



CAPCR Shout Out

Monitoring the Ferguson Monitor's Consent Decree Bills

Part 2

Billing & Accomplishments to Date

By

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and

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Introduction

As reported in [Part 1](#), a Sunshine Request of the Ferguson Monitor's billing records from August 1, 2016 through March 31, 2017 revealed a number of problems. 2016 bills totalled almost \$350,000, reaching the first year cap for Monitor spending. Bills from the first three months of 2017 brought the total to just over \$600,000--half the total allowed for Monitor expenses over the entire five year period of the consent decree. The Monitor has agreed to recalculate and substantially lower the January through March bills and the head of the Monitor team, Clark Ervin at the firm of Squire Patton Boggs, has agreed to work for free from January 2017 through at least August 2018.

Part 2 of our reporting attempts to make sense of how the money and time were allocated, and what the Monitor Team produced. In particular, it focuses on the first five months, since the billing for the spring of 2017 is expected to change. The data and updates from the following months (Jan. to Mar.) are also included when they are useful as a reference for assessing the efficacy and direction of the Monitor Team going forward.

Among the conclusions reached are the following:

- The Monitor massively underestimated the time he would be working on the consent decree.
- The vast majority of the billing is being paid to the head of the Monitor team, who needs to farm more of the policy review work to his team members with particular areas of expertise.
- The general proportions of the work accomplished--policy review, auditing etc--seem to be in line with what would be expected.
- Much of the Monitor's promised work has not been accomplished as of the date of this publication--including such important items as the baseline community survey, his updated Work Plan and his six-month Comprehensive Review.
- The Monitor and the parties to the consent decree have kept the problems associated with the Monitor's billing hidden from the public for too long.
- Going forward, there is a need for a written contract regarding billing procedures, updated deadlines for consent decree provisions, greater effort at community outreach, and greater community oversight of the process.

Background: The Monitor's Role

What is the Monitor?

In the wake of the Consent Decree reached by the City of Ferguson and the Department of Justice, both sides agreed to appoint an independent Monitor to oversee and assist in implementing the goals of the Consent Decree. In July 2016, the parties agreed to appoint a team headed by the Washington, DC law firm of Squire Patton Boggs that included experts in the areas of policing, data analysis, municipal courts, and race.

What was the Monitor expected to do?

As stated in the May 2016 call for Monitor applications, “[g]enerally, the Monitor will provide objective and thorough assessments of whether the terms of the Consent Decree have been implemented and continue to be met, and whether implementation of the Consent Decree is resulting in the outcome required by the Consent Decree.”

In addition, the request for applications specified that the Monitor would regularly communicate with Parties, regularly communicate with a broad spectrum of community stakeholders, conduct regular (at least annual) data-based assessments of disparate impact, and assist the City in developing and implementing an auditing plan.

In response to a Community Questionnaire for candidates, Clark Ervin, the Monitor, also stated that he would solicit community input and distribute formal reports using numerous accessible methods, encourage the Police Department to partner with local social service organizations, and channel community feedback both in and outside the Court.

While the Monitor Team's has revised its work method to rely on a list of Priority Areas* within three Work Categories, the Consent Decree initially specified numerous deadlines that the Monitor would need to meet. These are a useful reference for purposes of planning, assessment, accountability, etc.:**

- Develop a Monitoring Plan, which includes policy review, evaluations and audits, and outcome assessments) within 90 days of assuming duties.

**Recruitment; accountability, community engagement; use of force; bias-free policing; and stops, searches, citations, and arrests*

***Policy review, auditing and evaluating, outcome assessment*

- An initial work plan was submitted in December. After the parties agreed to work in priority areas and essentially ignore the consent decree's deadlines, a revised work plan was promised but as of this date has not been submitted.
- Conduct a survey of members of the Ferguson community regarding experiences and perceptions of FPD, public safety, and the municipal court by April 2017 (i.e., within one year of the Effective Date of the consent decree)
 - In December, the Monitor announced that the survey would be distributed in January. Design issues have blocked its distribution to date.
- Review and recommend changes to the outcome measures detailed in the consent decree within 120 days.
 - No public documents have been filed on this matter.
- File a written, public report with the Court at least every 6 months.
 - Other than the December Initial Monitoring Plan, no written public reports have been made available.

Monitor team members submitting bills in 2016

Squire Patton Boggs:

Clark Ervin
 Kelley Guthleben
 Lauren Katz
 Samuel Rosenthal
 Thomas Maronick
 William James

Frances McLeod, *Forensic Risk Alliance*

Specializes in investigating various compliance, internal controls, sanctions, anti-corruption, fraud, asset tracing, and money laundering.

BB&T

Created the domain name registration for the monitorship website

Edward Davis, *Edward Davis, LLC*

Served as the Police Commissioner of the City of Boston from 2006-2013.

Kimberly Norwood, Independent Consultant

Henry H. Oberschelp Professor of Law at Washington University School of Law. Served as a Commissioner on the American Bar Association's Commission on Diversity and Inclusion 360 and co-chaired its implicit bias committee. Serving as the Monitor Teams expert on court reform and as the local monitor/community liaison

Natasha Tidwell, *Corolla, LLC*

Former sergeant and lieutenant in the Cambridge Police Department and now an attorney who serves on the City of Boston's Community Ombudsman Oversight Panel.

Rocknine Creative

designed and built the Ferguson Monitorship Website

The Monitor's Work Product So Far

As of this date, there have been three public status hearings* to evaluate the work progress on the Consent Decree. The monitor and the court base their testimony on three agreed-upon work categories:

Work Categories

- **Policy Review** involves analyzing the legislative and procedural changes made by Ferguson and ensuring that they are congruent with the requirements laid out by the consent decree.
- **Auditing and Community Engagement** includes impromptu visits to Ferguson Municipal Court and Ferguson Police Department along with other methods of ensuring that the city's institutions are meeting decree expectations in daily functions.
- **Outcome Assessment** includes the monitor's engagement in both community outreach and data analysis to ensure that the measures being taken as a result of the consent decree are in line with constitutional requirements.

The following pages provide a summary of the progress made in each of these categories as reported at the three status hearings.

Reviewing Policy Changes - \$90,277

- September → The monitor laid out monitoring and reviewing policy changes as a primary function of the monitor.
- December → The six priority areas were established. The monitor stated that outlining of "core" policies should also be prioritized.

*Meetings were held in Sept. 2016, Dec. 2016, and Mar. 2017.

- March → The Monitor had reviewed the following policy changes:
 - **The City's recruitment plan:** The monitor has drafted the plan. Also conducted a "salary survey" of the police department and conducted in person visits.
 - **Duty of Candor**
 - **Duty to Report Misconduct**
 - **The Civilian Review Board**
 - September: The City passed an ordinance establishing a Civilian Review Board (CRB). However, the Monitor and the Department of Justice reviewed the ordinance and deemed it insufficient. The City amended the plan and passed another statute.
 - March: CRB had its first meeting.
 - **Procedure for Internal Investigations:** The City began developing a procedure, and pre-implementation drafts and comments were exchanged.

Auditing & Community Outreach - \$30,641

- **Monitor's Trips to Ferguson \$17,458**
 - September → Clark Ervin, Head of the Monitor Team, expected to take trips every six weeks in addition to the required quarterly trips for review hearings.
 - December → Ervin had visited every six weeks (irrespective of quarterly review), and planned to continue this schedule.
 - March → Although Ervin initially committed to visit every 6 weeks, this was rendered unnecessary (in the Monitor's view) because 1) the focus has been policy review and 2) Kimberly Norwood served as the local representative. However, he recommitted at the hearing to come to town hall meetings every 6 weeks.
- **Monitor's Community Outreach**
 - December → The Monitor Team participated in meetings with CRB Task Force, Neighborhood Policing Steering Committee, Youth Advisory Board, and other neighborhood associations. He was alerted to issue that associations in apartment buildings had still not been established.

***Billing categories were difficult to determine, as many billing time slots contained multiple work categories. The amounts listed here represent billings with a single category and do not reflect the total work in a given work area.*

- March → Noting community concerns that he had not been to Ferguson in three months and that notifications of community meetings were not reaching broadly enough, Mr. Ervin sought input on engaging community more.
- **Municipal Court Reform Efforts**
 - December → Monitor developed a methodology of the audit but has not produced any tangible product.

- March → Monitor has finished determining auditing methodology; pending timeline for auditing each provision. Confirms process changes, i.e., muni oversight shifted to Circuit Court
- **Police Staffing Assessment**
 - December → Davis and Tidwell from Monitor to begin evaluation
 - March → Working on police officer scheduling policy so that their work will include community policing in addition to crime fighting
- **Community Engagement**
 - March → DOJ and Monitor waiting for City's list of community outreach activities; will intensify efforts to make suggestions

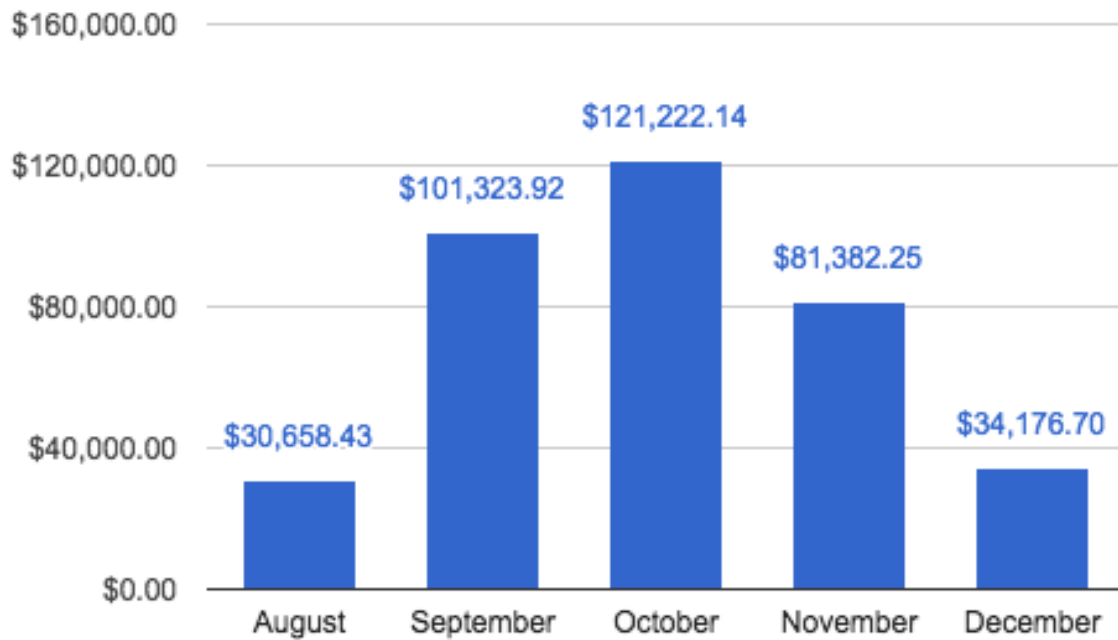
Outcome Assessment- \$11,071

- **Community Survey**
 - September → The Monitor announced they already had begun working on developing a baseline survey
 - December → Monitor said that they would distribute survey in January
 - March → Still have not distributed the survey. Have cited a lack of volunteers, will now move forward with about 10 volunteers and grant money (\$100,000) to implement the survey.
- **Police Department Survey**
 - December → Draft “nearly finalized”
 - March → Has a good draft, to be implemented after community engagement survey
- **Analyzing Policing Data**
 - September → Identified Reviewing and Analyzing Police Data as an important part of the monitoring process
 - December → Basic data available to monitor, working to get full data, fund access to it.
 - March → The monitor confirmed that the ITI system includes some data, and not others; currently consulting outside groups that may donate services to City.

Monthly Expenditures

Amount the monitor billed in 2016: \$342,319.44

Breakdown by month:



Projected and Actual Billing 2016

Projections were pulled from the Squire Patton Boggs Response to Request for Applications to Serve as Independent Monitor of the Ferguson Police Department, June 8, 2016. Actual Billing and Actual Monthly Hours drawn from billing records. The billing entities included in the two tables on the right are only those originally included in the project budget and hours on the left.

Projected First Year Budget*

Clark Ervin	\$246,600
Samuel Rosenthal	\$32,880
Edward Davis	\$21,600
Kimberly Norwood	\$14,400

Actual Billing 2016

Clark Ervin	\$268,992.05
Samuel Rosenthal	\$820.08
Edward Davis	\$12,610.87
Kimberly Norwood	\$8,850

Projected First Year Monthly Hours*

Clark Ervin	30
Samuel Rosenthal	4
Edward Davis	6
Kimberly Norwood	4

Actual Monthly Hours 2016

Clark Ervin	75.15 average
Samuel Rosenthal	N/A*
Edward Davis	7.9 average
Kimberly Norwood	4.96 average

* The parties interpreted the first-year projections differently, to be either for five months or a calendar year, as explained in the text below. The actual totals for 2016 reflect the last five months of 2016, which aligns with the Monitor's interpretation..

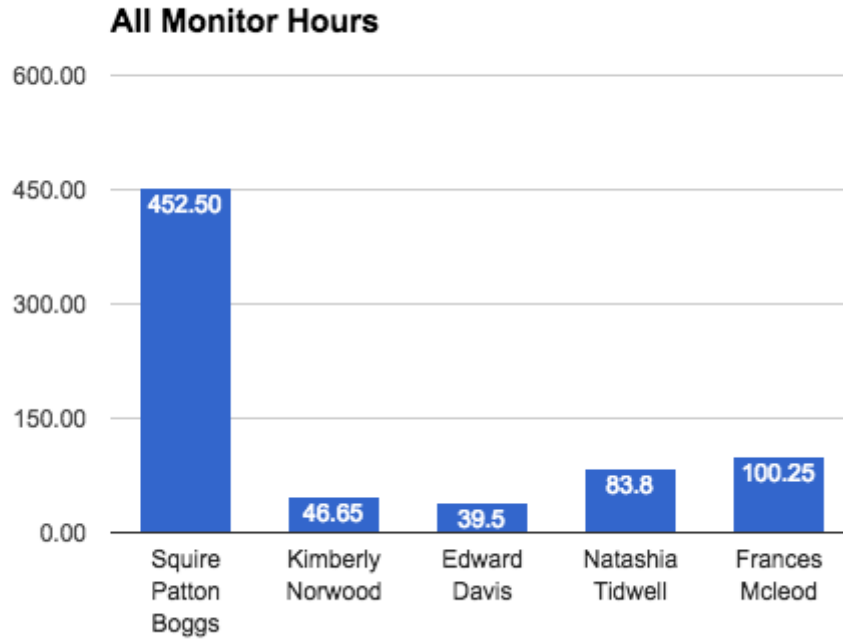
As explained in Part 1 of this report, Mr. Ervin had a different interpretation of "first year" than did the City and the DOJ. This helps explain why the Monitor billing reached its projected level for the first year in only five months. Still the Monitor's total billing of over \$600,000 reached the second year cap in only three more months. It is clear that the billing was well beyond expectations even given Mr. Ervin's assumption that he was operating on a "calendar year" basis.

The tables point to the bulk of the problem--Mr. Ervin's monthly hours were 250% of his original estimates. The policing and courts experts on his team worked less than projected; clearly organizational issues, internal coordination and communication spiraled upward while substantive progress took a back seat during this period.

Mr. Ervin had stated before being hired that he would likely be working more hours than proposed but these extra hours would be pro bono. His team members had promised the same. However, this method of billing for his more-than-projected hours was flawed. By not counting

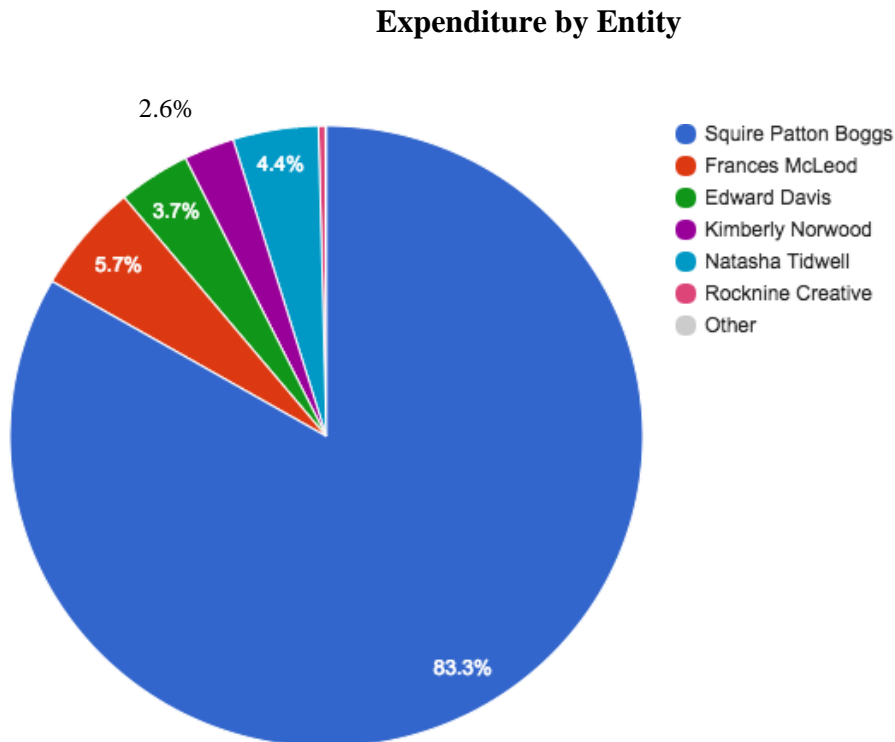
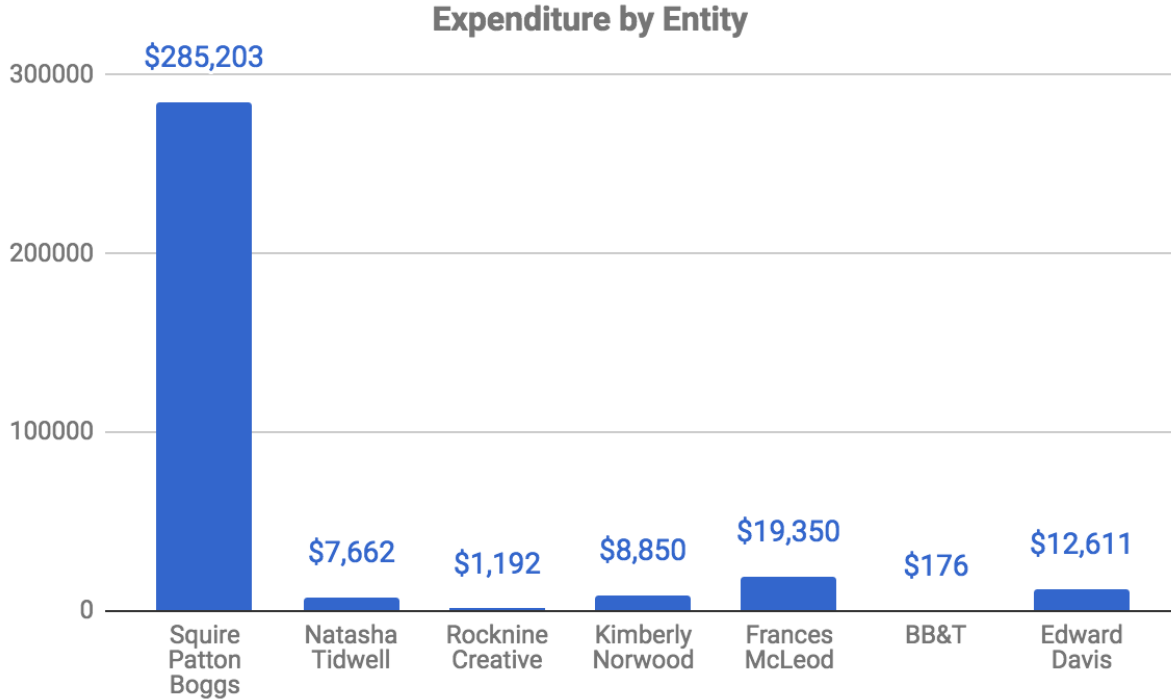
any hours as pro bono until reaching his cap, he was creating a situation where the rest of the year's work would be done pro bono by both himself and the members of his team. Rather than paying team members proportionately for their work throughout a full year, he would be forced to pay team members who worked after March essentially nothing for their efforts. To rectify this situation, the Monitor has agreed to create a schedule of work for each future year and distribute payments to his team members accordingly.

Billing 2016 - All Monitor Hours



Total hours billed by each team member in 2016. The remaining team members did not include an hourly figure in their billing.

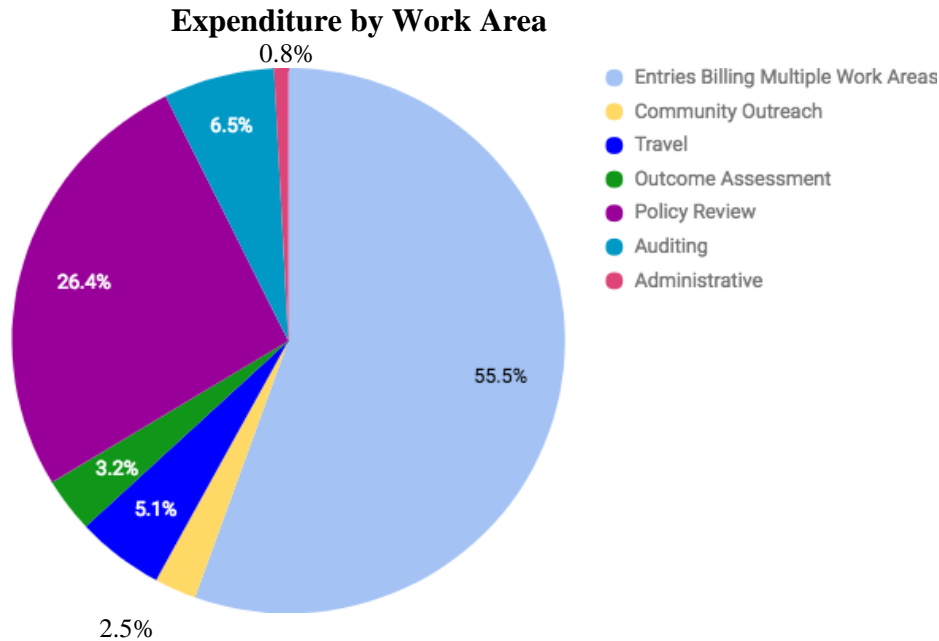
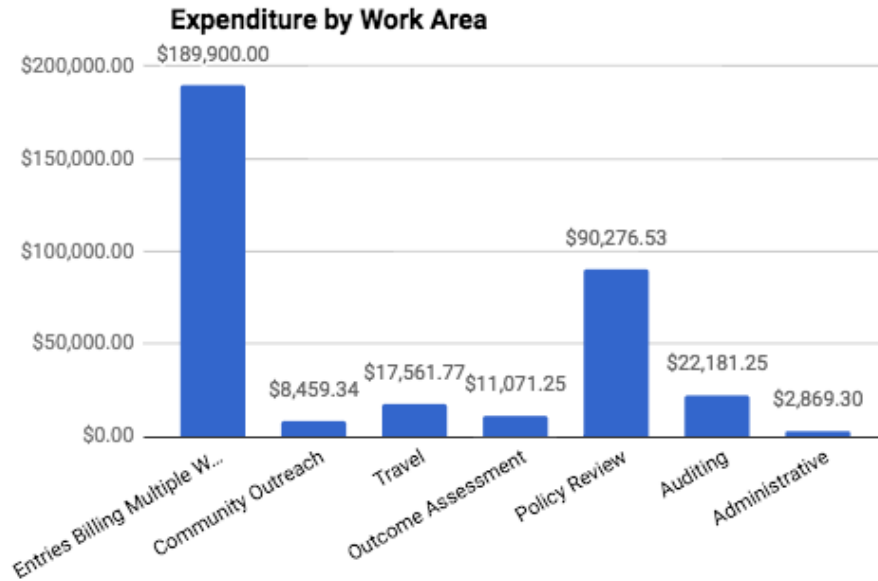
Billing 2016 - Expenditures by Entity



Mr. Ervin's higher hourly rate, \$680 per hour, added to his higher percentage of the billing. While he accounted for 63% of the hours, he was 83% of the costs. During this early stage of the consent decree implementation, only 17% of the costs went to the various policy experts whom we would like to see doing the bulk of the substantive work. We would hope to see a major shift in these percentages in the future.

Billing 2016 - Work Areas

The authors looked at every line item from the 2016 bills. Each billing line item for 2016 was coded as auditing, policy review, outcome assessment, travel, administrative, or community outreach. Slightly over half of the billing entries involved two or more of these categories and could not be disaggregated. These entries are counted in their own category--entries billing multiple work areas. The authors then totalled the expenditures spent on each Work Area to create the charts below.



The size of the Policy Review category, compared to the smaller percentage of expenditures going to the policy experts in the earlier graph, indicates that Mr. Ervin was doing a fair amount of this Policy Review. We would hope that he would decentralize his own role and rely more on

his experts in the future.

The category labeled Entries Billing Multiple Work Areas is by far the largest category. Unfortunately, this makes it impossible to tell the true distribution of expenses to the various Work Areas. One might risk assuming that the 55% in that category was distributed proportionately among five of the other categories (excluding travel, which was exclusively reimbursement for costs). This would slightly more than double each of those categories and give a rough estimate of the actual distribution of work.

In any case, the proportions of the spending seem appropriate for this stage of the process. Much of the early work involves policy review. In subsequent years we would expect that area to diminish as more work goes into implementation and auditing of results.

City Comparisons

[East Haven, CT](#) - [Newark, NJ](#) - [New Orleans, LA](#)

<u>City</u>	<u>Consent Decree Start Date</u>	<u>Recent Budgets for Cities</u>	<u>Consent Decree Budget</u>	<u>% of Yearly Budget</u>	<u>Two-Year Mark</u>
Ferguson, MO	April, 2016	\$21.7 million (2016)	\$1.25 million (4 years)	1.44%	N/A ¹
East Haven, CT	Dec., 2012	\$80 million (2012)	\$2.5 million (4 years)	0.78%	\$668,000 spent
Newark, NJ	May, 2016	\$800 million (2016)	\$7.4 million (5 years)	0.18%	N/A
New Orleans, LA	Jan., 2013	\$496 million (2013)	\$55 million (5 years)	2.21%	\$12.6 million spent

The concern expressed by the City of Ferguson going into the consent decree was that a city of its size could ill afford the costs associated with this type of reform. Protesters, and the DOJ, answered that constitutional policing is a mandate, not a luxury item. Nevertheless, efforts were made to keep down costs, and an extremely tight schedule of budget caps was implemented.

The chart above shows the tiny size of Ferguson's budget as compared to other cities with consent decrees. Given that fact, Ferguson is spending twice as much, as a percentage of its budget, as East Haven, the next lowest city. Its cap of \$1.25 million is only half of what the next highest city is spending.

¹ "N/A" = Not Available

The Monitor knew these numbers going into the project, and knew that some work would be done pro bono. However, he seems to have done little to keep costs down in the first eight months. By offering to put in much pro bono time from January 2017 through July 2018, he has shown a willingness to correct his mistake.

Nevertheless, the way these issues came to light, the change in financial arrangements, and the nature of the new arrangement all raise issues of their own. We explore those in the Conclusion below.

Conclusion

Some of the issues, in addition to the tight budget, that have arisen during the early stages of the monitorship and consent decree can be attributed to the small size of Ferguson. Short on resources and understaffed due to massive turnover in city government during the time in question, Ferguson has needed time to get itself organized and productive. This is perhaps the major reason that consent decree deadlines had to be essentially abandoned. The failure of these agreed-upon deadlines is an indication that not only the Monitor but also the DOJ underestimated the projected time needed to accomplish goals. The City always protested that the deadlines were most likely unachievable; they insisted on flexibility and they were correct in doing so, but more realistic deadlines would have proved much more useful. We are now left with no milestones to judge progress or to determine what work is falling behind schedule.

Still other mistakes were made. It is hard to imagine that a room full of lawyers from the DOJ, Monitor and Ferguson did not clarify what was meant by a “year” when setting the financial caps. The scale of the error in projecting hours of work is also hard to gloss over. Finally, the billing of such large amounts (again, half the five year cap billed in just eight months) indicates an unwillingness to face facts and deal with the issues at hand.

The situation has been at least somewhat rectified, but red flags and questions for the future remain:

Has enough work been accomplished to justify the cost?

Clearly not at this point. Even allowing for the fact that start-up costs are expected to be higher than those in later years and initial work will tend toward creating infrastructure rather than creating product, there is not enough to show for \$600,000. There is too long a list of unaccomplished projects that must be part of the early stages of reform; since some of those important projects must be initiated by other parties, they are not part of this particular discussion. The Monitor must take ownership, though, of having failed to get out a baseline survey in time to capture that important information, the lack of an updated Work Plan at the time of this publication, and the failure to have produced the first six month Compliance Report. One more example: the City has a spreadsheet of all the consent decree requirements and spaces to fill the amount of progress at any given time. The spreadsheet was filed with the court in August 2016, but the city has never updated that document, not even for its own use. The Monitor should be auditing this document and requiring continuous updates.

Nevertheless, when the January through March bills are revised, the outlook will look much

better, at least from a financial point of view. With the Monitor working pro bono at least till August 2018, the costs going forward will hopefully get things back in line. An analysis such as this one should be done periodically to ensure that balance is achieved. And, as stated earlier, new timelines need to be created and progress toward those timelines recorded.

Will the quality or pace of the work suffer due to financial pressures when so much of the work is being done on a pro bono basis?

All of the people involved with the Monitor team are professionals. They agreed that some work would be done pro bono. But, going forward, the likely scale of that pro bono work does change the calculus. Will the Monitor be as apt to come to town every six weeks when he is spending his own dime, or will he be tempted to spread it out an extra week or two? Will he bring as many team members when he comes?

The DOJ and Monitor have agreed to some steps to streamline the policy review process, but they need to make sure that less time spent does not affect the quality of the review. Giving more of the work to team members with expertise should be part of the effort to maintain the work quality. We would still feel more comfortable if there were some agreed-upon process of quality control, but such a process might be hard to formalize. The parties involved, but most importantly the community members, will have to remain vigilant and unabashed in giving feedback and in demanding the outcomes that they envision for the stakeholders. And the judge, as final legal arbiter of the consent decree's success, should allow frequent community input at status hearings so that she can make her best judgments.

When billing issues and disagreements were clear to the parties in January (when the city refused to pay the Monitor's bill due to the disagreement of the definition of a "year"), why did it take so long to come to light?

From discussions with the Monitor and the DOJ, the authors believe they know the answer: those two parties (we have not spoken to the city about this) wanted to reassure the public by having a solution to the difficulties worked out before any public disclosure was made.

This point of view seriously underestimates the maturity of the stakeholders and also the parties' responsibility for keeping the community informed about the expenditure of their tax dollars. This issue should have been discussed, at the very latest, at the March status hearing. We have no doubt that a disagreement of this importance and the time necessary to reach a consensus solution took time away from forward progress on the consent decree. The people had a right to know what was going on.

We can only hope that the June status hearing will review all this history for the record, and that there will be a full accounting of what has transpired.

Furthermore, the authors have heard in conversation, and have reported here in good faith, that pro bono work will increase, that the spring 2017 billing will be revised, and that yearly work

schedules will be developed. We have been told that those agreements would be committed to writing. We hope that contract is filed at the June status hearing, and the public should see it when the filing is made.

Will billing be more transparent in the future?

It must be. The public should not have to rely on the Missouri Sunshine Law for this type of information. The city should post the bills on their website for all taxpayers to see. We would urge that the billing records be as complete as possible. We realize that it is impractical to do away with billing entries covering multiple categories, but some effort in this regard would improve transparency. More importantly, billing records must be kept for all pro bono work, so that the public can best determine what is being worked on.

In the end, work product and movement toward constitutional policing will be the final measure. But it is a mistake to keep the public removed from a complete record of the process behind the curtain. That is the only way to guarantee accountability and to provide a mechanism for course corrections moving forward.