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# Making Room at the Inn: Implications of 'Christian Legal Society v. Martinez' for Public University Housing Professionals

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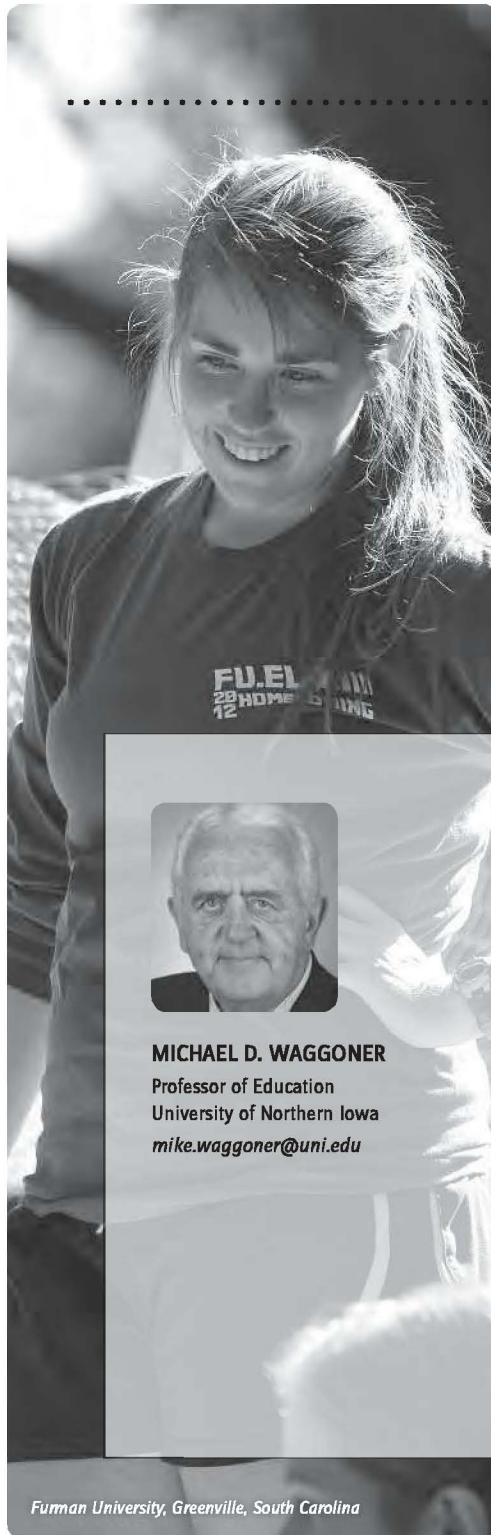
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## Making Room at the Inn: Implications of *Christian Legal Society v. Martinez* for Public College and University Housing Professionals



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**THE SUPREME COURT'S RULING IN *Christian Legal Society v. Martinez***, its most important case to date on student associational activities, upheld a policy at a public law school in California that required recognized student organizations (or clubs) to admit "all-comers" even if they disagreed with organizational goals and values. Rather than retracing the work of Moran and her colleagues, who examined related issues such as religious expression in public areas of residence halls, this article analyzes the potential impact of *CLS*, since membership in campus organizations clearly overlaps with the kinds of issues that students and housing professionals deal with in their residences. The article then reviews the facts and the Supreme Court's rationale in *CLS* before suggesting alternative views on its implications for housing professionals in public institutions. The focus here is on officials in public institutions because the constitutional principles involved in *CLS* are generally inapplicable in private colleges and universities, where the rights of their students (and staff) are typically contractual in nature.

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Ever since college officials made provisions for housing students on their campuses in the late 18th century, these residences served, in part, as venues to argue about ideas generated in their classrooms. In the earliest college days, tutors not only introduced ideas during instruction but also often lived with their students and could continue to interact in extracurricular conversations in the residences (Brubacher & Rudy, 2008; Reuben, 1996; Rudolph, 1990; Thelin, 2011). In some institutions, faculty still live among students for similar reasons, though most faculty have stepped away from residential roles, which have been assumed by professional staff.

As many studies have shown, students learn as much outside of their classrooms as they do inside of them during their years on campus, thereby underscoring an important role for student affairs professionals in residence life (Pascarella & Terenzini, 2005). While

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not all classroom discussions carry over to the residence halls, many do—particularly where they touch closely held beliefs or values often grounded in religion and spirituality. In addition to informal group discussions, campus ministry groups are making more concerted outreach efforts to residence halls to initiate such conversations (Waggoner, 2011).

Housing professionals have unique opportunities to influence these discussions, yet they may choose to avoid them for a variety of reasons: indifference, lack of knowledge in areas of religion and spirituality, lack of confidence in their own positions, or fear of offending others or acting inappropriately. Another major reason is ignorance of the law and the resulting fear of litigation if some line is crossed, however inadvertently this may occur.

This article cannot survey the landscape of all the legal parameters that housing staff should understand regarding religious and spiritual issues at public colleges and universities, whether in the halls or on the campuses, particularly because so many legal issues, such as foot baths and dietary rules, remain unsettled. Recognizing that the law should guide one's work and involvement and accepting that legal norms should be seen not so much as constraints on behavior as parameters within which to actively engage with these topics, this article examines one area in which the law is relatively settled.

After making some preliminary remarks about the First Amendment, this article focuses on the Supreme Court's ruling in *Christian Legal Society v. Martinez* (CLS, 2010a), its most important case to date on student associational activities, in which it upheld a policy at a public

law school in California requiring that recognized student organizations (or clubs) admit "all-comers" even if they disagreed with organizational goals and values. As such, this article does not retrace the work of Moran and her colleagues (2008) who examined related issues such as religious expression in public areas of residence halls. Rather, this article analyzes the potential impact of CLS, since membership in campus organizations clearly overlaps with the kinds of issues that students and housing professionals deal with in their residences.

The remainder of this article reviews the facts and the Supreme Court's rationale in CLS before suggesting alternative views on its implications for housing professionals in public institutions. The article focuses on officials in public institutions because the constitutional principles involved in CLS are generally inapplicable in private colleges and universities, where the rights of their students (and staff) are typically contractual in nature.

## PRELIMINARY REMARKS ABOUT THE FIRST AMENDMENT

According to the First Amendment to the U.S. Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." A full review of the occasional tension between the religion and free speech clauses is beyond the scope of this article. Still, in *Widmar v. Vincent* (1981) and in *Rosenberger v. Rector and Visitors of the University of Virginia* (1995), the Court ruled that if campus officials allow some groups to use their facilities or to meet or to access funds for publications, then they must allow all clubs to do so, including those that are religious in



nature. In so doing, the Court treated religious speech as a subset of free speech. This distinction was at issue in *CLS* as the Court modified the extent to which it was willing to protect the rights of a religious organization.

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### **CHRISTIAN LEGAL SOCIETY V. MARTINEZ**

*CLS* involved a challenge to a policy of the Hastings College of the Law, a part of the University of California system, concerning institutional recognition of on-campus student groups. Acquiring status as a registered student organization (RSO) at Hastings confers on a group

access to the use of institutional funds, facilities, and channels of communication as well as use of the college's name and logo. When the Christian Legal Society (CLS) applied, there were more than 60 RSOs, including the Hastings Jewish Law Students Association and the Hastings Association of Muslim Law Students.

RSOs at Hastings are obligated to comply with its nondiscrimination policy. According to this policy, which is consistent with California law, RSOs "shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities" (*CLS*, 2010a, p. 2989). Hastings officials interpreted this policy as requiring RSOs to accept all-comers, meaning that they had to allow students to join and to seek leadership positions regardless of their beliefs.

The controversy began at the start of the 2004–05 academic year when some students at the Hastings campus branch chose to affiliate with the national CLS group and adopted bylaws requiring members and officers to sign a Statement of Faith which required them to conduct their lives in a manner consistent with its provisions. At the heart of this dispute is the provision that all members accept that sexual activity should not occur outside of marriage between a man and a woman, regardless of whether it is heterosexual or homosexual. By extension, CLS further interpreted the bylaws as including those who engaged in "unrepentant homosexual conduct" (*CLS*, 2010a, p. 2980) or had religious beliefs that disagreed with the statement.

When the leaders of CLS sought RSO status, campus officials at Hastings rejected their application since their bylaws differed from the school's all-comers policy by excluding students based on religion and sexual orientation. Although they denied the group RSO status, officials offered them

the use of Hastings facilities for its meetings and activities [and] access to chalkboards and generally available campus bulletin boards to announce its events. In other words, Hastings would do nothing to suppress CLS's endeavors, but neither would it lend RSO-level support for them. (CLS, 2010a, p. 2981)

Under these conditions, CLS "hosted a variety of events in the year following denial of RSO status" (2010a, p. 2991). On being denied RSO status, however, CLS filed suit against Hastings.

### Judicial History

CLS unsuccessfully sought to prevent implementation of Hastings' policy, alleging that it violated the group's rights to speech, association, and religion. A federal trial court in California decided that the all-comers condition in the policy was reasonable and viewpoint-neutral. The court also commented that Hastings' policy neither impermissibly impaired CLS's right to expressive association nor was unacceptable because it did not require the group to admit members or to limit speech. The court maintained that the policy merely placed conditions on the use of on-campus school facilities and funds. Moreover, the court rejected CLS's free exercise claim in ruling that the neutral, generally applicable policy did not single out religious beliefs for different treatment.

On appeal, the Ninth Circuit affirmed that the all-comers policy was reasonable and

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viewpoint-neutral (CLS, 2009a). Since the Ninth Circuit's judgment in *CLS* conflicted with a case from Indiana in which the Seventh Circuit reached the opposite result (*Christian Legal Society v. Walker*, 2006; Russo & Thro, 2007), the Supreme Court agreed to hear an appeal to resolve this conflict.

### Supreme Court Analyses

**Majority opinion.** A divided Supreme Court, in a 5-4 judgment, upheld the constitutionality of the all-comers policy. Writing for the majority, Justice Ginsburg was joined by Justices

Stevens, Kennedy, Breyer, and Sotomayor. The majority began its analysis by acknowledging its reluctance to deny student access to campus facilities based on their viewpoints. In recognizing that it faced an issue of first impression, the Supreme Court identified the issue before it by asking whether “a public law school [may] condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization’s agreement to open eligibility for membership and leadership to all students” (*CLS*, 2010a, p. 2978).

Following its review of the facts, in which it described access to campus facilities as a kind of subsidy, the majority combined *CLS*’s freedom of speech and association claims in light of the Supreme Court’s limited public forum jurisprudence. It is worth noting that in reviewing First Amendment claims, the Justices have identified three different types of fora. As such, it is important to engage in a brief review of them.

Under the first category, governmental power to regulate expression is most restricted in traditional public fora or open places such as parks, streets, and sidewalks (*Hazelwood School District v. Kuhlmeier*, 1988), an analysis that was inapplicable in *CLS* since it dealt with a college campus. Equally inapplicable was the non-public forum doctrine typically applicable in classrooms that are “not by tradition or designation a forum for public communication” (*Perry Education Association v. Perry Local Educators’ Association*, 1983, p. 46). Turning to the third category, the Supreme Court held that the appropriate standard was that of a “limited public forum” (*Rosenberger v. Rector and Visitors of the University of Virginia*, 1995, p. 829), property that the state, as represented by offi-

cials at institutions such as Hastings, opened for public use as a place for expressive activity. Officials at public institutions can create such fora either by express policy or by practice.

After reviewing cases in which the Supreme Court applied this forum analysis, the Justices determined that the all-comers policy was a reasonable viewpoint-neutral means for assessing *CLS*’s claims for four reasons. First, the Justices agreed that insofar as they ordinarily deferred to educators, campus officials had the authority to establish a policy of this nature. Second, the Court ruled that the reasons officials provided for initiating the policy—namely that it afforded leadership opportunities for students, forbidding discrimination based on status and bringing individuals of all types together—were legitimate and non-discriminatory. Third, the Court agreed that Hastings officials adhered to their position that the policy brought together individuals with diverse backgrounds and beliefs,

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which encourages tolerance, cooperation, and learning among students. Fourth, the Court indicated that the policy was consistent with California's nondiscrimination law, thereby demonstrating Hastings' commitment to refusing to subsidize conduct disapproved by the state.

The Supreme Court was convinced that in light of the alternative social media channels that were available to CLS even without RSO status, the all-comers policy was all the more reasonable. The Court next rejected CLS's concerns that if it had to comply with the policy there would be no diversity of perspectives on campus and that individuals who were hostile to it could infiltrate its ranks in order to subvert its mission. The majority thought that insofar as the policy does allow clubs to make eligibility for membership and leadership positions conditional on such qualifications as attendance at meetings, dues payment, and other neutral criteria, CLS's concerns were unfounded. However, the Court did not directly address whether accommodations should be made for sincerely held religious beliefs, since the question had not been raised.

The Supreme Court concluded that the all-comers policy was constitutional but remanded the dispute to the Ninth Circuit for further consideration. The Justices pointed out that insofar as the lower courts failed to address whether Hastings officials selectively enforced the all-comers policy, the Ninth Circuit had to decide whether CLS's argument remained viable.

**Justices offer concurrences.** Justice Stevens, in the final case of his almost 35-year career on the Supreme Court, briefly sought to rebut Justice Alito's dissent, which viewed the policy

as unconstitutional. Stevens responded that although CLS is free to limit membership in its off-campus activities, the First Amendment does not require the policy at Hastings to permit such behavior.

In an even briefer concurrence, Justice Kennedy posited that Hastings officials and the leadership of CLS agreed that there was no evidence of viewpoint discrimination in the policy. He explained that the result might have been different if CLS had been able to prove that the all-comers policy was designed or employed to infiltrate its membership or challenge its leadership in an attempt to stifle its perspective.

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**Four Justices dissent.** Justice Alito, joined by Chief Justice Roberts along with Justices Scalia and Thomas, authored a lengthy dissent. Justice Alito feared that the Supreme Court majority imposed a significant restriction on religious freedom, especially since law school officials had not relied on the all-comers policy until, he maintained, CLS raised its complaints. Alito further asserted that the Hastings policy, ostensibly viewpoint-neutral in a limited open forum, placed a substantial burden on the religious freedom of CLS's members but not on any other on-campus group, thereby unreasonably infringing on their rights.



**Postscript.** On remand, the Ninth Circuit rejected CLS's remaining claims (*Christian Legal Society v. Wu*, 2010b). The court refused to allow the leaders of CLS to proceed with their case because they failed to preserve their argument that law school officials selectively applied the policy to their members.

## IMPLICATIONS

Depending on one's interpretation of *CLS*, there is room for alternative views on its implications for student affairs housing professionals. This section offers alternative views in three key areas: expanding institutional authority, assessing all-comers policies, and creating communities of tolerance and inclusion. In order to emphasize the importance of differing interpretations and the possible range of views, these pairings offer food for thought by presenting alternative views for each area, recognizing that there could be other positions.

### Expanding Institutional Authority

**In one view.** *CLS* extends public institutional authority to restrict access to limited public fora such as auditoriums and public spaces, both of which are relatively common in residence halls. While officials at public institutions always had the authority to bar activities from their limited public fora, *CLS* allows them the opportunity to deny access to groups that condition membership on the basis of belief. Consequently, housing professionals may require outside groups that seek to rent residence hall space for films and presentations to have all-comers membership policies. In a related question, it remains to be seen whether such groups can post signs or have small group meetings in residence hall rooms.

**In another view.** *CLS* reaffirms the authority of public institutions to regulate limited public access fora such as auditoriums and public places, including such spaces within residence halls. This affirmation is consistent with precedent upholding nondiscrimination based on the *actions* of individuals or groups, not their *beliefs* (*Healy v. James*, 1972). In fact, as Justice Stevens pointed out in his concurring opinion, Hastings' policy actually sought to extend religious freedom rather than to suppress it. As before, any group may apply to use space and to advertise whether or not they are an officially recognized organization. Indeed, *CLS* continued to use facilities on campus under such arrangements.

### Assessing All-comers Policies

**In one view.** Institutional policies can now require student organizations to admit all-comers who wish to join or who seek leadership positions, regardless of their beliefs, even if they disagree with the core tenets of the organizations' philosophies. As a result, in what may be a principle of unintended consequences, atheists are eligible to serve as leaders of *CLS* chapters, while a heterosexual Evangelical Christian may become president of the Gay Students Association. Policies of this nature may remove some administrative challenges associated with student groups that wish to restrict membership but may create others, such as the fear voiced by *CLS* that some might seek to join with the purpose of infiltrating their membership or undermining their goals. A related concern that may emerge is whether students who wish to serve in leadership positions within religious groups such as *CLS* may be subject to the loss of opportunities to serve

as residence hall advisors even if they profess their willingness to accept all, regardless of their own lifestyle choices.

**In another view.** The all-comers policy emanating from *CLS* extends membership and leadership opportunities to all who seek them in any recognized student organization. *CLS* and the dissent raise the specter of groups being infiltrated by subversive elements for the purpose of undermining group goals. However, as the majority opinion stated, “This supposition strikes us as more hypothetical than real” (*CLS*, 2010a, p. 2992). Students are unlikely to expend the effort to go where they are not welcome. This would most likely be the case in the extreme examples cited in the view expressed above. A more realistic challenge would be like that proposed in Justice Alito’s dissent, where members of other Christian groups who hold different views on sexual orientation from *CLS* join that group with the

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intent of correcting what they perceive as an erroneous representation of the Christian position in this area. Yet even this example falters on extrapolation. Should such a displacement of the original *CLS* statement of faith be accomplished, the group would be disaffiliated from the national body and not be allowed to use the *CLS* name. The original group would then be free to re-form under the *CLS* imprimatur. The subversive group would then have to mount a new assault. This all seems “more hypothetical than real.”

#### **Creating Communities of Tolerance and Inclusion**

**In one view.** While *CLS* seems to be a victory for institutional officials, it may undermine efforts to foster communities of inclusiveness and tolerance. For example, requiring Christian groups to include non-Christians in leadership roles as a condition of using public facilities may reinforce the notion that they are unwelcome on campus. In light of a question Justice Scalia raised in dissent in *Lee v. Weisman* (1992), wherein the Supreme Court invalidated graduation prayer, if individuals cannot be on campuses or other learning environments and are not able to respond respectfully to ideas with which they disagree, then where can this happen? Further, revising facilities-use policies so that religious and/or political groups that differ from established campus orthodoxies may not use campus property arguably sends a message of isolation that institutional officials may not wish to endorse.

**In another view.** *CLS* is a victory for public institutional authorities, but it is also a victory for upholding the law surrounding nondiscrimination and thereby encouraging tolerant



and inclusive communities. As argued earlier, there is no discrimination against belief, only insistence on actions that comply with the law. Although administrators at public institutions may withhold official recognition, they still may provide facilities as they do to recognized groups; this is common practice. Arguably, this is a practice of tolerance, allowing groups who practice discrimination to meet in a place where nondiscrimination is the law.

## CONSIDERATIONS FOR HOUSING PROFESSIONALS

The law relating to housing professionals as agents of public institutional authority continues as before *CLS*, yet with a nuance. Residence life staff must ensure that decisions granting access to and use of facilities as well as official communication media are based on the actions of individuals or groups, not their beliefs. While private institutions may establish access rights within the bounds of contractual relationships, public institutions may not do so.

In light of *CLS* and the preceding discussion, there are at least five considerations for housing staff at public colleges and universities. First, officials must be aware that student groups may use public areas in residence halls for meetings in accordance with institutional policies. Such an approach puts a premium on having officials at public institutions carefully develop policies that have been thoroughly vetted by institutional legal staff and helping residence staff understand these policies. Due to regular changeover in who serves as resident hall assistants and other staff, maintaining this awareness requires ongoing professional development.

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Second, advertising for group events may be conducted in halls in designated areas open to all, regardless of official institutional recognition; however, if groups are not approved, they may be denied access to institutional communication media. This may continue to be a sensitive and legally contested point, particularly if it is construed as impinging on freedom of belief. Though unrecognized groups may meet and advertise, they may continue to object to being denied official recognition and the imprimatur of institutional approval that comes with recognition.

Third, membership and leadership in recognized student groups must be open to all, with individuals elected to the latter based on elections by group rules or bylaws. In most cases, this will require a review and revision of organizational bylaws and rules to ensure conformity with the Court's ruling in *CLS*. Institutional officials should oversee and document this process to protect against litigation.



Fourth, residence hall staff may not discriminate against groups or their members based on their beliefs, clearly a sensitive area. *CLS* separates actions from underlying beliefs as the Court maintained that it did not discriminate based on belief, but on actions running counter to the nondiscrimination laws of the United States. Individuals in unrecognized groups may be expected to argue with the action-belief distinction. Until the Court rules further, it will be up to local institutional staff to demonstrate that their decisions are based on actions of the group and not on beliefs. And, finally, residence hall staff must abide by federal and state nondiscrimination laws. Since housing professionals are not expected to be attorneys, neither should they behave in such a manner. When questions arise concerning whether instances are covered by institutional policies, staff should contact institutional counsel in writing in order to have their questions resolved.

As to further considerations for housing professionals, the nature of the law is that, without litigation to provide direction, it is unclear where the courts are going. Even so, issues that may emerge include whether menus in cafeterias can be modified to address the dietary wishes of students and whether single-sex or segregated residence halls can be permitted under existing federal and state nondiscrimination laws.

## CONCLUSION

*CLS* underscores an important aspect of the role of the law in the lives of housing professionals in public colleges and universities and the even-handed treatment of all with whom they work. In upholding *Hastings'* nondis-

It may sound like a truism, but the law is much more fluid and evolving than may appear on the surface. There is considerable room to accommodate differences if disputes are moderated with reason. College and university housing professionals are at the ground level of where disputes can arise—where students live and informally process their classroom and cocurricular experiences.

crimination policy, the Court looked to cast the widest possible net regarding who is subject to discrimination. This includes minority voices of all kinds, whether because of race, ethnicity, sexual orientation, or religion. Liberty of conscience has been a hallmark of the American experience since Roger Williams elaborated the argument in the earliest days of Colonial America (Barry, 2012; Davis, 2008; Nussbaum, 2008). The achievement of freedom of conscience in a pluralist 21st-century American context is ever more challenging since individual rights are further elaborated by the courts, thereby requiring that more groups be afforded equitable treatment in our democracy.

Housing professionals need to address growing legal challenges in their professional preparation programs and through professional development activities on campus or

at conferences. Graduate programs organized according to the Council for the Advancement of Standards in Higher Education (CAS) recommend that professionals have acquaintance with the legal and ethical parameters of their work (CAS, 2012). Educational programs of this type, whether in graduate programs or professional development contexts, should include studies of case law, combined with the use of hypothetical situations, involving questions raised in *CLS* as parts of discussions led by legal professionals. These should be conducted with reference to relevant college student development theories such as moral and faith development, reflective judgment, and identity development.

It may sound like a truism, but the law is much more fluid and evolving than may appear on the surface. There is considerable room to accommodate differences if disputes are moderated with reason. College and university housing professionals are at the ground level of where disputes can arise—where students live and informally process their classroom and cocurricular experiences. The sensitive exercising of an ethic of care grounded in a solid knowledge of settled law can help bridge differences in this important area of religious belief. Perhaps the only thing that can be certain in the ever evolving study of law is that litigation will continue to raise such questions as who may have access to campus facilities, what institutional communication channels are available to which groups, and whether there is possible infiltration by groups hostile to organizational values. It thus remains incumbent on housing professionals to keep abreast of legal developments so that they can provide the most beneficial learning experiences for students.

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