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December 31, 2009

**VIA ELECTRONIC MAIL**

Jamie S. Gorelick  
Michael Traynor  
ABA Commission on Ethics 20/20  
321 N. Clark Street  
Chicago, IL 60654-7598

**Re: ABA Commission on Ethics 20/20 - Preliminary Issues Outline**

Dear Ms. Gorelick and Mr. Traynor:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees have members representing these three segments, to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.<sup>1</sup>

**I. BACKGROUND**

ABA President Carolyn B. Lamm created the ABA Commission on Ethics 20/20 ("Commission") in August 2009. The Commission is to review and assess the Model Rules of Professional Conduct and other sources of lawyer regulation in the context of the accelerating pace of technological innovation and the increase in

<sup>1</sup> The Honorable Thomas C. Wheeler, a member of the Council of the Section of Public Contracts Law, did not participate in the Sections' consideration of or voting on these comments.

globalized law practice. As part of this work, the Commission has prepared and circulated for comment a Preliminary Issues Outline (“Outline”).

## **II. SECTION COMMENTS ON THE OUTLINE**

The purpose of the Section is to improve public procurement and grant law at the federal, state, and local levels and promote the professional development of attorney and associate members in public procurement law, thereby promoting the objectives of the ABA. Public procurement law includes statutes and regulations that impose requirements on government contracts that are generally not applicable to commercial contracts, and that raise issues the Commission may not hear about from other ABA Sections. As such, we are providing the following comments for the Commission’s consideration.

### **A. National Practice of Law**

Subsection II.B. of the Outline (“Protection of Clients”) states that the Commission will study whether there should be different standards applicable to providing advice on law that is uniform nationwide, such as federal or international law. This subsection also asks if it makes a difference whether the lawyer or law firm maintains an office in other states or countries. Subsection II.B. is part of Section II, which deals with issues that arise in light of current and future advances in technology that enhance virtual cross-border access.

Part of the Public Contract Law Section’s focus involves federal contracts, and federal procurement law is uniform nationwide, governed primarily by requirements in the Federal Acquisition Regulation, 48 C.F.R. Parts 1-53 (and agency supplements). Therefore, focusing solely on federal procurement law (as opposed to state or local procurement law), the Section does not believe that different standards should apply to providing advice on this body of law, or that maintaining an office in other states or countries should impact such advice. A client seeking advice on federal procurement law should be able to obtain legal guidance that is grounded in the same body of law, regardless of whether the client consults a lawyer in its home state or in any other state, territory, or in Washington, D.C.. Nor does the Section believe that advances in technology that enhance virtual cross-border access create a need for different standards applicable to providing advice on federal procurement law. While technological innovations may impact the *form* of this body of law (*e.g.*, advances may increase access to case law), maintaining the *substantive* uniformity of federal procurement law promotes predictability, efficiency, and fairness.

**B. The Impact of Technology**

The Commission's inquiry into the accelerating pace of technological innovation raises other issues that concern particular interests of the Public Contract Law Section. In particular, section III.C. of the Outline discusses issues raised by changing technology with respect to data security and confidentiality issues, including:

- Whether there is or should be a professional obligation to understand and to use new technologies and new applications reasonably. For example, how does a lawyer's obligation to avoid inadvertent disclosure of confidential or privileged information apply to "cloud computing," where the lawyer or law firm no longer maintains physical possession of, or exercises control over, the server that holds the information?
- How does technology accentuate or ameliorate the risks and consequences of inadvertent disclosure of confidential and/or privileged information; and
- Do the Model Rules and existing ethics opinions adequately protect clients from inappropriate use by lawyers of available technologies (*e.g.*, cell phones in public locations, blogging, Tweeting, or the indiscriminate use of the "reply all" function in e-mail)?

The Section does not believe it is necessary or appropriate at this time to take a position on the general issue concerning whether lawyers should, as an ethical matter, keep abreast of changes in technology. Nevertheless, the protection of certain types of information can play an important role in seeking or performing a public contract. In particular, federal procurement lawyers can be involved in matters covered by numerous laws relating to the protection of confidential data, including:

- Information that is, for reasons of national security, designated by a U.S. agency for limited or restricted dissemination or distribution.
- Information subject to the Arms Export Control Act (22 U.S.C. §§ 2778-2780), and the International Traffic in Arms Regulations (22 C.F.R. Parts 120-130), concerning the sale, export, and re-transfer of defense articles and defense services.
- Information covered by the Trade Secrets Act, 18 U.S.C. § 1905, which prohibits disclosure by government employees of certain

confidential/proprietary information provided to the Government by nongovernment entities.

- Information protected by exemptions in the Freedom of Information Act, 5 U.S.C. § 552(b).
- Information protected by the Procurement Integrity Act, 41 U.S.C. § 423.
- Information subject to protective orders in bid protest proceedings, which permit counsel for parties to the protest to review confidential data of other parties subject to non-disclosure requirements.
- Matters governed by statutes and regulations that deal with the allocation of rights between the Government and contractors concerning technical data and software relevant to certain contracts.

These types of restrictions likely have little application to most commercial contracts, but can routinely apply to lawyers and their clients who are involved in public contract matters. As such, in addition to ethical requirements to protect confidential client communications, public contract lawyers may be faced with a patchwork of additional requirements to protect confidential information. In addition, some of the laws include criminal penalties for noncompliance. Given the many distinctive restrictions that may be relevant to public procurement lawyers, the Section at this time simply wants to alert the Commission to those restrictions.

Also, while we are not at this time taking a position on whether lawyers should, as an ethical matter, keep abreast of changes in technology, we wish to note that certain parts of the Model Rules arguably require lawyers who must deal with the many federal data protection laws to keep abreast both of developments in those laws and advances in technology that could present additional risks of inadvertent disclosures in violation of the laws. These parts of the Model Rules include Rule 1.1 concerning providing competent representation, Rule 1.3 concerning acting with reasonable diligence and promptness in representing a client, and Rule 1.6 concerning confidentiality of information.

Finally, we would like to bring additional information to the Commission's attention that may be relevant to its work in 2010. The Federal Government is considering pilot projects with a new emphasis on cloud computing, and is implementing a new program, the "work-at-a distance" initiative, to leverage modern technologies to allow Federal employees to work in real time from remote locations. Office of Management and Budget, *Cross-Cutting Programs* at 157-58,

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available at [http://www.whitehouse.gov/omb/budget/Analytical\\_Perspectives/](http://www.whitehouse.gov/omb/budget/Analytical_Perspectives/) (last visited December 4, 2009).

### III. CONCLUSION

For the reasons discussed above, the Section does not believe that different standards should apply to providing advice on federal procurement law, or that maintaining an office in other states or countries should impact such advice. Also, the Section has provided information for the Commission's consideration concerning numerous restrictions on disclosing data that may apply to public procurement lawyers. The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,



Karen L. Manos  
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