

Should Institutional Employees Have a Duty to Report Campus Crime?

By: Brett A. Sokolow, JD

The Department of Education's new Campus Crime Reporting Handbook clarifies which institutional officials have a duty to report campus crime, for Clery Act statistical tracking and timely warning purposes. However, the question of who *should* report is different from the question of who *must* report, and the Clery Act is only part of the equation, and is not definitive on this issue. This article focuses on the broad question of whether institutional employees should have a duty to report campus crime. I think the answer is yes, but imposing such a duty broadly on all campus employees requires a full consideration of the issues discussed below (This article was written well before the Virginia Tech shootings, and I believe it deserves revisiting in light of that tragedy, and in that context).

WHAT DOES THE CLERY ACT REQUIRE?

The Clery Act does not impose a requirement that all campus employees report crime. The requirements for Clery are very broad, but not all-encompassing. Clery imposes reporting requirements on campus law enforcement, local law enforcement, anyone a college or university designates as someone to whom crimes should be reported, and *institutional officials who have significant responsibility for student and campus activities*. Institutions are expected to make a list of those whom it interprets to have this level of responsibility. The Handbook and regulations make clear that administrators are included, as are RAs, coaches and faculty who advise student organizations. Faculty whose only responsibility is teaching, the regulations make clear, would not have "significant responsibility." The Handbook emphasizes that Clery imposes reporting responsibilities specifically on officials, and notes that support staff are not officials. It even defines officials as "any person who has the authority and the duty to take action or respond to particular issues on behalf of the institution." Counselors, medical providers and clergy are, with some qualification, exempted from the reporting requirement.

THE FACULTY REPORTING REQUIREMENT

Have you ever tried to tell a tenured, full professor to do anything? Differing campus climates mean that the duty imposed by Clery is met with varying degrees of success. Many faculty aren't impressed that a federal law imposes reporting obligations on them, especially when they know that this requirement cannot be enforced against them personally by the courts or the government. In my experience, faculty contribute about 1% of campus crime data on campuses I serve, and that is far less than the percentage of campus crimes of which they are aware. Institutions can impose this duty on faculty, as employees, and in my view, would be wise to do so for a number of reasons. First, if you make it part of the job description, you create a contractual obligation to report which does impact on the faculty member personally. Second, by incorporating crime reporting mandates into employment contracts and faculty manuals, you highlight to faculty how

important a priority this is. Third and last, you create an enforcement scheme that allows you to discipline or remove a faculty member who deliberately fails to comply.

The question with creating a faculty mandate for me is whether you can do so selectively. Under the Clery reporting scheme, only some faculty will qualify as “campus security authorities,” when their contact with students reaches beyond the level of classroom interaction, only. Examples might include when faculty advise student organizations, coordinate externships, oversee community service, chaperone campus-sponsored trips or study abroad excursions. On a small campus, almost all faculty—except perhaps adjuncts—do more than teach. On larger campuses, if you work from the Clery scheme, you will have to classify some faculty as reporters and some not. Some will need training and some won’t. And, you have a moving target, as faculty positions turn over, and as faculty assume or depart from extra-curricular student advising and support positions.

While you could advise faculty of their reporting requirements on an individual basis, few colleges do. I have overheard conversations between faculty, one of whom was designated as a reporter, and one who was not. They were equal colleagues in the same department. One wondered aloud if the training required of the other was something he needed to attend as well, as he had not received the meeting notice. If not, why not? It was confusing to them, and understandably so. Individual classification is inefficient and time-consuming, and the ball eventually gets dropped by the classifier or the classified. A more rational reporting scheme is to require reporting from all faculty members, with no exceptions. If you then only count some of those reports for Clery purposes, that is up-to-you, but at least you have a one-size-fits-all, enforceable rule that avoids confusion and avoids selective training.

FAILING TO REPORT

Faculty need to understand through annual training that if they fail to report even one crime about which they are aware, and that becomes known, the college can be fined by the Department of Education for failure to comply with Clery. Each crime that qualifies but is not included in the annual tally can cost your institution \$27,500. And the fines are no longer an abstraction. Program Review teams from the Financial Assistance Programs at DOE are being sent out with the instructions to find something to cover the cost of their program review. The days of fines as a remote, rarely used sanction are over. Program Reviews are becoming more adversarial, even coercive. For the first time, DOE is interpreting the fine parameters loosely. At first, fines were only imposed for intentional violations, egregious incompetence or cover-ups. Now, the DOE is using the “substantial misrepresentation” standard within the Program Review Guide. Any substantial misrepresentation is fine-able, and substantial is not intentional. Substantial is any misstatement that could lead a consumer to have a false impression. PLEASE NOTE: THIS CAN AND DOES INCLUDE OVER-COUNTING. I have never seen Program Reviewers chastise institutions for over-reporting, but they now can characterize over-reporting as inaccuracy, on a case-by-case basis.

Best practice tip: Some campuses spend tremendous time training campus security authorities on which campus crimes they must report under Clery. While this can be valuable, it can also be limiting. There are campus crimes that senior administrators and legal counsel need to be aware of that are not Clery violations. The better approach, in my view, is to make sure everyone is reporting all crime, and to allow campus law enforcement to cull from those reports those that fit the Clery categories.

SHOULD THE SAME REQUIREMENT APPLY TO ALL STAFF?

Once you have classified all faculty as reporting officials, the next question is whether it is easier, appropriate or wise to impose the same requirement on all employees. It is not an unreasonable expectation to ask all employees of your institution to report crimes of which they are aware. Most corporations do so. In an age where administrators are often legally held to constructively possess the knowledge of their reports, you need to know what your staff knows. Would I include support staff? Clery specifically does not. This seems odd to me, because the people who know the most about crime on many college campuses are the administrative assistant to the director of judicial affairs (or dean of students) and the residence hall housekeeping staff. Ask a different question—what happens if we do not impose this duty on all staff. Suppose a custodian is aware of several burglaries, but fails to bring them to the attention of her supervisor. The case breaks, and it becomes clear that the custodian kept quiet. DOE comes in to investigate, and asks you to remedy the failure to report as part of the consent decree. How will you? You can't discipline the custodian for failing to do something that was not part of their job. You may want to fire the custodian for allowing an unsafe condition to persist, to send a message to your community, and show that you are responding, but you will lack grounds.

Quirks of the Law: The Clery Act makes it clear that RAs are officials of your institution, for purposes of the "campus security authority" definition.

The benefits of a mandatory crime reporting policy should be more than just creating accountability and enforcement mechanisms if the policy is violated. Your campus should benefit from a greater awareness of the extent and nature of campus crime. Your institution may be better able to track incidents, prevent crimes, and catch perpetrators. You ought to be able to respond and investigate. For example, suppose that a female student reports a sexual assault to her professor, but asks the professor to keep it confidential. Under a mandatory reporting scheme, the professor will have to complete at least an anonymous report, perhaps more. If there is no mandate, the institution will take no action based on the report to the professor. But, if the professor passes along the report, regardless of the victim's wishes (that is what a mandate is all about), campus law enforcement and/or investigators may respond, if appropriate, taking whatever action is needed to make the community safe and secure.

Best Practice Tip: The reporting of campus crime is not the decision of the victim, unless the report is made to counselors, clergy or medical providers. Once the victim shares a report with an employee, the duty of the employee to pass that report to supervisors,

deans and/or campus law enforcement is almost without exception. The report may withhold personally identifiable information about the victim, if that is desired by the victim. The only exception to the mandatory reporting duty might be where the employee is also the victim. I would be hesitant to impose a reporting requirement that mandated disclosure of victimization by the victim.

Without question, a campus-wide reporting mandate carries with it a training requirement, if you intend your employees to take the mandate seriously, and comply competently. This could be a boon to your community policing efforts, or an onerous additional training burden for your campus. While an all-employee mandatory crime reporting policy may have some upsides, it could potentially bite you, too. Once you create a duty to report, failure of institutional employees to uphold that duty could create liability for the institution via contract or negligence theories (assumed duty). A secondary bite might be felt from a DOE audit, for failure to follow your own policies and procedures. You must weigh the overall benefits and demerits, to decide what is in the best interests of your campus.

All information offered in this publication is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader.

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