



December 5, 2024

Committee of Bar Examiners
The State Bar of California
CBE@calbar.ca.gov

Sent via electronic mail

Re: Concerns with September 23, 2024 State Bar Memo on Consideration of Protest-Related Conduct in Moral Character Determinations (Agenda Item 1.4)

Dear Committee of Bar Examiners:

We write to express our concerns about the State Bar of California's September 23, 2024 memorandum regarding "Moral Character Determinations and the Israeli-Palestinian Campus Protests" (the "memo").¹ This memo purports to authorize the State Bar and Committee of Bar Examiners to "consider an applicant's protest-related conduct in the context of a moral character determination." This misguided approach would inevitably expose countless bar applicants to scrutiny regarding constitutionally-protected speech and protest activities and would have an undeniably chilling effect on the exercise of those rights. As the State Bar explores these issues, we urge it to reconsider the approach articulated in the memo.

Under its current policies, Bar examiners can already consider if an applicant has "received disciplinary action by schools, or were subjected to civil lawsuits, criminal arrests, or prosecution" – regardless of whether those sanctions were related to their participation in protests or anything else. Thus, singling out "protest-related activity" as a moral character consideration serves only to heighten the risk, in applicants' minds, that attending a protest, joining a teach-in, engaging in peaceful civil disobedience actions, or otherwise speaking out could have major repercussions on their future legal careers. Even if, as the memo describes, protest conduct does not categorically disqualify someone from a sufficient moral character determination, it is clear that the approach that the memo endorses would chill participation in protest-related activity by prospective lawyers.

Protests and civil disobedience have been the backbone of American social movements since this nation's founding, and they remain vital to the health of our democracy today. Revolutionary colonists at the Boston Tea Party, women's suffragists marching on Washington,

¹ Moral Character Determinations and the Israeli-Palestinian Campus Protests, Sept. 23, 2024, <https://calbar.primegov.com/meetings/ItemWithTemplateType?id=944&meetingTemplateType=2>.

civil-rights protestors staging sit-ins in the South, and anti-war movements on college campuses tell our country's story – “the story of a countless number of Americans who prodded, provoked, and pushed the United States to actually be the nation it imagined itself to be.” Ralph Young, *Dissent: The History of an American Idea* 1 (2015). Given this rich history, the Supreme Court recognizes that “the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.” *Citizens Against Rent Control/Coal. For Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981). Accordingly, political speech, and protest in particular, “occupies the highest rung on the hierarchy of First Amendment values,” and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (internal quotations and citation omitted).²

The “protest-related conduct” covered by the memo’s recommendation encompasses vast amounts of First Amendment-protected speech, from marching to signing petitions to engaging on social-media with activist content. That breadth casts a shadow of moral suspicion over all “protest-related conduct,” no matter how peaceful or nondisruptive it may be. It thus “deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas.” *United States v. Williams*, 552 U.S. 285, 292 (2008). The memo’s broad sweep is not remedied by assurances that consideration of protest-related conduct can be done “without regard to the applicant’s political motivations” or that examiners should “always respect the First Amendment rights of the applicant.” Indeed, such assurances ring hollow given the memo’s explicit content-based focus on “Israeli-Palestinian Campus Protests.”

Future applicants will read the memo and conclude, reasonably, that participating in a protest could imperil their careers. Once an applicant finally submits their application to the Bar, in other words, the damage will already be done. It is unacceptable to place applicants under suspicion for constitutionally-protected protest activities in the first place. The current State Bar guidelines already permit bar examiners to consider criminal history, civil-legal history, and academic disciplinary history. Communicating that “protest-related conduct” could be evidence of poor character does not deter violence, fraud, criminal activity, or other misconduct. Rather, it discourages political speech and signals that law students who advocate for social justice or on controversial issues may not be welcome in the legal profession.

The State of California needs excellent legal advocates with strong moral character. As written, the State Bar’s memo undermines that goal. It would discourage law students from engaging in reasoned public debate on important issues, stunting the development of character traits necessary for the practice of law. This is especially important in the current national

² With respect to acts of civil disobedience, we highlight Dr. Martin Luther King, Jr.’s famous words penned from his Birmingham jail cell: “an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law.” M. King, *Letter From a Birmingham Jail* (Apr. 16, 1963).

political climate where faith in the rule of law, courts, and other political institutions is eroding. The crucial moral growth necessary for principled legal advocacy will be impaired if the State Bar adopts a process that effectively discourages participation in political activity.

Thank you for your consideration of this letter. We welcome the opportunity to speak with the State Bar about our concerns.

Sincerely,

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