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October 20, 2011

SENT VIA EMAIL ONLY

Professor William T. Harbaugh
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Re: Petition for Public Records Disclosure Order
DOJ File No.: 580-500-GA0094-11
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Dear Professor Harbaugh,

This letter is the Attorney General's order in response to Professor Harbaugh's October 5, 2011, petition.[1] Professor Harbaugh asks the Attorney General to evaluate whether certain information redacted by the University of Oregon (UO) from an attorney's billing statements is exempt from disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505. For the reasons that follow, we respectfully deny Professor Harbaugh's petition.

The Public Records Law confers a right to inspect any public records or a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Any person denied the right to inspect or to receive a copy of a public record may petition the Attorney General to determine whether the record may be withheld from inspection. ORS 192.450(1).

On September 15, 2011, Professor Harbaugh sent a public records request asking UO for a copy of any invoices received since August 12, 2011 from Bond, Schoeneck, & King, PLLC.[2] On October 4, 2011, UO provided a copy of the requested invoice. UO

[1] We thank Professor Harbaugh for allowing us until October 20 to issue our order.

[2] Other aspects of Professor Harbaugh's request are not at issue in this petition.

attorneys representing UO in the matter), asserting that the redacted materials were covered by the attorney-client privilege and therefore exempt from disclosure.[3]

ORS 192.502(9) exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." Oregon law, in turn, recognizes the attorney-client privilege, which is codified at ORS 40.225. Subsection (2) of that section states the general rule of the privilege:

> A client has a privilege to refuse to disclose * * * confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;
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> * * * * *
>
> (e) Between lawyers representing the client.

The privilege applies when the communication is (1) "confidential," (2) "made for the purpose of facilitating the rendition of professional legal services to the client," and (3) "between persons described in one of the paragraphs of [ORS 40.225](2)(a) and (e)." *See State ex rel. Oregon Health Sciences University v. Haas*, 325 Or 492, 501, 942 P2d 261 (1997). "The application of the privilege also depends on 'the intent of the parties to shield the communication from disclosure and the purpose for which the communication is made.'" *Port of Portland v. Oregon Center for Environmental Health*, 238 Or App 404, 411, 243 P3d 102 (2010), *rev den*, 350 Or 230 (2011) (quoting *State v. Ogle*, 297 Or 84, 87, 682 P2d 267 (1984)). Communications covered by the attorney-client privilege are exempt from disclosure under ORS 192.502(9). *Klamath County School Dist. v. Teamey*, 207 Or App 250, 260-61, 140 P3d 1152, *rev den*, 342 Or 46 (2006).

Client-fee information is not generally protected by the attorney-client privilege. But where billing records contain privileged information, the privilege may protect that information from being disclosed through the disclosure of billing records. *See US v. Osborn*, 409 F Supp 406, 411 (D OR 1975), *affirmed in part, vacated in part on other grounds, reversed in part on other grounds*, 561 F2d 1334 (9th Cir 1977); *Clarke v. American Commerce Nat. Bank*, 974 F2d 127, 130 (9th Circuit, 1992); Paul R. Rice, Attorney-Client Privilege in the United States § 6:18 (2011 ed.) ("Although the amounts of fees paid may not be seen as privileged, courts may still be inclined to protect related information in billing records, like hours spent and related written explanations.").

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[3] We understand Professor Harbaugh's petition to concern only the redactions in the descriptive statements, not account numbers which UO also redacted from the billing statements. We only address whether the redacted portions of the descriptive statements can lawfully be withheld under ORS 192.502(9). In any event, the redacted account numbers appear to be exempt under 192.501(27), and we perceive no reason to think that the public interest would favor their disclosure.

It is true that the essential purpose of a billing statement is to obtain payment for services. The purpose of a narrative in a billing statement is to inform the client of the legal services rendered with enough precision so that the client understands that the work performed justifies the amount billed. The detail in the narrative assists the client. But conveying more details crosses into the attorney-client relationship when it discloses more than the general nature of the work performed. As the authorities above make clear, a billing narrative need not be disclosed where doing so would encroach on the confidential attorney-client relationship. To order disclosure of those details would encourage cryptic narratives, which do not convey the information attorneys generally want to convey to their clients. Oregon Rules of Professional Conduct (ORPC) 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); ORCP 1.5(a) ("A lawyer shall not * * * charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses."). And guarded communications with clients undermine the purpose of the privilege. *Frease v. Glazer*, 330 Or 364, 370, 4 P3d 56 (2000) ("The purpose of the privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.") (citations and internal quotation marks omitted). Thus, a narrative statement that contains details within the confidential attorney-client relationship is integrated with the rendition of legal services.

Applying these principles to UO's redactions, we conclude that the redactions are justified. UO's redactions in the narrative statements are privileged because the redacted information constitutes confidential communications. The redacted communications are from UO's attorney to UO. We are informed that compelled disclosure of the communications at this time would be detrimental to one objective of the representation. The redactions themselves illustrate UO's intent to shield those communications from disclosure, and we perceive no reason to think that UO has taken any actions inconsistent with that intent. Neither UO nor Mr. Glazier sent the descriptions of those communications to anyone outside of the privileged relationship.[4] Finally, none of the exceptions to the privilege in ORS 40.225(4) apply.

In some circumstances, ORS 192.502(9)(b) requires the disclosure of factual information from communications that are otherwise protected by the attorney-client privilege. Five conditions must be present for this requirement to apply. One of those conditions is that "the holder of the privilege under ORS 40.225 has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction." ORS 192.502(9)(b)(E). We are not aware of any statement made or authorized that characterizes or partially discloses the information that we have determined is subject to the privilege. Consequently, the limitation of ORS 192.502(9)(b) is inapplicable to this case. We need not examine whether the other four conditions would be met.

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[4] Our office sent an unredacted copy of the billing statement to you, and you then forwarded it to other individuals. That action by our office was the result of staff misunderstanding the instructions of an attorney. The attorney promptly asked you to destroy the unredacted version of the statement. We have no trouble concluding that this inadvertent disclosure does not constitute a waiver of privilege under ORS 40.280.

Based on the foregoing, Professor Harbaugh's petition is respectfully denied.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

MHW:naw/3037964v4
c: Elizabeth Denecke, Public Records Officer, UO
Randy Geller, Deputy General Counsel, UO