Insights: Alerts

5 Key Takeaways: Survive (and Thrive) a Technology Merger

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Kilpatrick Townsend partner **Kandace Watson** and Ron Zollman, co-chairs of **San Diego's Association of Corporate Counsel (ACC) Technology & Licensing Roundtable**, shared advice on pre- and post-merger challenges during their recent roundtable "Survive (and Thrive) a Technology Merger."

Key aspects and strategies to navigate this difficult landscape include:

- **Mergers are always a possibility.** Plan ahead. Ensure assignability of contracts (without consent). Avoid escrow of key technology, when possible. Avoid licenses that give up control over your business strategy.
- **Expect ethical conflicts to arise.** Understand that executives and other employees in the process may face losing their positions or may have change of control provisions in their employment agreements that create a conflict between their duty of loyalty to the company and their own self-interest. The Board should be informed of executive compensation arrangements offered to executives in connection with the merger. Also, sellers of privately-held companies may focus on "this is my one shot" versus adopting a "long-term relationship" mindset. Is approval by disinterested stockholders recommended? Have an experienced outside M&A attorney advise the Board on its overall legal (fiduciary) duties. Define in-house attorney's duties to educate executives, the Board, and the buyers when material due diligence issues arise.
- **Know where you stand.** Do you want to stay? If so, will your boss champion your retention? Is your boss on the chopping block? What is the vision for the new entity? Regardless of whether you stay or leave, maintain your integrity and invest in new relationships. How will Legal support Operations and M&A simultaneously?
- **Sometimes forgotten merger considerations.** Who controls the confidential information? Review whether the intellectual property, URLs and contracts reside in the right entities being merged, or whether they reside in different entities. Are locations and email addresses and URLs changing? Know what Open Source you have.
- **Post-merger considerations.** Harmonize policies. Are old signature policies relevant now? How will access to systems and contracts be managed? Harmonize form contracts. Know your top inbound and outbound contracts. Can you still find old contracts? Send required notices to third party vendors. Know what Open Source you have. Consider clean rooms.