

What General Counsel Should Know About Monitorships

By **Sue Reisinger**

Law360 (October 26, 2021, 4:47 PM EDT) -- No company welcomes having a corporate monitor looking over the CEO's shoulder, but the general counsel can make the experience less painful and more valuable to the organization.

Preston Pugh of Crowell & Moring LLP, who is currently monitoring an unnamed organization, said the most important thing a general counsel can do "is to think about costs, cooperate, and understand what the monitor's job is, and is not." Pugh is a partner in the firm's Washington office, where he focuses on internal investigations, governance and compliance.

"The monitor's job is not to relitigate the case," he said. "Advocacy is finished. The longer that the company fights the idea of having a monitor, the less progress can be made."

As to cost, Pugh said, companies are always concerned that "someone you are paying on a monthly basis might really run up the check. By and large that doesn't happen." But he acknowledged that it has happened occasionally, which is why the general counsel needs to watch costs and reassure management.

The general counsel can also help pave the way for the monitor by opening communications and establishing easy access to materials and witnesses, Pugh added.

Understanding monitors is important because while the U.S. Department of Justice has used corporate monitors for more than two decades in enforcement actions, more recently other federal and state agencies have adopted the idea, including the U.S. Securities and Exchange Commission, Environmental Protection Agency, Federal Trade Commission and Food and Drug Administration.

Just last week the U.S. attorney's office in Brooklyn imposed a monitor on Credit Suisse Group as part of a deferred prosecution agreement over a fraudulent loan in Mozambique.

Ronald Goldstock, an independent private sector inspector general and construction integrity monitor who teaches at New York University School of Law, views a monitor as a private inspector general.

"The monitor's job is to ensure that the organization operates with integrity across the board and that — and this is the critical difference — that the culture of the organization is modified," Goldstock said.

Goldstock was an inspector general in the U.S. Department of Labor, was the New York state

commissioner of the Waterfront Commission of New York Harbor for 10 years, and spent 13 years as director of the New York state Organized Crime Task Force. In that role, Goldstock designed and developed the Independent Private Sector Inspector General program, on which the concept of monitorships was built.

In his view, there are two types of monitors: one that operates like a member of management and doesn't make waves, and one that guards its independence and seeks change.

Most general counsel, he said, like to see the latter type of monitor butt heads with management. "The monitor essentially becomes their hammer," Goldstock said. "They love having the monitor go in there and say everything that the general counsel has been trying to tell management before."

Steven Solow, a partner in the Washington office of Baker Botts LLP, said monitorships can act as a deterrent for many companies.

"What do organizations really hate?" he said. "The loss of freedom to operate the way they want. Having someone in your business ... may be one of the most effective deterrents than people yet realize."

Solow was recently appointed to monitor the world's largest cruise line company, following the company's plea to criminal charges related to vessel pollution.

He said general counsel should play a key role in getting the leadership of the organization to accept the monitor as an opportunity to strengthen itself.

"If they don't do that, if they are combative, then that will permeate the organization and it really only results in a frustrating dynamic," Solow said.

Putting the company on a path with a sustainable approach to compliance is the best way for an organization to manage risk, Solow said.

"By successfully navigating through the monitorship, you also should earn back the trust you have lost from your regulator," he said.

--Editing by Brian Baresch.