

# A Communications Strategy Is Crucial to Surviving a Merger

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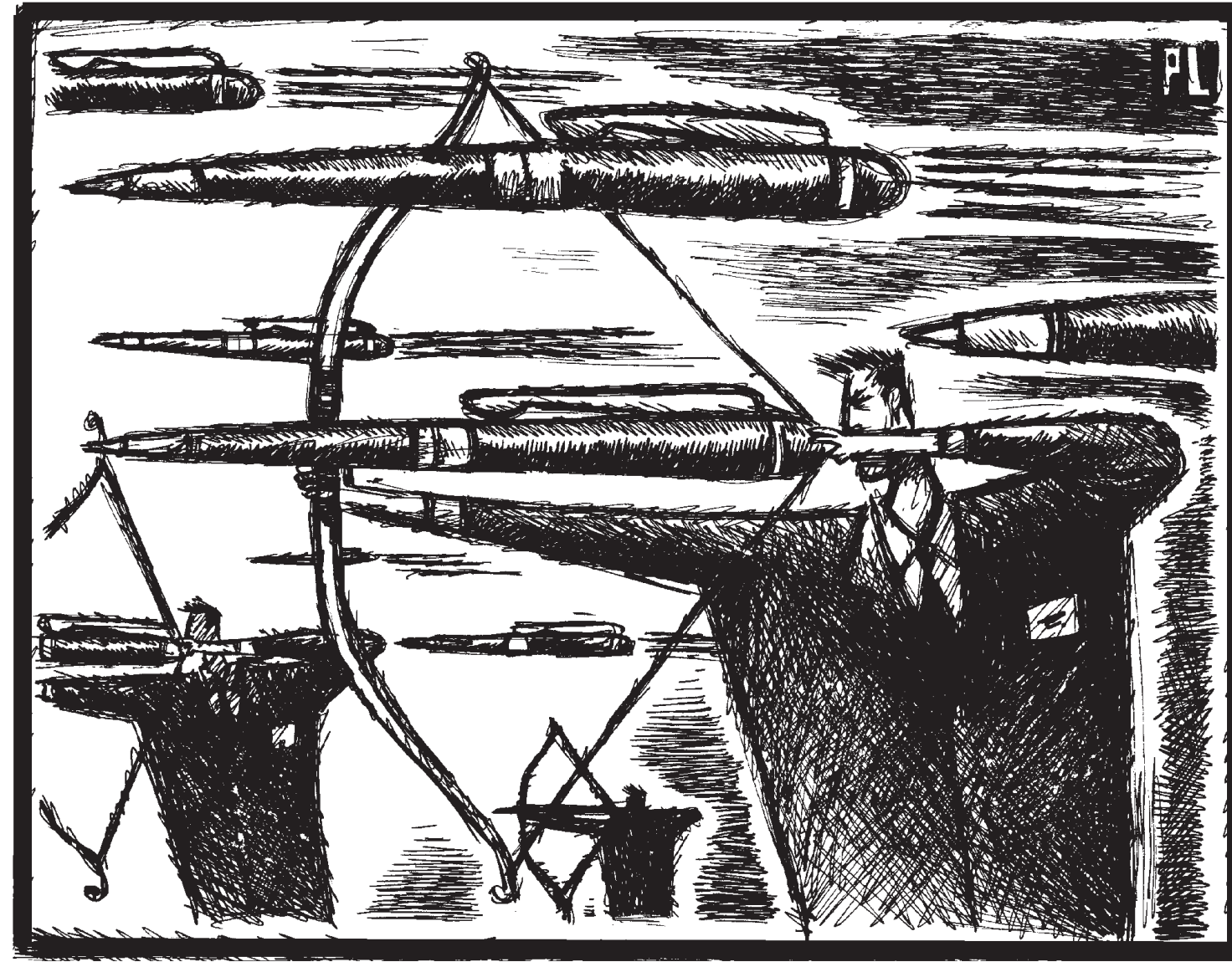
By David Silver

Corporate America and the economic order continue its freefall in 2009, with the financial system going through chaotic swings. The consumer credit market is in tatters, with many financial institutions remaining clogged with bad loans and other distressed assets as Americans executives and employees wonder what the future holds for their declining assets. We are living in a new public-private paradigm with corporate icons such as Bear Stearns, Merrill Lynch, Citigroup and others having to be rescued or taken over in a distressed merger and acquisition by competitors for cents on the dollar or having the government provide bailouts. Even powerful buyout firms such as Kohlberg Kravis and Roberts & Co., Bain Capital THL Partners have seen their distressed acquisitions go sour.

Lawyers are now in a strategic position to communicate complicated issues to clients and the media, especially in 2009, when there will be an increasing number of distressed mergers and acquisitions as companies seek to survive the next few years in a spiraling economy. Many variables drive mergers and acquisitions, especially in distressed markets. In 2009, a number of corporations will see mergers as an alternative to bankruptcy and reorganization and an important exit strategy. In assessing the economics of an acquisition, many factors come into play such as irreconcilable conflicts, dilution of profitability because of declining market shares and weak financial performance. But in this turbulent global marketplace, a key indicator for lawyers working on a successful merger and acquisition is how they handle communications before, during and after the deal.

"Communications is crucial in a distressed M&A situation, because you have a number of audiences who need to know what is happening, including customers, investors, employees, general counsel, boards of directors and management," says Lindsey Alley, managing partner in the M&A group of Houlihan Lokey, the largest M&A investment bank adviser for U.S. transactions up to \$1.25 billion.

Teams of in-house corporate attorneys, investment bankers and public relations professionals can



be tremendous assets in helping to develop a combined communications and legal strategies for the court of public opinion and the court of law in a distressed merger or acquisition. In a merger or acquisition, maintaining a transparent and consistent public relations strategy can be beneficial to all parties, especially employees for both companies. For a public or private company, getting a story out that the deal will be advantageous for all parties involved can be a huge asset. Explaining difficult legal terms will be important. The image of an acquirer going after a company can be vital, especially in a stock deal or one involving companies subject to litigation or regulatory approvals. Target audiences are frequently in limbo and should be communicated to as the deal progresses. Shareholders and employees are

concerned about the background and history of the acquirer, whose future performance will determine the value of the company and its stock price.

In any takeover contest, good press helps the teams of lawyers and investment bankers believe in the value of the struggle. Contrary to popular opinion, the courts and regulatory bodies keep a tab on the media for certain cases to come in front of those deliberative bodies. The markets can react in a disciplinary form if a company fails to merge with a suitor that will make the company stronger. Take the case study of Microsoft's pursuit of Yahoo.

In May 2008, Microsoft made a tender offer for Yahoo for \$33 a share, and Yahoo countered with \$37 a share. Both sides refused to budge, but Microsoft put on a public

relations campaign to try and influence Yahoo's shareholders. Even though many would say that this offer was not made because of a distress situation, the fact of the matter is that Yahoo has seen its market share drop significantly because of Google. Microsoft understood that Yahoo would be stronger with Microsoft in its daily battles with Google. The press followed the story on a daily basis. As the deal failed to go through and Yahoo's stock dropped, shareholders and investors — outraged — demanded that Jerry Yang step down as CEO. He failed to understand that in a distressed situation, the press is relentless and will position him, or any other executive, as the one who failed to respond to an offer.

In this distressed marketplace, reporters, editors, producers and bloggers act as an interface between

attorneys, investors, shareholders and management. Consequently, the first major story about a deal usually defines the debate of the battle in the court of public opinion. This has an important effect and impact on institutional investors and individual investors. What is definite is that the rise of the financial media coincides with the long bull market and the baby boomer cohort, people who are highly educated and seeks to understand the markets. Therefore understanding how to communicate to this highly opinioned, educated group of investors and professionals is key in a distressed merger and acquisition. The legal media is also an important avenue for lawyers to be interviewed, because stories there tend to be more complete and detailed.

First, the goal from the perspective of management at corporations

and their advisers is to maximize the opportunities that the company's story will receive a fair hearing in media channels. It is important to cultivate journalists months before the company is going to potentially either get acquired, or be the acquirer.

Provide background materials — legal and financial — with message points about the deal to "leading journalists," reporters who are respected by their peers. That could be someone at the Wall Street Journal, Business Week or CNBC. Once the story has been written or produced for a television segment, make sure to be open to other members of the media, who will surely follow up. It is important that you have full disclosure of all information given to the media. That first story is crucial.

Make sure that you put the CEO or CFO out to answer any questions about the distressed merger, not some flunky spokesperson. Make sure senior management, including general counsel, can articulate in simple terms the financial status of the company in this potential distressed acquisition or merger. Credibility and trust is important and in this era of the democratization of information, being there to be proactive and not being on the defensive will score many points with investors, shareholders, employees and the media.

This is where the value of seasoned outside M&A lawyers working in tandem with general counsel and communications professionals within the corporation can be beneficial to all parties as the merger unfolds and continues to be reported on. Make the media your ally.

Never has there been a better time to create enormous goodwill for communications as in an environment of distressed mergers and acquisitions. As Ken Chenault, CEO of American Express, told Fortune, "We have to remember that reputations are won or lost in a crisis." In this economic environment, it behooves lawyers to understand that communications is a powerful tool.

**David Silver** is president of Silver Public Relations, a financial public relations and investor relations firm in Los Angeles. He is accredited by the State Bar of California to provide an MCLE session for lawyers in California on "Managing the Litigation PR Process: When Public Opinion Matters."