Faculty Advice:
Reporting, Disclosure and Privilege

Office of General Counsel

Colby

The Act was passed in 1990, as a result of advocacy by the parents of Jeanne Clery, who was raped and murdered in her dormitory at Lehigh University in 1986. Clery’s murder was one of over 30 violent crimes that occurred on the campus in the three years prior to her death. Her parents sued the University, claiming that she would not have attended had the crime data been publicly disclosed.

a. Colby’s Clery Act Reporting Obligation

- Under the Clery Act, Colby must compile crime statistics and publish them annually in its Annual Safety, Security, and Fire Safety Report, which is posted on Security’s webpage.
- The report contains statistics only, and does not disclose identities of victims or perpetrators. The following crimes are tracked:
  - Murder and manslaughter;
  - Any sex offense, including rape, fondling, incest, and statutory rape;
  - Assault;
  - Robbery/larceny-theft;
  - Burglary;
  - Motor vehicle theft;
  - Arson;
  - Intimidation;
  - Destruction/damage/vandalism of property;
  - Hate crimes associated with the above criminal activity;
  - Domestic violence (As required by the Violence Against Women Act of 1994 (VAWA). For purposes of reporting, the crimes required to be reported under VAWA are defined by relevant state statutes);
  - Dating violence (VAWA);
  - Stalking (VAWA);
  - Illegal weapons: carrying, possession, etc.;
  - Arrests and campus referrals for liquor and drug abuse violations.
- The report must include crimes on Colby property and off-campus property owned or controlled by the College. Examples of covered Colby off-campus properties include the Hume Center and the new downtown residence hall when occupied.
- Victims or perpetrators of Clery Act-reportable crimes can be students, faculty members, staff, or visitors on Colby’s campus or off-campus property.
• Mandatory reporters are College officials who have “significant responsibility for student and campus activities.” At Colby, these include campus security employees and officials with significant responsibility for student housing, discipline and campus judicial proceedings.

• Typically, a faculty member is not a mandatory reporter unless that person serves in another role such as a faculty member in residence, a faculty advisor to a student group, or a faculty member on a student disciplinary board or committee. A good test is whether the person has the authority AND duty to take action or respond to particular issues on behalf of Colby.

• If a mandatory reporter becomes aware of activity that is potentially reportable under the Clery Act, the mandatory reporter must notify Security. Security will review the report and determine whether it should be included in its Clery Act reporting.

• However, even if you are not a mandatory reporter under the Clery Act, crimes and misconduct should be reported to Security.

II. Colby’s Sexual Misconduct Policy & Title IX Compliance

Passed in 1972, Title IX is a comprehensive federal law that prohibits discrimination on the basis of sex in any federally funded education program or activity. The principal objective of Title IX is to avoid the use of federal money to support sex discrimination in education programs and to provide individual citizens effective protection against those practices. Title IX applies, with a few specific exceptions, to all aspects of federally funded education programs or activities, including colleges, universities, and elementary and secondary schools. Originally used as an enforcement tool to achieve equality in athletics programs, Title IX is now a primary mechanism for the Department of Education to evaluate how colleges and universities address sexual misconduct on campus.

• Colby’s Sexual Misconduct Policy in the Student Handbook defines “Sexual Misconduct” as follows: “Sexual Misconduct is an umbrella term used to encompass the full range of unacceptable conduct of a sexual nature that may be adjudicated at Colby. It includes Sexual Harassment, Sexual Assault, Sexual Exploitation, Intimate Partner Violence, Stalking, Sexual or Gender-Based Harassment, Complicity in the commission of any act prohibited by this policy, Retaliation, and any other acts of misconduct of a sexual nature.” For further information and definitions of these terms, please review the complete Sexual Misconduct Policy.

• All reports of sexual offenses or violations of the College’s Sexual Misconduct policy involving students must be reported to the Title IX Coordinator:

Melvin D. Adams, III, Ed.D.  
Assistant Dean of Conduct and Accountability/Title IX Coordinator  
Office of the Dean of the College  
Eustis 210B  
207-859-4256  
melvin.adams@colby.edu
• A faculty member must report potential sexual misconduct to the Title IX Coordinator when the faculty member has “specific identifying information” regarding the identity of the alleged victim, perpetrator, or third-party witness. Faculty members may wish to caution students about their duty to report at the outset of any conversation about possible sexual misconduct.

• If a faculty member does not have “specific identifying information,” a report to the Title IX Coordinator is not mandated. However, the faculty member may wish to refer students to the College’s Confidential Campus Support Resources for sexual assault. These persons are not required to report sexual misconduct.
  ○ The Gender and Sexual Diversity Program: Emily Schusterbauer, (207) 859-4093
  ○ Counseling Center: (207) 859-4490
  ○ Health Center: (207) 859-4460
    ▪ Practitioners
    ▪ Nursing Staff
    ▪ Athletic Training Services Staff
    ▪ Mental Health Staff
    ▪ Nutritional Consultant
    ▪ Substance Abuse and Wellness Staff
  ○ The Office of Religious and Spiritual Life (207) 859-4272
    ▪ Kurt Nelson, Dean of Religious & Spiritual Life
    ▪ Rabbi Erica Asch, Jewish Chaplain
    ▪ Charles Demm, Catholic Campus Minister

a. Consequences of Failure to Report

• If a faculty member fails to make a mandatory report pursuant to the Clery Act or Title IX, the victim could file a complaint with the U.S Department of Education’s Office of Civil Rights, which could in turn investigate the College for compliance with these and other statutes.
• The College could also be liable for monetary damages in a civil action.
• The faculty member could be subject to disciplinary action.

III. FERPA – Family Educational Rights and Privacy Act

a. Student Rights

FERPA provides students with basic rights regarding their educational records:

• The right to consent to the disclosure of their educational records;
• The right to view/inspect their educational records;
• The right to seek amendments to their educational records that they believe to be incorrect;
• The right to be notified of their FERPA rights on an annual basis; and
• The right to file a complaint with the U.S. Department of Education.
• However, there is no private right of action for students to sue colleges for violation of FERPA.

b. Exception to Consent Requirement for Disclosure

There are some 16 exceptions which permit the disclosure of educational records without student consent. The ones most applicable to faculty are:

• To school officials within the College with a “legitimate educational interest”/”need to know”;
• To parents of students with “dependent” status for federal tax reporting purposes;
• In order to effectively respond to a health/safety emergency; and
• To comply with a lawful judicial order or subpoena.

c. Definition of Educational Records

“Educational Records” are generally defined as any record maintained by the institution that contains personally identifiable information of a student.

• Conversations about a student are not “educational records.”
• Personal notes not shared with anyone or placed in a student file are not “educational records.”
• Whether or not e-mails regarding students or e-mails to/from students and faculty members could be considered an “educational record” has not been definitively addressed by the courts. However, such e-mails could be discoverable in civil litigation in connection with a claim other than a FERPA violation. Therefore, appropriate discretion should be used in discussing student matters via e-mail.

d. Directory Information

Colby may disclose a student’s “Directory Information” without consent from the student, unless the student has explicitly opted-out of such disclosure. Colby defines “Directory Information” as the following:

• Student’s name;
• Address;
• Telephone listing;
• Electronic mail address;
• Photograph;
• Date and place of birth;
• Major and minor fields of study;
• Grade level;
• Enrollment status (e.g., full-time or part-time);
• Weight and height of members of athletic teams;
• Dates of attendance;
• Degrees and awards received; and
• Most recent educational agency or institution attended.

e. FERPA Best Practices Regarding Grading

• Peer grading practices may be used, as long as the grades are not collected and recorded by the professor.
• However, if you require the assistance of student-graders, paid student-graders are considered school officials with a “legitimate educational interest” and therefore, can grade documents for professors. This FERPA exception does not apply if the student-graders are unpaid. As a best practice, paid student-graders should sign a confidentiality statement, indicating that grades are confidential and should only be shared as necessary within the scope of the position.
• Likewise, graded papers or exams with identifiable information should not be left for students to sort through and retrieve.
• For more information, please see handout attached as Exhibit A: “FERPA: what faculty and staff should know.”

IV. Colby Attorney-Client Privilege

“Privilege” or “attorney-client privilege” refers to a centuries-old, common law doctrine that generally protects communications between a client and that client’s lawyer from disclosure. The doctrine has since been codified in many states and in the federal courts, and a substantial body of law has developed around the doctrine. However, the underlying principles remain in place. The privilege is relevant to some interactions which you may have with attorneys in Colby’s Office of General Counsel or Colby’s outside counsel.

a. The “Client”

In the case of Colby, the client is the College corporation – “The President and Trustees of Colby College.” In the instance of an “inanimate client”, the privilege extends to a client’s representatives. As members of the faculty, there are situations in which you become a “client representative” of Colby. Such situations include:

• If you are named as a party or witness in a proceeding in your capacity as a member of the faculty.
• If you are subpoenaed in a proceeding in your capacity as a member of the faculty.
• If you are a party to a contract or agreement with a third party in your capacity as a member of the faculty, or if you have the authority to sign a contract or agreement which binds Colby.

Conversely, if you are named as a party or witness, or become involved in a legal matter in a capacity other than as a faculty member, or if you sign contracts and agreements which do not involve Colby, you are not “client representatives” for Colby. Likewise, if you are involved in a College legal matter in which you are adverse to Colby, you cannot be a “client representative.”
If you are uncertain whether you are a “client representative” in a particular matter, please let us know. Customarily, communications to determine if privilege applies are protected.

b. The “Lawyer”

Again, in the case of Colby, the “lawyer” is the new Office of General Counsel as well as outside counsel which Colby may engage from time to time for College legal matters. The fact that someone has a law degree or is a member of the bar does not automatically create a privileged situation.

Additionally, at Colby, Richard Uchida serves two roles for Colby: General Counsel and Vice President/Secretary. Will Saxe, the other lawyer in the Office of General Counsel, also serves two roles: Director of Risk Management and a lawyer in the General Counsel’s office. When Richard or Will is acting as counsel and providing legal advice to you, as a client representative, those communications are protected under the attorney-client privilege. However, when Richard is acting in his role as vice president/secretary and attending to College governance matters, or Will is performing his job as director of risk management (such as managing Colby’s insurance program), those communications are not protected by privilege.

Outside counsel for legal matters involving Colby should always be engaged through our office. Not only does this allow us to manage and supervise the work of outside counsel, but it allows us to work productively with outside counsel, ensure the privilege is protected and provide you with protected legal advice in the context of the College matter in which you are involved.

c. What Is Protected – “Communications”

A communication between you, when you are a client representative, and us, is generally protected if it is made to facilitate the provision of legal advice or legal services to Colby and is not intended to be disclosed to any third party. A communication of this nature can be oral or written.

Communications may be quite extensive and still be privileged if the communication or discussion involves the obtaining of legal advice, including communications about whether to seek legal advice. That said, we do not recommend extensive e-mail/digital exchanges relating to a legal matter/need for legal advice. If the matter is that extensive, a meeting or call is in order.

Communications involving the explanation by one client representative to another of legal advice obtained from us are also protected. Written communications, including e-mail threads, are not likely to be privileged if issues/comments/options are discussed in communications between client representatives, and later someone thinks to add us to the communication to try to protect those communications.

A good rule is that if you are unsure whether an issue raises a legal concern, erring on the side of including counsel on written communications and including counsel in any initial discussion of the issue will help protect those communications. You may also mark your request as “confidential” to underscore your own understanding/agreement that you are seeking the advice of counsel.
Finally, be thoughtful about your digital communications. Obviously, faculty cannot stop using e-mail. However, e-mails and text messages can be extraordinarily harmful evidence in litigation. Employment discrimination cases, Title IX cases, price fixing and collusion cases, compliance and regulatory matters often rise or fall on e-mails and texts. Because email and texting is immediate and often informal, the tone of the words can be explosive in litigation. In the case of written communications about an employment, student disciplinary, or other issue that is in the category of issues that carry a risk of litigation, please include us on the communication.

d. Waiver of Privilege

If you are a “client representative”, you can also waive the privilege. This means you must exercise care because privilege can be waived unintentionally. For example:

- Privilege is limited to advice sought or provided to those who need to know. If you seek legal advice and include your assistant on the request, solely as a matter of convenience, an argument will likely be made that privilege has been waived.
- If you use a group or family e-mail account and engage in a communication about a legal matter, privilege could well be waived.
- The forwarding of legal advice can result in a waiver of the privilege. An e-mail or other communication which pastes in or forwards the legal advice provided by counsel with a statement to the effect that “here is why we need to do this”, and then disseminated to an audience beyond those who need to know, will likely result in a waiver of privilege.

e. Exceptions to Privilege

There are certain communications which might qualify as protected by privilege, but by law, are not protected. Although these differ in degree and scope from jurisdiction to jurisdiction, the general exceptions are as follows:

- If the client sought or obtained the lawyer’s services to help a person plan or commit what the client knew or reasonably should have known was a crime or fraud.
- Any communication relevant to an issue of the lawyer’s breach of a duty to the client, or of the client’s breach of a duty to the lawyer.
- Any communication relevant to an issue about a document to which the lawyer is an attesting witness.
- Any communication between clients who were represented jointly by the lawyer, if that communication is relevant to a matter of common interest between clients, and if it was made by any one of the clients to the lawyer retained or consulted as part of a joint representation.
V. Conclusion and How to Find Us

When in doubt on any issues regarding reporting, disclosure, and privilege or any other legal or compliance matter, please contact the Office of General Counsel:

- Richard Y. Uchida  
  General Counsel  
  Eustis 304A  
  859-4609  
  richard.uchida@colby.edu

- Will Saxe  
  Office of General Counsel  
  Eustis 308B  
  859-4632  
  will.saxe@colby.edu

Thank you!
Exhibit A

FERPA: what faculty and staff should know
In light of recent incidents on other college campuses, and in preparation for the new school year, it’s a good time to remind ourselves of our obligations – and rights – under FERPA, the federal statute that governs the privacy of student records and information.

In general terms, FERPA prohibits us from disclosing student records (or information from student records) to anyone other than the student to whom the records pertain, unless we have the student’s consent. The records that are covered are not limited only to “academic” records. FERPA certainly does protect transcripts, exams, grades, and the like, but it also protects virtually all other records, in any format, that contain personally identifiable information about a student, including the student information database, class schedules, financial account and financial aid records, disciplinary records, “unofficial” records, and even photographs and e-mails. Moreover, “personally identifiable information” includes not only express identifiers such as names, addresses, and ID numbers, but also other information from which the student’s identity could be ascertained, either by itself or in combination with other available information.

For example, a record containing such demographic information about a student as gender, age, major, class year, and residence might well make the student personally identifiable even if it does not list the student’s name.

Given the breadth of FERPA, it’s best to assume that all records concerning students are covered unless you’re sure that they’re not. Fortunately, however, there are a number of exceptions to the nondisclosure requirement that enable us to conduct our academic business and make appropriate disclosures even without the relevant student’s consent. The most important such exceptions are the following:

1. We may disclose any student records to other College officials (including other students serving on official College committees) who need the information in order to perform their College duties and functions. Thus, for example, a faculty member may (and, of course, should) turn student grades in to the Registrar’s Office; an RA who observes a potential disciplinary violation may (and should) inform the College’s Disciplinary Committee; and any employee with concerns about a student’s mental health may (and should) raise them with the Office of Student Development and, if it involves immediate safety issues, Public Safety.

2. We generally may disclose “directory information” about a student to anyone (though we should use appropriate discretion in doing so). “Directory information” includes a student's name; local, home, and e-mail addresses; local and home telephone number; major field of study; dates of attendance; anticipated degree and degree date; degrees, honors, and awards received; and photograph.

Note, however, that students have the right to “opt out” of having their directory information disclosed, and each year some students do so. Accordingly, we must confirm whether a student has done so before releasing directory information about that student. You can obtain such confirmation from the Colleague system or the Registrar’s Office.

Note also that we cannot disclose directory information in ways that would disclose other, non-directory information. For example, we cannot provide a list containing only names and addresses in response to a request for the names and addresses of all students who have disciplinary records or who have a specified...
GPA or higher, because in doing so we would implicitly be revealing that those particular students have disciplinary records or the specified GPA, which is protected information.

3. We may disclose any records or information about a student to the student’s parents, **but only if we first have confirmed that the student is their dependent for tax purposes**, either by checking with the student or by obtaining a copy of the parents’ most recent tax return. For purposes of this exception, it makes no difference whether the student is a minor.

4. When we have a good-faith belief that there is a health or safety emergency, we may disclose student records and information relevant to that emergency to anyone we reasonably believe can help deal with that emergency. In general, and when reasonably possible, the initial disclosure should be made to professionals trained to evaluate and handle such emergencies, such as Public Safety or the Office of Student Development, who can then determine whether further and broader disclosures are appropriate.

In addition, there are a number of other, more limited exceptions for specific situations.

Keep in mind that all of these exceptions are discretionary, that FERPA does not require us to disclose student records to anyone other than the relevant student, and that there may be other legal or policy reasons not to disclose information even when FERPA would allow us to do so.

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**Here are some things that we should *not* do:**

- Post a list of student grades by SSN or ID number.
- Leave graded tests or papers out in a stack for students to sort through and pick up.
- Send student information on a postcard instead of in a sealed envelope.
- Discuss a student’s situation with others not directly involved in the situation or where they might overhear.
- Release student information by phone or e-mail without first verifying the identity of the recipient.
- Leave student records where they could be seen or accessed by others.
- Dispose of old student records in the normal trash.
- Access the student information database or other student records for reasons unrelated to our individual College duties and functions.