

## 1.4 Memo - Moral Character Determinations and the Israeli-Palestinian Campus Protests



# The State Bar *of California*

OFFICE OF ADMISSIONS

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Date: September 23, 2024

To: Brandon Stallings, Chair, Board of Trustees

From: Erika Doherty, Program Director, Office of Professional Competence  
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Subject: Moral Character Determinations and the Israeli-Palestinian Campus Protests

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## I. Introduction

Since October 2023, widespread protests related to the Israeli-Palestinian conflict have occurred on college and university campuses. Students have established encampments, held marches, organized teach-ins and sit-ins, and engaged in other forms of protest. While many of the protests have been limited to peaceful and legal expressions of political views consistent with campus rules, some protesters have engaged in acts of civil disobedience, violated campus rules, and committed criminal acts.

The State Bar and Committee of Bar Examiners may see bar applicants who received disciplinary action by schools, or were subject to civil lawsuits, criminal arrests, or prosecutions related to their participation in these protests. These actions could warrant inquiry in an applicant's moral character process.

At the Board of Trustees meeting in May 2024, Chair Brandon Stallings directed staff to explore this topic and bring back recommendations to the Board of Trustees. Staff subsequently formed an internal working group, engaged in outreach to other jurisdictions and entities, and reviewed applicable federal and state case law and ethics opinions, particularly with respect to First Amendment concerns in the moral character process. After a thorough review, the working group recommends that State Bar staff and the Committee of Bar Examiners continue to look to relevant legal precedent for guidance in evaluating protest-related conduct in the context of moral character determinations, and evaluate each applicant's moral character application on an individual basis.

## II. The Moral Character Requirement

An applicant has the burden of demonstrating that they possess the requisite good moral character for licensure.<sup>1</sup> Good moral character includes “qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of others and the judicial process.”<sup>2</sup> A moral character determination largely focuses on whether the applicant has engaged in conduct that involves moral turpitude by “show[ing] a deficiency in any character trait necessary for the practice of law,” or “involv[ing] such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms,” that it, “would be likely to undermine public confidence in and respect for the legal profession.”<sup>3</sup>

Past misconduct by an applicant, particularly when it involved moral turpitude, is relevant in the moral character process because it may relate to their ability to practice law ethically. Conversely, applicants may sufficiently address concerns about past misconduct by refraining from engaging in further misconduct and demonstrating affirmative rehabilitative behavior.

## III. Consideration of Protest-Related Conduct in the Moral Character Context

Moral character inquiries are broad in scope, and each is informed by a set of facts that is unique to the applicant. Still, courts have provided general guidance with respect to issues that may arise when an applicant engages in political protest. For example, an applicant’s political beliefs or speech are protected by the First Amendment and generally should not be considered in making a moral character determination.<sup>4</sup> An exception to this general rule is that an applicant who advocates overthrow of the government, “by force, violence, or other unconstitutional means,” is ineligible for licensure.<sup>5</sup> Accordingly, the political beliefs that motivate an applicant’s participation in protests generally are not a proper basis for inquiry in the moral character process, and an applicant’s conduct during protests related to the Israeli-Palestinian conflict should be considered without regard to the applicant’s political motivations.

Disciplinary action by a school, or other administrative or legal consequences related to an applicant’s conduct during a protest, is not necessarily grounds for an adverse moral character

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<sup>1</sup> Bus. & Prof. Code, § 6060; Rules of the State Bar of Cal., rule 4.40.

<sup>2</sup> Rules of the State Bar of Cal., rule 4.40.

<sup>3</sup> *In re Lesansky* (2001) 25 Cal.4th 11, 16.

<sup>4</sup> See, e.g., *Baird v. State Bar of Ariz.* (1971) 401 U.S. 1, 8 [“views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law”]; *Konigsberg v. State Bar of Cal.* (1957) 353 U.S. 252, 269 [“Government censorship can no more be reconciled with our national constitution standard of freedom of speech and press when done in the guise of determining ‘moral character,’ than if it should be attempted directly.”].

<sup>5</sup> Bus. & Prof. Code, § 6064.1.

determination, even when it stems from intentional violations of the law.<sup>6</sup> While the consequences of an applicant's conduct may provide a basis for further inquiry, the conduct itself is the primary concern in the moral character context. Moreover, the relevant issue is not whether an applicant's conduct was, in some definitive sense, 'right' or 'wrong,' but is the likelihood that, if licensed, the applicant would not practice law ethically.<sup>7</sup>

Violence or other conduct that infringes on the rights of others may not be protected by the First Amendment, and is legitimate grounds for inquiry and consideration in the moral character process.<sup>8</sup> Even so, just as with any issue relevant to a moral character determination, the facts surrounding conduct should be considered in making a determination. A myriad of contextual facts could inform consideration of violent conduct, including the applicant's intention, the presence or absence of evidence that the applicant has engaged in a pattern of misconduct, the age of the applicant insofar as it bears on culpability, and evidence of rehabilitation following the misconduct. The purpose of the moral character process is not to punish past misconduct, but is aimed at determining an applicant's current moral character for the practice of law.

#### IV. Conclusion

The State Bar and Committee of Bar Examiners may consider an applicant's protest-related conduct in the context of a moral character determination. A moral character inquiry, however, should always respect the First Amendment rights of the applicant, and past misconduct should be considered in the broader factual context in which it occurred. Accordingly, the working group recommends that State Bar staff and the Committee of Bar Examiners continue to consider protest-related activity on an individual basis, and in the context of moral character determinations, in a manner that is consistent with relevant state and federal legal precedent, taking care to generally avoid consideration of an applicant's protected political speech or expression, and always considering the specific facts relevant to the individual applicant.

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<sup>6</sup> See, e.g., *Schwartz v. Board of Bar Examiners of N.M.* (1957) 353 U.S. 232, 241 ["The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct."];

*Hallinan v. Com. of Bar Examiners* (1966) 65 Cal.2d 447, 459 [when a crime does not involve moral turpitude, there must be some act beyond the bare fact of a conviction to show bad moral character].

<sup>7</sup> See *Hallinan v. Com. of Bar Examiners, supra*, 65 Cal.2d at pp. 459-460 [the moral character standard "must have a rational connection with the applicant's fitness or capacity to practice law"].

<sup>8</sup> *Schwartz v. Board of Bar Examiners of N.M., supra*, 353 U.S. at 241-242 [noting a lack of evidence that the applicant used force or violence during a labor dispute in finding that his related arrest was not sufficient to show bad moral character]; *Hallinan v. Com. of Bar Examiners, supra*, 65 Cal.2d at pp. 461-462 [noting that the applicant "repudiated violent civil disobedience," and engaged in "peaceful," "non-violence civil disobedience," in finding an absence of moral turpitude].