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OPINION

AFTERMATH: Crews work to remove the statute of Penn State football coach Joe Paterno, days after issuance of Freeh report critical of him.

Lessons From Happy Valley

Penn State's missteps offer four important lessons for any organization that finds itself involved in a criminal investigation.

BY TY HOWARD

As a Pennsylvania State University alumnus and native central Pennsylvanian, I've watched the unfolding Jerry Sandusky scandal—and Penn State's response to it—with outrage, regret and deep sadness. But I've also watched those events as a former federal and state prosecutor and white-collar defense attorney who has overseen hundreds of police investigations and led scores of internal investigations of organizations, large and small. From that perspective, I believe my alma mater's missteps after learning of the grand jury investigation offer four important lessons for any organization that finds itself involved in a criminal investigation:

First, when the threat of a government investigation arises, organizations must quickly investigate internally to learn the scope of the conduct, assess their legal exposure, and chart a course of action. That course may involve cooperating with government investigators, taking proactive actions or simply preparing a defense for a later day. But none of those decisions can be made until the organization's leaders understand what occurred through an internal investigation.

None of this happened at Penn State. At the latest, the university learned of the grand jury investigation in January 2010 when it was subpoenaed for documents. That subpoena should have set off alarm bells and caused an internal review by outside counsel experienced in criminal matters. Such an investigation could have preserved historical information, marshaled key documents and even obtained statements from individuals who wouldn't or couldn't speak later. At a minimum, it would have

revealed the university's legal and public-relations exposure so its leaders could make informed decisions going forward.

THE IMPORTANCE OF PREPARATION

Second, as investigations develop, organizations must prepare extensively. For employees called to testify, that means reviewing documents, refreshing distant memories and anticipating questioning. Ask yourself: Would you feel comfortable testifying under oath about details of a document, email or event from more than a decade ago if you hadn't reviewed them beforehand? Yet it appears that's just what happened at Penn State—four high-ranking officials, including the president, testified before a grand jury without having been prepared by experienced criminal-defense counsel, having reviewed pertinent documents or having fully understood the grand jury process.

Preparation also means evaluating the need for separate counsel, particularly when the interests of the organization and individual employees may conflict. In Penn State's case, there was significant confusion on this issue, and it appears those who testified failed to appreciate—and perhaps were not adequately advised of—their need for separate counsel. For example, while the former general counsel has claimed that she advised them that she only represented the university, she also appeared in the grand jury room with them—something only the attorney for the witness can do under Pennsylvania criminal rules.

Third, organizations must ensure that the investigating counsel remain its advocates. That doesn't mean seeking sugar-coated facts or refusing to acknowledge fault, both of which result in less-than-candid advice. Organizations should, however, use counsel's findings to craft a strategy and insist that counsel advocate for them while government scrutiny continues.

Unfortunately, Penn State lost control of its would-be best advocate. The so-called "Freeh report," produced by lawyers hired by the board of trustees, was protected by the attorney-client and work-product privileges and could not have been disclosed without the board's consent. Nonetheless, the board allowed it to be disclosed publicly without prior review—a serious tactical error. Regardless of any media clamoring, it's entirely appropriate for a client to review materials prepared by its own lawyers to determine if and how they're released. For example, even had the board concluded release was appropriate, it could have limited that release to factual findings and recommendations. Moreover, by removing the usual attorney-client constraints from the Freeh law firm, the board enabled its own attorneys to become its attackers instead of its advocates.

Fourth, organizations must manage the media so legal issues don't become uncontrollable media events. Even modest coverage can undermine investor confidence and business prospects, so organizations must have a well-planned media strategy that includes a consistent message, timely responses and proactive tactics.

By contrast, Penn State was caught flat-footed in November 2011 when the news first broke and continued to falter as the scandal grew. But those mistakes pale in comparison to its further mishandling of the Freeh report. After naïvely allowing the report to be released without review, the board erred again by, tacitly or expressly, accepting the report in full. By doing so, it undermined any principled objection to the media's—and ultimately, the National Collegiate Athletic Association's—rubber-stamping the report's opinions, regardless of whether they were supported by facts in the report. Having lost control of the media narrative, the university was left defenseless, largely by its own doing.

These lessons aside, Penn State can rise above recent events the way strong organizations always do—through the character of its people. With a Penn State family more than 500,000 strong, we will overcome this adversity, honor the victims, and move forward with the resolve, pride and spirit of a great university.

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