

A Litigator's Look at **CRISIS**

MANAGEMENT



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BY JAMES D. SHOMPER
AND KATHLEEN TAYLOR SOOY

CORPORATE MANAGEMENT'S WORST nightmares play out daily on the front pages of U.S. newspapers: workers perish in an industrial accident; a train transporting hazardous chemicals derailed; a product defect triggers a nationwide recall; and people fall ill and die because of product tampering.¹ When such a media intensive event occurs, some company—and its in-house counsel—has a crisis.

Not every crisis is as dramatic, or as newsworthy, as fatalities resulting from cyanide-laced Tylenol capsules or from a lethal gas leak at an industrial plant. Corporate crises also arise from government investigations of company employees;² damaging documents revealed in pending civil lawsuits;³ adverse regulatory actions;⁴ studies pronouncing products unhealthy;⁵ and large jury verdicts.⁶

These crises require an integrated forward-thinking corporate response. This article, written from the litigator's perspective, will focus on the three stages of crisis management: the immediate stage, when you manage short-term effects; the intermediate stage, when you manage litigation and other collateral consequences; and the final stage, when you evaluate long-term effects and put the crisis behind you.

While the immediate stage passes quickly, the collateral effects of a crisis can drain corporate energy and resources, and linger for months or years. Beyond negative press coverage, you can expect possible regulatory actions, criminal investigations, and civil litigation, ranging from individual lawsuits filed in state and federal courts by numerous injured parties to nationwide class actions. You also should be aware of the possibility of satellite litigation, including shareholder litigation,⁷ and insurance coverage suits. Your company may need to recall products from the marketplace, thus adversely affecting sales. Crises have effects on corporate governance and financial reporting, too.



IN THE IMMEDIATE STAGE, THE FOCUS IS GATHERING THE FACTS AND GETTING INFORMATION OUT TO THE PUBLIC.

In short, while a corporate crisis can have profound effects on your company it does not have to spiral out of control. Steps can be taken in advance to prepare for a crisis. The crisis can be managed to minimize the risks to the company and address the company's primary constituencies—customers, shareholders, and employees—as well as other stakeholders, such as suppliers, regulators, the local community, media, the financial world, and the general public. Legal counsel with experience in litigation should be among the key players in crisis management.⁸

As your company progresses through the three stages of a crisis, its risks and your role change. In the immediate stage, the focus is on gathering the facts and getting information out to the public. Counsel's job is to be sure these early steps are done in a way that addresses the company's short-term needs in responding to the crisis and prepares a solid foundation for the litigation that may soon follow. During the second or intermediate stage, the focus shifts to litigation and other collateral effects. You will oversee internal investigations, evidence gathering, document management, and litigation management. The final stage is your opportunity to look back at the crisis and its aftermath to evaluate whether changes should be made to avoid or to deal better with the next crisis.⁹

THE IMMEDIATE STAGE—DECISIVELY MANAGING SHORT-TERM EFFECTS

Your opportunity for minimizing damaging, long-range effects of a crisis is probably greatest during the immediate stage, just after the disastrous event has occurred. You seize this opportunity when you take prompt and decisive action. Indecision only prolongs the crisis, allowing the event to remain a focus of unwelcome media attention. As soon as the event occurs, a crisis management team should be mobilized.

Instead of running from the press and the public, your crisis management team should be prepared to

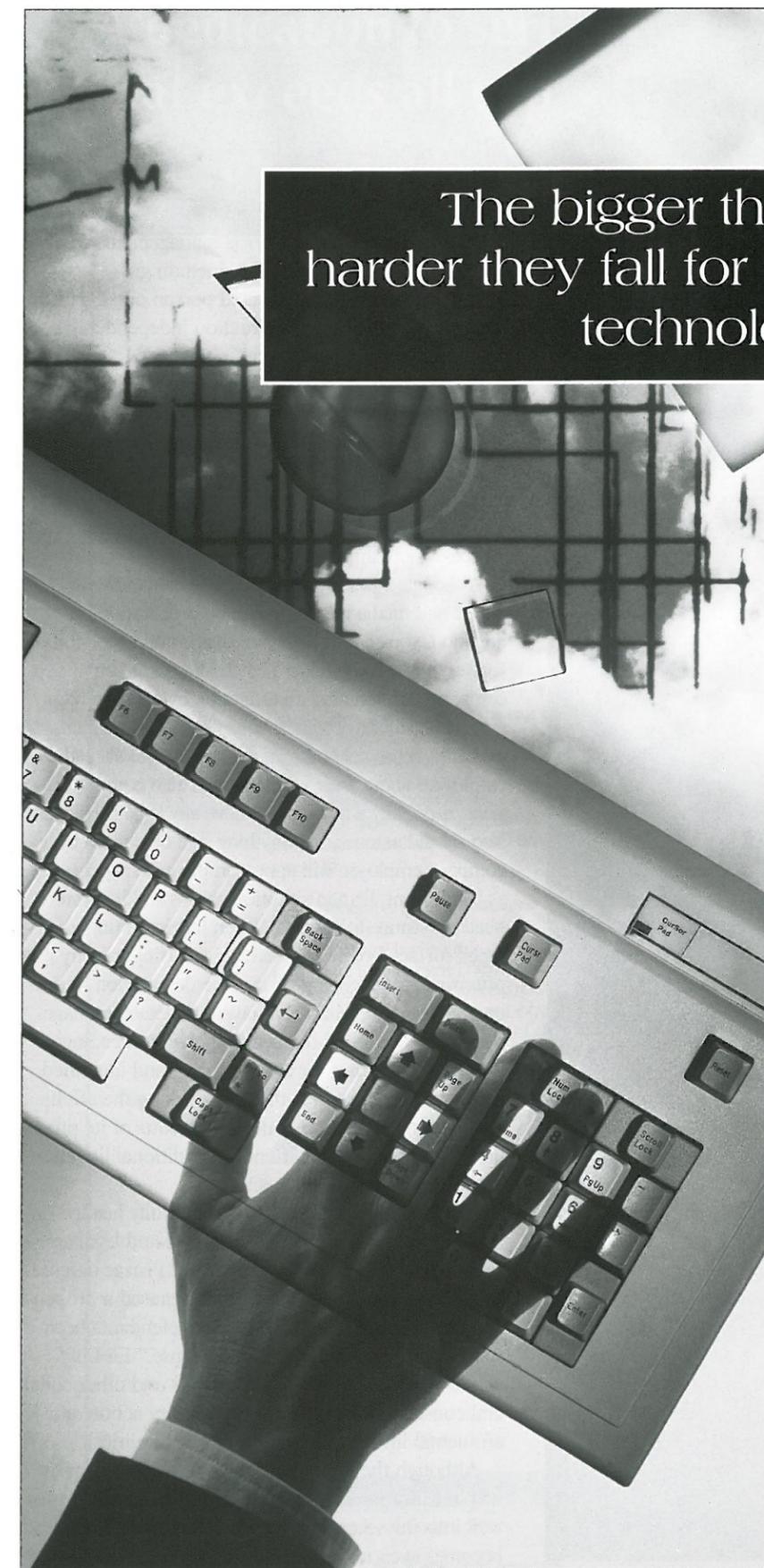
address both squarely, providing information through a designated company spokesperson and issuing public statements that acknowledge known facts—favorable and unfavorable—and detail actions the company intends to take. A litigator generally prefers to defer public statement or public action until more facts—gleaned through a thorough investigation—are known. This means interviewing witnesses, reviewing relevant documentation, and completing appropriate tests. A public relations specialist, on the other hand, recognizes the need to be proactive and answer questions about a crisis as quickly as possible.¹⁰ The crisis team must strike a proper balance between these two postures by having the lawyer and the media specialist work together in preparing all public statements. Your company could be adversely affected in future litigation by prematurely taking a position on a disastrous incident before all of the facts are in. The overly cautious approach to crisis communications advocated by many legal counsel, however, can in the long run prove equally damaging to the company. Enough information will be available from the outset of a crisis to enable you to make a public statement, appropriately qualified to allow for further factual developments—and you should.¹¹

As early as possible, your company should issue a statement saying in essence: "This is what we know so far. It's too early to determine the cause, but we are investigating it and are devoting all necessary resources to it. Reasonable and proper safety precautions have been taken, and there is no continuing danger to employees or the public. We are cooperating with authorities. We will provide updates as we get more information." You are thus pledging to investigate the incident fully and promptly, to work with public authorities, and to provide further updates as more information becomes available.

Media inquiries should be referred to a company spokesperson trained in crisis communications. You should provide some basic guidance to the company spokesperson on appropriate qualifiers ("Based on the best information available...") and language having legal ramifications ("liability" and "responsibility"). At the same time, you should inform employees in writing about all of the known facts.

Your company's first order of business is to investigate the causes of the disaster. This investigation should be overseen by counsel with assistance from other members of the crisis management team. The

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TASK LISTS

Immediate Stage

- Notify emergency, government, and regulatory authorities.
- Activate the crisis management team.
- Designate company spokesperson.
- Organize emergency relief efforts.
- Issue media statement.
- Issue statement to employees.
- Notify insurers and any other relevant constituencies.
- Begin internal investigation.
- Determine whether inside or outside counsel will lead the investigation.

Intermediate Stage

- Assemble legal team.
- Determine need for coordinating counsel and local counsel.
- Preserve evidence.
- Issue document hold orders to suspend routine records destruction.
- Identify and interview witnesses.
- Consider need for outside experts and independent testing of evidence.
- Instruct employee witnesses on privileges, creation of new documents, and email.
- Determine use of internal investigation.
- Respond to investigative agency requests or subpoenas.
- Collect and manage relevant company documents including electronic records.
- Formulate legal strategies for defending or settling lawsuits.

Final Stage

- Revise existing crisis response plan as needed.
- Conduct crisis post mortem and make needed changes to company procedures.
- Prepare "lessons learned" evaluation of the crisis.
- Evaluate insurance needs.
- Consider need for public relations consultant.
- Consider additional employee training.
- Consider additional preventive legal counselling.

Crisis Prevention

- Hold workshops on crisis prevention.
- Implement crisis response plan.
- Conduct crisis response drills.
- Review and update corporate compliance programs.
- Prepare for product recalls.
- Conduct audit of company's "high risk" products or businesses.
- Review procedures for document retention.

facts developed in the investigation will be at the heart of any future company actions and litigation.

At the same time, your crisis management team should consider further action, including:

- appointing a highly respected person outside of the company to review the situation independently;
- organizing emergency relief efforts;
- opening lines of public communication with the company, such as a toll free telephone hotline to answer consumer questions and offer refunds or exchanges;
- providing updates on the situation through press releases and/or conferences; and
- suspending offending employees or company practices where appropriate.

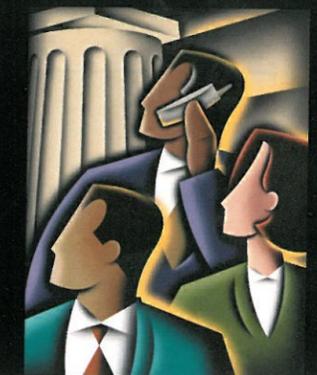
Although this early crisis stage focuses more on public and media relations than on preparation for litigation, you should be aware that groundwork for legal action is being laid. You should assist your company's preliminary investigation by coordinating evidence gathering, witness interviews, and relations with governmental authorities. You should also advise employees about their verbal and written communications, especially whether they have any legal privileges.¹² You should assume that anything said or written by a company employee will appear in the newspapers.

The recent Texaco situation shows solid action to head off future litigation. When incriminating audiotapes surfaced of Texaco executives using racially offensive language and discussing destruction of documents requested in a civil lawsuit, Texaco management quickly settled the pending civil proceedings, publicly apologized for any mistakes, and identified actions taken to correct them. By taking the offensive, Texaco avoided threatened boycotts of its products, prolonged media attention, additional litigation, and other financial impacts.¹³

Also, Eli Lilly & Company successfully headed off more litigation by providing technical and legal assistance to prosecutors in rejecting the "Prozac defense," in which defendants alleged Prozac caused a propensity for violent acts. Had criminal defendants been successful in using the "Prozac defense," Eli Lilly would have faced more civil lawsuits and other collateral consequences, including regulatory action, governmental investigations, and public inquiries.

Although the immediate stage of the crisis rarely will last more than a few days, the effects will persist well into the second phase where counsel's role becomes even more central.

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Stacey J. Mobley
Senior Vice President,
General Counsel and
Chief Administrative Officer

February 17, 2000

William H. King, Jr.
McGuireWoods LLP
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901 East Cary Street
Richmond, Virginia 23219

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- Forming a close working relationship with one of our service provider partners;
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Congratulations on meeting the challenge in 1999.

Sincerely,

Stacey J. Mobley

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THE INTERMEDIATE STAGE—DECISIVELY MANAGING LITIGATION

After the immediate stage—and the initial onslaught by the news media—your company's crisis will persist primarily in the form of continuing investigation and litigation. During the intermediate stage, as counsel you are the central and most active member of the crisis management team. Your job is to finish the internal legal investigation; to advise the company on locating and preserving any relevant physical evidence and documents;¹⁴ to inform employees about the legal status of their communications; and to assemble and direct the litigation team.

Handling Records

Being proactive, you should advise your company to suspend routine records destruction under its retention policy and ensure that a written directive to this effect is communicated throughout the organization.¹⁵

Generally speaking, a party on notice of pending or reasonably anticipated litigation has a duty to preserve relevant documents, including electronic mail. In a recent deceptive sales practices lawsuit against Prudential, a federal court fined the insurance corporation \$1 million for allowing business records to be destroyed during litigation, and strongly criticized it for taking insufficient steps to preserve records.¹⁶ You should inform your employees that any documents they generate—including notes and email—may have to be produced to adversaries in litigation. With recent trends in electronic discovery, you should review your company's sources of electronic media, including email and other internal databases where relevant records may be stored electronically, and take steps to preserve them.

Outside investigators may request or subpoena your company's records. When documents are provided to such parties, you should ensure that your company keeps duplicates. You also should prepare relevant company documents for production in any future litigation. This step sounds simple, but a large volume of documents can make it a very lengthy process. Also, if government investigators take evidence samples, consider taking split samples for independent testing.

Preserving Privileges

It is very important at this stage that employees

know how the company expects them to respond in both internal and external investigations. If litigation policies or guidelines were not in place before your company's crisis, you should draft and circulate instructions to employees now. In them, you should explain the pretrial discovery process, the attorney-client privilege, and work product protection. You also should advise employees to avoid speculation and premature opinions, and explain the risks involved in "casual" email conversations.

If you are acting in a business advisory role, your communications with company personnel may not be confidential. On the other hand, if you are acting in an investigatory role, communicating with personnel in anticipation of litigation, certain privileges may attach.¹⁷ You should be mindful of clearly separating your functions to minimize confusion later.

Investigating Facts

The company should designate a team to conduct the internal investigation. The team should be led by counsel. Your participation on the team is important because you know your company's people, processes, and business best. Designating outside counsel as the official lead of this team strengthens the argument that the team's work is protected by privilege.

You should nail down the facts of the event as quickly as possible. Promptly locate and study relevant company documents and interview witnesses, both inside and outside of the company. You will need to decide if a report of your findings should be written and disclosed outside of the company. Disclosing the results of your investigation to government agencies—for example, in an effort to avoid adverse regulatory action—would likely constitute a waiver of any privileges in future civil litigation.¹⁸ But you may not wish to assert privileges or you may consider structuring the report to include only nonprivileged information.

Setting Litigation Strategy

Once you assemble the facts, you should develop your litigation defense strategy. You can then identify, and begin preparing, the key company witnesses. It is often desirable to have one central witness, "Mr. or Ms. Company," whom you prepare to tell the company's story at trial. You should also determine the necessity for expert witnesses to support your defense. Locating the right experts on your issues and preparing them for testifying takes time.

Selecting the Outside Counsel Team

Your company should consider retaining national coordinating counsel and outside trial counsel in geographic areas where litigation is anticipated. As the most knowledgeable person about the event from its very beginning, you should begin educating these lawyers, even before lawsuits are filed.

THE FINAL STAGE—DECISIVELY MANAGING LONG-TERM CONSEQUENCES

To put the crisis behind your corporation—to have closure—you should thoroughly examine how the crisis began and what changes must be made to prevent another similar crisis from occurring. As part of this effort, you should conduct a review of the just concluded crisis to evaluate its long-term effects and to repair any long-term damage.

Your review should include:

- analyzing your company's structure and staff to be sure you have clear lines of authority and accountability for the business processes that caused the event (and the right people in the right positions), and making any necessary adjustments;
- determining if the crisis will be a trigger for ongoing additional litigation and creating a plan to preserve your company's story for use in such litigation.
- calculating the impact of the crisis on corporate finances;
- examining the effects of the crisis on corporate insurance coverage and filling any gaps in coverage;
- considering whether public relations efforts or advertising should be used to improve or reinstate your company's image;
- assembling a "lessons learned" statement about the crisis and its management;¹⁹ and
- creating a crisis response plan (or reviewing the existing plan) and making any adjustments.

After repairing any damage, you should decisively move forward with methods for both forecasting and averting future disasters. You should start by educating corporate management and other employees about crisis prevention. You should anticipate that a crisis will occur regardless of the nature of the client's business, and should conduct a crisis management audit to ensure the company has tools in place to deal with, even prevent, future crises. Some basis precautionary steps may effectively avoid a crisis or at least minimize its effects.

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- Articles with advice on managing corporate crises
www.publicrelations.about.com/careers/publicrelations/msub4.htm
- *Corporate Internal Investigations* by Webb and Molo, Law Journal-Seminars Press, 1993, updated with looseleaf supplements
- *Corporate Legal Departments* by Basri and Kagan, third edition, Practising Law Institute, 1995, updated with looseleaf supplements
- *Crisis Communication Plan: A Blue Print for Crisis Communication* by Clawson, www.niu.edu/newplace/crisis.html
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Developing a Crisis Response Plan

A crisis response plan provides a basic framework for responding to the crisis. It should spell out who will be on the company's crisis management team, who will have responsibility for handling press inquiries and formulating company positions, and how the team will be notified when a crisis breaks. In addition, the plan should include contact names and phone numbers for local, state, and federal agencies and emergency relief organizations that may need to get involved. The plan should also provide basic guidance to plant managers and line management on responding to the immediate events on the scene.

The crisis response team should be cross-functional and include members from top corporate

AN EFFECTIVE COMPLIANCE PROGRAM CAN PREVENT CRISES FROM HAPPENING IN THE FIRST INSTANCE. COUNSEL SHOULD REVIEW THE COMPANY'S COMPLIANCE POLICIES RELATING TO ANTITRUST, ANTIDISCRIMINATION, EQUAL OPPORTUNITY, SEXUAL HARASSMENT, OCCUPATIONAL HEALTH AND SAFETY, AND ENVIRONMENTAL REGULATION.

management, line management, public affairs, legal, and finance. While the CEO may head up the highest level corporate crises, in any crisis of a protracted nature the CEO and key managers should delegate the crisis management function to trusted senior level managers. Once the immediate stage of the crisis has passed and a process is in place to manage the problem, the CEO should leave implementation to senior level managers.

The primary objective of the crisis response plan is to set up a structure that is capable of responding to any type of crisis quickly, decisively, and in a coordinated manner. The plan may provide for differing levels of response, varying with the nature and severity of the crisis. Once the plan is in place, the company should schedule periodic drills to test the organization's response and to fine-tune the plan.

Addressing Product Recalls

Either in conjunction with the crisis response

plan or as a stand-alone policy, counsel should prepare a plan for product recalls. Product recalls have all the hallmarks of a corporate crisis. They raise fundamental questions about product quality, performance, or safety; they are likely to generate claims and lawsuits; they will result in media attention; and they require a coordinated corporate response. Keep in mind that premature or unnecessary recalls—or improperly implemented recalls—needlessly expose the corporation to additional liability.²⁰ Your crisis response plan should provide for a process whereby appropriate company officials make an informed recall decision. Recalls should not be conducted on an ad hoc basis, but rather should be done pursuant to a preplanned recall policy that identifies the individuals who will make the recall decision and sets forth broad guidelines for the decision-making process. Counsel should play an integral part in the decision.

Reviewing the Compliance Program

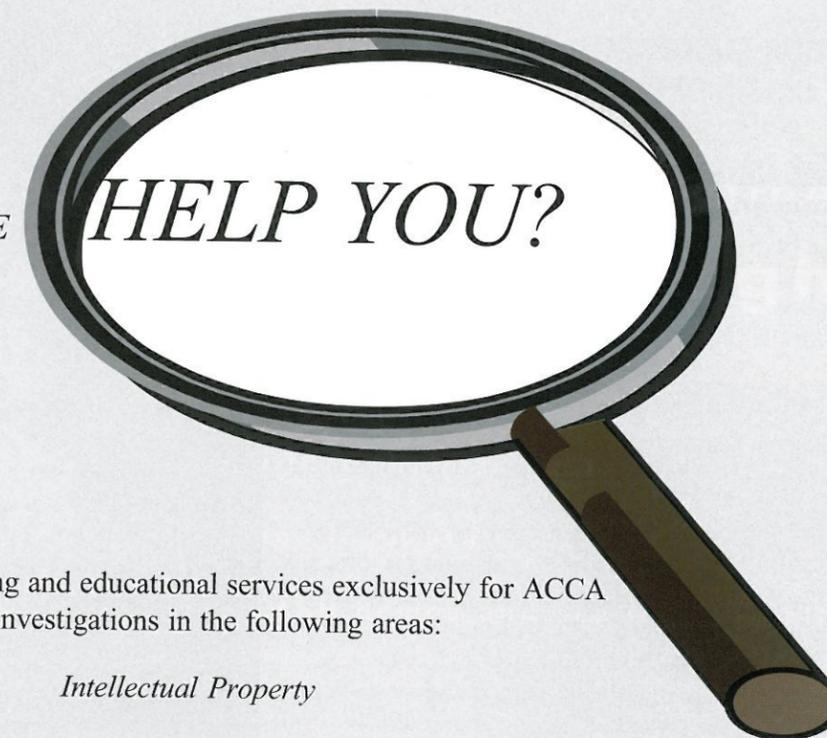
Corporate compliance programs should be reviewed by counsel for two reasons. First statutory penalties can often be mitigated by proof of effective compliance programs.²¹ Second, courts today appear more willing than in the past to impose duties on boards of directors to supervise corporate compliance.²² An effective compliance program can prevent crises from happening in the first instance. Counsel should review the company's compliance policies relating to antitrust, antidiscrimination, equal opportunity, sexual harassment, occupational health and safety, and environmental regulation. The compliance policies should be more than window dressing. They should be disseminated routinely and reinforced by top management, and they should be enforced internally. Key employees should be required to periodically certify they have read and complied with them.

Assessing the Company's Liability Risks

Counsel should periodically review the company's liability risks in light of the nature of its business and in light of changing legal developments. Consider conducting an audit of the high-risk products or businesses to address any safety, health, or environmental issues. You should ensure—rather than assume—that business management is fully aware of the risks it is undertaking. Other areas that you may

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YOUR SUCCESSFUL NAVIGATION OF A CRISIS DEPENDS ON TWO KEY THINGS: BEING PREPARED BEFORE THE CRISIS HITS AND TAKING PROMPT AND DECISIVE ACTION AFTER THE CRISIS IS UPON YOU.

want to periodically look into are:

- Insurance policies and coverage: where are the policies maintained; is the coverage adequate;
- Product labeling and warnings: are they current;
- Product testing and recent medical literature affecting your company's products;
- Customer or product complaints: are there discernible trends;
- Contractual provisions relating to indemnification, disclaimers, limitations of liability, and insurance;
- Procedures for statutory incident reporting (for example, OSHA, TSCA, or FIFRA);
- Mergers and acquisitions procedures (avoid buying into a mass tort or other large liability); and
- Availability of legal defenses such as the raw material/bulk supplier defense, the component parts rule, or the learned intermediary rule.

Consider holding workshops aimed at instructing key nonmanagerial employees about legal issues arising from what they do on a daily basis. For example, you could organize a session on how to write business documents or a refresher course on the company's document retention policy with emphasis on the importance of following its mandates. You could also establish a system whereby these employees serve as regular consultants to the company's business managers. By getting more involved in business decision making, you enhance your opportunity to prevent situations that may result in liability.

Increasingly, companies are enlisting public relations firms for both advice on crisis management and actual crisis intervention. A public relations expert



can assist in preventing or ameliorating negative publicity that might instigate and accelerate costly litigation. You should consider whether hiring outside consultants in the immediate aftermath of your crisis would have benefited your company, and whether, now that the crisis has passed, a consultant's objective assessment of your company's policies would be helpful.

After your company has completed final stage actions, you should declare the crisis at an end. Such closure allows relief to employees who have managed, and otherwise been involved, in the crisis. While the conduct of company business should change as a result of the lessons learned and the organizational improvements made during the crisis, people's energies finally can be devoted to other business needs.

LEARNING FROM THE CRISIS

Your successful navigation of a crisis depends on two key things: being prepared before the crisis hits and taking prompt and decisive action after the crisis is upon you. You can do these things more effectively if you keep in mind counsel's shifting focus as a crisis evolves. In the immediate stage, you deal with the press and the public. Litigation demands are at the center of the intermediate stage: the counsel team, documents, witnesses, and courts. And finally, you put the crisis behind your

company and circle back to prepare for the next one. In each of these stages, counsel is at the center of the team informing your company of its legal rights and obligations and protecting it from the big hit. ■

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NOTES

1. See Epstein, *The Ubiquity of the Benefit Principle*, 67 S. CAL. L. REV. 1369, 1383 (1994) (addressing Johnson &

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- Johnson's experience with consumer deaths caused by cyanide-laced Tylenol); Prentice, *The Future of Corporate Disclosure: The Internet, Securities Fraud, and Rule 10b-5*, 47 EMORY L.J. 1, 46 n.208 (1998) (noting problem of product tampering and citing as examples the false reports of syringes in Pepsi-Cola bottles and the contamination of Perrier and Sudafed); Ross, *Second-Hand Smoke: The Asbestos and Benzene of the Nineties*, 25 ARIZ. ST. L.J. 713, 723 (1993) (discussing benzene contamination of Perrier water, which forced the company to recall and destroy \$35 million worth of bottled water)...
- See Maclin, *Informants and the Fourth Amendment: A Reconsideration*, 74 WASH. U.L.Q. 573 (1996) (discussing criminal investigation of Archer Daniels Midland for price fixing and subsequent indictment of several executives); Underwood, *Perjury! The Charges and the Defenses*, 36 DUQ. L. REV. 715 (1998); Rovella, *Texaco Executives' Verdicts Roil Prosecution: Should Discovery Abuses Ever Lead to Criminal Cases?*, NAT'L L.J., May 25, 1998, at B1 col. 3 (reporting on the acquittal of two Texaco executives who were charged with obstruction of

- See Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 CORNELL L. REV. 773, 821 (1997) (accusing manufacturers of the Dalkon Shield and other products of refusing to conduct long-term safety studies so that they could defend those products in litigation by arguing that existing scientific research was insufficient to prove they caused harm).
- A massive jury award, a finding of punitive damages, or an adverse verdict in a bellwether case will receive press coverage and attract the interest of other prospective plaintiffs and lawyers, and may provoke a market reaction or governmental inquiry. At minimum, these events should compel an informed assessment by top legal and business management. See, e.g., Convey, *Florida Jury Finds Tobacco Companies at Fault—Verdict Could Spark Wave of Smoking Liability Suits*, BOSTON HERALD, July 8, 1999, at A1 (discussing the proliferation of tobacco lawsuits in light of large jury awards). See also Sesser, *ASIAN WALL ST. J.*, July 12, 1999, at A 10; Deftos, *Opinion*, SAN DIEGO UNION-TRIBUNE, July 7, 1999, at B7, B9 (explaining that, after large verdicts in individual



- justice for destroying evidence during discovery in a civil case). Accord Chatterjee, *Should Trade Secret Appropriation Be Criminalized?*, 19 HASTINGS COMM/ENT. L.J. 853, 880 n.153 (1997); Lertzner, *Information Is Property*, FORBES, 104 (Feb. 23, 1998) (discussing criminal investigation of former Volkswagen executive who stole documents from General Motors, his former employer).
- See McCann, *Shareholder Proposal Rule: Cracker Barrel in Light of Texaco*, 39 B.C.L. REV. 965 (1998) (noting the financial repercussions suffered by Texaco after the disclosure of secretly recorded audiotapes of Texaco officials using racially offensive language and discussing destruction of company records); Hanson & Logue, *The Costs of Cigarettes: The Economic Case for Ex-Post Incentive-Based Regulation*, 107 YALE L.J. 1163 (1998) (noting the compelled disclosure of tobacco industry documents that contained incriminating language).
 - See Pregon, *Casualties of the War on Tobacco: Can Farmers Survive the Anti-Tobacco Onslaught?*, 3 DRAKE J. AGRI. L. 465 (1998) (discussing federal regulation of the tobacco industry); Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121 (1998) (concerning FDA moratorium on silicone breast implants).

- lawsuits against breast-implant manufacturers, thousands of similar lawsuits were filed, resulting in a \$7 billion national settlement).
- In the case of publicly traded companies, the investment community may closely monitor the crisis. See, for example, THE WALL STREET JOURNAL, BUSINESS AND FINANCIAL SECTION (March 14, 1997) ("A major tobacco lawsuit was given the go-ahead by the Mississippi Supreme Court. The decision, coupled with a bearish market and comments by a lawyer at a litigation conference in Atlanta, pounded tobacco stocks."); and THE NEW YORK TIMES, April 12, 2000, Headline: *Aetna Settles Texas Suit Over Doctors' Cost Rules*, Section C, Page 2, Column 5, Business/Financial Desk; ("Aetna's shares dropped sharply when the lawsuits were filed."); and USA TODAY, August 20, 1997 Section: Money, page 3B, Headline: *Columbia/HCA Lawsuits Plague Stock Holdings*; and 46 EMORY L.J. 1113, 1135 (Summer, 1997) ("One way in which buyers and sellers of corporate stock respond to variations in corporate law compliance records is by shifting their evaluations of corporate worth up or down.")
 - One commentator has remarked: "As part of their preventive counseling, corporate counsel can take concrete steps

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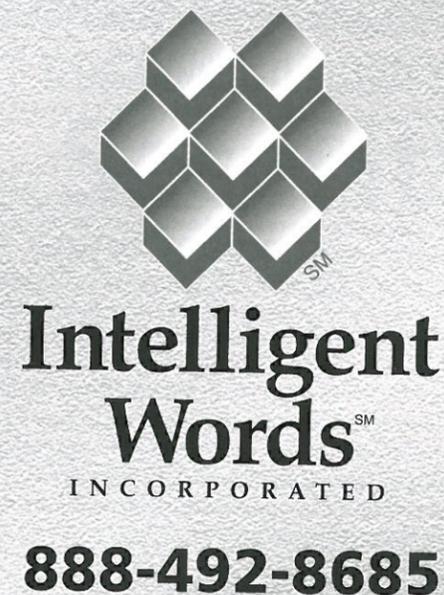
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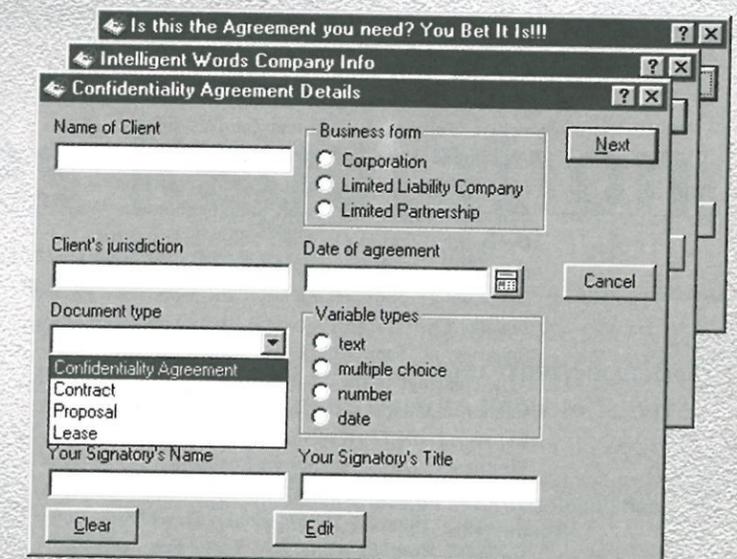
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to either prevent these crises or at least diminish their impact." Harvey L. Pitt and Karl A. Groskaufmanis, *When Bad Things Happen to Good Companies: A Crisis Management Primer*, 15 CARDOZO L. REV. 4, January, 1994, pp. 951-969.

9. Sources on the development of corporate disaster plans include: Flannery, Anne C. and Zaleskas, Kristine, *Damage Control: Managing the Inevitable Corporate Crisis*, 1121 PLI/Corp. 423 (1999); *Franchising Business & Law Alert*, *supra* note 7, at 5; John F. Schmutz, *What to Do Before; What to Do After*, 5 BUS. L. TODAY 19 (May/June 1996); Epstein, *supra* note 1, at 1383.
10. See Newman, *Coordinating Legal, PR Aspects of a Product Liability Crisis*, (Vol. XV, No. 3) PROD. LIABILITY L. & STRATEGY, 1 (Sept. 1996).
11. "The challenge of the crisis manager is to balance public relations and legal consideration and determine where the organization's greatest exposure lies." Kathy R. Fitzpatrick, *Ten Guidelines for Reducing Risks in Crisis Management*, PUBLIC RELATIONS QUARTERLY, Vol. 40, no. 2, page 33 (June 22, 1995); see also Steven Fink, *Dow Corning's Moral Evasions*, N.Y. TIMES, Feb. 16, 1992, § 3 at 13 ("Lawyers in product liability crisis often take the view that everything revolves around the law and its loopholes. What becomes obscured is the ultimate crisis management objective: to have a company left to manage after—or if—the crisis passes."); and Lanny A. Breuer, Michael X. Imbroscio, and Brian D. Smith, LEGAL TIMES, April 17, 2000 at p. 44 ("Lawyers must be increasingly sensitive to the public relations dimensions of a client in

crisis without forsaking their considered judgment of traditional legal risks....By handing crisis management responsibilities to lawyers trained in finding that balance, companies can develop effective public relations strategies while simultaneously minimizing legal risks."

12. At minimum, you should instruct employees involved in the incident on the need to preserve privileges, on the need to avoid creating damaging documents, on the company's position on the incident, and to refer any media inquiries to the company spokesperson.
13. Experts on crisis management agree that Texaco management handled the "crisis" in the correct manner. See *supra* note 3. "Take a lesson from the way Texaco handled the crisis regarding the airing of race discrimination charges. The company spoke quickly and with a consistent theme: What happened here was wrong. It does not represent what Texaco is about, and the company will deal with it in the right way. *Communications Specialists Help with Damage Control*, U.S. BUSINESS LITIGATION, Vol. 2, No. 7, p. 20 (February 1997).
14. The duty to preserve records is a complex area of law with sometimes conflicting judicial decisions. See, generally, *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984) (prelitigation correspondence provided notice of claim and duty to preserve relevant evidence). As recent cases involving Texaco and Prudential Ins. Co. indicate, companies must be especially sensitive to document retention issues when a "nondestruct order" or "preservation order" has been entered. See, *Rovella, supra* note 2; *McCann, supra* note 3. See also, *In re Prudential Ins. Co. Sales Practices Litigation*, 169 F.R.D. 598 (D.N.J. 1997); *MANUAL FOR COMPLEX LITIGATION* (third) § 21-442 & Form 41.34 1995.
15. The *Prudential* and *Texaco* cases underscore the importance of issuing legal hold orders within your company to suspend routine records destruction—including the destruction of email—while litigation is pending. See, *In re Prudential, supra* note 14, at 615. Audiotapes of Texaco officials discussing withholding documents and "purging" files—all in violation of legal hold orders issued by management—prompted Texaco to settle a race discrimination lawsuit for a reported \$170 million. See *Rovella, supra* note 2; *McCann, supra* note 3.
16. *In re Prudential, supra* note 14, at 616. Although the company sent electronic mail to some employees, instructing them to hold records, the court found this communication inadequate to properly advise all necessary employees.
17. See, generally, *Savarese & Miller, Protecting Privilege and Dealing Fairly with Employees While Conducting an Internal Investigation*, 1121 PLI/CORP. 525 (1999). See also, *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994); *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 146 (2d Cir. 1994), *cert. denied*, 513 U.S. 1015 (1994) (discussing the work product doctrine's application to

- documents prepared "with an eye toward litigation").
18. See, e.g., *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3rd Cir. 1992); *In re Subpoena Duces Tecum* (Fulbright & Jaworski), 738 F.2d 1367 (D.C. Cir. 1984) (privilege waived by disclosure to SEC, notwithstanding reservation in transmittal letter). *But see, Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (disclosure of a privileged corporate report to the SEC amounted to only a "limited" or "selective" waiver of the attorney-client privilege). If disclosure to a government agency is necessary as a last resort to avoid adverse regulatory action, steps can be taken to increase the chances that applicable privileges will be later sustained in civil litigation. See, *Mulroy & Thesing, Confidentiality Concerns in Internal Corporate Investigations*, 25 TORT & INS. L.J. 48 (1989).
19. The "lessons learned" statement should be positive and forward looking. It should not be used to second guess or cast blame.
20. There is a positive correlation between recalls and lawsuits. See *Ross, supra* note 1, at 725. According to the Restatement of Tort, Products Liability, a manufacturer may be held liable for the negligent recall of a product. See, Restatement

(third) of Torts, Products Liability, § 11 (1998).

21. The Organizational Sentencing Guidelines, adopted by the United States Sentencing Commission in 1991, provide a clear incentive for companies to adopt "an effective program to prevent and detect violations of law" by allowing for reduced fines, under certain conditions, if an offense occurs despite the existence of such a program. (U.S.S.G. § 8C2.5(f) and § 8C2.6)).
22. See, e.g., *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), (the Delaware Chancery Court held that directors have a duty to "attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and...failure to do so...may, in theory at least, render a director liable for losses caused by noncompliance with legal standards.")



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Black CEOs Join Pledge For Workplace Diversity, Inclusion

NOW IS THE TIME TO TAKE A STAND.

BY [DONNA M. OWENS](#) · [DECEMBER 11, 2018](#)

As issues [centered around race](#), gender and sexuality continue to impact America's social, cultural, and legal landscape, Black chief executives have joined peers nationwide in taking a formal pledge: they're vowing to make their workplaces more diverse, inclusive and trusting places.

The '[CEO Action for Diversity and Inclusion](#)' initiative was launched in 2017, and a new wave of activity has happened in recent weeks. They include a "Day of Understanding" held on December 7, across the country.

Billed as the largest mass dialogue focused on addressing [bias in the workplace](#), about 150 organizations at more than 1,000 locations nationwide hosted a daylong discussion at their respective worksites. Complete with training materials, various resources and facilitators, the goal was to educate employees, promote greater tolerance and understanding, and build more inclusive cultures inside and outside of the workplaces.

"Biases and social injustices in our communities affect so many of us throughout our lives," said Tim Ryan, head of the CEO Action steering committee, and U.S. Chairman and Senior Partner at PricewaterhouseCoopers, (PwC), the global accounting and consulting firm.

"By creating more opportunities for dialogue," he added, "we are helping build greater trust and compassion about the experiences and challenges our friends and co-workers are navigating inside and outside of work everyday."

To date, some 500 CEOs and presidents of America's businesses, academic institutions and nonprofits across the country have joined the effort. Procter & Gamble, Lowes, Mastercard. The Clorox Company and L'Oreal USA, are among the companies who've signed on.

Black-owned firms and entities participating include Career Communications Group, Inc., Bashen Corporation, INROADS, and The Executive Leadership Council. The National HBCU Business Deans Roundtable, K12 Inc., and Thurgood Marshall College Fund are among those who've taken the pledge, too.

These organizations— which collectively represent more than 85 industry sectors in all 50 states, and some 12 million employees— have committed to taking specific steps to cultivate environments where [diverse experiences and perspectives](#) are welcomed. The

goal is to help employees feel comfortable having an open dialogue around sometimes uncomfortable topics, and have organizations share best practices, as well as what not to do.



PHOTO OF DR. AMINTA H. BREAUX COURTESY OF BOWIE STATE UNIVERSITY

For Ryan, such issues have gained even greater urgency after tragedy touched his organization. In September, 26-year-old Botham Jean, an employee of PwC originally

from St. Lucia, was fatally shot in his Dallas apartment by a White police officer, who was indicted in November on murder charges.

Botham's death helped inspire Ryan to plan the "Day of Understanding," which follows a CEO Action gathering last month (November) in New York City. Executives and speakers such as Magic Johnson and Van Jones met for closed-door sessions; they focused on diversity, inclusion and how leadership can champion those principles within their organizations and beyond.

Black women who hold leadership posts around the country are taking part in CEO Action. According to organizers, the list includes: Brenda Lauderback, Board Chair of Denny's restaurant chains; Janet Bashen, founder and president of Bashen Corporation; Viola Maxwell-Thompson of Information Technology Senior Management Forum; and Veronica Nelson of Advancing Minorities' Interest in Engineering, among others.

Dr. Aminta H. Breaux is the first woman president of [Bowie State University](#), the oldest HBCU in Maryland. Today's diverse students, she said in a statement to ESSENCE, will become the workforce of tomorrow.

"We prepare our students to become ethical and socially responsible leaders who value diversity and function effectively in a highly technical and dynamic global community," Breaux said.

Each of the organizations represented have at least one model program that highlights a commitment to diversity. At Bowie State, its 'Summer Design and Think Technology Innovation Capstone Project,' is led by Professor Lethia Jackson; the youth outreach initiative aims to strengthen the pipeline of people of color in the cybersecurity profession.

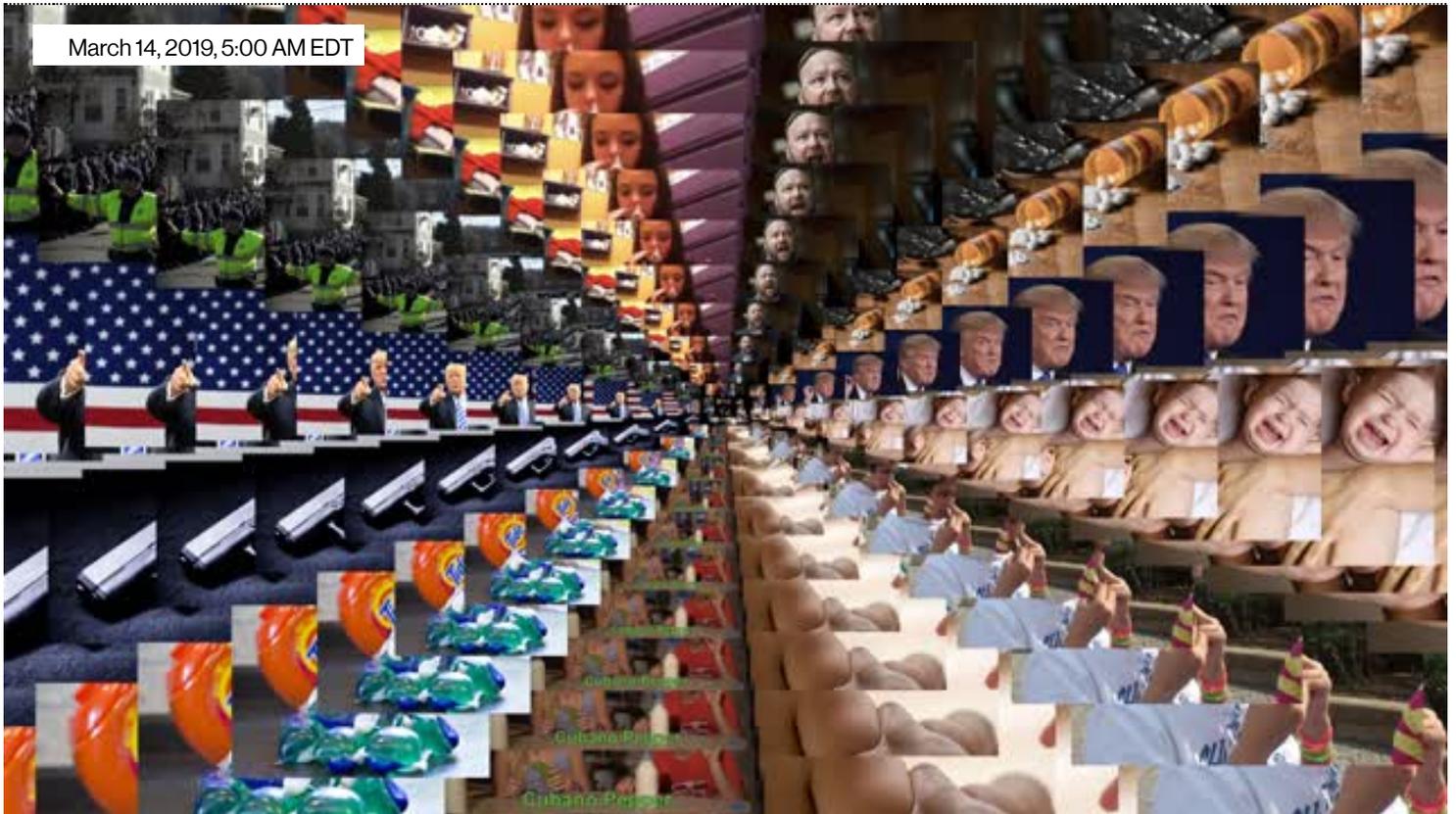
CEO Action for Diversity & Inclusion has also unveiled a "Check Your Blind Spots" 45-ft. custom bus that will make 100 tour stops nationwide. It features multimedia, interactive experiences designed to increase unconscious bias awareness and education.

The coalition also wants to engage citizens and employees through the "I Act On" pledge—a personal promise that any individual can take "to commit to tackling bias and cultivating more inclusive behaviors in their everyday lives."

Roger W. Ferguson, Jr., President and CEO of TIAA insurance company servicing teachers, is among the African-American executives who called the pledge an important step towards creating a truly inclusive workplace culture.

"By supporting an environment where individuals are encouraged to have honest and open conversations, we are building trust, raising awareness and helping employees embrace their differences," he said.

March 14, 2019, 5:00 AM EDT



Facebook's Crisis Management Algorithm Runs on Outrage

One year after the Cambridge Analytica scandal, Mark Zuckerberg says the company really cares. Then why is there an endless cycle of fury and apology?

By Sarah Frier

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ast year, a Facebook user in Sri Lanka posted an angry message to the social network. "Kill all the Muslim babies without sparing

even an infant,” the person wrote in Sinhala, the language of the country’s Buddhist majority. “F---ing dogs!”

The post went up early in 2018, in white text and on one of the playful pink and purple backgrounds that Facebook Inc. began offering in 2016 to encourage its users to share more with one another. The sentiment about killing Muslims got 30 likes before someone else found it troubling enough to click the “give feedback” button instead. The whistleblower selected the option for “hate speech,” one of nine possible categories for objectionable content on Facebook.

For years nonprofits in Sri Lanka have warned that Facebook posts are playing a role in escalating ethnic tensions between Sinhalese Buddhists and Tamil Muslims, but the company had ignored them. It took six days for Facebook to respond to the hate speech report. “Thanks for the feedback,” the company told the whistleblower, who posted the response to Twitter. The content, Facebook continued, “doesn’t go against one of our specific Community Standards.”

The post stayed online, part of a wave of calls for violence against Muslims that flooded the network last year. False rumors circulated widely on Facebook claiming Muslims were putting sterilization pills in Buddhists’ food. In late February 2018 a mob attacked a Muslim restaurant owner in Ampara, a small town in eastern Sri Lanka. He survived, but there were more riots in the midsize city of Kandy the following week, resulting in two deaths before the government stepped in, taking measures that included ordering Facebook offline for three days.



▲ Featured in *Bloomberg Businessweek*, newsstand edition, March 18, 2019. Subscribe now.

PHOTOGRAPHER: CHIP SOMODEVILLA/GETTY IMAGES

The shutdown got the company's attention. It appointed Jessica Leinwand, a lawyer who served in the Obama White House, to figure out what had gone wrong. Her conclusion: Facebook needed to rethink its permissive attitude toward misinformation. Before the riots in Sri Lanka, the company had tolerated fake news and misinformation as a matter of policy. "There are real concerns with a private company determining truth or falsity," Leinwand says, summing up the thinking.

But as she began looking into what had happened in Sri Lanka, Leinwand realized the policy needed a caveat. Starting that summer, Facebook would remove certain posts in some high-risk countries, including Sri Lanka, but only if they were reported by local nonprofits and would lead to "imminent violence." When Facebook saw a similar string of sterilization rumors in June, the new process seemed to work. That, says Leinwand, was "personally gratifying"—a sign that Facebook was capable of policing its platform.

But is it? It's been almost exactly a year since news broke that Facebook had allowed the personal data of tens of millions of users to be shared with Cambridge Analytica, a consulting company affiliated with Donald Trump's 2016 presidential campaign. That revelation sparked an investigation by the U.S. Justice Department into the company's data-sharing practices, which has broadened to include a grand jury. Privacy breaches are hardly as serious as ethnic violence, but the ordeal did mark a palpable shift in public awareness about Facebook's immense influence. Plus, it followed a familiar pattern: Facebook knew about the slip-up, ignored it for years, and, when exposed, tried to downplay it with a handy phrase that Chief Executive Officer Mark Zuckerberg repeated ad nauseam in his April congressional hearings: "We are taking a broader view of our responsibility." He struck a similar note with a 3,000-word blog post in early March that promised the company would focus on private communications, attempting to solve Facebook's trust problem while acknowledging that the company's apps still contain "terrible things like child exploitation, terrorism, and extortion."

If Facebook wants to stop those things, it will have to get a better handle on its 2.7 billion users, whose content powers its wildly profitable advertising engine. The company's business depends on sifting through that content and showing users posts they're apt to like, which has often had the side effect of amplifying fake news and extremism. Facebook made Leinwand and other executives

available for interviews with *Bloomberg Businessweek* to argue that it's making progress.

Unfortunately, the reporting system they described, which relies on low-wage human moderators and software, remains slow and under-resourced. Facebook could afford to pay its moderators more money, or hire more of them, or place much more stringent rules on what users can post—but any of those things would hurt the company's profits and revenue. Instead, it's adopted a reactive posture, attempting to make rules after problems have appeared. The rules are helping, but critics say Facebook needs to be much more proactive.

“The whole concept that you're going to find things and fix them after they've gone into the system is flawed—it's mathematically impossible,” says Roger McNamee, one of Facebook's early investors and, now, its loudest critic. McNamee, who recently published a book titled *Zucked*, argues that because the company's ability to offer personalized advertising is dependent on collecting and processing huge quantities of user data, it has a strong disincentive to limit questionable content. “The way they're looking at this, it's just to avoid fixing problems inherent with the business model,” he says.



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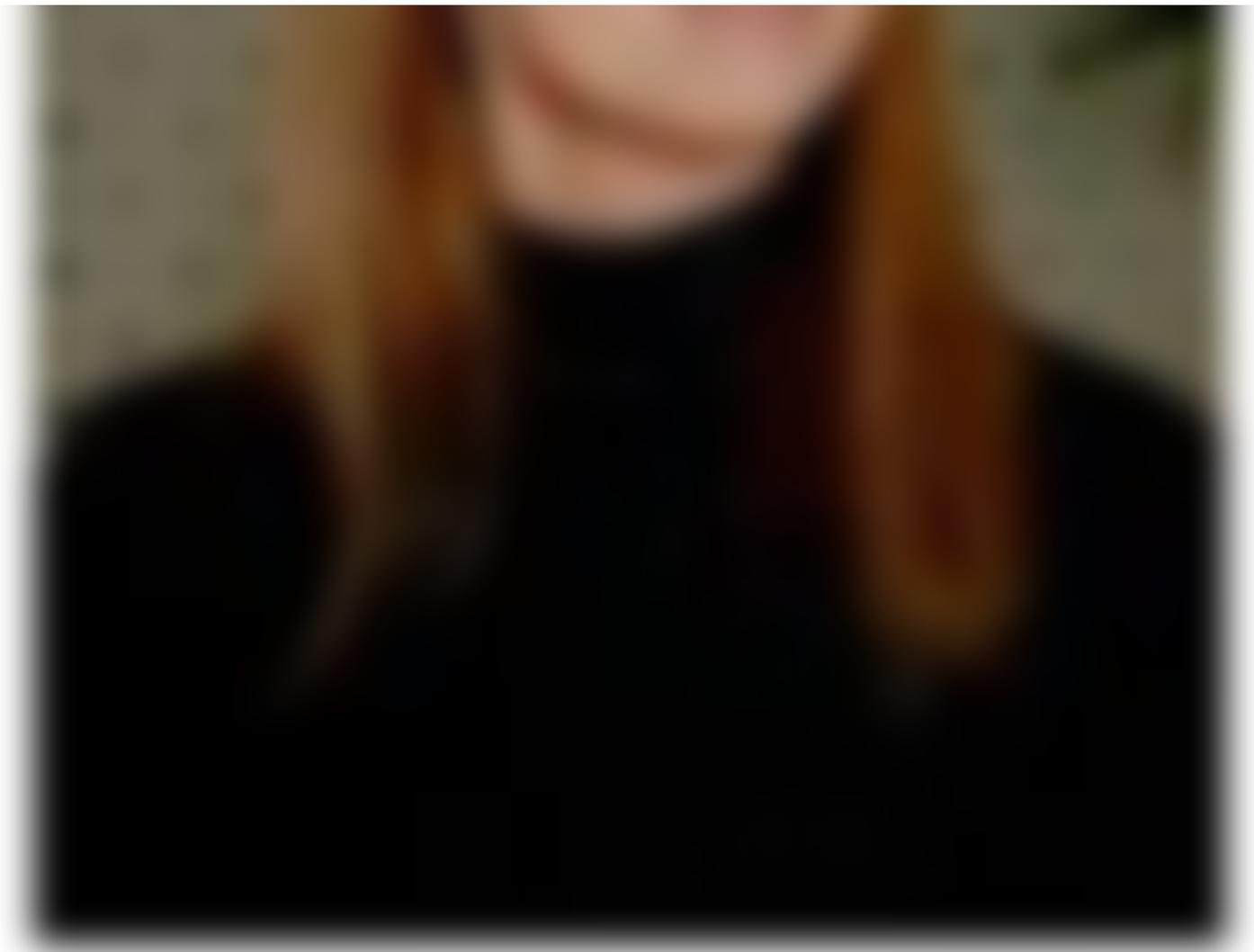
- A to take responsibility
- B to admit your mistake
- C to introspect
- D to release a list of books you read

Today, Facebook is governed by a 27-page document called Community Standards. Posted in detail for the first time in 2018, the rules specify, for instance, that instructions for making explosives aren't allowed unless they're for scientific or educational purposes. Images of "visible anuses" and "fully nude

closeups of buttocks,” likewise, are forbidden, unless they’re superimposed onto a public figure, in which case they’re permitted as commentary.

The standards can seem comically absurd in their specificity. But, Facebook executives say, they’re an earnest effort to systematically address the worst of the site in a way that’s scalable. This means rules that are general enough to apply anywhere in the world—and are clear enough that a low-paid worker in one of Facebook’s content-scanning hubs in the Philippines, Ireland, and elsewhere, can decide within seconds what to do with a flagged post. The working conditions for the 15,000 employees and contractors who do this for Facebook have attracted controversy. In February the *Verge* reported that U.S. moderators make only \$28,800 a year while being asked regularly to view images and videos that contain graphic violence, porn, and hate speech. Some suffer from post-traumatic stress disorder. Facebook responded that it’s conducting an audit of its contract-work providers and that it will keep in closer contact with them to uphold higher standards and pay a living wage.

Zuckerberg has said that artificial intelligence algorithms, which the company already uses to identify nudity and terrorist content, will eventually handle most of this sorting. But at the moment, even the most sophisticated AI software struggles in categories in which context matters. “Hate speech is one of those areas,” says Monika Bickert, Facebook’s head of global policy management, in a June 2018 interview at company headquarters. “So are bullying and harassment.”



▲ Bickert PHOTOGRAPHER: MAURA FRIEDMAN FOR BLOOMBERG BUSINESSWEEK

On the day of the interview, Bickert was managing Facebook's response to the mass shooting the day before at the *Capital Gazette* in Annapolis, Md. While the massacre was happening, Bickert instructed content reviewers to look out for posts praising the gunman and to block opportunists creating fake profiles in the names of the shooter or victims, five of whom died. Later her team took down the shooter's profile and turned victims' pages into what the company calls "memorialized accounts," which are identical to regular Facebook pages but place the word "remembering" above the deceased person's name.

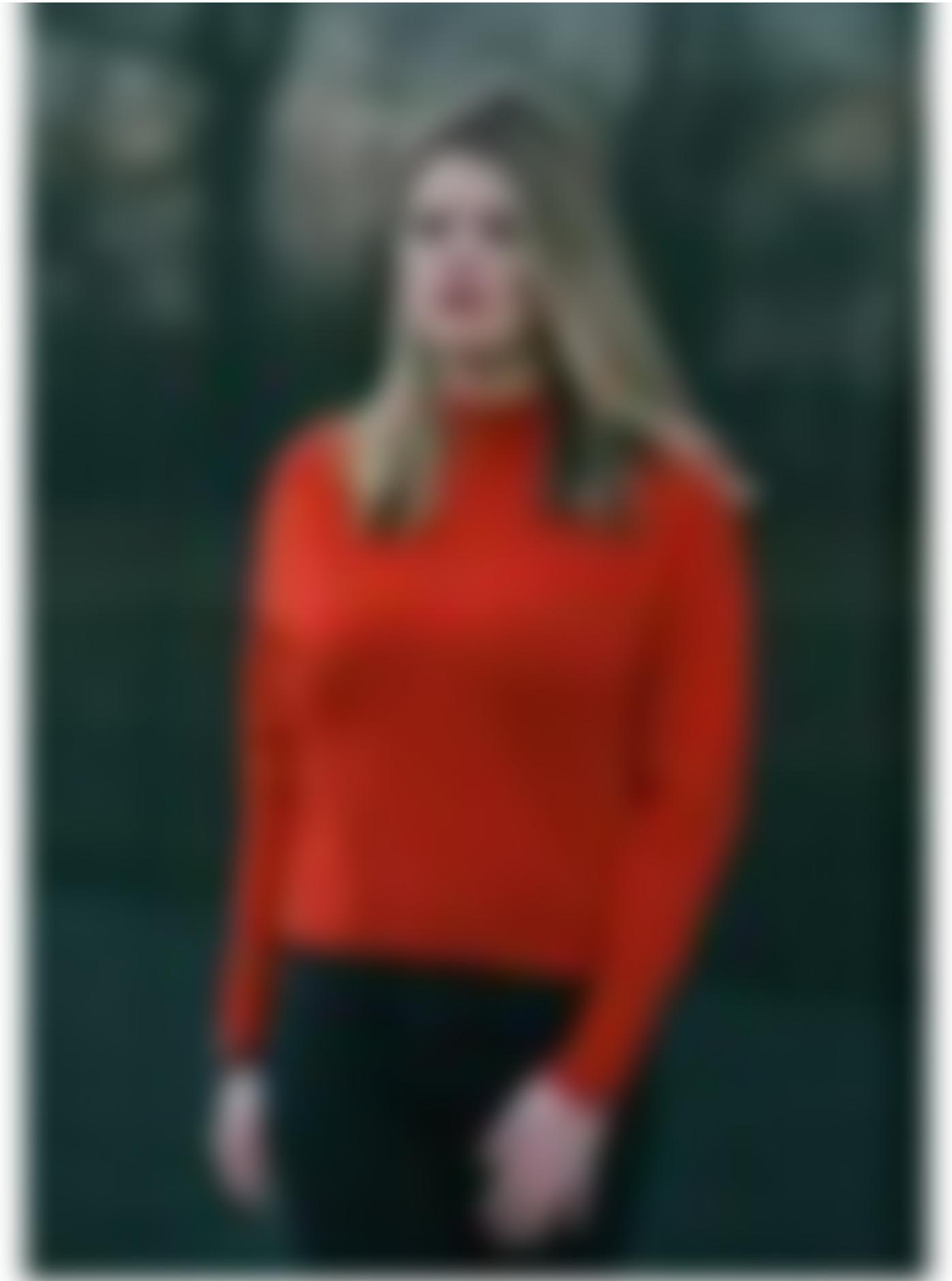
Crises such as this happen weekly. "It's not just shootings," Bickert says. "It might be that a plane has crashed, and we're waiting to find out who was on the plane and whether it was a terror attack. There may be a protest, and people are alleged to have been injured."

And these are the easy cases, where the lines between good and evil are clear and Facebook has developed a formula for responding. On her laptop, Bickert pulls up a slide presentation from a meeting of the company's Community Standards group, which gathers every other Tuesday morning to come up with new rules. As many as 80 employees participate in the discussions, either in person or virtually. The slides show that, on a Tuesday last year, the team discussed what to do with #MeToo posts created by women who named their assailants. If the posts were untrue, they could be construed as harassment of innocent men. In the same meeting, the company evaluated viral stunts that younger users attempt, such as the "condom-snorting challenge," which, with apologies, involves snorting a lubricated prophylactic up a nostril and pulling it out through the mouth. There are dozens of challenges such as this—the chile pepper challenge, the Tide Pod challenge, and so on—that young people do (or pretend to do) to get views. If these stunts can hurt people, should Facebook stop people from promoting them?

In December, after months of discussion, Facebook added new rules. #MeToo accusations are OK, as long as they don't encourage retaliation. Challenges are also fine, as long as they don't encourage bodily harm, which would seem to put condom snorting in a gray area. "None of these issues are black and white," Bickert says.

In congressional testimony and elsewhere, Facebook has deployed a practiced set of responses to criticism about its content decisions. If interrogated about something on the site that was already forbidden by the Community Standards, executives will reassure the public that such content is "not allowed" or that there is "no place" for it. If there's no rule yet, Facebook will usually explain that it is trying to fix the problem, was "too slow" to recognize it, and is taking responsibility. The company has said dozens of times that it was "too slow" to recognize Russia's manipulation of the 2016 U.S. presidential election, Myanmar's genocide, and ethnic violence in Sri Lanka. But "too slow" could be fairly interpreted as a euphemism for deliberately ignoring a problem until someone important complains.

"They don't want to be held liable for anything," says Eileen Carey, a tech executive and activist. Since 2013 she's kept records of drug dealers posting pictures of pills on the web, some of them captioned as OxyContin or Vicodin. Many of these posts include a phone number or an address where interested users can coordinate a handoff or delivery by mail. They are, in effect, classified ads for illegal opioids.



▲ Carey, photographed at the Vietnam Veterans Memorial. PHOTOGRAPHER: MAURA FRIEDMAN FOR BLOOMBERG BUSINESSWEEK

Carey's obsession started while she worked for a consulting firm that was helping Purdue Pharma remove counterfeit pills. Most tech companies—including Alibaba, Craigslist, and EBay—were quick to agree to take down these images when Carey alerted them. Facebook and Facebook-owned Instagram were the exceptions, she says.

Carey, who like Zuckerberg is from Dobbs Ferry, N.Y., and lives in the Bay Area, would sometimes end up at parties with Facebook executives, where she'd kill the mood by complaining about the issue. "I started sucking at parties once I started working on the whole getting-rid-of-fake-drugs-on-the-internet thing," she says. Also since 2013, Carey has kept an eye on the issue, spending a few minutes most days searching for (and reporting) drugs for sale on Facebook and Instagram. Usually she got a dismissive automated response, she says. Sometimes, she got no response at all. At the time, technology companies were advocating at conferences and in research reports for harsher enforcement of drug sales on the anonymous dark web. In reality, Carey came to believe, most of the illicit purchases occur on the regular web, on social media and other online marketplaces. "People were literally dying, and Facebook didn't care," she says.

In 2018, Carey began tweeting her complaints at journalists and Facebook employees. In April, Guy Rosen, a Facebook vice president who was training the company's AI software, sent her a message, asking for more examples of the kind of content she was talking about. "Do a search for #fentanyl as well as #oxys on IG [Instagram] and you'll see lots of pics of pills, those accounts are usually drug dealers," she wrote to Rosen. She sent over some Instagram posts of drugs for sale. "I reported these earlier and they are still there in the #opiates search—there are 43,000 results."

"Yikes," Rosen wrote back. "This is SUPER helpful." Facebook finally removed the searchable hashtags from Instagram in April—a week after being criticized by Food and Drug Administration commissioner Scott Gottlieb and just a day before Zuckerberg testified before Congress.

Since then, Carey has kept her eye on news reports from Kentucky, Ohio, and West Virginia, where deaths from opioid overdoses have declined this year. Some articles speculate that the reason may be a rise in community treatment centers or mental health resources, but Carey has a different theory: "The only thing that really changed was the hashtags."

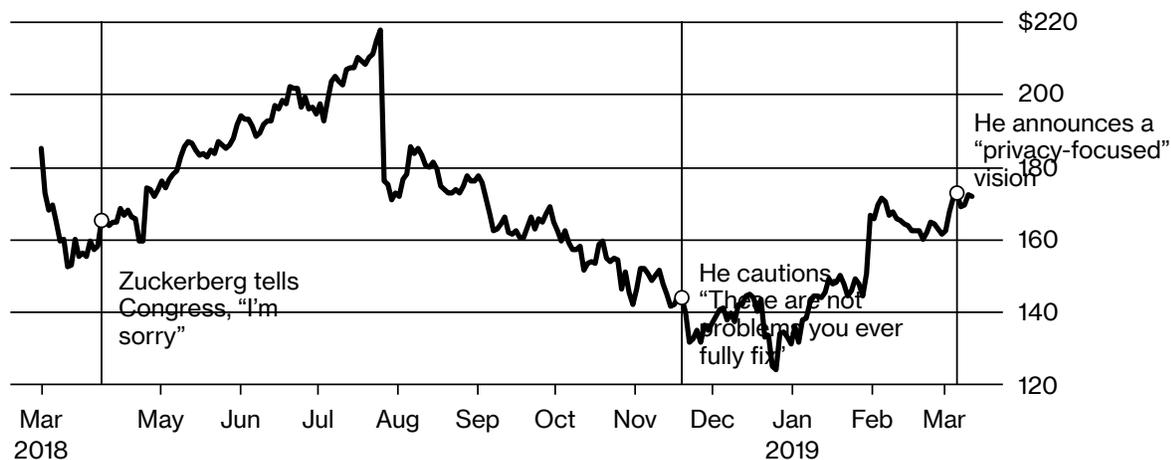
Even so, Facebook's drug problem remains. In September the *Washington Post* described Instagram as "a sizable open marketplace for advertising illegal drugs."

In response, Bickert published a blog post explaining that Facebook blocks hundreds of hashtags and drug-related posts and has been working on computer imaging technology to better detect posts about drug sales. She included a predictable line: “There is no place for this on our services.”

Zuckerberg, as CEO, chairman, founder, and controlling shareholder, has frequently faced questions about whether he deserves near-absolute power over the company's products. He's strongly resisted this suggestion, except in the realm of content moderation. “I've increasingly come to believe that Facebook should not make so many important decisions about free expression and safety on our own,” he wrote in November. The company, he detailed, would establish “an independent body” to make a final call on disputes over what should stay up on Facebook, in a way that will be “transparent and binding.” The proposed group will include 40 “experts in diverse disciplines,” Zuckerberg wrote. “Just as our board of directors is accountable to our shareholders, this body would be focused only on our community.”

Facebook's Stock Post-Scandal

March 17, 2018: Cambridge Analytica scandal first reported



DATA: COMPILED BY BLOOMBERG

At the same time, Zuckerberg plans to offload as much of the moderating as possible to computers. Already, Bickert says, content reviewers are training the machines. “The reviewers say, ‘Yes, machine, you got it right on this one. This is hate speech’ or ‘No, machine, you got it wrong this time. This is not hate speech.’” Facebook says that 52 percent of posts taken down by moderators as hate speech have already been identified as such by the algorithm. The company says it is also using AI to try to take down drug-related posts.

Another way to cede responsibility is to encourage users to try the company's new encrypted messaging services, which are designed so not even Facebook can see what they're saying to one another. "I believe a privacy-focused communications platform will become even more important than today's open platforms," Zuckerberg wrote in his March 6 blog post. Some read it as victory for Facebook's critics after the Cambridge Analytica scandal, but even Zuckerberg acknowledges a trade-off: The shift could make it easier for terrorists, drug pushers, and propagandists to run wild. On Facebook's WhatsApp service, which is already encrypted, misinformation in India last year has led to panic in villages over suspected child abductors, causing some to stone or lynch uninvited visitors. WhatsApp couldn't remove the content; it could only reduce the number of people a message can be shared with. Since that move, there's been another "WhatsApp lynching," according to the BBC.

In the meantime, Facebook executives have been trying to reassure the world. Bickert traveled to Sri Lanka in September, meeting with 60 civil society groups, hearing their concerns about, among other things, fake accounts. There was lots to talk about. "Their Community Standards are very specific and have, for example, things like how immediate a threat content is," says Sanjana Hattotuwa, a senior researcher with the Centre for Policy Alternatives in Sri Lanka. But, he says, "the whole point about some of this content is to radicalize over a longer period of time."

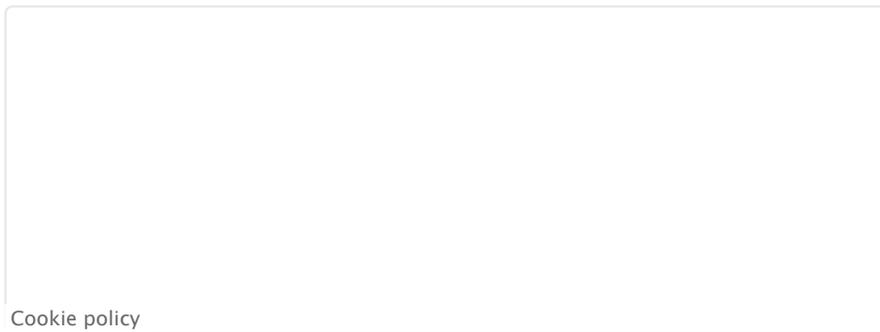
Recently, Hattotuwa's group warned in a blog post that Facebook was too close with the country's government, exchanging gifts and gaining favor with officials who've also been accused of spreading misinformation for political purposes. The post cited a tweet from an official in which Ankhi Das, Facebook's public policy director for the region, gave former President Mahinda Rajapaksa,

whose supporters were blamed by some for orchestrating anti-Muslim riots, a large painting from a local artist. Facebook says the gift was “community art” with no cash value and that it gave paintings to other Sri Lankan leaders.

The overarching concern from Hattotuwa, Carey, and critics around the world is that Facebook is more interested in fixing the perception of its problems than the actual problems themselves. “Alex,” who asked that his real name not be used out of fear of retribution, was recently offered a job at Facebook in London focusing on the company’s policy programs. He’d worked on political campaigns and at a big tech company, and in one of about a dozen meetings he spoke to Victoria Grand, Facebook’s global head of policy programs.

Alex recalls asking her about the true nature of the role, in light of Facebook’s scandals: “Do you need someone to effect lasting change or to change the channel?” He says Grand told him that no candidate had ever asked that question before. She paused before continuing.

“Look, I think everybody wants to be idealistic and promise the former,” he remembers her saying. “But no one is going to listen to all the good stuff we do if we’re just stuck responding to the negative.” Facebook says Grand “remembers a very different conversation.” Alex declined the job offer.



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(Updates information about Facebook’s Community Standards. Corrects the day of the week that the standards team meets and the term Facebook used to describe its gift to a Sri Lankan politician. This story originally published on March 14, 2019. A previous version of this story corrected Eileen Carey’s title.)

More On Bloomberg

BUSINESS

Sephora to close its stores for company-wide diversity training on June 5

Singer SZA said in a series of tweets that she was racially profiled and stopped by security officers at a Sephora store in Calabasas, California.

By USA TODAY Network | Jun 3, 2019, 11:08am CDT



The entrance of the flagship Paris store of French cosmetics maker “Sephora” during night on the Champs-Elysees. | Kenzo Tribouillard/AFP/Getty Images

The beauty products giant Sephora will close more than 400 stores on the morning of June 5 to host inclusion workshops for its employees, according to a statement posted on the company’s website.

Sephora said in a statement that it “believes in championing all beauty,” celebrating differences and “building a community where diversity is expected.” The cosmetics giant will take a few hours out to train its 16,000 employees about the brand’s values.

Along with the retail stores, including five in Chicago, the company-wide training will also include employees in Sephora's distribution centers and corporate offices, according to Retail Dive.

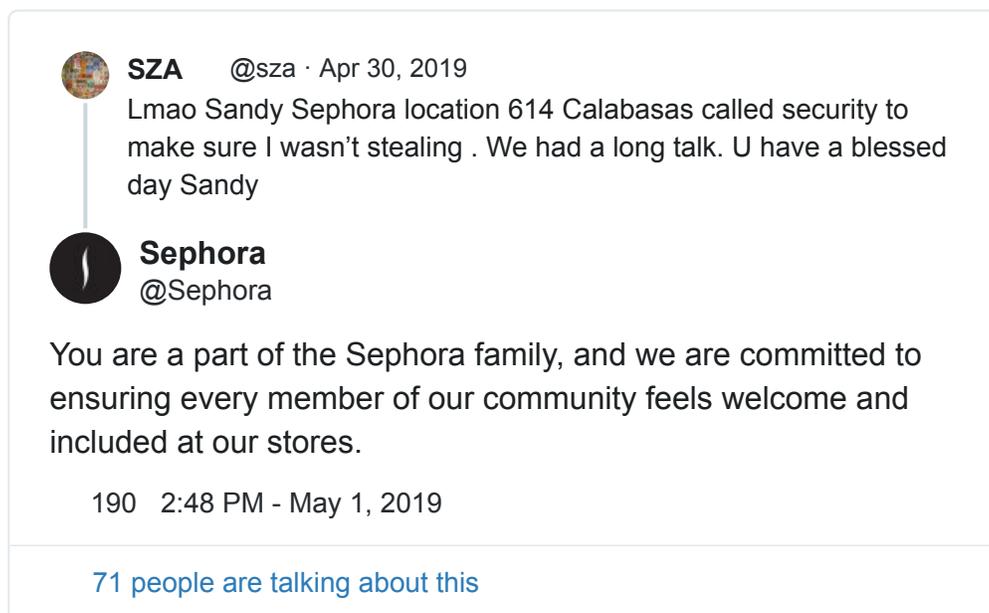
The move more closely aligns Sephora with its parent company's tagline, "We Belong to Something Beautiful," which has been in the works for more than a year.

The temporary store closures come during a time when consumers are becoming increasingly aware and averse to the discrimination that happens while shopping, eating out or grabbing a coffee from brick-and-mortar giants.

Several weeks ago, 28-year-old singer SZA said in a series of tweets that she was racially profiled and stopped by security officers at a Sephora store in Calabasas, California.

The musician once worked as a skin consultant for Sephora and is a spokesmodel for Rihanna's Fenty Beauty brand, which is sold exclusively at Sephora.

SZA received a tweeted apology from Sephora that said, "You are a part of the Sephora family, and we are committed to ensuring every member of our community feels welcome and included at our stores."



Rihanna, whose real name is Robyn Fenty, sent a gift card and a handwritten note and to SZA that read, "Go buy yo' Fenty Beauty in peace sis! One love, Rihanna," which SZA shared on her Instagram Story.

Other retailers including Nike, Papa John's and Starbucks instituted diversity training programs in the last year after incidents and accusations of wrongdoing.

Starbucks attempted a dramatic move toward racial reconciliation in 2018 as it closed 8,000 stores across the nation for an afternoon of anti-bias training. This came following an incident at a Starbucks store in Philadelphia in which a manager called police on two African-American men who were quietly waiting for a friend.

Also last year, employees at Papa John's underwent diversity training in a bid to transform the troubled company's culture. The founder of the pizza maker ignited a firestorm after admitting to using a racial slur during a media training session.

Read more at usatoday.com.



STORE SPACES

Starbucks takes its signing store concept to China

BY MARIANNE WILSON

May 20, 2019

Starbucks Corp. has opened its first-ever store in China designed for the deaf and hearing impaired.

The outpost is dedicated to offering employment and career advancement opportunities for the deaf and hard of hearing community. Located in the city of Guangzhou, near the Guangdong Disabled Association and Guangdong Deaf People

Association, it is Starbucks' third signing store to date. (Prior to China, Starbucks opened a signing store in Malaysia in 2016 and in Washington, D.C., in 2018.)

Featuring exclusive artwork and unique merchandise designed by deaf artists, the new store is designed to provide a platform for the deaf and hard of hearing community to unleash its talents. The environment is welcoming and inviting, with wooden frames above the bar area arranged to express the gesture of love in sign language.

Sign language symbols are printed on umbrellas in front of the store, and there are indicators throughout the interior. Deaf baristas wear aprons with the word "Starbucks" embroidered in sign language. The store is equipped with a customized ordering system. Customers and associates can communicate using notepads and two-way digital displays. There is also a dedicated area for customers new to sign language where they can write down their orders on an electronic board. Wireless vibrating pagers notify customers when their orders are ready.

To create an inclusive environment and encourage customers to learn more about the deaf community, the store will also offer sign language lessons and coffee workshops in sign language.

"As a coffee leader deeply rooted in China, for China, Starbucks is committed to creating equal opportunities for everyone, as well as a unique third place experience that addresses a wide range of community needs," said Belinda Wong, CEO of Starbucks China. "The new signing store is an example of how we are building inclusive environments and careers for our partners. This store truly creates a sense of belonging for everyone and is a strong testament to our continued commitment to building a more diverse and inclusive working environment."

Starbucks currently employs over 100 partners with disabilities in China. Building on its efforts to nurture talent and create more opportunities for the deaf workforce, the company has partnered with the Guangdong Deaf People Association to offer professional skills training, including sign language courses and internship opportunities.



ARCHIVE

The Art of the Apology

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5/19/2003

Done right, an "I'm sorry" can enhance both reputations and relationships. Done wrong, it can compound the original mistake. Here's how to make sure your apology hits the mark.

by **Holly Weeks**

Most of us were taught that offering an apology, any apology, when we make a mistake will take care of most offenses. But offering the right apology, particularly in the corporate world, is not as simple as saying, "I'm sorry."

Done right, an apology can enhance both reputations and relationships. Done wrong, an apology can compound the original mistake, sometimes to disastrous consequences.

Consider, for instance, a senior member of an executive team who became angry when a junior vice president opposed him in a meeting and refused to change her position. He lashed out at her in front of the group, sarcastically questioning her intelligence and her commitment to the company in difficult times. When other members of the team told him he should apologize, he balked, thereby making matters worse. "I'm sorry she's upset, but I didn't do anything wrong—she's got to learn to take the heat," he declared.

When the offender is embarrassed and worried about losing face, this kind of sidestepping can take place. But, in fact, offering an apology is not a sign of weakness, nor does it amount to backing down. On the contrary, offering an apology can be a potent reputation enhancer.

Apologies matter for two reasons. First, they mend relationships. When an offense has torn the fabric of a relationship, an apology is a stage in its repair. Second, apologies mend the transgressor's reputation. Following an offense, some people—not just the offended but all who know about the affront—may have concerns and doubts about the transgressor and even question his character. An effective apology can reassure people that the transgression is understood and not likely to be repeated.

Too often companies, as well as individuals, miss the opportunity to reap the good that an apology can provide. In early 2002, NSTAR, a New England public utility, admitted it had improperly moved nearly 24,000 of its electric customers to the "default" service category—a

— **Holly Weeks** much more expensive service option—without those customers' knowledge. NSTAR apologized "for any inconvenience."

But were NSTAR customers, and the public, really concerned about *inconvenience*? Of course they weren't. When the story became news, customers and the public saw doublespeak and deceit, and NSTAR's credibility fell. The misdirected apology the company offered only sent the public's opinion lower.

Mending fences is not only the right thing to do on a personal level, it also makes good business sense. So why do so many people and institutions fail at it?

To start with, most people find being in the wrong to be embarrassing. And when they are embarrassed, they may go into denial and try to minimize the offense, as NSTAR did. In other cases, the offender may try to blame the victim, as the senior executive did with the junior vice president.

Even if an apology is offered, it may be unrecognizable as such because the embarrassment or anger of the person giving the apology distorts it. This can be a disastrous mistake; credibility, once lost, is very hard to gain back.

So how do you build a good apology? Apologies involve three elements: Acknowledgment of a fault or an offense, regret for it, and responsibility for the offense. You can put them all together, but a sincere, effective apology need not necessarily express all three; whether it should depends on the circumstances.

Because we don't separate out acknowledgment, regret, and responsibility, we are often at sea, finding it unnecessarily painful to apologize when it would actually be reasonably easy to do so. Instead of getting caught up in blame, we can acknowledge another's anger or dismay, or regret an offense, even when we don't feel responsible for a wrong.

Decide whether it will be easier for you to apologize position to position or person to person.

— Holly Weeks

Dos and don'ts

1. Find words that are clear and accurate—not provocative. A good apology should make the person wronged think, "Yes, she understands." Often what the offended person wants is accountability and vigilance; he wants to know that it won't happen again.

2. Don't apologize for the wrong thing. People and institutions tend to apologize for what they find forgivable, as in the NSTAR example. If there is no clear relationship between what the offender is apologizing for and what the offended experienced as the original wrong, the apology actually exacerbates the problem. At best, the offender will seem blind to the problem; at worst, he will be perceived as intentionally distorting it.

That gives the offended two problems: the original offense and the sense that a similar offense is likely to occur. The offended party thinks, "How can I accept this apology? It makes me appear to be complicit in allowing the problem to happen again."

3. Consider the angle of approach. Decide whether it will be easier for you to apologize position to position or person to person. If you are angry with the person you've got to apologize to, it may be easier to frame the apology in terms of your respective jobs or ranks.

For example, while the senior executive remains angry at the junior vice president, he can't offer a sincere personal apology. But he could apologize to her as a senior administrator to a more junior colleague, from his position to hers. Example: "We both work for a good company, and, as your colleague, I should try harder to see past our individual differences. I'm sorry I spoke harshly."

Such an apology is likely to resonate favorably with both parties, even when anger between them remains.

In other circumstances, a person-to-person apology is easier to offer. For someone who equates an apology with loss of stature, for instance, the person-to-person apology can appear to be a magnanimous act that does not diminish her. Example: "I can't agree with the stance you are taking, but I like you and want us to work well together. I'm sorry I spoke harshly."

Choose the approach that is easier for you to do well. That will save you from making an apology that is so grudging that it fails.

4. Don't think in terms of an "expression of regret." Instead, your goal should be actually *communicating* your regret, that is, getting it across to the other person. Expression is one sided—as though one were getting an apology off one's chest. *Communication*, however, occurs between people, and an apology needs to work well for the other person to be effective. Take the focus off yourself and keep it on your counterpart and the three elements of an apology—acknowledgment, regret, and responsibility. That protects you from sounding defensive, and your apology will be better received.

5. "I want to apologize" is not an apology. It's no more an apology than "I want to lose weight" is a loss of weight. Do the work. Deliver a clear, direct apology; don't hide behind vagueness, circumlocution, or clichés.

You may not be able to control whether your apology is accepted, but you can control its quality. So make every effort to control what you can. This will increase your chances of feeling good about what you have done with your apology—instead of feeling bad about having to do it. [Wk](#)

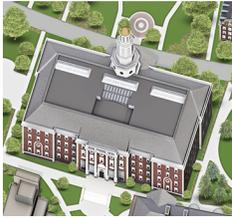
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What Are the Pros & Cons to Diversity in Crisis Action Planning & Management?

by Kenya Lucas

As our country becomes more and more diverse, so do our companies. Employees with different cultures, genders and other backgrounds -- including physical abilities -- must work cooperatively to identify, interpret and respond to crises in the workplace. External groups also have key stakes in your organization's diversity-related activities. Identify the pros and cons of diversity in crisis action planning and management in order to address corporate challenges in both an equitable and powerful way. Moreover, a comprehensive and inclusive approach to developing and delivering strategies can be applied to many areas of your company's operations.

Encouraging an Open Dialogue about Diversity

A diverse work environment embraces the varied experiences and interests of employees -- and is motivating. It also makes sense from a practical standpoint: a body of evidence shows that when diverse staff members collaborate they arrive at better decisions about complex problems. Resist the urge to minimize communication and proactively encourage open discussions among diverse staff at all levels. This dialogue will encourage workers to move beyond stereotypes and engage in reality-based exchanges that support a better understanding of each other and how to collectively tackle the situation at hand.

Exposing Stressful Interactions Related to Diversity

While learning to cooperate with fellow employees with different backgrounds has its payoffs, it also has demands. The more diverse a company, the more workers have to learn to perform successfully as a team. This can create stress about roles and expectations -- and introduce other challenging interpersonal dynamics. Your employees' criticisms and exclusionary behaviors often point to emerging crises. In addition to making everyday observations, observe your company's message boards and social media outlets for grievances.

Working with Stakeholders Who Share a Diversity Agenda

It's important to affirm diversity as a corporate imperative. Planning and managing a response to a crisis allows you to build on existing partnerships with companies that share this value or to develop new diversity-centered allegiances. Moreover, crisis action planning and management opens avenues to working with external groups who might be critical of your diversity-related tactics such

as legislators and regulators. Investing in all of these relationships can prove valuable in the event that you face future challenges -- and need outside stakeholders to vouch for your commitment.

Introducing Diversity When It's Unrelated to the Crisis

There are times when a crisis has to do with real job performance -- yet your company's practices are reframed as discriminatory or otherwise unethical. You are at greater risk of such claims when a lawsuit is involved or PR tactics are executed. Frame the crisis as accurately and neutrally as possible. Resist the urge to "settle" to avoid negative press or legal outcomes. Remember that while you might immediately distance your organization from an uncomfortable situation, your actions have long-lasting implications within and outside of company doors.

About the Author

Kenya Lucas has been writing professionally since 1998. Her work has appeared in "Anthropology & Medicine," "New Directions for Evaluation," "Psychology of Women Quarterly" and "Journal of the Grant Professionals Association." She holds undergraduate and graduate degrees from Johns Hopkins University and Brown University.

9,782 views | Apr 27, 2019, 10:15pm

Why Chief Diversity Officers Often Fail



Janice Gassam Contributor ⓘ

Diversity & Inclusion

I help organizations create strategies for a more equitable workplace.



GETTY

Many companies are introducing a new position within corporate leadership that focuses on how to create a more diverse, inclusive and equitable workplace. The newest addition to many C-suites across organizations is the chief diversity officer (CDO). Pinterest decided to [hire](#) its first CDO, Candice Morgan, in 2016. At the beginning of 2018, [Uber](#) hired its first CDO, Bo Young Lee. The hire came with the intentions of revamping the company's image following several high-profile scandals, including [claims](#) of racial and gender discrimination within the company. WarnerMedia also recently [announced](#) that it would be adding a chief

diversity and inclusion officer to the team of executives at the company. The announcement came following [reports](#) that then-CEO of Warner Bros., Kevin Tsujuhara, had an inappropriate sexual relationship with an actress affiliated with the company. Google's chief diversity officer, Danielle Brown, stepped down a few weeks ago. Brown was hired in 2017 and had to deal with several diversity-related issues that Google experienced, including an employee [walkout](#) and a viral [memo](#) alleging the company's discrimination against white male employees.

A common practice following public and high-profile discrimination scandal is to hire a CDO or to create a similar position within the organization. While having a CDO is better than not having one at all, tasking one individual with the job of changing toxic workplace culture, implementing employee resource groups, developing strategies to attract and retain diverse talent and figuring out how to create a more inclusive environment for employees is a lot, to say the least. Many companies set their CDO up to fail by placing an unreasonable amount of problems on their plate, along with unrealistic expectations. Having a CDO allows a company to have a scapegoat if diversity and inclusion initiatives fail. If these issues persist, organizational leadership can easily transfer the blame and responsibility to the CDO. This is problematic because it doesn't allow individual employees and corporate leadership to take responsibility for their contribution and perpetuation of toxic work culture. It's important to remember that changing work culture takes time—one person can only move the needle but so much.

In addition to a CDO, your company would benefit from having a diversity task force of some sort. Many organizations have a diversity task force or council that consists of a group of individuals that are passionate about creating a more diverse and inclusive workplace. This task force should consist of employees and also change makers and change agents within the organization. Organizational leadership should also be represented on this task force; change will be more challenging without executives and leadership representation. In order for diversity and inclusion initiatives to be successful, employees must understand that it is everyone's responsibility to create an inclusive environment. [Research](#) indicates that inviting non-managers to diversity workshops can increase the likelihood of workshop success. Every leader in the organization is responsible for

creating a culture of equity and inclusion because diversity starts at the top. Attainment of diversity goals is contingent on leadership accountability. It isn't just the CDO's job to ensure that the organization is fostering an inclusive environment; each employee is instrumental in creating an inclusive workplace for all.

I am a TEDx speaker, diversity and inclusion consultant, and professor, located in the New York City area. Connect with me on [LinkedIn](#) and visit my website at drjanicegassam.com.



Janice Gassam Contributor

I grew up in five different states and across two continents, which was the catalyst to my interest in diversity. My ultimate goal is to help leaders infuse more love in... **Read More**
