California Bar Examination

Performance Test and Selected Answers

July 2018

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

PERFORMANCE TEST AND SELECTED ANSWERS

JULY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the July 2018 California Bar Examination and two selected answers.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

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Performance Test

INSTRUCTIONS AND FILE

IN THE MATTER OF ABIGAIL WATKINS

IN THE MATTER OF ABIGAIL WATKINS

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. This performance test is designed to be completed in 90 minutes. Although there are no parameters on how to apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

LAW OFFICES OF TIA LUCCI

MEMORANDUM

TO: Applicant

FROM: Tia Lucci

SUBJECT: In the Matter of Abigail Watkins

DATE: July 24, 2018

This case involves a Columbia State Bar disciplinary action against our client, Abigail Watkins. On June 8, 2018, Watkins pled guilty to a single felony count of insider trading that occurred more than two years ago. The State Bar then initiated disciplinary proceedings against Watkins, seeking disbarment. Watkins hired us to prevent that.

We have just completed testimony in a hearing on the threshold issue of whether the facts and circumstances surrounding the insider trading by Watkins involved moral turpitude. The judge has requested simultaneous briefs on this issue. Please draft an argument for me to use in a brief asserting that:

1) The conduct underlying the plea does not justify a finding of moral turpitude.

2) Watkins' testimony at the hearing does not justify a finding of moral turpitude.

At this point, we seek to avoid a finding of moral turpitude. Do not argue about appropriate discipline.

Do not write a separate statement of facts. Instead, incorporate the facts into your persuasive argument, making sure to address both favorable and unfavorable facts.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, v. ABIGAIL WATKINS, Defendant.	Criminal Case No. 2018-999-111 VIOLATION: 15 U.S.C. 78j (Insider Trading)

PLEA AGREEMENT

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States of America and the defendant, Abigail Watkins, agree as follows:

1. The defendant is entering into this agreement and is pleading guilty freely and voluntarily without promise or benefit of any kind (other than contained herein), and without threats, force, intimidation, or coercion of any kind.
2. The indictment relates to a single sale of stock by the defendant. The defendant pleads guilty.
3. The defendant knowingly, voluntarily and truthfully admits the facts contained in the attached Factual Basis for Plea.

FOR THE DEFENDANT

Dated: ___June 8, 2018___

____*Abigail Watkins*_____
Abigail Watkins
Defendant

____*Tia Lucci*_____
Tia Lucci
Counsel for Defendant

FOR THE UNITED STATES

Dated: ___June 8, 2018___

____*Mary Butler*_____ _____*Stephanie Evans*___

Mary Butler
Criminal Division
U.S. Department of Justice

Stephanie Evans
Securities Criminal Enforcement
U.S. Department of Justice

HEARING DEPARTMENT OF THE STATE BAR COURT
HEARING IN THE MATTER OF ABIGAIL WATKINS

July 20, 2018

Case No. 18-SF-1023

State Bar Court Judge Margaret Kenler

BY THE COURT: Mr. Simonds, you may proceed.

ASSISTANT CHIEF TRIAL COUNSEL MATT SIMONDS: Your honor, this morning the State Bar relies on the Factual Basis for the Plea Agreement. We're standing on the admissions that the Respondent made in her plea agreement and in that Factual Basis. Specifically, we rely on her statements that she made a purchase of stock in Fort Software with knowledge of an impending purchase of Fort by Silicon Microsystems, knowledge that she gained through conversations with lawyers representing Silicon Microsystems. I understand that the Respondent will also testify. We rest.

BY THE COURT: Ms. Lucci, you may proceed.

BY TIA LUCCI: Thank you, your honor. We call the Respondent, Abigail Watkins.

ABIGAIL WATKINS

EXAMINATION BY MS. LUCCI: Ms. Watkins, could you please briefly describe your professional education and preparation.

WATKINS: I have a J.D. and a degree in chemical engineering from Worcester Polytechnic Institute. I practiced intellectual property law for many years before joining Wakefield and Lester in 2006. I chair its intellectual property group.

LUCCI: You have been a member of the bar in Columbia since 1991, and before that in Virginia and the District of Columbia. Have you ever been disciplined or even cited or received notice of any charges involving any discipline?

WATKINS: Never, until now.

LUCCI: You represent Fort Software?

WATKINS: Yes, in 2011 I personally advised and represented Fort during its start-up phase and when it went public a few years later. I have followed Fort since then and intended to make a purchase of its stock. Everything I read online about Fort, the stock recommendations from rating agencies, were very positive on Fort. At that point the patents were public information. But I never did so.

LUCCI: Did you reconsider that decision?

WATKINS: Yes. In June 2015, Fort was trading at $10 a share, and by August it was at $13. Two major brokerage companies had upgraded Fort stock from a "buy" to a "strong buy." The technology message boards were talking up Fort as a likely merger target for its software. I know that I was planning to make a purchase. I wasn't going to lose out again.

LUCCI: In July 2015, you underwent surgery for a tear to your rotator cuff.

WATKINS: Yes, July 14th.

LUCCI: Your doctor gave and you filled prescriptions both for Percocet and Ambien?

WATKINS: Yes, Percocet for pain and the Ambien to help me sleep. Percocet is something with oxycodone and the doctor said it's a potent pain reliever, for severe pain, but that I could take one or two tablets every 4 hours. I took it a lot, although I now know that it had some side effects. I was told not to take it before driving, and no alcohol.

LUCCI: How much and how long did you take Percocet?

WATKINS: I don't know. The prescription was for 50 tablets. I took it on and off until it ran out.

LUCCI: Were you still taking Percocet at the time of the Fort-Silicon merger?

WATKINS: I don't know. My memory from the surgery in July until September is very poor. I was very distracted by the pain and the medications, and trying to maintain a normal full-time work schedule.

LUCCI: You returned to work five days after surgery?

WATKINS: Yes, although I had considerable pain and limited mobility.

LUCCI: Turning to the Fort merger, when did you hear from Fort?

WATKINS: In 2015, I was not actively representing Fort. My best recollection is that on August 16, 2015 I received a call from Fort's general counsel, Samantha Darmond, with whom I had not previously worked, or from an attorney at Jordan & Haines. I really can't remember which. Anyway, I was asked to send our patent files over to J & H.

LUCCI: In the conversation, do you remember anything being said about a pending merger, or due diligence, or the need for confidentiality?

WATKINS: No. I thought that Fort was going to be represented by J & H. It's a top intellectual property firm, and I considered it a positive development for Fort. I had the files assembled, but did nothing more. I didn't think it was urgent. I think it was the next day that I received another call from the attorney at J & H about the files.

LUCCI: On August 16, did you place an order to purchase 1,000 shares of Fort?

WATKINS: Yes.

LUCCI: Was it because you knew about the merger?

WATKINS: It is my best recollection of that purchase, that on that day I was acting on my general opinion and my previous interest in Fort, observations from the message boards and buy recommendations. And as I said, I thought J & H's involvement was also good news. Looking back now, I know that I made a mistake.

LUCCI: Nothing further.

CROSS-EXAMINATION BY ASSISTANT CHIEF TRIAL COUNSEL SIMONDS:

SIMONDS: Do you claim that the Percocet or Ambien made you commit insider stock trading?

WATKINS: No, of course not.

SIMONDS: Did you have symptoms of delirium, or inability to reason, or impaired ability to understand your moral or ethical duties?

WATKINS: No, of course not. But I didn't appreciate the effect that had on me, as I can now.

SIMONDS: Neither drug left you mentally impaired or diminished your mental capacity?

WATKINS: As to actual effects of those drugs, you are asking the wrong person. It is not for me to say.

SIMONDS: Since you only had 50 Percocets, if you had taken just three a day, less than your doctor said you could, it would have run out in 17 days, or a week or more before the call about the merger. Correct?

WATKINS: I don't know. I took it infrequently, in reaction to pain. Then I would take it for a day or two and then stop.

SIMONDS: You saw your doctor several times between the surgery and mid-August. Did you complain about the effects of Percocet, tell him that you were mentally impaired?

WATKINS: No. The doctor said that continued pain in that period was normal.

SIMONDS: You would agree that it would be hard for any alleged Percocet intoxication to have caused you to commit an insider stock purchase?

WATKINS: That's not what I am saying. The Percocet and the pain, however, may have distracted my thinking, left me insufficiently attentive to what Ms. Darmond was telling me, why I could have failed to register what was so important, and especially why I don't have a very clear memory of what she told me in conversations or voice messages. My partner and associates were telling me that I was unfocused during that time.

SIMONDS TO COURT: Objection and move to strike. Hearsay and unresponsive.

COURT: The statements of others as to her mental state are stricken.

SIMONDS: As to your testimony that your stock purchase on August 16th was not based on anything about a pending merger told to you by Ms. Darmond, but on message boards and the like -- Those boards and buy recommendations were because of expectations of a Fort merger. Correct?

WATKINS: Yes.

SIMONDS: It is true, isn't it, that you were told on August 16th to gather the Fort patent files and you in fact did that?

WATKINS: Yes, my billing record on that date is 0.7 hour to review the Fort files and prepare a transmittal letter to J & H.

SIMONDS: Ms. Watkins, you agreed in the plea agreement that Ms. Darmond told you of the merger and that it was confidential information, before you made the purchase of Fort stock on August 16th.

WATKINS: That is what I agreed to.

SIMONDS: But now in your direct testimony today you claim that what you agreed to in a guilty plea is not true?

WATKINS: No, only that I don't remember it that clearly, that I don't remember that she told me she was talking about an imminent merger. I grasped the task, to assemble our patent files to send to other counsel, but little more. I had someone put together the documents she wanted, but I did not consider the matter sufficiently urgent to do more, and instead waited to hear from someone from J & H.

SIMONDS: I don't understand. Do you deny what you agreed was true in the plea agreement?

WATKINS: I am trying to say that the statement in the plea agreement is contrary to my memory of the event. But I agreed to it because my attorneys explained that it was a good deal. I received probation instead of jail time. I knew that the version in the plea agreement was Ms. Darmond's recollection and what she'd say if she testified. I simply have no recollection of it. And so I can't deny that the August 16th conversation with Ms. Darmond took place, nor can I agree that it happened and led me to the stock order.

SIMONDS: But long before today, didn't you refute her version?

WATKINS: What do you mean?

SIMONDS: Eight months after the merger, the SEC called you. Correct?

WATKINS: Yes, totally out of the blue.

SIMONDS: Right. You had no warning and were taken by surprise by the call.

WATKINS: I was shaken, and as I was trying to collect my thoughts to answer the questions, I saw my life passing before my eyes.

SIMONDS: You had enough control to repeat your story that you didn't know about the merger when you made the August 16 purchase?

WATKINS: Yes, Mr. Simonds. I told that to the SEC and I am telling it today because it is my best recollection.

SIMONDS: Nothing further, your honor.

BY THE COURT: As we agreed, then, simultaneous briefs due in one week. We are adjourned.

July 2018

California Bar Examination

Performance Test

LIBRARY

IN THE MATTER OF ABIGAIL WATKINS

LIBRARY

CHADWICK v. STATE BAR

Columbia Supreme Court (1989)

We review the recommendation of the Review Department of the State Bar Court that petitioner, William Chadwick, be suspended from the practice of law following his misdemeanor conviction for violating federal statutes prohibiting insider trading and for related misconduct. The Review Department recommended that Chadwick be suspended from the practice of law for a period of five years; that execution of the suspension be stayed, subject to two years actual suspension. On appeal, we review the facts underlying Chadwick's conviction to determine whether they constitute moral turpitude.

Chadwick was admitted to the practice of law in Columbia in December 1973. Formerly, he was a partner in a large firm. Chadwick is currently a sole practitioner, primarily rendering legal advice about alternative investment structures. He has no prior record of discipline.

Chadwick's misconduct began in December 1981 when he acquired material, nonpublic information regarding a tender offer involving the Brunswick Corporation from a Martin Cooper, who was a bank officer and banker for the Whittaker Corporation. The Whittaker Corporation was the company attempting to take over the Brunswick Corporation. Chadwick purchased stock options of the Brunswick Corporation for himself. Later, the takeover of Brunswick by the Whittaker Corporation was publicly announced.

Chadwick was later contacted by the SEC. After consulting with counsel, Chadwick informed the SEC that he had relied upon material, nonpublic information concerning the Brunswick tender offer.

On July 1982, Chadwick was charged in U.S. District Court with one misdemeanor count of having violated 15 United States Code section 78(j). Chadwick pled guilty to the count as charged and was fined $10,000 and ordered

to disgorge profits. The plea agreement establishes the facts relevant to the question of moral turpitude and facts that may be used to impeach Chadwick.

Thereafter, the State Bar issued an order to show cause charging Chadwick with willfully committing acts involving moral turpitude within the meaning of Business and Professions Code section 6101. These charges were based on Chadwick's illegal purchase of stock options, the acts that underlay his misdemeanor conviction.

As we have noted on numerous occasions, the concept of moral turpitude escapes precise definition. For purposes of the Rules of Professional Responsibility, moral turpitude has been described as an act of baseness, vileness or depravity in the private and social duties that a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. To summarize, it has been described as any crime or misconduct without excuse. The meaning and test is the same whether the dishonest or immoral act is a felony, misdemeanor, or no crime at all.

Chadwick argues that his willingness to comply with the SEC's investigation excuses his earlier conduct. However, the concept of excuse relates to Chadwick's conduct at the time of the violations to which he pled guilty. Here, Chadwick's guilty plea rests on facts that indicate no such excuse at the time he purchased the stock.

Chadwick also argues that, by entering into a plea agreement, he did not concede that the factual basis for the criminal plea would justify ethical discipline based on those facts. However, even if true, this proposition does not prevent this court from reviewing the factual basis of the plea to determine whether the conduct it describes justifies a finding of moral turpitude.

In this case, we agree with the Review Department's conclusion that the facts and circumstances of the particular offense and Chadwick's related conduct establish that Chadwick's acts involved moral turpitude. We adopt the Review Department's recommended discipline.

In the Matter of HAROLD SALAS, a Member of the State Bar

Review Department of the State Bar Court (2001)

In 1999, Harold Salas entered a plea to conspiracy to obstruct justice. After his conviction, the State Bar Court held a hearing to recommend appropriate discipline pursuant to Section 6102(a) of the Business and Professions Code. After the hearing, the State Bar Court recommended disbarment rather than discipline because it concluded that Salas had lied at the hearing.

In 1995, Respondent entered into a business relationship with Anna Bash, the owner/operator of Chekov Legal Services in the Little Russia neighborhood. Respondent paid Bash $5,000 per month to market his practice to the Russian community in the City of Angels and to provide him with a secretary and a translator. Respondent would assist Bash in providing legal services, many on a pro bono basis, and Bash would refer personal injury, criminal, and other fee cases to Respondent. Respondent admitted he agreed to split fees with Bash, a non-attorney, and that this was illegal.

The District Attorney's Office filed a criminal complaint against Respondent and Bash as co-defendants in a "capping" conspiracy, alleging that Respondent paid Bash for referring clients to him. There were several charges of referral and fee-splitting, including one that alleged that Respondent issued a check for $10,000 to Bash from the proceeds of a settlement of a personal injury case. The District Attorney claimed that the $10,000 payment was an illegal payment in exchange for Bash's referring the case to Respondent.

Respondent and Bash were each charged with three felony counts: (1) conspiracy to commit a crime; (2) capping; and (3) conspiracy to commit an act injurious to the public. Respondent pled no contest to count three as a misdemeanor; and the District Attorney dismissed counts one and two.

In the hearing below, Respondent testified that he owed Bash $10,000 for two months of services, and that he properly withdrew that amount from the settlement because it was a part of his contingency fee in the case. Respondent denied that the payment to Bash was for referral of the personal injury case to him.

After her own plea agreement, Bash testified against Respondent. Her testimony directly contradicted Respondent's. She did, however, confirm that she operated an office, which included substantial secretarial and translation services, and that Respondent was paying her $5,000 a month and that $10,000 was due when she was paid. She was adamant that the $10,000 was for the referral.

The State Bar Court did not accept Respondent's testimony about the payment, and questioned why he would advance it before the court. The State Bar Court concluded that his lack of candor in the proceedings itself warranted a finding of moral turpitude.

Based on our review of the record, we find that the State Bar Court's finding of moral turpitude was not supported by clear and convincing evidence that Respondent had testified falsely and hence was guilty of moral turpitude. The State Bar bears the burden to prove moral turpitude by clear and convincing evidence. We conclude that the State Bar did not carry its burden here.

Normally, we would defer to a finding of fact from the State Bar Court. But in this case, Respondent contends that the hearing officer did not apply the burden of proof correctly. Respondent argues that there is no reasonable and logical explanation for why he would insist on his version of this one payment, other than the fact that he believes it to be true. It would have been easier, he says, to admit responsibility for this referral as well. Respondent contends that directly contradicting the plea agreement would raise severe doubts as to his candor. However, he asserts that his repeated statement of the innocent

PT: SELECTED ANSWER 1

To: Tia Lucci

From: Applicant

Subject: In the Matter of Abigail Watkins

Date: July 24, 2018

Brief

Issues Presented:

1. The conduct underlying the Watkins' plea agreement does not justify a finding of moral turpitude.

2. Watkins' testimony at the hearing does not justify a finding of moral turpitude

I. The conduct underlying Abigail Watkins' pleas does not justify a finding of moral turpitude, because at the time of the August 16 stock purchase she did not remember being told about the merger and thus she was with excuse at the time of the violation to which she pled guilty.

The State Bar must show cause to charge Abigail Watkins with willfully committing acts involving moral turpitude within the meaning of Business and Professions Code section 6101. Chadwick v. State Bar heard by the Columbia Supreme Court (1989)

is controlling. The concept of moral turpitude escapes precise definition. For Rules of Professional Responsibility, it has been described as an act of baseness, vileness or depravity in the private and social duties that a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and woman (Chadwick). The court in Chadwick summarized this definition and interpreted it as meeting "any crime or misconduct without excuse," noting that the meaning and test is the same whether the dishonest or immoral act is felony, misdemeanor or no crime at all. Furthermore, the concept of excuse as it relates to conduct is tested as of the time of the violation to which an individual has pled guilty, not whether they had excuse afterwards. In addition, though a defendant does not necessarily concede that the factual basis of a plea justifies ethical discipline, a court may nevertheless review the factual basis underlying the plea to determine if the conduct amounts to moral turpitude.

In Chadwick v. State Bar, Chadwick pled guilty to the misdemeanor of insider trading and related conduct (i.e. the illegal purchase of stock options based on insider information). After Chadwick engaged in the insider trading, he was contacted by the SEC, and after consulting with counsel he cooperated with the SEC's investigation and admitted to relying on insider trading when he bought the stock options in question. Chadwick then argued to the court that his willingness to comply with the SEC investigation showed "excuse" for his violation such that it did not rise to the level of moral turpitude. The Court rejected this argument, because this action took place *after* he had gone through with the insider trading, and since the concept of excuse relates to the insider trading conduct itself, he was not excused. Based on this, the court adopted the Review Department's finding that the underlying insider trading amounted to moral turpitude.

Watkins' case is strikingly similar to that of Chadwick's, but bears an important distinction because of Watkins' lack of awareness of the wrongness of her actions at the time she bought the Fort Stock. Like Chadwick, Watkins admitted in her plea

agreement to the purchase of equity securities based on material, nonpublic information, here concerning the merger between Silicon and Fort. Also like Chadwick, Watkins promptly cooperated with the SEC investigation of her, as she quickly admitted to her actions the first time the SEC contacted her with respect to the August 16 transaction.

However unlike Chadwick, Watkins was not aware that she was engaging in insider trading at the time that she bought the security. In that case, Chadwick did not present any evidence and there were no surrounding circumstances to show that he had committed the insider trading inadvertently and that he was otherwise innocent. Here, though Watkins conceded in the plea agreement that the conversation between her and Darmond took place and that Darmond told her about the merger, she also maintains within the plea agreement that at the time of the purchase she was not aware of the planned merger. This is supported by her testimony before the hearing department of the State Bar court, where she admits that she believes Darmond's recollection of events, but she also was on Percocet at the time, which affected her energy levels and memory abilities.

Accordingly, at the time of the violation, i.e. August 16, she did not act 'contrary to the customary rule of right and duty between man and woman' because at the time of her crime, she had the excuse that she was unaware and did not remember being told about the merger, and but for her lack of memory she would not have gone through with the trade. Watkins testified that she had long been planning on buying the stock, and that because of recent public excitement over the stock, particularly by two major brokerage firms and also the technology message boards, she was encouraged to finally go through with the purchase. All of this was public information, and trading on public gossip about a possible merger does not amount to moral turpitude. That she inadvertently committed insider trading was thus also not a crime of moral turpitude, but an unfortunate outcome and side effect of her Percocet prescription.

This is true even though Watkins followed through with the request of the phone order in gathering the patent files. Watkins' testimony shows that she was hazy as to the particulars of the phone call, including the request for the patent files, and it was not even until a follow up phone call from J&H the next day that she knew where to send the files to.

Because at the time of the August 16 purchase, Watkins was by her own admission 'distracted in her thinking' because of the Percocet and the pain, and thus was unaware that she had been informed of nonpublic material information regarding the Fort-Silicon merger, she was 'with excuse' at the time of the violation, and her conduct underlying her plea agreement does not rise to moral turpitude. As such, she should not be disbarred or suspended on this basis.

II. Watkins' testimony at the hearing does not justify a finding of moral turpitude because her testified to belief that she was not aware of being told about the merger at the time of her August 16 purchase, while maybe mistaken, was honest, and the record does not show any other clear and convincing evidence that Watkins engaged in lack of candor.

When an attorney pleads guilty to a crime, the State Bar looks to the appropriate discipline under section 6102(a) of the Business and Professions Code, and this turns on whether the attorney has committed an act of moral turpitude (Salas). Any determination of moral turpitude by the State Bar must be found by clear and convincing evidence, including a determination that the attorney's testimony lacks candor (Salas). While testifying falsely before the Review Department is considered lack of candor giving rise to a finding of moral turpitude, the Review Department of the State Bar in the matter of Harold Salas stated that an honest, if mistaken belief in innocence is not a lack of candor, as lack of candor cannot be founded merely on different memory of events. Moreover, applying the standard of proof by clear and convincing evidence means reasonable doubts must be resolved in favor of the

accused attorney, and if equally reasonable inferences may be drawn from a proven fact, i.e. it is equally likely that the respondent is telling the truth versus lying, the inference to innocence must be chosen and the State Bar has not met its burden of establishing clear and convincing evidence of culpability (Salas).

In Salas, the respondent pled guilty to the various felonies related to his conduct wherein the respondent-attorney Salas partnered with Anna Bash, the owner/operator of Chekov Legal Services, and violated the law by fees with her (a non-lawyer) in exchange for case referrals. However, he also lawfully partnered with Bash in certain aspects, as he also employed her for $5,000 a month to market his practice to the Russian community and to provide him secretarial services. At issue during his testimony before the Review Department was a certain $10,000 he had paid to Bash. The plea agreement was silent as to what the $10,000 represented. Salas insisted it was lawful payment of 2 months of Bash's salary as a secretary. Bash testified and insisted that the $10,000 represented an illegal referral fee. There, the Review Department of the State Bar court overturned the lower State Bar Court's finding that the conflicting evidence sufficiently proved that Salas had to be lying and holding him liable for disciplinary action based on this 'lie.' The Review Department noted that because in this situation Salas truly did not have any real reason to lie, the plea agreement was silent as to this issue (i.e. Salas's testimony did not conflict with his plea agreement), and the only other evidence was conflicting testimonial evidence, equal inferences could be drawn as to whether Salas was lying or telling the truth. Thus, the State Bar Court had not met its burden of providing clear and convincing evidence of lack of candor and thus moral turpitude.

Watkins' case again bears striking resemblance to the case law. Watkins' insistence that when she purchased her August 16 stock she did not remember that Darmond had told her about the Fort-Silicon merger was an honest, if mistaken, belief in her own innocence, and on its own that is not a lack of candor. She and Darmond merely have different memories of the event, but the fact that Watkins is testifying the exact same recollection that she told the SEC when they first confronted her,

supports the finding that she subjectively and honestly believes that at the time, she lacked awareness of the merger. In her testimony, Watkins does not insist that she was not in fact told about the merger. She merely testifies to her memory of the events, stating that while she cannot agree that it happened, she also cannot deny that it happened - this is an honest statement of her beliefs. While, unlike with Salas, here Watkins does have a modicum of incentive to lie, as it would prevent her from being disbarred, this should in no way be dispositive or controlling. What is controlling is the veracity of her belief, which as discussed above, was sincere. Moreover, Watkins, like Salas, is not testifying in conflict with her plea agreement, and her statements are consistent with her plea agreement factual basis statement that on August 16 she was not aware that she knew about the merger. Thus, while contradiction with a plea agreement does raise severe doubts as to candor, such a contradiction is not present here.

Based on the facts and testimony at hand, equally reasonable inferences can be drawn from the proven fact that she had a conversation with Darmond and then bought shares on August 16. Thus, all reasonable doubts must be resolved in favor of Watkins, meaning that any doubts that the Percocet did not actually inhibit her memory so that she could not remember her phone conversation must be resolved in favor of believing Watkins' statement on this matter. Thus, an inference must be drawn as to Watkins' innocence.

Because the State Bar has not met its burden of establishing clear and convincing evidence of culpability, Watkins' testimony at the hearing does not justify a finding of moral turpitude.

PT: SELECTED ANSWER 2

To: Tia Lucci

From: Applicant

Subject: In the Matter of Abigail Watkins

Date: July 24, 2018

In the Matter of ABIGAIL WATKINS, a Member of the State Bar

Brief for Ms. Watkins

Argument

I. The conduct underlying Ms. Watkins' plea does not justify a finding of moral turpitude.

The conduct underlying Ms. Watkins' guilty plea does not justify a finding of moral turpitude because Ms. Watkin's act, while criminal, has a valid excuse.

In *Chadwick v. State Bar* (Co. S. Ct. 1989), the court stated that under, "the Rules of Professional Responsibility, moral turpitude has been described as an act of baseness, vileness or depravity in the private and social duties that [one] owes to his fellowmen, or to society in general," which is "contrary to the accepted and customary

rule of right and duty between [people]." While the court then offered a summary definition, targeting "any crime or misconduct without excuse," it then noted that the key component in a finding of moral turpitude is not whether the act is criminal, but rather whether the act is dishonest or immoral. *Id.* (stating that the "meaning and test is the same whether the dishonest or immoral act is a felony, misdemeanor, or no crime at all.") Finally, the *Chadwick* court recognized that the act of entering a guilty plea does not automatically concede that the factual basis for the plea would justify ethical discipline based on those facts, but retained the discretion to review the factual basis underlying the plea to determine whether the conduct it describes warrants a finding of moral turpitude. *Chadwick*, at 3.

Significantly, the court in *In re the Matter of Harold Salas, a Member of the State Bar (Rev. Dept. St. Bar Ct. 2001),* noted that "it is equally likely that Respondent is telling the truth about controverted facts, the State Bar has not met its burden of establishing clear and convincing evidence of culpability."

Ms. Watkins' Act Has an Excuse

Ms. Watkins pled guilty to a single felony count of insider trading, but she should not be subject to a finding of moral turpitude because she did not know about the merger at the time of her stock purchase due to her use of prescription medication. Ms. Watkins' plea was for felony insider trading, while the Respondent in *Chadwick* pled guilty to a misdemeanor count of insider trading–yet, these cases should be treated differently. As the court noted in *Chadwick*, an act of moral turpitude is "crime or misconduct *without excuse*". *Id.* (emphasis added).

In July 2015, just a month before the alleged misconduct, Ms. Watkins underwent surgery for a tear to her rotator cuff. As a result of that surgery and through recovery she suffered, in her own words "considerable pain and limited mobility." *Hearing in*

the Matter of Abigail Watkins (Case No. 18-SF-1023). Ms. Watkins was prescribed medication, Percocet and Ambien, to help her deal with the pain and to sleep. Ms. Watkins testified that the Percocet "had some side effects," and that her "memory from the surgery in July until September," after the alleged misconduct, "is very poor." Significantly, during that time, Ms. Watkins was "very distracted by the pain and the medications," all while trying to keep up a strenuous full-time work schedule.

The facts in *Chadwick* indicate that the attorney in that case committed misconduct by trading on inside information from a bank officer of a company set to acquire another. The facts do not state the relationship between the attorney in that case and the source of the information, but that relationship is relevant in this case. Here, Ms. Watkins was told of the merger by Samantha Darmond, with whom she had previously worked, and assumed that the reason Ms. Darmond, the target company Fort Software's (Fort's) in house counsel, asked Ms. Watkins to prepare and send patents to another firm was that that firm would be Fort's new intellectual property representative. As the company's previous intellectual property representative, it would be reasonable for Ms. Watkins to believe that she would need to forward patent information on the company to another firm for purposes other than a merger if she was not told or did not hear or understand anything about the merger.

The court in *Chadwick* further held that cooperation of a Respondent with a criminal investigation does not excuse the Respondent's earlier moral turpitude, if any. *Chadwick*, at 3. While this may be true, in this case the circumstances surrounding Ms. Watkins' cooperation with the SEC indicate the sincerity of her excuse– Ms. Watkins was surprised by the call from the SEC, and maintained that she did not recollect being told about the merger by Ms. Darmond on August 16. The fact that Ms. Watkins maintained that she did not recollect being told about the merger rather than flatly denying being told makes it more likely that she was seriously affected by the pain and medication of post-surgery recovery during the period in question.

Ms. Watkin's purchase of stock was based on her own, independent feelings toward and valuations of Fort, not on the mention of a merger. While it is true that her valuations were based on boards and recommendations that in turn were influenced by rumors of a merger, her reliance on such boards and recommendations is not a dishonest act. In short, this is not the kind of base, vile, or depraved act at issue in *Chadwick*, but rather was an action with an excuse – Ms. Watkins may have been *told* about the merger, but she did not *know* about the merger.

II. Ms. Watkins' testimony at the hearing does not justify a finding of moral turpitude.

In *In the Matter of Harold Salas*, the Review Department of the State Bar Court held that, to justify a finding of moral turpitude based on testimony in a State Bar hearing, the State Bar must "support by clear and convincing evidence that" the Respondent has testified falsely. *In the Matter of Harold Salas, a Member of the State Bar* (Rev. Dept. St. Bar Ct. 2001). Further, the State Bar bears the burden of proof with respect to moral turpitude. *Id.* This burden of proof by clear and convincing evidence extends to a determination that a witness has testified falsely. *Id.* This means that reasonable doubts about whether an attorney testifies truthfully in a disciplinary hearing must be "resolved in favor of the accused attorney." *See id.*

The *Salas* court specifically noted that a Respondent's "honest if mistaken belief in his innocence does not signal a lack of candor," and, significantly, "a lack of candor should not be founded merely on [the Respondent's] different memory of events." *Id.* Here, Ms. Watkins is either telling the truth that she did not hear any information about the merger, or her testimony constituted just such an honest and mistaken belief. Ms. Watkins has maintained throughout the SEC and state bar proceedings that her memory of the time period in question is extremely poor. That testimony is buttressed by the fact that she was prescribed a potent pain killer during that time.

The court in *Salas* noted the difference between hearing testimony that contradicts a plea agreement and one which argues on a point the agreement is silent on. *Id.* In that case, the Respondent maintained at a disciplinary hearing the innocence of a particular transaction, while admitting culpability for other, similar actions. In comparison, Ms. Watkins did not testify in conflict with the plea agreement, which states that she was told about the merger on August 16. Rather, she testified that she does not recall being told about the merger, and that it is her recollection that she purchased Fort stock without knowledge of the merger. It is entirely possible that in a pained and medicated state, Ms. Watkins was told about the merger but did not hear or understand the information. As a result, Ms. Watkins is not contradicting the plea agreement, just as the respondent in *Salas*.

Ultimately, under *Salas*, if "it is equally likely that Respondent is telling the truth about controverted facts, the State Bar has not met its burden of establishing clear and convincing evidence of culpability." *Id.* Here, the State has shown that the medication did not cause Ms. Watkins on its own to commit a crime, and that if Ms. Watkins had continually taken her medication she would have finished it before August 16. The State is arguing that Ms. Watkin's August 16 purchase was based on insider information, and that her receipt of that information was not affected by her medication. But it is equally likely, as Ms. Watkins has testified that she did not remember being told about the merger when testifying, and that she did not hear or understand the information when told about the merger on August 16.

In conclusion, Ms. Watkins' conduct and testimony do not justify a finding of moral turpitude.