

2008 WL 8720798 (La.Civil D.Ct.) (Trial Motion, Memorandum and Affidavit)  
Civil District Court of Louisiana.  
Orleans Parish

Tommy Taylor THOMAS, Cpa,

v.

THE STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANTS OF LOUISIANA, Michael A. Henderson, Cpa, Michael A. Tham, Cpa, Carol T. Barnes, Cpa, Susan C. Cochran, Cpa, Mark P. Harris, Michael B. Bruno, Lettilowe-Ardoin, Cpa, and Craig Laborde, Special Investigator.

No. 20082205.  
July 1, 2008.

Division "G"

Civil Action On Judicial Review from State Board of Certified Public Accountants of Louisiana Michael A. Tham, CPA, Chairman

### **Original Brief of Appellee, State Board of Certified Public Accountants of Louisiana**

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### **I. FACTUAL BACKGROUND**

Tommy Taylor Thomas ("Thomas" or "Respondent") was certified as a Certified Public Accountant ("CPA") by the State Board of Certified Public Accountants of Louisiana ("Board") in 1969. At all times relevant to this matter, Thomas was a licensed CPA in good standing with the Board and a CPA with the firm Thomas, Hunter, & Company, LLP.

Thomas became the CPA for Mr. and Mrs. Sewell in the early 1980's.<sup>1</sup> In 1996, the Sewell's created wills that made Thomas the executor of their estates, in the event of their death, and signed powers of attorney in favor of Thomas.<sup>2</sup> Up until 1996, Thomas only prepared annual tax returns for the Sewells. However, in 1996 Thomas began performing additional services which were described as **Elder** Care Services.<sup>3</sup> In 1998, Thomas' firm included a brochure on **Elder** Care Services in its annual mail out.<sup>4</sup> Mr. and Mrs. Sewell met with Thomas concerning these **elder** care services, however, no agreement concerning the **elder** care services were ever signed.<sup>5</sup> In September 2000, Thomas prepared a letter stating among other things that, "Any unbilled services of Thomas, Hunter & Company, LLP are to be billed and paid by your estate."<sup>6</sup> Both Mr. and Mrs. Sewell signed the letter.<sup>7</sup>

In June 2002, Thomas began invoicing Mr. and Mrs. Sewell \$250.00 per month for **elder** care services, which the Sewells paid timely.<sup>8</sup> In October 2003, Thomas increased the monthly fee for **elder** care services to \$300.00 per month.<sup>9</sup> These were the only invoices mailed to the Sewells and the Sewells timely paid all of the monthly invoices for **elder** care services.<sup>10</sup> Thomas prepared itemized invoices for the hourly work performed by he and his wife, but these invoices were not mailed to or delivered to the Sewells.<sup>11</sup> In fact, the invoices totaling \$40,597.00 of hourly work were not given to Mrs. Sewell until after Mr. Sewell had died,<sup>12</sup> if they were ever given to Mrs. Sewell.

The services described as **elder** care services, which totaled \$40,597.00, are outlined in Thomas' invoices, which were not disclosed to Mrs. Sewell until her attorney requested them on April 26, 2005,<sup>13</sup> months after the Thomas paid himself the fee. These services include driving the Sewells to and from the doctors office; driving them to and from the bank, setting up cleaning services at their home, setting up a Medical Alert Service at their home, calling 911 for Mr. Sewell, waiting for the ambulance and driving Mrs. Sewell to the emergency room, assisting Mrs. Sewell with the renewal of her green card, driving Mr. Sewell to the funeral home to make funeral arrangements, repairing the Sewells' garage, and giving them general advice.<sup>14</sup>

An invoice from John E. Settle, Jr., Attorney at Law, indicates that Mr. Settle drafted a new Will, Power of Attorney, and other documents in March and April of 2003.<sup>15</sup> The invoice reads, "Receipt and Review of revisions to Will by Mr. Thomas on April 2, 2003..."<sup>16</sup> It is unclear what changes Mr. Thomas made to the Will. On October 16, 2003, Mrs. Sewell updated her power of attorney and again granted a durable power of attorney to Thomas.<sup>17</sup>

In November 2003, Thomas' wife, Willica Thomas, began performing **elder** care services for the Sewells.<sup>18</sup> Thomas initially billed the Sewells \$20.00 per hour for Willica's services but that amount was later increased to \$30.00 per hour.<sup>19</sup> Thomas billed between \$100.00 and \$150.00 per hour for **elder** care services.<sup>20</sup> Thomas claims the Sewells were aware of his hourly rate because it was stated in the annual engagement letter sent by his firm. However, the annual engagement letter only referenced work completed in preparation of taxes and did not mention the fee charged for **elder** care services.<sup>21</sup>

On July 19, 2004, just prior to Mr. Sewell's death, Thomas took Mrs. Sewell to Hibernia Bank where she opened a checking account ("Special Account") in the name of Irmgard Sewell or Tommy Taylor Thomas.<sup>22</sup> A Hibernia Bank CD owned by the Sewells in the amount of \$7,141.11 and a \$20,000 check from Mrs. Sewell's Merrill Lynch account were deposited into the Special Account.<sup>23</sup> Thomas had signatory authority over the Special Account.<sup>24</sup> On July 26, 2004, five days after Mr. Sewell's death, Thomas used his Power of Attorney to withdraw \$50,000.00 from Mrs. Sewell's Barksdale Credit Union account and deposited that money in the Special Account, over which account Thomas had signatory authority.<sup>25</sup> On August 2, 2004, Thomas used his signatory authority to write a check drawn on the Special Account made payable to Hibernia in the amount of \$40,597.00.<sup>26</sup> Under the instruction of Thomas, Hibernia National Bank issued a cashiers check made payable to Thomas Hunter in the amount of \$40,597.00 and Thomas deposited this check into his firm's account.<sup>27</sup> This was the only check Thomas wrote out of this Special Account.<sup>28</sup> Every other check written out of this account was written and signed by Mrs. Sewell.<sup>29</sup>

Thomas claims this action was authorized by the September 2000 letter which stated that, "Any unbilled services of Thomas, Hunter & Company, LLP are to be billed and paid by your estate."<sup>30</sup> However, this action was contrary to the agreement evidenced by the September 2000 letter signed by Mr. Sewell. The unbilled services of Thomas, Hunter & Company, LLP were not paid by Mr. Sewell's estate. Thomas wrote a check drawn on a joint account in the name of Mrs. Sewell or Thomas that contained funds owned only by Mrs. Sewell.<sup>31</sup> Furthermore, the succession of Mr. Sewell was filed as not having any debts and was not administered.<sup>32</sup> Thomas was fully aware of the succession documents and was given the succession pleadings to edit.<sup>33</sup>

On or before February 2005, Mrs. Sewell began questioning the transaction executed by Thomas on August 2, 2004. On March 15, 2005, Mrs. Sewell revoked the power of attorney she granted to Thomas.<sup>34</sup> Later that year, Mrs. Sewell moved to Germany where she currently resides.<sup>35</sup>

## II PROCEDURAL HISTORY

On or about July 13, 2005, the Board received an official complaint submitted by Richard M. John, Esq. (“Mr. John”) against Thomas.<sup>36</sup> Mrs. Irmgard Sewell (“Mrs. Sewell”) verified the allegations in the complaint.<sup>37</sup> In his letter, Mr. John alleged that Thomas **abused** his power of attorney and violated his fiduciary duty to Mr. and Mrs. Sewell by transferring \$50,000.00 from the Barksdale account to the Hibernia account, where he had signatory authority, and writing his firm a check for \$40,597.00 out of the Hibernia account.<sup>38</sup>

The Board's investigator, Mr. Laborde, sent a letter dated October 7, 2005 to Thomas via certified mail informing him that an investigative file had been opened and asking him for a response to the allegations outlined in the complaint.<sup>39</sup> On November 22, 2005, the Board's office received a letter from Thomas dated November 1, 2005.<sup>40</sup> This letter was in response to the Board's letter of October 7, 2005. Thomas denied any wrongdoing, but provided very little information as it pertained to the allegations. Mr. Laborde reviewed Thomas' letter dated November 1, 2005 and determined that additional information should be requested from Thomas.

On January 20, 2006, Mr. Laborde sent a follow up letter to Thomas requesting additional information regarding the **elderly** services he provided to Mr. and Mrs. Sewell, including a request for Thomas to provide an engagement letter or contract signed by the Sewells.<sup>41</sup> The Board's office received a response from Thomas on February 7, 2006.<sup>42</sup> Thomas stated that Mrs. Sewell was aware of the fees charged for **elderly** services.<sup>43</sup> However, he admitted that there was no engagement letter signed for these services.<sup>44</sup> Instead, he stated that, “we included the fee range in our tax engagement letter to them each year.”<sup>45</sup>

The Board sent a Subpoena Duces Tecum to Thomas on December 7, 2006 directing Thomas to mail or deliver any and all information, documentation, and work papers concerning Mr. and Mrs. Sewell.<sup>46</sup> Thomas responded to the Subpoena Duces Tecum by delivering a file box of documents to the Board's office on December 22, 2006.

The Board held an Administrative Hearing on October 22, 2007 to hear evidence and adjudicate an Administrative Complaint against Thomas.

The specific allegations were as follows:

- a. La. R.S. 37:79(A)(4), dishonesty, fraud, or gross negligence in the performance of services while holding a license;
- b. La. R.S. 37:79(A)(7), performance of any fraudulent act while holding a certificate;
- c. La. R.S. 37:79(A)(8), conduct reflecting adversely upon a licensee's fitness to perform services while a licensee;
- d. La. R.S. 37:79(A)(11), engaging in efforts to deceive or defraud the public;
- e. La. Admin. Code §46:X.1701(B), placing one's own financial interests ahead of the financial interests of a client;
- f. La. Admin. Code §46:XIX.1703(C), failure to comply with applicable professional standards;
- g. La. Admin. Code §46:XIX.1707(A)(2), fiscal dishonesty of any kind; and
- h. La. Admin. Code §46:XIX.1707(A)(11), conduct that brings dishonor, or is detrimental, to the profession.

At the hearing, the Board considered the testimony of Michael Henderson, CPA, (custodian of records), Richard John, Esq. (the complainant), Brenda Isabella (Capital One), Jerry Sewell (Mrs. Sewell's nephew), and Thomas. The Board also considered all 43 of the Board's Exhibits, which were admitted without objection,<sup>47</sup> and Thomas' one Exhibit. Mrs. Sewell was subpoenaed

for the hearing but did not attend the hearing.<sup>48</sup> The Board rendered a final decision on November 29, 2007 finding that Thomas violated the above referenced statutes.

Thomas petitioned the Board for a rehearing which the Board denied on January 31, 2008. Following the Board's denial of the rehearing, Thomas filed a Request for Stay of Enforcement, which the Board granted. Thomas then filed a Petition for Judicial Review with this Court. This matter is currently set for trial on July 21, 2008.

### III. STANDARD OF REVIEW

On appeal, determinations of administrative agencies are given great weight. For factual determinations,

[t]he trial court applies the manifest error standard of review in reviewing the facts as found by the administrative tribunal; the trial court applies the arbitrary and capricious test in reviewing the administrative tribunal's conclusions and its exercise of discretion. *Save Ourselves, Inc. v. Louisiana Environmental Control Comm'n*, 452 So.2d 1152, 1159 (La.1984); *Rochon v. Whitley*, 96-0835, pp. 4-5 (La.App. 1st Cir.2/14/97), 691 So.2d 189, 192.

*Samuels v. Goodwin*, 2005-2131 (La.App. 1 Cir. 11/3/2006), 950 So.2d 736, 738.

For legal decisions

[a] reviewing court should afford considerable weight to an administrative agency's construction and interpretation of its rules and regulations adopted under a statutory scheme that the agency is entrusted to administer, and its construction and interpretation should control unless they are found to be arbitrary, capricious, or manifestly contrary to its rules and regulations. *In The Matter of Recovery I, Inc.*, 93-0441 (La.App. 1st Cir.4/8/94), 635 So.2d 690, 696, writ denied, 94-1232 (La.7/1/94), 639 So.2d 1169.

*Delahoussaye v. Board of Sup'rs of Community and Technical Colleges*, 2004-0515 (La.App. 1 Cir. 3/24/2005), 906 So.2d 646, 649.

### IV. LAW AND ARGUMENT

#### A. Thomas' Due Process Rights Were Protected.

##### 1. The Findings of Fact in the Final Decision were not based on hearsay.

As the Board correctly stated in its denial of Decision and Order on Petition for Rehearing, "the salient facts are not in dispute." The Board did not, as asserted by Thomas, rely solely on hearsay testimony in its ruling against him. In its Final Decision, the Board considered Thomas' testimony and based its decision primarily on Thomas' testimony and the 43 exhibits which were admitted with no objection from Thomas at the hearing.<sup>49</sup> The Board did, however, disagree with Thomas on the consequences of the actions described by him in his testimony and in the exhibits admitted without objection.

In his brief, Thomas relies heavily on *Bourque v. Louisiana State Racing Com 'n*,<sup>50</sup> to support his contention that the State Board violated his due process rights. *Bourque* is inapplicable. *Bourque* stands for the proposition that "administrative findings must be set aside if supported *only* by hearsay evidence."<sup>51</sup> The Final Decision was not based solely on hearsay. As demonstrated in detail below, the Final Decision was based primarily on Thomas' own testimony and a plethora of evidence admitted into evidence with no objection from Thomas.

In his brief, Thomas fails to assert a single sentence in the testimony which constituted hearsay.<sup>52</sup> Thomas' brief also failed to assert which, if any of the factual findings in paragraphs 1 through 11 of the Final Decision were based on hearsay. Each of the material factual findings in paragraphs 1 through 11 of the Final Decision was supported by either the testimony of Mr. Thomas or an exhibit which was admitted without objection. None of the factual findings were based on hearsay.

For instance, paragraphs 1 and 2 of the Final Decision dealt with the State Board's jurisdiction, to wit: Thomas was a licensed CPA and his firm held a valid CPA permit.<sup>53</sup> Paragraph 3 outlined the initial allegations against Thomas. The original complaint, filed by Richard M. John, was entered without objection to show the nature of the allegations.<sup>54</sup> Paragraphs 4 through 10 of the Final Decision explained the steps taken by the investigating officer and her assistant in investigating the complaint made by Mr. John.<sup>55</sup>

Paragraph 11 contained fourteen specific allegations (a through m) which were made in the Administrative Complaint. Paragraph 11(a) asserts that Mr. Thomas began working for the Sewells in the early 1980s. Thomas agreed with this assertion.<sup>56</sup> Paragraph 11(b) asserts that Mr. and Mrs. Thomas were friends with Mr. and Mrs. Sewell. Again, Thomas admitted this fact.<sup>57</sup> Paragraph 11(c) asserts that in 1996, Mr. and Mrs. Sewell named Thomas as executor of their estates.<sup>58</sup>

Paragraph 11(d) asserts that Thomas's firm produced a brochure advertising **Elder** Care Services.<sup>59</sup> Paragraph 11(d) further stated that although Mr. and Mrs. Sewell met with Thomas about those services, they never entered a written **Elder** Care Services Agreement.<sup>60</sup> Exhibit 5 contained the only written engagement letters between the Sewells and Thomas, dealing only with preparation of tax returns.<sup>61</sup>

Paragraph 11(e) asserts that Thomas prepared a letter for the Sewells' signature which provided that "Any unbilled services of Thomas, Hunter & Company, LLC are to be billed and paid by your estate."<sup>62</sup> Paragraph 11(e) further states that the unbilled services were not by Mr. Sewell's estate. Rather, they were paid by a check from Mrs. Sewell's account on which Thomas also had signature authority.<sup>63</sup> Paragraph 11(e) concludes with the assertion that Thomas assisted in completing the succession documents, which failed to list the alleged debt for **Elder** Care Services.<sup>64</sup>

Paragraph 11(f) describes Thomas' billing practices. Beginning in June 2002, Thomas began invoicing the Sewells \$250.00 per month for his services. This amount was later increased to \$300.00 per month. These were the only invoices sent to the Sewells, although additional amounts were shown on itemized invoices retained by Thomas. Mr. and Mrs. Sewell paid the \$250.00 to \$300.00 invoices monthly.<sup>65</sup>

Paragraph 11(g) references an invoice for a new will and power of attorney for Mrs. Sewell, prepared by an attorney named John Settle. The invoice references that Thomas revised the will.<sup>66</sup> Paragraph 11(h) states that the Sewells granted a durable power of attorney to Thomas on October 16, 2003.<sup>67</sup>

Paragraph 11(i) states that in November 2003, Thomas' wife began performing services for the Sewells. The initial rate was \$20.00 per hour, but was later increased to \$30.00 per hour.<sup>68</sup> Paragraph 1(j) asserts that Thomas billed his own time at from \$100.00 per hour to \$50.00 per hour for the **elder** care services.<sup>69</sup> The only engagement letters call for rates for Tax Preparation for \$105 to \$130.00 dollars per hour.<sup>70</sup>

Paragraph 11(k) states that Mr. Sewell died in the summer of 2004.<sup>71</sup> Paragraph 11(l) asserts that shortly after Mr. Sewell's death, Thomas wrote a check drawn on the Hibernia account which was opened in his name and Mrs. Sewell's name. The check

was written to Hibernia National Bank and was converted into a cashie's check made payable to Thomas Hunter, Thomas' CPA firm.<sup>72</sup> Every other check in the account was written and signed by Mrs. Sewell.<sup>73</sup>

Paragraph 11(m) asserts that Mrs. Sewell began questioning the transaction in February, 2005.<sup>74</sup> Paragraph 11(n) asserts that Mrs. Sewell revoked Thomas' power of attorney on March 15, 2005.<sup>75</sup>

Thus, none of the Findings of Fact in the Final Decision was based on hearsay. None of the factual determinations are manifestly erroneous. This Court should not overturn any of those Factual Findings.

## **2. The Conclusions of Law in the Final Decision were not based on hearsay.**

Thomas fails to assert a single Conclusion of Law in the Final Decision which was premised on a hearsay statement. The Conclusions of Law were made in paragraphs 12 through 23 of the Final Decision. Each paragraph corresponds to a charge made in the Administrative Complaint. In paragraphs 13,16,17, and 21, the Board did not sustain the charges against Thomas. The Board did sustain the remaining seven charges. Each of the remaining seven charges is supported by competent evidence.

In paragraph 12, the Board accepted Thomas' testimony that he did not use his power of attorney to write the check for \$40,597.00. Rather, he used his signature authority on Mrs. Sewell's checking account. However, that does not absolve Thomas of the obligation to be honest with his clients. Based on Thomas' testimony, the Board concluded that Thomas was dishonest in his dealings with his client. Based on his testimony, the Board correctly concluded that Thomas failed to fully disclose "the details of the fees and the billings." If nothing else, this charge is supported when Thomas issued invoices for \$250.00 to \$300.00 per month,<sup>76</sup> while failing to disclose to his clients that he was accruing substantial additional expenses.<sup>77</sup> The dishonesty is supported by Thomas' own testimony that he failed to tell the Sewells of the additional amounts due:

Q Did you tell them at any time after September 19,2000, about the accruing unbilled time and the amount of it.

A. No.<sup>78</sup>

Even though he did not use the power of attorney to issue the check, he had an obligation to fully inform his clients of the billing practices. The Board interprets its rules. Its interpretation of La.R.S. § 37:79A(4) should not be overturned unless they are arbitrary and capricious. A board can properly conclude that the failure to inform the clients for a period of over two years is dishonest. This determination should not be overturned.

Despite his protests otherwise, Thomas' testimony demonstrates that he did use his power of attorney to pay the hidden invoices. Thomas had signature authority over the Hibernia account, but he did not have signature authority over the Barksdale Credit Union account. The Hibernia account did not have sufficient funds to pay the \$40,597.00 invoice.<sup>79</sup> Thomas transferred money from the Barksdale account to the Hibernia account.<sup>80</sup> Thus, Thomas used the power of attorney to effect his over payment. Again, the Board had sufficient competent evidence of the fiscal dishonesty within the meaning of La.Admin.Code §46:XIX.1707.A(2) to support the charge in paragraph 14. Its determination should not be overturned because it is not arbitrary and capricious.

In paragraph 15, Thomas admitted that he moved \$50,000.00 from Barksdale to Hibernia.<sup>81</sup> The power of attorney did not authorize self-dealing.<sup>82</sup> In order to use a power of attorney for self-dealing, the power of attorney must specifically authorize the self-dealing.<sup>83</sup> Since the Hibernia account did not have sufficient funds to pay the invoice, the transfer from Barksdale constituted self-dealing. The transfer allowed Thomas to issue the Hibernia check. This type of conduct does reflect adversely on Thomas' fitness to perform services while he is a licensee in violation of La.R.S. § 37:79.A(8). The Board is the agency

charged with interpreting the statute. Therefore, the Board's interpretation of what adversely reflects upon a licensee's fitness should not be overturned unless arbitrary and capricious. The Board's interpretation was not arbitrary and capricious.

Thomas admitted the facts which supported paragraph 18. Thomas did not just write a check to his firm. After Thomas used the power of attorney to transfer the money from Barksdale, Thomas wrote a check made payable to Hibernia (not Thomas or his firm).<sup>84</sup> He then had Hibernia issue a cashier's check to his firm.<sup>85</sup> Thomas received the statements for Mrs. Sewell's Hibernia account.<sup>86</sup> Moreover, any payment, if owed, should have come from Mr. Sewell's estate. The agreement, so often cited by Thomas at the hearing, requires that any amounts owed would be paid by the estate.<sup>87</sup> Even though Thomas reviewed the Sworn Descriptive List for Mr. Sewell's succession, he failed to disclose any debt to the attorney in the succession.<sup>88</sup> Instead of telling the attorney of the debt so that a court could review the alleged debt as part of the succession and in compliance with the agreement, Thomas failed to be honest with the attorney and inform him of the debt and transferred money in violation of his power of attorney. Further, instead of having Mrs. Sewell sign the check like she had done for all other checks in that account,<sup>89</sup> Thomas wrote a check to Hibernia and had it converted to a check for his firm. If he had written the check directly to himself, at least Mrs. Sewell would have known what the check was for, when she finally discovered it. This conduct placed Thomas' financial interest above the interests of his client. The Board's determination that the conduct placed his financial interest above his client's interest was not arbitrary and capricious. There is ample admissible evidence to support this charge.

The Board had sufficient admissible evidence to support the conclusion in paragraph 19. Thomas admitted that he had befriended the Sewells.<sup>90</sup> Due to the friendship, coupled with the hidden invoices,<sup>91</sup> the Board was correct to determine that the Sewells were not given adequate information as to the actual cost of the **Elder** Care Services. Thomas admitted all of the relevant facts for this charge. The hidden invoices demonstrate Thomas' deception. The Board's decision was not arbitrary and capricious.

The Board was not arbitrary or capricious in determining that paying himself \$40,597.00 without sending an invoice was fiscally dishonest within the meaning of La.Admin. Code § XIX.1707.A(2). This is especially true in light of the fact that this was apparently the only time that Thomas used his power of attorney to transfer money from one account to another and this was the only time that he signed a check in the Hibernia account.<sup>92</sup> Finally, making the check out to Hibernia and converting it to a cashie's check shows an attempt to conceal the transaction.<sup>93</sup> All of the evidence supporting this charge was competent evidence. The Board's decision was not arbitrary or capricious with regard to the charge in paragraph 20.

Finally, the Board properly found that the \$150.00 per hour was an exorbitant rate for common household tasks in the charge reflected in paragraph 22. This is especially true in light of two facts: 1. Thomas charged Mr. and Mrs. Sewell \$30.00 per hour for the work that he had his wife perform<sup>94</sup> and 2. Thomas only charged \$105.00 to \$130.00 per hour for the tax preparation work performed for the Sewells.<sup>95</sup> This is especially true in light of the fact that the only written engagement letters contained the \$105.00 to \$130.00 rates.<sup>96</sup> The Board properly found that Thomas' exorbitant rates for common household services, when his firm otherwise charged \$30.00 per hour, brought dishonor or was detrimental to the profession. That determination is neither arbitrary nor capricious.

### **3. Mrs. Sewell's failure to appear does not create a defect in the decision.**

Thomas relies heavily on the fact that Mrs. Sewell did not appear to attempt to overcome this decision. Thomas' argument is inaccurate. First, as shown above, there is ample evidence to support the decision without relying on Mrs. Sewell's testimony. Second, Mrs. Sewell was not the complainant in this matter; Richard M. John, Esq. was the complainant.<sup>97</sup> Third, even if this Court determines, despite the myriad of evidence above, that the Board did consider some hearsay statement of Mrs. Sewell, the Board complied with Thomas' request and issued a subpoena to Mrs. Sewell.<sup>98</sup> Mrs. Sewell moved to Germany since Mr. John filed the complaint.<sup>99</sup> Despite the Board's effort's to have Mrs. Sewell attend, she failed to attend. The confrontation clause

issue raised by the Thomas is not applicable since the Board made reasonable efforts to compel Mrs. Sewell's attendance.<sup>100</sup> In *Driscoll*, the Supreme Court reaffirmed that “[g]enuine unavailability of a witness is the jurisdictional requirement to obviate constitutional confrontation problems.”<sup>101</sup> In *Driscoll*, the Supreme Court ruled that although hearsay may normally be used in administrative hearings, the absence in the record of an attempt to compel the witnesses testimony and the unnecessary delay in processing the proceeding, meant that *Driscoll* was denied his right to cross-examine the witness. The facts here are different. The record does show that the Board attempted to have Mrs. Sewell attend by issuing a subpoena. The record also shows that Mrs. Sewell is in her 90s.<sup>102</sup> Finally, even when Mrs. Sewell initially saw John, she was already in the process of moving back to Germany.<sup>103</sup> The Board made reasonable efforts to have her testify. Therefore, any hearsay testimony of Mrs. Sewell which may have been considered, was competent evidence in an administrative proceeding.<sup>104</sup>

#### **4. The unnamed Hibernia employee is irrelevant.**

Thomas also complains that the bank employee who opened the account was not subpoenaed. The Court should note that even here, Thomas fails to identify the name of the witness that he wants to have been subpoenaed. Thomas also fails to assert that he paid a witness fee for the subpoena of this unnamed Hibernia employee. Without the payment of the witness fee, the Board was not authorized to issue a subpoena.<sup>105</sup> Despite, Thomas' failure to pay the witness fee or to even name the potential witness, the Board attempted to locate the unnamed employee. The person who opened the account was no longer at the bank and could not be located.<sup>106</sup>

However the issue is irrelevant. Thomas stated that Mrs. Sewell and the Hibernia employee were the only two, other than himself, who could state what happened when the account was opened.<sup>107</sup> Thomas testified that Mrs. Sewell voluntarily put Thomas' name on the account and that Mrs. Sewell wanted Thomas to be able to sign on the account.<sup>108</sup> No evidence was presented contradicting Thomas' assertions. The Board did not attempt to introduce any statements of either Mrs. Sewell or the bank employee from the time that the account was opened. The findings of the Board do not contradict Thomas' assertions of what happened at the opening of the account.<sup>109</sup> The issue of whether the former bank employee testified is not relevant. The Board's decision is not premised on what happened when the account was opened. Rather, it is premised on Thomas' conduct after the account was opened. The unnamed Hibernia employee could have added nothing to Thomas' testimony.

#### **5. The Board assessed the proper fine.**

Thomas next asserts that the \$16,000.00 fine should be limited to \$4,000.00. Thomas misreads La.R.S. § 37:79A. The statute allows an administrative fine for each of the violations. The Board found seven violations: paras. 12, 14, 15, 18, 19, 20, and 22. Thomas asserts that each violation carries a \$2,000.00 fine.<sup>110</sup> However, the limit is not a limitation per statute or rule violated. The limitation is for each violation of the statute or rule. Each time Thomas sent a deceptive or misleading invoice (10 times),<sup>111</sup> Thomas had a separate violation. Those invoices alone would carry a maximum of \$20,000.00 of fines, under the law at the time of the hearing. Each of the additional violations: improperly using the power of attorney to transfer funds, issuing the check to Hibernia and having that converted to a check for his firm, failing to inform the Sewells of the rates being charged for the services, billing exorbitant rates for common household errands, failing to send invoices for **elder** care services, and failing to comply with the September 9, 2000<sup>112</sup> letter agreement to have unpaid balances from the estate; the Board could have, arguably, assessed a fine of in excess of \$32,000.00. The Board, in its discretion, limited Thomas's fine to \$16,000.00, based on the allowable fine as of the date of the offenses, rather than the date of the Administrative Complaint and Hearing.

#### **6. The Testimony of Mr. John was not a violation of Due Process.**



Thomas argues that the Board violated Due Process by allowing a party's attorney, Mr. John, to testify at the hearing. In furtherance of this argument, Thomas cites [Rules of Professional Conduct, Rule 1.6](#), which sets forth the attorney-client privilege, and Rule 3.7, which prohibits an attorney from acting as both counsel and a witness at a trial. Thomas does not have standing to raise Mrs. Sewell's attorney-client privilege and, even if he did, it would not be applicable because Mr. John's client, Mrs. Sewell, is not a party to this action.

[La. Code of Evidence Art. 506](#) sets forth the attorney-client privilege, defines what testimony is considered privileged, and who can claim the privilege. [La. Code of Evidence art. 506\(D\)](#) states that:

**D. Who may claim privilege.** The privilege may be claimed by the client, the client's agent or legal representative, or the successor, trustee, or similar representative of a client that is a corporation, partnership, unincorporated association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege on behalf of the client, former client, or deceased client.

Since Thomas is not the client, the client's agent or legal representative, or the successor, trustee, or similar representative of a client that is a corporation, partnership, unincorporated association, or other organization, he does not have standing to claim Mrs. Sewell's attorney-client privilege.<sup>113</sup> In *Bernard*, the court reached the same conclusion analyzing [La. R.S. 13:3734.3](#), which was repealed, but was replaced by [Article 506](#). In *Bernard*, the court reversed the district court, holding that an attorney was allowed to testify against a former client, even in the case for which he was employed.<sup>114</sup> In *Bernard*, the attorney was even to testify against his client. Here, Mr. John's representation of Mrs. Sewell required that he testify.

Even if Thomas could raise Mrs. Sewell's attorney-client privilege, the testimony of Mr. John did not violate the Rules of Professional Conduct. Rule of [Professional Conduct, Rule 1.6](#) states that:

[Rule 1.6](#). Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, **the disclosure is impliedly authorized in order to carry out the representation** or the disclosure is permitted by paragraph (b).

(Emphasis Added)

Mrs. Sewell hired Mr. John to advise her of her rights in recovering the money which Thomas took out of her bank account. In addition, Mrs. Sewell requested Mr. John file a complaint against Thomas with the Board. In fact, Mrs. Sewell verified the complaint submitted by Mr. John.<sup>115</sup> As part of his representation of Mrs. Sewell, Mr. John filed the complaint with the Board. At the hearing, Mr. John testified as to the facts in the complaint, which was related to his representation of Mrs. Sewell. This was not a violation of [Rule 1.6](#) because [Rule 1.6](#) authorizes Mr. John to reveal information relating to the representation of his client in order to carry out the representation. Mr. John's testimony was related to the filing of the complaint. Mrs. Sewell's verification of Mr. John's complaint letter demonstrates that Mr. John was authorized to make the disclosures by Mrs. Sewell.

Thomas further alleges that the testimony of Mr. John violated [Rule 3.7 of the Rules of Professional Conduct](#). [Rule 3.7\(a\)](#) states that, "a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." This Rule does not apply to this situation because Mr. John does not act as an advocate in this action. The parties to this action are Tommy Taylor Thomas, CPA and The State Board of Certified Public Accountants of Louisiana. Mr. Thomas represented himself. Albert J. Derbes, III was retained as complaint counsel pursuant to 46 ADC, PT. XIX, section 1901(B). Mrs. Sewell is not a party to this litigation and her attorney, Mr. John does not represent any party to this litigation. Thus, Mr. John is not precluded from being a fact witness in this case.

In addition, the facts of this case are easily distinguishable from the facts in the case cited by Thomas. Thomas cited *Gutierrez v. Travelers Ins. Co.* which stands for the accurate proposition that one person cannot be both counsel for a party and a witness

at trial of that matter. In *Gutierrez*, the plaintiffs stepson and deceased's child, acted as plaintiffs counsel, while also testifying on plaintiff's behalf as a substantial part of her case. When on the witness stand he was examined by his law partner. The Court correctly remanded the case to the trial court for a new trial and ordered that Plaintiff find new counsel. The *Gutierrez* case is factually different than the case before the Court. Mr. John did not, and could not, ask even a single question to any witness in this matter.

Mr. John was not acting as counsel for any party involved in this litigation. He did represent Mrs. Sewell, but she is not a party to this litigation. In fact, she is not even the complainant in this case. Mr. John is the person who sent the complaint letter to the Board and is the complainant.<sup>116</sup> Mr. Thomas' specious argument would preclude the complainant from testifying.

## V. CONCLUSION

For the foregoing reasons the Board's findings of fact and conclusion of law are not arbitrary, capricious, or manifestly contrary to the rules and regulations. Furthermore, the Board's decision did not violate Due Process. The Board's decision should be affirmed, with all costs taxed to the Thomas.

### Footnotes

- 1 Testimony of Thomas, TR at 108 lines 1-2.
- 2 TR at 88 lines 7-8; Board's Exhibits 19 and 20.
- 3 Board's Exhibit 16 (Significant Time Events) and Exhibit 43.
- 4 Testimony of Thomas, TR at 160 and Board's Exhibit 11 pg 2.
- 5 Testimony of Thomas, TR at 161 and 163-164.
- 6 Board's Exhibit 3
- 7 *Id*
- 8 Testimony of Thomas, TR at 152- 153,168 lines 13-20 and Respondent's Exhibit A.
- 9 *Id.*
- 10 *Id.*
- 11 Testimony of Thomas, TR at 142 lines 15-18,157 - 158, and 164.
- 12 *Id.*
- 13 Board Exhibit 8.
- 14 Board Exhibit 43.
- 15 Board's Exhibit 43, invoice of John E. Settle, Jr.
- 16 *Id.*
- 17 Board's Exhibit 26.
- 18 Testimony of Thomas, TR at 172.
- 19 Testimony of Thomas, TR at 172 and Board's Exhibit 43.
- 20 TR at 155 and 165; Board's Exhibit 43.
- 21 Board's Exhibit 5.
- 22 Testimony of Thomas, TR at 130; Board's Exhibit 16 (Significant Time events) and 27.
- 23 *Id.*
- 24 Board's Exhibit 28.
- 25 Testimony of Thomas, TR at 138; Board's Exhibit 16 (Significant Time Events) and
- 26 TR at 62; Board Exhibit 16 (Significant Time Events) 27.
- 27 TR at 62, Testimonyf Thomas TR at 154-155; Board Ehibit 27.
- 28 Testimony of Thomas, TR at 168-169; Board Exhibit 27.
- 29 *Id.*
- 30 Testimony of Thomas TR at 141-142

31 Board's Exhibit 27  
32 Board's Exhibit 6  
33 *Id.*  
34 Board's Exhibit 33.  
35 TR 11 & 15.  
36 Board's Exhibit 9.  
37 *Id.*  
38 *Id.*  
39 Board's Exhibit 10.  
40 Board's Exhibit 11.  
41 Board's Exhibit 11.  
42 Board's Exhibit 13.  
43 *Id.*  
44 *Id.*  
45 *Id.*  
46 Board's Exhibit 14.  
47 TR at 9 lines 1-18.  
48 TR at 23.  
49 TR at 8-9  
50 92-CA-0049 (La.App. 4 Cir. 12/15/1992), 611 So.2d 742  
51 *Id.* at 743 (emphasis added).  
52 The Board reserves the right to address any specific allegations of hearsay when made.  
53 Board Exhibit 2.  
54 Exhibit 9.  
55 Board Exhibits 10 through 14, which were admitted without objection.  
56 Testimony of Thomas, TR. at 108.  
57 Testimony of Thomas, TR. at 155.  
58 Exhibit 20 contained copies of the Thomas' 1996 will, appointing him as executor, should they die.  
59 Board Exhibit 11, page 2.  
60 Testimony of Thomas. TR at 163-64.  
61 Testimony of Thomas, TR at 161.  
62 Exhibit 3.  
63 Testimony of Thomas, TR at 195; *see also*, Board Exhibit 16.  
64 Testimony of Thomas, TR at 145-46.  
65 TR at 152-53; *see also*, Respondent's Exhibit A.  
66 Exhibit 43.  
67 Exhibit 26; *see also*, TR at 112. The Board noted that only Mrs. Sewel's power of attorney was admitted, but the parties stipulated that one was also executed by Mr. Sewell. TR at 112.  
68 Testimony of Thomas, TR at 172.  
69 Exhibit 43.  
70 Testimony of Thomas, TR at 165; *see also*, Exhibit 5.  
71 Exhibit 29.  
72 Exhibit 27.  
73 Testimony of Thomas, TR at 168-69.  
74 Exhibit 16.  
75 Exhibit 33.  
76 Respondent's Ex. A.  
77 Board Ex. 43.  
78 Testimony of Thomas, TR at 142.

79 Exhibit 27.  
80 Exhibit 16; *see also*, Exhibit 31.  
81 Exhibit 16.  
82 Exhibit 23.  
83 [Rutledge v. Hibernia](#), 2000-CA-0674 (La.App. 4 Cir. 1/16/2002), 808 So.2d 765, 769.  
84 Exhibit 16; *see also*, Exhibit 27  
85 Exhibit 16 (In Exhibit 16, Thomas asserts that it was a money order. It was, in fact a cashier's check. Exhibit 27. The difference between an money order and a cashier's check is not material to this case.)  
86 Testimony of Thomas, TR at 175.  
87 Exhibit 3.  
88 Testimony of Thomas, TR at 145-46.  
89 Testimony of Thomas TR at 168-69  
90 Testimony of Thomas, TR at 155.  
91 Compare Board Exhibit 43 (actual invoices) with Respondent's Exhibit A (monthly invoices presented to the Sewells).  
92 Testimony of Thomas TR at 168-69.  
93 Exhibit 27.  
94 Testimony of Thomas, TR at 172.  
95 Testimony of Thomas, TR at 165; *see also*, Board Exhibit 5.  
96 Testimony of Thomas, TR at 161; *see also*, Board Exhibit 5.  
97 Testimony of John, TR at 10: "It is a letter which was drafted at Mrs. Sewell's behest by me issuing a complaint against Mr. Thomas." *See also*, Exhibit 9; Final Decision at para. 3.  
98 Testimony of John, TR at 22-23.  
99 Testimony of Jerry Sewell at 83.  
100 *See*, [Driscoll v. Stucker](#), 2004-0589 (La. 1/19/2005), 893 So.2d 32, 50.  
101 *Id.* (citation omitted).  
102 Testimony of John, TR at 11.  
103 *Id.*  
104 Thomas' argument is problematic. He argues that if Mrs. Sewell is the complainant and she does not testify, there can be no case. If the victim always had to testify, no one could be prosecuted for murder.  
105 [La.R.S. § 49:956\(5\)\(a\)](#)("No subpoena shall be issued until the party who wishes to subpoena shall be issued until the party who wishes to subpoena the witness first deposits with the agency a sum of money sufficient to pay all fees and expenses to which a witness in a civil case is entitled pursuant to [R.S. 13:3661](#) and [R.S. 13:3671](#)."") The record is void of the payment of the witness fee for the unnamed Hibernia employee. Thomas does not assert that he paid a witness fee and, in fact, he did not pay a witness fee for the unnamed Hibernia employee.  
106 TR at 103-04.  
107 *Id.*  
108 Testimony of Thomas, TR at 130.  
109 *See* Final Decision.  
110 Acts 2006, No. 214, § 1 increased the fine from \$1,000.00 to \$2,000.00. The Administrative Complaint and the Hearing took place after the change, but the actions took place prior to the change.  
111 Respondent's Exhibit A.  
112 Exhibit 3  
113 [La. Code of Evidence Art. 506](#); *see also*, [Bernard v. Lott](#), 92-1855 (La. App.4th Cir. 1992) 610 So.2d 1117.  
114 [Bernard](#) at 1118 ("No attorney or counselor of law shall give evidence of anything that has confided to him by his client, without the consent of the client, but his being employed as counselor or attorney does not disqualify him from being a witness in the cause in which he is employed.")(emphasis omitted).  
115 Board's Exhibit 9; *see also*, TR. at 10-11.  
116 Administrative Complaint at 2; *see also*, Board Exhibit No. 9.