Memorandum

To: Rafael Moure-Eraso, Chairperson, U.S. Chemical Safety and Hazard Investigation Board

From: Richard W. Painter RP

Re: EPA Inspector General Request for Documents Covered by the Attorney-Client Privilege

Date: August 28, 2013

I am the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School. I am a graduate of Harvard College and Yale Law School and my law practice has been in corporate and securities law, commercial litigation, lawyers' ethics and government ethics. From February 2005 to July 2007, I was the chief White House ethics lawyer, and in that capacity gave legal advice to the President, the White House staff and the President's nominees for Senate confirmed positions in the Executive Branch. I also dealt with Congressional investigations and Inspector Generals' investigations of executive branch agencies.

Earlier this month, through the CSB General Counsel, you requested my expert opinion on the question of whether the U.S. Chemical Safety and Hazard Investigation Board (CSB) should produce privileged attorney-client communications in response to a document request by the Inspector General (IG) of the Environmental Protection Agency (EPA) who currently has statutory authority to investigate matters at the CSB. I understand that the EPA IG request includes a request for communications between the CSB Chairman and one or more CSB attorneys that were made for the purpose of seeking legal advice, as well as communications between the CSB Chairman and/or CSB attorneys with outside counsel retained by the CSB, also made for the purpose of seeking legal advice. I understand that the subject matter of some of these privileged communications is the same or substantially similar to the subject matter of pending complaints brought against the CSB by certain employees of the CSB.

The common law rule is that the attorney-client privilege is waived by showing privileged communications to persons outside the scope of the attorney-client relationship and that there is no selective waiver of the attorney-client privilege. E.g. the client cannot show the privileged communication to one person or entity outside the scope of the attorney-client relationship and then continue to assert the privilege against another person or entity. Thus, absent specific statutory provisions to the contrary, an organization that shows an attorney-client communication to a government agency cannot thereafter continue to insist that the communication is privileged from disclosure to third parties litigating against the organization. See In *re Pacific Pictures Corp.*, ___ F.3d ___, 2012 WL 1293534 (9th Cir. 2012) (attorney produced attorney-client privileged documents to assist in a government investigation and then sought to enforce the privilege as to nongovernmental third parties; the Ninth Circuit rejected the selective waiver doctrine because it is unnecessary to support the policies behind the privilege and because exceptions allowing for selective waiver should be crafted by the legislature).

My review of relevant authority on this issue has not uncovered any exception that would allow a federal agency to disclose privileged attorney-client communications to an agency inspector general and then continue to assert the privilege against third parties in litigation. None of the language in the statutory authorization for IGs to review agency records refers to attorney-client privileged communications, see Section 6 of the Inspectors General Act, and there is no language in the statute allowing for selective waiver of the privilege in an IG investigation. Congress amended the Act as recently as 2008 and Congress knows how to enact language permitting selective waiver of the privilege, yet Congress did not do so.

Indeed, disclosure to an IG of privileged communications by a federal agency is counterintuitive for a number of reasons. First, agency IGs are by statute supposed to be *independent* of the agency. They cannot be removed by the agency head, but only by the President after notice to Congress. Second, agency IGs are obviously *outside the scope of the attorney-client privilege* because agency personnel rarely if ever communicate with IGs for purposes of seeking legal advice. IGs are instead charged with investigating agency matters when alleged violations of the law, waste or abuse have already occurred. Although agency personnel may continue to seek legal advice in these contexts, they will seek legal advice from agency lawyers and not from agency IGs. Third, in many situations IGs are *adverse* to the agency if the agency is alleged to have engaged in conduct that constitutes waste, fraud or abuse. For obvious reasons, adverse parties are not included in privileged attorney-client communications.

Finally, I note that agency IGs have on occasion tried to use their subpoena power to obtain attorney-client communications from nongovernmental parties alleged to have participated in conduct involving government waste, fraud or abuse. In these situations, attorneys representing these third parties have steadfastly refused to turn over privileged communications, citing their ethical obligation to preserve the privilege, and the ABA has steadfastly backed them in this refusal. In 2011, the Department of Housing and Urban Development (HUD) IG sought attorney client privileged communications from the Philadelphia Housing Authority in connection with an investigation of the Authority's use of HUD funds. The Authority refused to turn over the communications and the American Bar Association President weighed in on the side of the Authority, objecting to the IG's attempted intrusion upon the attorney-client privilege. The HUD IG's response to the ABA President acknowledged that (i) the IG is totally independent of the agency investigated by the IG, and (ii) the IG has no power to compel waiver of the attorney-client privilege. See: http://www.renocavanaugh.com.php5-25.dfw1-2.websitetestlink.com/wp-content/uploads/2011/11/D0192437.pdf

An agency IG who cannot access privileged communications of a party adverse to a federal agency would be of little help to the government or the taxpayer if the IG were to demand that the agency turn over its privileged communications and thereby waive the privilege for purposes of litigation against the agency by a third party. In this scenario the IG investigation would cause the government to lose the privilege while the third party's privilege would remain intact.

It is therefore my opinion that it would be inappropriate for a federal agency in proceedings against third parties, including its own employees, to turn over related subject matter communications to an agency IG if such communications are covered by the agency's attorney-client privilege. The agency should turn such privileged communications over to the IG only if the IG can provide the agency with sufficient legal authority contrary to my conclusions herein – e.g. authority showing that disclosure to the IG does not waive the agency's attorney-client privilege vis a vis third parties adverse to the agency.