire to provide information to the monitor on a confidential basis. While information obtained confidentially may shed vital light on important issues or specific areas that a monitor should evaluate more comprehensively and rigorously, the monitor must take care to understand fully the informant's motivations and incentives. The monitor must, accordingly, weigh carefully the credibility and reliability informants. A monitor should be willing to receive anonymous information because such information might suggest avenues of inquiry, investigation, or research.

The monitor must fully disclose to all informants whatever limitations constrain the monitor's promise confidentiality. The monitor should be explicit about the circumstances in which he or she may be compelled to disclose the identity of the informant and the information imparted. The monitor should have an explicit agreement from informants that they fully understand limitations on confidentiality.

III. THE MONITORING PLAN.

3.1 *A detailed monitoring plan, or a set of guidelines or protocols, should be drafted to assist the monitor and the parties to undergo the monitoring process in an orderly and predictable way.*

Commentary

A monitoring plan or set of guidelines is a written document describing how monitoring tasks will be performed. The creation of a monitoring plan should take place at the inception of the monitoring process. The plan or guidelines provide the monitor and monitoring staff or team members with a structured work plan, instruct the monitored agency how best to coordinate its efforts with those of the monitor, and, in the litigation context, set forth how the Settlement Agreement will be broken down into clear, discrete tasks with specific deadlines and defined expectations. The monitoring process functions more effectively when all parties know and understand, and agree upon to the extent possible and as early as is reasonable and feasible, what evaluative criteria will be used to determine implementation and compliance with the terms of an Agreement or the municipal ordinance or code.

In the litigation context, the formulation of a monitoring plan, however, should never be a renegotiation of the Settlement Agreement. Nor can it purport to constrain or circumscribe the court's discretion regarding the question of substantial compliance. Nor should it constrain or circumscribe the monitor's discretion in determining whether a provision of the Agreement has been implemented or complied with. A monitoring plan is a living document which should be modified and amended as the monitor sees fit and as circumstances change during the course of monitoring.

In both the litigation and municipal monitoring context, the parties should be consulted during the formulation of the plan to ensure that it is workable. Such consultation does not include negotiation over what will or will not constitute compliance. Monitors should anticipate that parties may disagree on points of the plan. Although the monitor should

take account of all reasonable input from parties, any remaining disagreement should not preclude the monitor from proceeding with, or later amending as necessary, a plan that, in his or her judgment, is best. Monitors must be able to deviate from or amend the provisions of monitoring plans. The validity and efficacy of the contents of a monitoring plan should be periodically reassessed to ensure that the plan remains effective.

3.2 *A monitoring plan is not only for the benefit of the monitor. It should also make clear to the monitored agency how the monitor plans to go about his or her assignment.*

Commentary

At base, the initial monitoring plan should contain the following:

- the elements of the monitored agency's performance to be reviewed and evaluated;
- identification of specific individuals within the monitored agency with responsibility for each such element;
- the existing data bearing upon such elements;
- additional data that must be generated and collected to permit meaningful review and evaluation;
- a general description of the criteria, standards, and process that the monitor will use;
- deadlines; and
- the frequency with which monitoring of a particular provision will take place.

It is important that careful consideration be given to each of these issues on a task-by-task basis, as it is unlikely that a one-size-fits-all approach will suffice for the typically varied nature of the requirements contained in the Agreement or required by ordinance. This is particularly true for measuring compliance under Settlement Agreements: Some items will require the specification of a quantitative standard (*x* percent of complaint investigations to be completed within the period of time specified by the Agreement), while others will require qualitative analysis (use of force policy to be revised in accordance with national standards). Others may require a combination of qualitative and quantitative analysis. In this connection, the monitor should consider consulting with a statistician to construct rigorous tests and sample sizes that lead to valid, trustworthy results.

The monitoring plan should be revised as time goes on and the monitoring tasks change. In the intermediate and end stages of litigation-initiated monitoring, the monitoring plan

should consider the steps being taken by the monitored agency to sustain compliance and constitutional policing up to and after termination of the Settlement Agreement and formal monitoring. The monitoring plan should shift focus from the trees of each individual provision to the forest of overall change and the success of the monitored agency's institutionalization of self-assessment mechanisms and corrective action protocols to maintain and sustain the progress achieved. While municipal action monitoring is an ongoing process without a fixed end date, the monitor should similarly keep an eye on the institutionalization of self-assessment mechanisms and corrective action.

IV. MONITORING REPORTS.

4.1 *Monitoring reports should be clear and concise and provide explicit guidance to the monitored agency on remedial action and the monitor's expectations.*

Commentary

Although the court and the parties are the principal audience for litigation-initiated monitor's reports, they are widely reported in the press and keep the community informed about the status of compliance. The reports of municipal action monitors likewise are widely distributed, reported on, relied upon, and discussed. They must therefore be clear, easy to understand, concise, well-researched, well-indexed, and well-written.

Clarity results from the use of straightforward, simple language. Clarity is achieved when complex thoughts are broken down into their constituent ideas. Technical terms, abbreviations, and acronyms should be used sparingly, and, if used at all, fully defined. Clarity follows from logical, common sense organization of material and accuracy and precision in stating facts and drawing conclusions. Titles, captions, headings, and subheadings foster ease of understanding.

Conciseness requires that a monitor's report be no longer than necessary. Unnecessary detail that distracts the reader may even conceal the real message or may confuse or distract the users. Monitors should look to delete unnecessary words and phrases. Charts, graphs, and tables clarify and condense the presentation of numbers and statistics. Maps are better than geographical descriptions.

Monitors should consider using a summary within or appended to the report to capture the reader's attention and highlight the overall message. The Los Angeles monitor's "report card," which offers summary grades for each of the major paragraphs and sub-paragraphs of the consent decree under which it operates, does this well, as do executive summaries, which identify major themes and an overview of findings in the report. Such summaries render the contents of the report accessible to those who might not have the

appetite to read a relatively technical and lengthy paragraph-by-paragraph compliance evaluation.

Monitors should consider, however, that some readers of their report may consider a summary or "report card" at the expense of the more detailed discussion found in the report itself. The complexity of some issues may be lost. If a monitor determines that a summary is helpful, it generally should synthesize the monitor's most significant findings, review the report's principal conclusions, and prepare readers to anticipate the major recommendations. For litigation-initiated monitors, the summary should focus specifically on areas of compliance and non-compliance.

4.2 *Anecdotes and examples must be chosen with care.*

Commentary

Monitors often use illustrative anecdotes. Although anecdotes may provide a powerful means of conveying a message or describing an issue, indiscriminate use can be misleading. Monitors should consider the following when deciding whether to employ examples and anecdotes in their reports:

- The inclusion of certain details may inappropriately indicate the identities of involved persons. In some jurisdictions the identities of officers allegedly involved in misconduct is confidential. To lessen the risk of inadvertent disclosure, names should be changed or other telling details altered as long as the monitor explicitly discloses doing so.
- If an anecdote is used, it must be representative of a general principle. For example, if a report describes the problem of investigators using leading questions, examples of leading questions should be included.
- If a negative, atypical incident is included, it should be identified as out of the ordinary and should be used only if it supports a finding in the report.

4.3 *Monitors should provide parties with draft copies of reports prior to publication in most instances and, if positive and productive, hold face-to-face meetings with the parties to discuss them.*

Commentary

As a general rule, monitors should provide drafts of reports to the parties in advance of scheduled publication in order to provide an opportunity to identify any inaccuracies or errors. The monitor should require the parties to provide notice at a specified time, perhaps 5 to10 business days after receipt, of any aspect of the report that may be inaccurate. Thereafter, the monitor should schedule a meeting with the parties to discuss the draft report. The dialogue, questions and answers, and explanations can be constructive and dispel misunderstandings or misinterpretations on both sides. It enhances the credibility of the report, the monitor, and the monitored agency.

A monitor can reduce the risk of factual error by submitting tables, charts, numerical and statistical data, and factual descriptions of events or incidents to the monitored agency for confirmation prior to publication of a report. An unwillingness or inability so to confirm should be noted in the monitor's report. A monitor should consider engaging, if feasible, a reputable accounting or consulting firm to perform complex statistical analyses and to formulate detail queries from databases. Likewise, if the monitor intends to rely upon data supplied by the monitored agency, the monitor should consider engaging an accounting firm to audit the key statistics and numbers.

At times, monitors have had a fractious relationship with the monitored agency or have been met with passive resistance where, among other things, negotiation, renegotiation, and discussions have been used in bad faith to frustrate or exhaust the monitor or delay publication of a report. In such circumstances, the monitor should consider whether it remains wise or useful to circulate all or part of the report in advance or whether an oral briefing or presentation of an executive summary is the better course.

4.4 *Monitors should publish corrections in all cases where a publicly reported assessment proves to have been inaccurate or is otherwise subject to revision.*

Commentary

The monitor's credibility and influence rest largely on the accuracy and precision of the monitoring reports. A monitor's credibility can be undermined by an accumulation of small, inconsequential errors as well as by a significant mistake. Whenever a monitor determines that an erroneous fact has been published or a previous finding or recommendation should be revised, he or she should publish a correction. Errors and revisions leading to detrimental reliance or changes in policy or practice should be corrected as soon as discovered and appropriately publicized. Less significant ones may be corrected in a subsequent report.

4.5 *The monitor and monitoring team must rigorously check facts.*

Commentary

Accurate reports result from full and accurate notes and relentless, repeated fact checking. As with a newspaper article, a monitor's report must have identifiable and reliable sources for each factual assertion. Like a law review article or scientific paper, each assertion must be grounded in a demonstrable fact, a citation to a reputable source, or to other proof. A law review or scientific article does this through elaborate footnotes printed along with the text. A newspaper does this through reporters' notes, vetting of sources, and documentary proof. A monitor's report is generally more akin to a newspaper article and is sparing in the use of footnotes and end notes. Like a reporter, a monitor must keep detailed notes, vet sources, and have documentary proof.

Each person on a monitoring team who is collecting facts should keep written, typed, or word processed notes with the fact taker's name, the date, and sources. If the sources are documentary, and it can be reasonably accomplished, a copy of the relevant page from the source document should be attached. Likewise, each person on a monitoring team who is conducting interviews should tape interviews or take detailed notes that are as close to verbatim as possible. Direct quotes should be noted as such.

It is an uncommon individual who can simultaneously conduct an interview and take notes, especially in face-to-face (as contrasted to telephonic) interviews. Accordingly, it is best to have both an interviewer and a note taker where feasible and the presence of the note taker does not compromise the openness and candor of the discussion. At times, this is not feasible: A monitoring team member or a monitor may be engaged in a casual discussion when something important is said and it would chill the conversation or be unseemly to whip out a notepad; a source may wish to speak to the monitor alone and in private. In such instances, one should commit the conversation to writing as soon as possible while explicitly pointing out that the notes are not contemporaneous.

4.6 *The monitor and monitoring team must keep thorough and accurate notes.*

Commentary

As when the monitor is interviewed by the press, so too should the monitor make sure the ground rules for an interview are thoroughly negotiated with the interviewee. Often, a key interviewee will ask for a pledge of confidentiality or that a discussion be treated as a off the record. The monitor needs to know if confidentiality can be promised in whole or in part. The monitor should be familiar with the applicable law governing the enforceability of a promise of confidentiality or consult a lawyer beforehand. In most instances, absolute confidentiality cannot be assured. The monitor and interviewee need to know under what circumstances the monitor may be forced to disclose the source and content of a conversation or interview. Like a good reporter, the monitor should discourage off the record or deep background discussions, if possible. There are nonetheless circumstances where the value of the information to be gained outweighs the undesirability of an off the record discussion.

4.7 *The monitor's reports should be widely distributed.*

Commentary

Monitors should distribute their reports to the involved parties in all formats requested by them. The monitored agency should affirmatively distribute hard copies to the entire command and supervisory staff and to as many rank-and-file officers as is feasible. If hard copies cannot feasibly be available to all, the monitored agency should put the report on its web site or otherwise affirmatively alert all personnel to the existence of the report and where hard or electronic copies can be found.

To distribute their reports to the wider community, monitors should create Internet sites and make the monitoring reports available on them. While exclusively electronic distribution is more efficient in terms of cost and time, many monitors, especially in communities with a large population of individuals who lack computer access, will find it useful to distribute hard copies of reports as widely as possible among the community. Accordingly, monitors should consider providing hard copies to relevant stakeholders, academic institutions, newspapers, and journals.

Monitors should consider having summaries of their reports translated into the languages spoken by those within the community.

4.8 *A monitor must carefully weigh the advantages and disadvantages of public comment on a report immediately before and after it is released.*

Commentary

Some federal Agreements forbid the monitor from speaking to the press without permission from DOJ. Other agreements are silent on the subject, and the monitor has discretion to speak with the press or not. Immediately before and after the release of a monitoring report is the most tempting time for the monitor to want to respond to inquiries from newspaper reporters, editorial boards, local government leaders, and radio and television news programs.

In the litigation context, the parties themselves are usually better positioned to comment upon the monitor's report. Accordingly, best practice suggests a presumption against a litigation-initiated monitor speaking to the press on record.

A municipal action monitor, in contrast, may find it useful to publicize proactively his or her report to ensure that it is not described incorrectly in media coverage. At times, such a monitor may operate on an overly optimistic assumption about his or her ability to shape the coverage the monitoring report will receive. Moreover, such media attention may shift the focus from the substance of the report and the performance of the monitored agency to the monitor himself or herself. Nonetheless, such monitors may find that offering public comment on a report is a primary tool for publicizing the findings of the report to the widest possible audience.

Some monitors will speak to newspaper reporters and editorial boards on an off-the-record basis. Those conversations allow the monitor greater freedom to discuss the monitoring report and respond to press inquiries in a way that will not be quoted or alluded to. Those conversations can prove useful in assisting the press to understand the specifics and overall import of the report. A prior off-the-record discussion with the reporter may assist the parties later to speak more convincingly on the record. On the other hand, it is perceived by some to overstep the monitor's role to talk to the press,

even if it is off-the-record. There is a risk that in speaking with the press, the monitor may become an advocate for himself and his point of view or be put in a defensive position. In either case, the monitor has a degree of personal involvement that may compromise the monitor's independence or integrity.

The advantages and disadvantages of speaking to the press off-the-record should be carefully considered by each monitor. In the context of a consent decree, where the court is actively involved and the monitor has a confidential relationship with the judge, it is wise for the monitor to seek guidance privately from the court regarding the matter. In the context of other settlement agreements and of municipal action monitoring, the weighing of the advantages and disadvantages should be left at the end of the day to the sound discretion of the monitor. It may be wise for the monitor to solicit the views of the parties on the subject, while reserving the final decision to him or herself—to give any party veto power would compromise the monitor's independence.

V. MONITORING TECHNIQUES.

5.1 *Monitors often must develop techniques and routines for measuring progress over time. Similarly, monitors must develop techniques for analysis of officer- involved shootings and other uses of force. It is useful for monitors to possess or have recourse to statistical expertise.*

Commentary

The science of police monitoring is still at an early stage. There is no complete set of tools at hand for measurement and analysis. Monitors have tended to work in isolation from each other, and a community of practice in the field is only starting to develop. Nonetheless, litigation-initiated and municipal action monitors have devised proven techniques for some of the major tasks facing them. Among those techniques for measuring progress over time are systemic analysis and trend analysis. A technique for analysis of officer involved shootings is decision point analysis. The sections that follow discuss these techniques.

5.2 *If permitted or required to do so by Agreement or ordinance, monitoring reports should examine performance on a systemic as well as a case-by-case basis.*

Commentary

Monitors are often permitted or required to review individual internal investigations of public complaints, and some also review officer-involved shootings and other uses of force regardless of whether a public complaint is generated. These case-by-case reviews help to assure the integrity of the investigation of individual cases. It is equally if not more important to determine whether the monitored agency's investigative protocols and practices as a whole produce fair results on a consistent and repeated basis. For example, in an officer-involved shooting, a case-by-case analysis may disclose that a given shooting officer was not kept separate from other witness officers prior to his interview, thereby violating department policy and possibly compromising the integrity of the investigation. The example elucidates one instance of a policy violation but does not shed light on the frequency of such violations or whether there is a reason or cause for the violations to occur. A systemic analysis would examine whether protocols are in place and enforced such that shooting officers are required to be kept separate. It would then examine the frequency of violations and the reasons for them.

Systemic analysis has potentially a broader reach than case-by-case examination. A flawed system is capable of producing fair and just results from time to time; one or more investigators may have the skill and professionalism to conduct a thorough investigation whatever the system or the rules are. But a system that is overly dependent on the personalities and professionalism of specific individuals cannot be relied upon to produce fair results time and again. A well-designed system, on the other hand, should produce fair results most of the time. A monitor examines a police system to determine if it is well-designed and calculated to produce fair results with adequate safeguards and checks to catch and correct occasional system failures. A monitor then looks at a representative sample of individual cases to test whether the system in fact is producing the fair results for which it was designed.

If permitted to render technical assistance or make recommendations, a monitor may, subject to the caveats in Guideline 1.17, provide advice how to design a better system or improve a flawed one. It is an important task because of a key goal of monitoring is that the monitored agency be capable of reproducing just and fair results in the future substantially independent of the monitor or personalities at the helm at any given time.

5.3 *Analysis of individual instances of force, including officer-involved shootings, should preferably be conducted pursuant to a decision point analysis.*

Commentary

Monitors are occasionally called upon to determine if internal investigations of force were correctly decided. Monitors are frequently called on to determine in whole or in part whether the monitored agency's internal mechanisms are such that its investigations are fair, thorough, and complete. Similarly, monitors test whether the lessons learned from internal review of such investigations are promptly incorporated in academy and in-service training.

To fulfill such obligations, a monitor should preferably analyze a given incident from its inception rather than focusing narrowly on the ultimate use of force. An officer-involved shooting, for example, is best analyzed from the moment police officers are dispatched. Each key strategic or tactical decision by the officers thereafter should be subject to thorough review in which alternatives are considered. This methodology is called "decision point analysis" and was first formulated by the late James Fyfe. This methodology recognizes that a shooting is the product of a sequence of decisions, and it analyzes each component decision. Ultimately, the monitor and the monitored agency must ask themselves whether the shooting could have been avoided, without amplifying the risk of death or serious bodily injury to the officer or officers involved, by the reasonable adoption of different tactics and strategy at each “decision point.”

Because such analysis requires thorough knowledge of policing techniques and strategies, it is useful for monitors to consult senior experienced police officials if they themselves lack the requisite expertise.

5.4 *A monitor should possess or have recourse to persons with knowledge of statistical techniques and analysis.*

Commentary

Monitors of large police departments may lack the time and resources to examine every instance of a large set of data. For example, it may not be possible to examine in detail all public complaint files for an agency that receives 3000 such complaints in a given year. In order to construct valid techniques for sampling large sets, it is useful for a monitor to possess or have recourse to persons with knowledge of statistical techniques and analysis.

Many litigation-initiated monitors consider that an agency is in compliance when 94 or 95 percent of the time the agency fulfills a particular requirement. When applied woodenly in the aggregate and without consideration of the relative importance of various requirements, a strict percentage test may not present a full and complete analysis. Care must be taken to disaggregate the data in order to determine whether compliance is occurring at roughly the same rate throughout all geographic areas of a particular jurisdiction. Thus, for example, if public complainants are not discouraged from filing complaints 95% of the time, but the 5% noncompliance is concentrated in a predominately immigrant community, then further analysis is in order.

5.5 *Trend analysis is a useful tool for measuring change.*

Commentary

Settlement Agreements and municipal ordinances seek the restoration and maintenance of constitutional policing. To that end, the monitor should gather or construct accurate baseline data about the trends or patterns to be tracked. To do so requires thought and ingenuity. While not necessarily employed by all monitors, nor required by all monitoring Agreements or ordinances, it provides a benchmark or baseline from which the fact and rate of progress can be displayed and judged. Properly constructed, trend analysis helps to identify problems in their inception, compares performance over time, and informs decision makers about areas requiring attention. The monitor must assess the underlying reasons for the municipal ordinance or Settlement Agreement and whether there are data reflecting the status quo in the monitored agency prior to the municipal ordinance or Settlement Agreement. Thus, for example, if plaintiffs allege or there is another reason to believe that patterns of excessive force being used with disparately high frequency on African-Americans, and if the remedies are revised use of force policies and practices, the monitor might establish, among others, the following baseline data:

- force/arrest ratios for the entire city
- force/arrest ratios on a precinct-by precinct basis
- force/arrest ratios per shift per precinct
- public complaints, claims, and lawsuits alleging excessive force
- dollar amounts for settlements and verdicts in excessive force litigation
- breakdowns on a precinct-by-precinct basis of type and severity of injury of uses of force
- breakdowns on a precinct-by-precinct basis of kind of force used (gun, baton, canine, taser, fists, etc.)
- breakdowns on a precinct-by-precinct basis of the race and ethnicity of suspects upon whom force was used.

Armed with these baseline statistics, the monitor will be able to track changes in trends on a regular to make a determination as to whether the new use of force policies are making a difference.

It may be that the monitored agency does not keep adequate records from which to derive the statistics necessary for accomplishing rigorous and meaningful trend analysis. If so, the agency should be required to collect the necessary data. The monitored agency cannot, for instance, manage use of force without it and the monitor can not make judgments about compliance without it.

The foregoing are suggested ways to measure differences in performance. It is also useful to measure differences in attitude. A powerful device, especially for municipal action monitors, is a baseline survey of officers' perceptions about how and when to use force followed up at reasonable intervals by repeated surveys. The monitoring process involves more than passively going down a checklist; rather, it is active, which may require the creation or formulation of new tests of compliance.

VI. ASSESSING COMPLIANCE DURING THE PENDENCY OF THE CONSENT DECREE OR SETTLEMENT AGREEMENT.

6.1 *Monitoring requirements vary from city to city, as will the methodology and vocabulary for assessing compliance with Settlement Agreements. Uniform definitions of compliance should be employed.*

Commentary

Litigation-initiated monitoring plans and monitors' periodic reports differ in methodology and vocabulary for determining how ongoing compliance is measured during the pendency of the Agreement. In part, the differences result from varying provisions in each of the Settlement Agreements. In part, the differences reflect the preferences, methodologies, vocabulary, and work styles of the individual monitors. The examples which follow highlight some of those differences. Because of the potential for confusion and the application of differing standards, uniformity is desirable. (An example of uniform definitions is set forth in 6.2 below.)

Washington, DC.

In monitoring Washington, DC's Metropolitan Police Department (MPD), the Office of the Independent Monitor (OIM) worked with the parties to develop the compliance assessment matrix. The monitoring plan reflects the agreement of the parties that compliance will be measured, where feasible, using objective standards and generally requiring 95 percent compliance. The evaluation also includes a subjective component involving assessments made by the OIM (or DOJ, where DOJ review and approval are required) and supported by appropriate analysis and explanation. OIM 12th Quarterly Report, April 2005, p. 1. Accordingly, the quarterly reports generally describe on a paragraph by paragraph basis the tasks the monitored agency must perform to achieve compliance. Each Quarterly Report quotes the relevant paragraph or sub-paragraph of MOA, describes the activities to be monitored, sets forth how compliance will be measured, and lists the factual basis and data supporting the monitor's conclusions. In general, the monitor sets forth separately for each paragraph:

- the status of implementation efforts,
- whether compliance has been achieved or is being maintained, and
- recommendations arising from the foregoing.

Los Angeles, California.

In Los Angeles, the monitor issued quarterly reports on the progress of the LAPD. The reports move through each provision of the consent decree, assess the status of compliance, set forth the facts and data relied upon by the monitor, and make recommendations regarding compliance. The quarterly report grades compliance as:

- in compliance,
- not in compliance,
- compliance cannot be determined,
- compliance not required at this time, and
- compliance not yet evaluated.

It notes when the task was last evaluated or next expected to be evaluated, with comments. The notion of compliance is further broken down into three subcategories: primary, secondary, and functional, as set forth in the Fifth Quarterly Report of the Independent Monitor as of September 30, 2002 at page 5:

- **Primary** definitions of compliance are viewed as the administrative aspects of compliance. They entail the creation of policy, procedure, rule, regulation, directive or command to "comply" as required by the text of the Consent Decree.
- **Secondary** measures and compliance deal with training, supervision, audit and inspection, and discipline to ensure that a specific policy is being implemented as designed.
- **Functional** compliance definitions require both the primary—policy and directives—and secondary—training, supervision, audit and inspection, and discipline—to be achieved, and the directives must, by matter of evidence, be followed in day-to-day operations of the department.

Each quarterly report includes a "report card" in a separate appendix. The card describes each task required by the consent decree and sets forth compliance status over the five

most recent quarters. The report card is a useful summary of the quarterly report in compact form.

Cincinnati, Ohio.

The monitor in Cincinnati issued quarterly reports on implementation of the MOA in that city by the Cincinnati Police Department (CPD). As described in his April 2005 quarterly report, the monitor's assessment of compliance, among other factors, explicitly take into account the overall goals of the MOA, and the objectives behind, and reasons for, inclusion of the individual provisions of the MOA. Compliance determinations are a mix of "yes or no" questions (does the CPD have a policy governing use of force?) qualitative judgments (whether complaint investigations were complete, or whether interviews of witnesses or officers used leading questions) and quantitative judgments (the percentage of chemical spray incidents in which a warning of impending use of force was given and documented). For purely quantitative determinations, the monitor requires compliance in 94 percent of incidents tested.

There are three gradations of compliance: “in compliance,” “not in compliance” and “partial compliance.”

"**In compliance**" includes the notion that any deviations from compliance be infrequent and be detected and corrected by the CPD on its own initiative. More specifically, as set forth in the April 2005 Quarterly Report, the monitor tests:

- whether the CPD has adopted a policy or procedure relating to the provision, requiring its members to comply with the provision’s requirements;
- whether CPD has trained its members on the provision and the policy or procedure adopted;
- whether officers in the field are actually implementing and complying with the requirements of the provision; and
- whether CPD has put in place a supervisory and/or internal audit process to ensure compliance, and whether CPD identifies and corrects non-compliance.

"**Not in compliance**" means that compliance is not evident or cannot be documented.

"**Partial compliance**" is an intermediate category for instances where implementation has begun but falls short of being "in compliance" for a variety of reasons, including a failure to demonstrate consistency in the implementation of a provision over time.

The Cincinnati monitor's compliance matrix is similar to that used by the Independent Monitor in Washington, DC. Cincinnati's detailed matrix lists the MOA's paragraph or sub-paragraph, the requirements and activities to be monitored, the definition of compliance for each paragraph or sub-paragraph, and the documents and sources used, including activities carried out by monitor to examine compliance progress.

New Jersey State Police.

In assessing compliance by the New Jersey State Police with its consent decree, the monitor divided compliance into two phases. Phase I compliance is the administrative piece of compliance. It asks whether the New Jersey State Police has adopted a policy, procedure, rule, regulation, directive, or command as required by the text of the decree. Phase II deals with the implementation of a specific policy. Compliance in Phase II requires evidence that the policy is being followed in the day-to-day operations of the State Police. The monitor looks at training, supervision, audits, and inspections. He also examines discipline imposed on officers whose performance is noncompliant. For quantitative determinations, the monitor requires compliance in 94 percent or more of instances examined.

6.2 *Uniform definitions and vocabulary are highly desirable.*

Commentary

The uniform definitions and vocabulary set forth herein attempt to assimilate the best that each monitor has independently fashioned. They are set forth as an example for guideline purposes. Precision and common definitions in assessing compliance will eliminate inconsistencies and potential unfairness between monitored agencies. The definitions below attempt to mirror the monitored agency's process as it implements a Settlement Agreement. The definitions are intended to fit the stages the monitored agency reaches chronologically before substantial compliance can be tested. A uniform guideline for substantial compliance is set forth at Guideline 7.0 et seq.

The core mission of the litigation-initiated monitor is to assess and evaluate whether the law enforcement agency in question is in compliance with a Settlement Agreement. Compliance is achieved in three broad phases—beginning, middle, and end. The end phase is substantial compliance for a specified time period. See Guideline 7.0-7.2.

Initial or basic compliance phase

The essential focus is the completion of all technical requirements of the Settlement Agreement. Basic compliance may incorporate both qualitative and quantitative measurements. Basic compliance in statistical terms means a specified percent confidence level (often 94 or 95 percent) resulting from examination of statistically significant samples. It is useful to have the services of a statistician in order to construct valid samples.

Compliance in the initial stages of implementing a Settlement Agreement, or basic compliance, generally requires the monitor to consider whether:

- all changes to existing policies, procedures, orders, directives, and protocol ("rules") have been made, submitted to the monitor and, if applicable, to DOJ, and they have received final approval;

- all new rules have been drafted, submitted to the monitor and, if applicable, to DOJ, and they have received final approval;
- all training materials relating to new or changed rules have been drafted, reviewed, and received final approval as necessary;
- all relevant personnel throughout the chain of command have been trained and tested on their understanding of new or changed rules;
- all systems for the capture of new or existing data required by the Settlement Agreement are functioning and consistently supplying all relevant data required by the monitor, the court, and the parties;
- all routine and special audits required by the Settlement Agreement have been performed to date in a manner satisfactory to the monitor, court, and parties; and
- all deadlines have been met or formally postponed or eliminated.

A monitored agency cannot achieve basic compliance if in the view of the court, monitor, or parties, the monitored agency is not in compliance with any material provision of the Settlement Agreement. Accordingly, it a given key provision has not been implemented until a couple of years have passed, the monitored agency will not have reached basic compliance with respect to that provision.

2. Intermediate phase

The middle phase of compliance requires the monitor to consider whether:

- police personnel in the field, in administrative positions such as internal affairs, and throughout the chain of command are actually implementing and complying with the requirements of the Settlement Agreement;
- the monitored agency is producing fair, thorough, complete, and reasonable internal investigations and reviews as contemplated by the Settlement Agreement and has adequate audit and oversight mechanisms to self-correct and assure such results on an ongoing basis;
- the monitored agency thoroughly identifies, investigates, and corrects all material instances of unconstitutional policing or other non-compliance;

- the monitored agency is actively and effectively managing risk of unconstitutional policing;
- the monitored agency's adjudicatory and disciplinary systems are producing fair and reasonable results reinforcing new rules and punishing noncompliance when retraining or other nondisciplinary options have been tried or are not appropriate given the gravity of the noncompliance; and
- objective evidence demonstrates that constitutional policing is being maintained.

Compliance in the initial and intermediate phases must be maintained consistently before it is ripe to consider whether the monitored agency has achieved substantial compliance overall. As time passes, the monitor, the parties, and the court should consider whether implementation is serving the ultimate goal of amelioration of the alleged unconstitutional conduct and the sustained maintenance of constitutional policing. A Settlement Agreement implicitly predicts that certain administrative steps will produce desired outcomes, and those predictions may be wrong. It may be that the terms of the Settlement Agreement should be modified at that point or new provisions added. It makes little sense to move forward if the monitored agency has achieved technical compliance but facts have not changed on the ground.

Some monitors adhere to a view that it is not necessarily within the scope of their responsibilities to determine if facts are changing on the ground. Those monitors believe that the monitor's role is appropriately limited to whether the specific provisions of the Settlement Agreement have been met. On the other hand, other monitors are hesitant to certify compliance if the unconstitutional patterns or practices that gave rise to the Settlement Agreement are not abating. These guidelines do not settle these differences in views. A monitor in each given case should work with court and the parties to resolve the degree to which a monitor should try to measure whether patterns or practices are in fact being ameliorated.

6.3 *The monitor must determine whether the monitored agency has formulated and adopted policies and protocols that embody the Settlement Agreement's provisions and requirements or, in the case of local monitors, formulated and adopted best practices in the field or practices consistent with the ordinance or authority by which the monitor was established.*

Commentary

The job of the monitor varies significantly depending upon the specificity of the Agreement. Settlement Agreements often are highly detailed and prescriptive. In key areas, the Settlement Agreement may dictate some or all of the specific language to be included in a reformulated policy or else require the monitored agency to submit proposed policy to the decision-maker for approval. In other instances, the Settlement Agreement will be vague and general. For example, the monitored agency "shall complete development of a Use of Force Policy that complies with applicable law and current professional standards**.**"

In instances where the Agreement is highly detailed, the monitor's responsibility may be almost mechanical: Does a particular policy, protocol, or order fully embody the specifics set forth in the Agreement? For example, in monitoring Washington, DC's Metropolitan Police Department, the Office of the Independent Monitor (OIM) worked with the parties to develop a compliance assessment matrix. The OIM matrix quotes the relevant paragraph or sub-paragraph describing the required task, describes the MOA requirement and activities to be monitored, defines substantial compliance, and specifies the data sources used by the monitor.

In Los Angeles, the monitor's reports describe individual paragraph's requirements, background, current assessment of compliance, and, as warranted, recommendations. The monitor's comprehensive compliance assessment review, called a "report card," is provided a separate appendix. It describes each task required by the consent decree and includes the compliance status for the five most recent quarters, using the following

categories: compliant, non-compliant, not required at this time, and not yet evaluated. It notes when the task was last evaluated or next expected to be evaluated, with comments.

The Cincinnati Monitor Team's compliance matrix is similar to that used by the OIM in Washington, DC. The matrix lists the MOA's paragraph or sub-paragraph, the requirements and activities to be monitored, the definition of compliance for each paragraph or sub-paragraph, and the documents and sources used, including activities carried out by monitor to examine compliance progress. In reviewing compliance where a quantitative measure can be used, the Cincinnati monitor uses a "greater than 94 percent" standard. The monitor describes how all provisions of the MOA are not the same and compliance cannot be assessed using the exact same standard in all cases. Sometimes compliance can be determined with a "yes/no" answer while at other times other compliance must be measured quantitatively. Other determinations are qualitative.

Municipal action monitors must look to evaluate whether the monitored department has adopted and sustains protocols and policies consistent with best practices or, in some instances, per the ordinance under which the monitor's position was established.

6.4 *The monitor should determine whether the monitored agency has notified and adequately trained its personnel in these policies and protocols.*

Commentary

The next essential task for the monitored agency is to educate and train command staff and the rank-and-file in the new policies, practices, and protocols required by the Settlement Agreement. The monitor is often required to assess the sufficiency of training materials, the quality of instruction, the speed and thoroughness with which training is provided, and the signals sent by command staff and supervisors concerning the importance and enforceability of new policies.

The sufficiency of training materials can be gauged by a thorough review of the syllabus and teaching materials. The essential question is whether the word and spirit of new policies are thoroughly covered and put into context where the background and reasons for them are clear, logical, and convincing. Teaching materials should specify in particular where new policies and practices deviate from the old. The monitor should evaluate whether there are sufficient audio and visual supplements to the written documentation and whether demonstrations, practice sessions, and scenario-based training are necessary and provided for.

The monitor and monitoring team should attend and audit a statistically significant sample of training sessions to form judgments about the quality of instruction. Monitors should consider random unannounced visits to training sessions. They should assess whether the instruction is well-organized, accurately reflects the new policies or practices and the associated training materials, and offers a clear and detailed understanding of the matters presented. The monitor and team should also gauge whether the instructor embraces what is being taught and communicates that the chief and command staff do also. The monitor should be alert to the instructors' body language and word choice to test the sincerity of the instructor: Is the instructor making a convincing case that the new policies and procedures are fit, right, and proper or is he or she signaling that the changes are being imposed from the outside on a reluctant and resistive department? The monitor

and team should follow up by scheduling a series of ride-alongs or conversations with rank-and-file officers to measure the degree to which the policies or practices have been correctly absorbed and accepted.

The monitor should measure the speed and thoroughness of the training by determining the training schedule and the monitored agency's plan for inclusion of all relevant personnel. The monitor should test whether the training schedule is being met and whether supervisors are cooperative in releasing officers to be trained. The monitor should assess whether the training schedule is sufficiently rapid given the timing to reach substantial compliance with the Settlement Agreement as a whole.

Police officers are expected to have better-than-average skills in determining the credibility, reliability, and sincerity of persons they come in contact with professionally. Accordingly, police officers often have a well-developed sense for when the command staff and supervisors really mean it or are putting on a show. Thus, it is important for the monitor and team to constantly assess the attitudes of the command and supervisory staff and the nuances of the messages they send. In that connection, the monitor and team should sit in when the instructors themselves are trained in order to test the quality of that instruction and the attitudes conveyed.

A well-managed police agency will have separate training and instruction in new policies and procedures for command and supervisory staff. The chief's presence at such sessions can emphasize the importance of the message. Again, the monitor and team should sit in on those sessions to test the quality of the presentation and judge the attitudes conveyed. Compliance or substantial compliance should connote acceptance rather than mere acquiescence, and the monitor should be alert to that distinction and be able to form judgments regarding the degree of acceptance from rank-and-file officers to the top of the command structure.

6.5 *The monitor should determine whether the monitored agency's personnel have modified their behavior in light of the training and are in fact implementing the new policies, orders, and protocols.*

Commentary

The fundamental question respecting this aspect of compliance is whether the training has taken hold and is in fact modifying actual practice within the monitored agency and on the streets. The monitor and team must construct tests and audits to measure how actual practice is changing. In this regard, trend analysis is a useful tool.

VII. SUBSTANTIAL COMPLIANCE.

7.1 *Substantial compliance means that the requirements of the Settlement Agreement have been fully adopted as policy, effectively incorporated into training, and routinely and consistently applied in actual practice for a sustained period of time.*

Commentary

A Settlement Agreement arises from allegations of a pattern or practice of unconstitutional police conduct. The formal Agreements set forth a set of tasks for the monitored agency to accomplish. In broad brush, these Agreements require the monitor to assess:

- whether the monitored agency has formulated and adopted policies, orders, and protocols that embody the Agreement's provisions and requirements;
- whether the monitored agency has notified and adequately trained its personnel in these;
- whether the monitored agency's personnel have modified their behavior in light of the training and are in fact implementing the new policies, orders, and protocols;
- whether the monitored agency has the capacity, will, internal control mechanisms, and competence to sustain compliance and to identify and correct noncompliance or slippage during the life of the Agreement and thereafter; and
- if the parties so decide or the court desires, whether the goals and objectives of the Agreement have been met and constitutional policing has been restored and is being maintained.

Settlement Agreements usually require substantial compliance to be maintained for two years before the monitoring period can come to an end. The Agreements typically add further detail concerning what is required. The Detroit decree, for example, states "noncompliance with mere technicalities, or temporary failure to comply during a period of otherwise sustained compliance, shall not constitute failure to maintain substantial compliance. At the same time, temporary compliance during a period of otherwise

sustained noncompliance shall not constitute sustained compliance." (Detroit Consent Decree, para. 148).

7.2 *As a monitored agency moves from substantial compliance to termination of a Settlement Agreement, the monitored agency should create self-assessment instruments incorporating the Settlement Agreement's major themes and goals. Based upon these instruments, the monitored agency should create protocols for corrective action. The monitor should review the quality and effectiveness of self-assessment and self-correction by the monitored agency.*

Commentary

Most Settlement Agreements require two years of substantial compliance for each material element. The two-year time period should be used to build self-assessment and corrective action protocols and instruments. The two-year period should be a time of monitored transition from plenary control under the Settlement Agreement to restored autonomy and independence. The monitored agency should have in place programs and protocols to sustain compliance after termination of the Settlement Agreement. It may be useful in that regard for the monitored agency itself to adopt a version of the monitoring plan so that it can perform from the inside what the monitor has been doing from the outside to test compliance and maintenance of constitutional policing.

If the monitored agency is doing so, the monitor may be able to shift partly from direct investigation to reviewing, critiquing, and auditing the fairness, completeness, and accuracy of the self-assessment reports and corrective action. Ultimately, a police organization could agree to post-termination external reviews on an ongoing basis as a condition of termination of the Settlement Agreement. If the police department discontinues meaningful self-assessment and corrective action under new leadership or become lax as time passes, that would be a red flag.

7.3 *If the parties so decide or the court desires**,** the monitor should determine whether the monitored agency has the capacity, will, internal control mechanisms, and competence to sustain compliance and to identify and correct noncompliance or slippage during the life of the Settlement Agreement and over time.*

Commentary

Under the pressure of an Agreement and a monitor, the monitored agency may be able to achieve compliance and sustain it. Temporary compliance, however, is not enough. The monitor has to figure out whether mechanisms are in place to sustain compliance after the decree has dissolved and the monitor is no longer there and the chief of police and other top executives have moved on. In other words, have the changes brought about by the decree been institutionalized?

All organizations bear the imprint of the chief executive. Chiefs of Police, as CEOs of a quasi military organization, have particularly strong unilateral power. The tenure, however, of Chiefs of Police in the United States only averages between two and three years, whereas the tenure of a police officer is far longer, giving rise to the "B Team" phenomenon: "we will be here when you arrive and we will be here when you leave." Passive resistance or token compliance can outlast Settlement Agreements, monitors, and top brass. Hence, the monitor must form a judgment whether the reforms mandated by the decree are built to last.

A first key component of that determination is whether adequate data exist to permit each level of supervision and management to measure and manage the risk of police misconduct that gave rise to the Settlement Agreement in the first place. The data must be readily accessible and available. The data should be computerized and capable of being queried in a variety of ways. The monitored agency should have on staff adequate technical and substantive computer and database experts to perform sophisticated trend analyses, longitudinal studies, and complex queries. If possible, the agency should develop a permanent research and development department.

Second, it is important to know whether there are functioning mechanisms to hold the entire chain of command accountable for management of those risks. Some monitored agencies might elect to have a Compstat process wherein the chain of command is held specifically accountable for controlling actual or potential misconduct and peer pressure is brought to bear. Up and down the chain of command, good risk management should be rewarded and substandard risk management should be corrected or punished. The monitor should be able to judge the adequacy of systems and mechanisms to inculcate and perpetuate accountability.

7.4 *If the parties so decide or the court desires, the monitor should determine whether constitutional policing has been restored and maintained, or, in the case of local monitors, whether the department has achieved a standard faithful to best practice such that the monitored agency will likely not revert to the past pattern or practice.*

Commentary

If the parties decide or the court desires, the answer to this question should be clearly in the affirmative before a Settlement Agreement is dissolved. The question may ultimately be answered by a federal judge. The input of the monitor may be vital to that determination. To answer it, the monitor must look in part to the cultural change the monitoring process has accomplished. A core purpose of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. §14141) is to correct patterns or practices of police misconduct and prevent a recurrence to the extent possible.

Section 14141 is invoked with regard to law enforcement agencies with embedded cultures that have tolerated chronic patterns of unconstitutional misconduct, sometimes for generations. It is optimistic to believe that a cultural shift of the magnitude required by a Settlement Agreement can be accomplished in five years, particularly with regard to large law enforcement agencies. At best, a monitor can only assess whether there is a high probability that changes are permanent. The required cultural change must be fully accepted by the chief of police, his or her executives, and the supervisory and managerial staff.

The monitor should inquire whether the Settlement Agreement is accepted in word and spirit when candidates are considered for promotion or transfer to a coveted position. The monitor should consider whether field training officers themselves accept and support the new rules and are providing instruction and guidance to their trainees consistent with the Settlement Agreement and its goals. The monitor should consider whether the disciplinary system is sending the right messages. The monitor should examine who is being promoted or given coveted positions and then research their records on the monitored agency's early identification or tracking system. If individuals

whose careers manifest indifference or hostility to constitutional rights are being promoted, the monitor should inquire why and withhold a finding of compliance until the situation is corrected.

If particular precincts or particular shifts within that precinct have caused the incidents comprising the unconstitutional patterns or practices, the monitor should focus specific attention on them. The monitor should inquire what has been done to break up the midnight shift in Precinct X., if that shift is disproportionately responsible for the misconduct that gave rise to the DOJ investigation or the private plaintiff's lawsuit.

If particular officers or groups of officers are disproportionately responsible for such incidents, the monitor should specifically inquire whether they are still on the force and, if so, has their conduct changed significantly for the better. If not, the monitor should explore why they are still in the position to do harm. It may be that civil service rules effectively prevent termination. It may also be that the monitored agency has not tried hard enough to justify a termination. In that latter case, a monitor should consider withholding a finding of compliance until the situation is corrected.

The monitor should test whether the monitored agency's procedures for identifying problem officers or potentially problem officers are functioning efficiently and effectively. The monitor should examine whether the interventions are in fact modifying behavior and reducing the risk of misconduct. If not, the monitored agency has not achieved substantial compliance. There are myriad ways in which a monitored agency can manifest its acceptance of the new rules. The monitor must be active and creative in fashioning ways to test the reality of that acceptance.

If the parties so decide or the court desires, compliance can become a complex and multifaceted inquiry that attempts to predict whether the Settlement Agreement has produced solid changes such that the monitored agency will not likely revert to the unconstitutional patterns or practices that gave rise to DOJ's intervention or the private

plaintiff's lawsuit in the first place. The monitored agency has the burden of proving substantial compliance to the monitor's, the court's, and DOJ's satisfaction.

Indeed, being a monitor has a professional's obligations and fiduciary-like responsibilities. The court and parties will never have the detailed knowledge and experience the monitor will have had. No outsider will have spent as much time in and around the law enforcement agency as the monitor. No outsider will know strengths and weaknesses of the agency's leadership as well as the monitor. No outsider will have exposure to investigatory files and internal decision-making.

A federal monitor holds in trust the determination of the United States to enforce federal constitutional and civil rights. Municipal action monitors have similar fiduciary duties. If substantial compliance is achieved, lives will have been saved, wounds and injuries avoided, and resident and police officer alike will arrive home safely and in less fear. Angry and alienated constituencies will have begun to cooperate with the police and be empowered to help clean up crime-ridden environments. If called upon by the parties or the court, communicating a view that a law enforcement agency is in substantial compliance is the monitor's greatest responsibility, and the assessment and evaluation must be made with convincing certainty.

VIII. AFTER THE MONITORING IS OVER.

8.1 *Monitors should provide advice or assistance to the formerly monitored agency under appropriate circumstances.*

Commentary

As the monitoring process ends, the monitored agency, faced with the impending loss of external oversight, may seek additional guidance from the monitor. So also might the city and other stakeholders.

Monitors should expect and prepare for the likelihood that a variety of stakeholders will request the monitor's input as post-monitoring arrangements are debated. Depending upon the provisions of their agreements, monitors may be required to provide technical assistance on the establishment of accountability mechanisms, or to evaluate the implementation of such mechanisms, in the course of their monitoring duties. In such cases, the monitor can refer interested parties to the content of his or her existing body of monitoring reports or to reports by others. National organizations with expertise in civilian oversight can also assist.