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Who Holds The Attorney-Client Privilege After A Merger?

By: Peter J. Gallagher

A recent decision from the Delaware Chancery Court is a must read for in-house and outside counsel representing companies involved in mergers and acquisitions. In Great Hill Equity Partnership IV, L.P. v. SIG Growth Equity Fund I, LLP, 80 A.3d 155 (Del. Ch. 2013), the court held that, under Delaware law, unless the parties agree to a different arrangement, following a merger, all privileges are transferred to the surviving entity, including the attorney-client privilege. In Great Hill, the surviving entity in a merger sued the former representatives of the company with which it had merged, claiming that these representatives had fraudulently induced the surviving entity into agreeing to the merger. During discovery, the surviving entity discovered pre-merger emails between the former representatives and their counsel in which they discussed the terms of the merger. The former representatives tried to assert the attorney-client privilege in connection with these emails, but the court rejected their efforts, holding that after a merger, all rights and privileges, including the attorney-client privilege, become the property of the surviving entity. The parties can agree to a different arrangement, but if they do, this arrangement must be set forth in the merger documents. Accordingly, the lesson to be learned from Great Hill is that if you are an officer or director of a corporation that is being acquired or entering into merger negotiations, and you are concerned about protecting the corporation's pre-merger communications with counsel, you need to make sure that this protection is built into the merger or sale agreement. If not, and if the dispute is governed by Delaware corporate law, the

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privilege will be passed to the surviving corporation as a matter of law.

Changes To Federal Rule 45 Make Issuing Subpoenas In Foreign Jurisdictions Easier

By: Peter J. Gallagher

Among the recent changes made to the Federal Rules of Civil Procedure were several amendments to Rule 45, which will make it easier to subpoena witnesses outside of the district where a lawsuit is pending. Say you have a lawsuit pending in the U.S. District Court for the District of New Jersey, but need to subpoena a witness in California. Under the old rules, a trial subpoena for that witness would have been issued by the New Jersey court (the place where the trial or hearing was to be held), a subpoena for the witness's deposition would have been issued by the district court in California where the deposition was to take place, and a subpoena for documents from the witness would have been issued by a district court in California where the documents would have been produced. The new version of Rule 45 eliminates this often confusing regime. Now, the court where the matter is pending, the New Jersey court in our example, issues all subpoenas. In addition, the new version of the rule allows for nationwide service, thus eliminating the geographical restrictions -- service in the district or within a 100-mile radius -- that were part of the old version. Finally, the revised rule also changes where a motion to quash or modify a subpoena must be filed. Under the old version, the issuing court heard such motions, but under the new version, they are heard by the district court in the district where the deposition will take place.
