

**Presentation to
ANA Advertising Law & Public Policy Conference**

**NOW WHAT?
A Drama in VI Acts**

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PROGRAM

- » ACT I. In the news examples. “Please, not me.”
- » ACT II. The match is struck – a crisis is born.
- » ACT III. The fuse is lit – the ordeal begins.
- » ACT IV. The fire burns – it gets worse before it gets better.
- » “Intermission” – A Client’s Story.
- » ACT V. The aftermath – immolation or rising from the ashes?
- » ACT VI. Would’ve, Should’ve, Could’ve.

PLEASE NOT ME . . .



The New York Times

Delta, United Airlines Become Latest Companies to Cut NRA Ties

By REUTERS FEB. 25, 2018, 12:30 A.M. E.S.T.



NEW YORK — Delta Air Lines and United Airlines on Saturday became the latest major corporations to sever marketing ties with the National Rifle Association as the fallout from last week's massacre at a Florida high school took its toll on the gun advocacy group.



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TIME

Disney Has Cut Ties with YouTube Star PewDiePie Over 'Anti-Semitic Videos'





Justine Sacco

@JustineSacco

CorpComms at IAC. Troublemaker on the side. Also known for my loud laugh.

NYC



'Ashamed': Ex-PR exec Justine Sacco apologizes for AIDS in Africa tweet

By Brian Stelter, CNN

Updated 11:42 AM ET, Sun December 22, 2013



Tweets



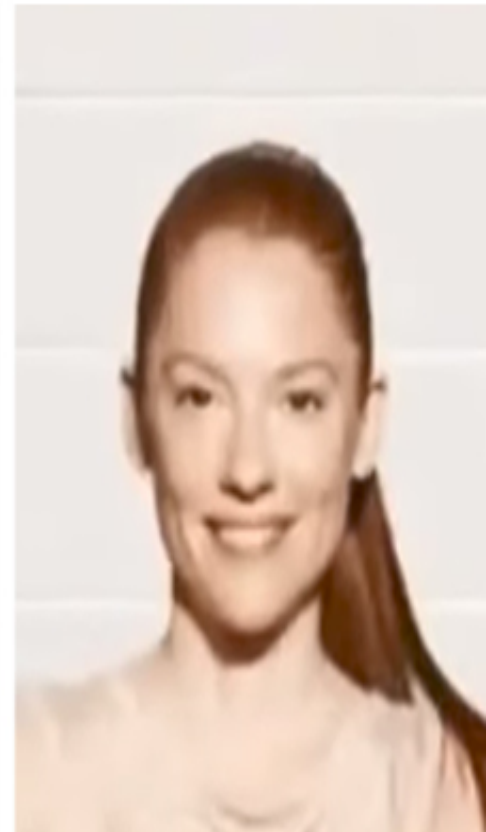
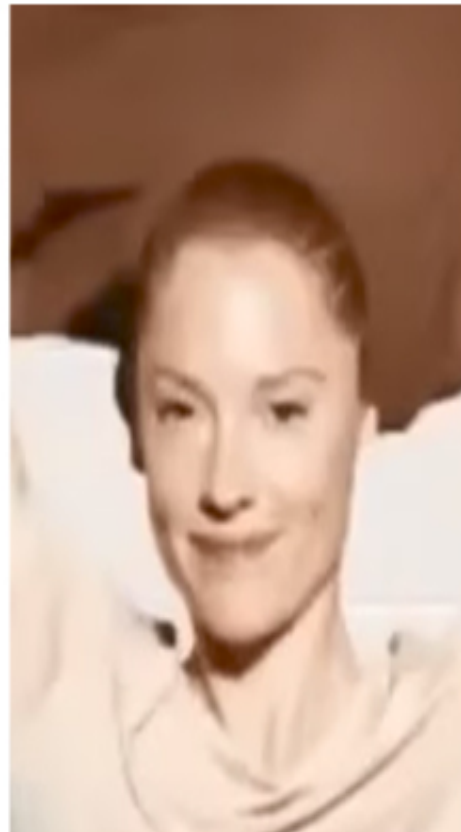
Justine Sacco @JustineSacco

Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!

from Hillingdon, London

Reply Retweet Favorite More

9h



The New York Times

Dove Drops an Ad Accused of Racism

By MAGGIE ASTOR OCT. 8, 2017



In a Facebook ad for Dove body wash, a black woman removes her brown shirt and — voilà! Underneath is a white woman in a light shirt.



VARIETY

NOVEMBER 3, 2017 7:20PM PT

Kevin Spacey Suspended From 'House of Cards'

By Stuart Oldham | [@s_oldham](#)



Innovations

Uber waits a year to reveal major hack of customer data

The Washington Post



THE MATCH IS STRUCK

THE MATCH IS STRUCK

» How does a crisis start?

- Defective product/service – perceived or real
- Accident
- Bad judgement or bad actions of one or more employees
- Fraud or appearance of ethical failure
- Consumer/customer dissatisfaction
- Government investigation
- Advocacy group or organized opposition
- Conflict between company/brand values and constituent expectations

THE FUSE IS LIT

THE FUSE IS LIT – WHAT DO YOU DO?

» Who is your team?

- Internal – management, communications, legal, PR, internal investigations
- External – advisors, legal, audit, financial, experts

» Who is your audience?

- Internal – Management, board, employees, investors ...
- External – clients, vendors, stockholders, media (all forms), government and regulatory agencies, influentials, advocacy groups, public/communities, future employees

THE FIRE BURNS

THE FIRE BURNS – WHAT DO YOU DO?

- » What is your process?
- » Engaging your team
 - Law firm
 - Crisis PR firm
 - Experts
 - Contracts
 - Among who?
 - Difference in the relationship?
 - Is there an applicable privilege?

THE FIRE BURNS – WHAT DO YOU DO?

- » Engaging the PR firm
 - » Maintaining the Attorney-Client Privilege
 - An attorney should directly retain public relations agency for advice
 - PR professionals should provide advice to the attorney about the attorney's representation, and not directly to the client
- Experts

THE FIRE BURNS – WHAT DO YOU DO?

- » Engagement Letter Between PR Firm and Law Firm
 - Should reflect that retention is to provide advice for the specific legal crisis
 - Should state that advice is not for client directly or for general media/PR campaign
 - Letter may, without destroying privilege, include provision for ultimate client to pay PR agency directly – as firm might handle other large disbursements

AND IT BURNS

- » Social substitution of brands for other institutions
- » More than economic and transactional framework
 - Reputation and relationship value
 - Authenticity, measuring reputation and brand in 9 dimensions
 - Moving to purpose-driven enterprise, Blackrock letter
 - Now shifting to Values-driven accountability
 - Does the company/brand act in my interest? Shared interest? Self interest?
 - Magnified by speed and permanence of information
 - The legal process and the constituent decision process operate on different time scales: minutes versus months

A FRAMEWORK FOR RESPONSE

» Before:

- Regret, Reform, Restitution

» Today:

- **Alignment**
- **Acknowledgement**
- **Acceptance**
- **Accountability**
- **Affiliation**

Accelerate

Values System

Intelligence System

Endorser network

Customers

Employees

Investors

Business Partners

Policy makers

Community

AND BURNS

» A word about THE LAW – the First Amendment

- *Kasky v. Nike*, 27 Cal 4th 939 (CAL. 2002)

- It was alleged that workers in Nike's factories were paid less than minimum wage; encouraged to work more overtime hours than law allowed; subjected to abuse; and exposed to toxic chemicals in violation of law
- Nike makes statements to the press, in press releases and in full page ads that its employees are treated fairly and in accordance with law

AND BURNS

» *Kasky v. Nike*, 27 Cal 4th 939 (CAL. 2002)

- Court needs to determine if speech is commercial or non-commercial
 - Non-commercial – full First Amendment protection
 - Commercial – Central Hudson Test
 - Intermediate Scrutiny
 - Is governmental interest substantial?
 - Does regulation directly advance the interest?
 - Is regulation more extensive than necessary to serve interest?

AND BURNS

» *Kasky v. Nike*, 27 Cal 4th 939 (CAL. 2002)

- Court calls speech commercial
 - Speech proposing a commercial transaction
 - Look at:
 - Advertising format
 - Economic motivation
 - Product references
 - Commercial speaker, an intended commercial audience and representations of fact of a commercial nature

AND BURNS

» *Kasky v. Nike*, 27 Cal 4th 939 (CAL. 2002)

- Importantly:

- Commercial speech, because it is both more readily verifiable by its speaker and more hardy than noncommercial speech, can be effectively regulated to suppress false and actually or inherently misleading messages without undue risk of chilling public debate.

INTERMISSION – A CLIENT'S STORY

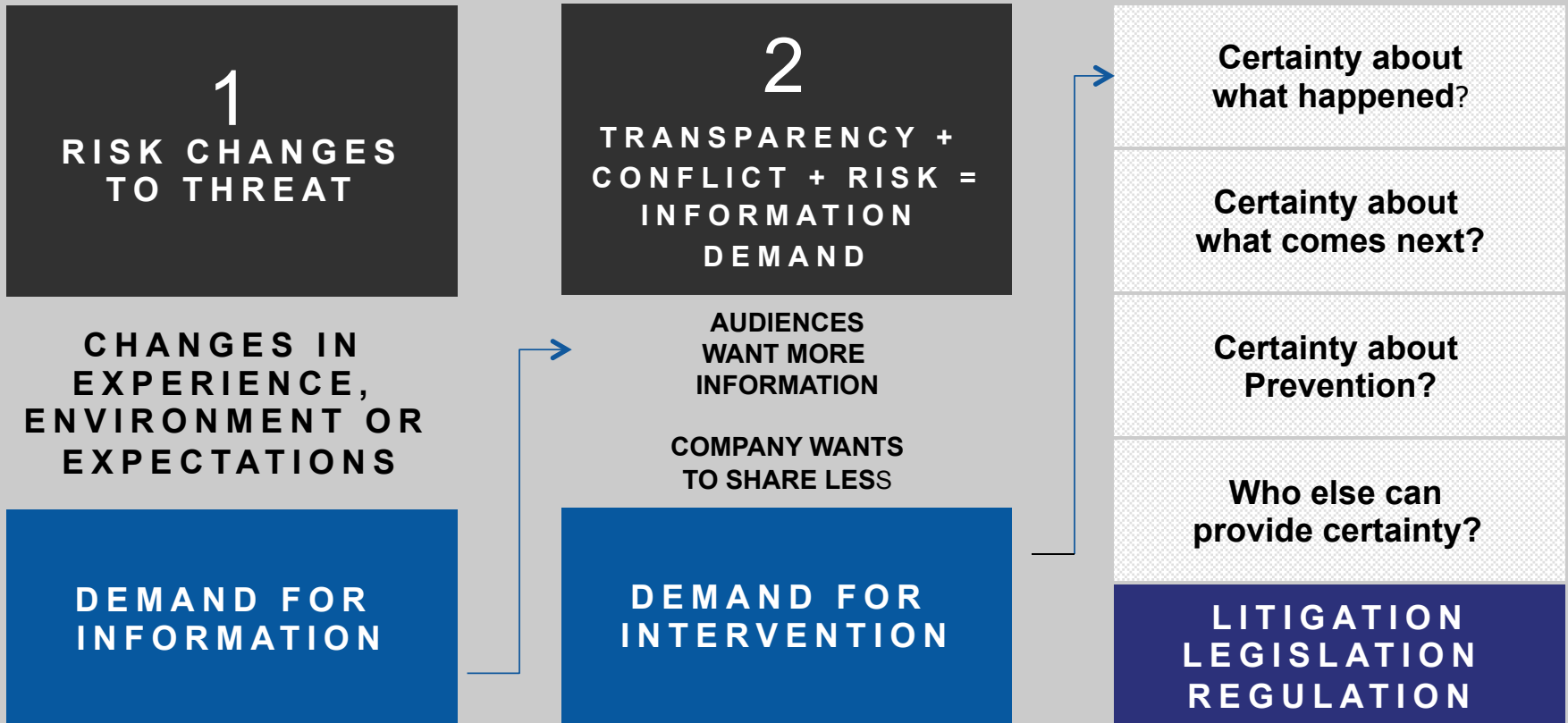


THE AFTERMATH

THE AFTERMATH – IMMOLATION OR RISING FROM THE ASHES

- » Cleaning up – part of the restitution and reformation
- » Legal fall-out with third parties:
 - Terminating contracts
 - Morals clauses and reverse morals clause
 - Money back or money paid
- » Investigation? Litigation? Settlement? – MOVING ON
 - Leading your company back to normal/better than normal
 - Lessons learned
 - Stronger, better, more resilient?

LOSS OF CREDIBILITY AND THE CERTAINTY PRINCIPLE



WOULD'VE
SHOULD'VE
COULD'VE

WOULD'VE, SHOULD'VE, COULD'VE LESSONS LEARNED

- » What might you have done before the crisis was a spark?
 - Compliance, ethics, culture, policies, processes, infrastructure?
 - Tone from the top, participation from the ground level up
 - Written policies/code of conduct
 - Area specific policies (accounting, IT, HR, FCPA, FARA, etc.)
 - Have your response process/call trees already in place

WOULD'VE, SHOULD'VE, COULD'VE LESSONS LEARNED

- Know who you would go to as outside experts and resources
- Infrastructure – management oversight, tools, reporting,
- Training, Monitoring AND Enforcement
- INCLUSIVE CULTURE – “Do the right thing, and don’t be afraid to speak up.”
- Issue tracking, peer benchmarking, constituent values analysis

REPUTATION RECOVERY:

- » **Earn the privilege to talk about the future again**
- » The solution is inside the crisis itself
 - Many banks and insurers
 - Carnival, Samsung, GM, JetBlue
- » Control tower
 1. Constructive engagement, more alliances
 2. Address issues directly
 3. Bigger themes, focus on the future
 4. Centralize core messages
 5. All in, all the time, everywhere



QUESTIONS

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