

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: September 12, 2013

I have reviewed the "seven day letter" sent to the U.S. Chemical Safety and Hazard Investigation Board (CSB) by the Inspector General (IG) of the Environmental Protection Agency (EPA). Nothing stated in the IG's letter changes my view that the CSB faces a substantial risk of waiving the attorney-client privilege *vis a vis* third party claimants, including CSB staff members currently in administrative proceedings against the CSB, if the CSB turns privileged communications over to the IG. More specifically, most of the IG's letter does not address privilege waiver at all, and to the extent the waiver issue is addressed, the IG has not disclosed any legal authority for the proposition that producing privileged communications to the IG would not constitute waiver of the privilege *vis a vis* third parties. The few cases cited by the IG all involve production of documents under court order, a circumstance that does not involve waiver of the privilege at all, rather a decision by a court that for whatever reason a particular communication must be disclosed. There is no court order for production of documents in the present instance, and these cases are thus irrelevant to the legal effect of the CSB acceding to the request of the IG.

I should note that government investigators, including IGs, routinely demand access to communications and other documents pursuant to their statutory authority. Statutes requiring certain persons to produce documents to government investigators are also common. This does not mean that a person's or entity's decision to comply with such discovery demands by producing attorney-client privileged documents does not constitute waiver of the privilege. Absent express language to the contrary in the statute, the common law doctrine refusing to allow selective waiver is not overturned.