

mitigating factors to his conduct: (1) Chambers is 70 years old and has no prior record or other arrests; (2) he has no prior disciplinary record or prior grievances filed against him with the State Bar; (3) no client or third party suffered any harm as a result of his conduct; (4) Chambers voluntarily entered a drug rehabilitation program under the supervision of the State Bar Committee on Lawyer Impairment; and (5) although maintaining an active membership status, Chambers is retired from the practice of law.

The Special Master recommended to the Review Panel that Chambers' petition be accepted, and that he be suspended from the practice of law for a period of eighteen months and be required to comply with certain conditions. The Review Panel agrees, and recommends that this Court suspend Chambers accordingly.

Upon consideration of the Special Master's recommendation, this Court accepts Chambers' petition for voluntary discipline, and hereby orders that Chambers is suspended from the practice of law in Georgia for a minimum period of eighteen months. The suspension shall remain in effect so long thereafter as Chambers fails to obtain an order from this court lifting the suspension, pursuant to the following procedures: (1) Chambers must seek the services of the Committee on Lawyer Impairment and obtain certification from the Committee that, based on the Committee's observation, Chambers does not manifest symptoms of any condition which would either mentally or physically impair his competency as an attorney or pose a substantial threat to himself or others; (2) Chambers must also obtain certification from the Office of the General Counsel that it has reviewed its disciplinary records maintained since the date of the issuance of this order, and that those records contain no evidence that Chambers has demonstrated any conduct or manifested any symptom of any condition which would indicate that he would pose a danger to his clients or the public by his return to the practice of law; (3) upon obtaining these certifications, Chambers must petition the Review Panel of the State Disciplinary Board to review the record of this proceeding and

the certifications and submit its recommendation to this Court on whether Chambers' suspension should be lifted; and (4) upon consideration of the Review Panel recommendation, this Court will issue an order thereon.

Chambers is reminded of his duties under Bar Rule 4-219(c) to timely notify all clients of his inability to represent them, to take all actions necessary to protect the interest of his clients, and to certify to this Court that he has satisfied the requirements of such rule.

All the Justices concur.



264 Ga. 351

AFLAC, INC.

v.

WILLIAMS.

No. S93G1805.

Supreme Court of Georgia.

June 27, 1994.

Reconsideration Denied July 14, 1994.

Corporation brought action seeking declaration as to enforceability of long-term retainer agreement with attorney. Attorney filed counterclaim for breach of contract. The Muscogee Superior Court, H.W. Lott, Senior Judge, entered summary judgment for corporation, and attorney appealed. The Court of Appeals, 209 Ga.App. 841, 434 S.E.2d 725, affirmed in part and reversed in part. The Supreme Court, Fletcher, J., held that provision in retainer agreement requiring payment of 50% of sums due under remaining term of agreement if client terminated agreement was unenforceable.

Reversed.

1. Attorney and Client ⇨134(1)

Attorney may not recover damages under penalty clause when client exercises legal right to terminate attorney's retainer contract.

2. Attorney and Client ⇨32(3)

Supreme Court has duty to regulate practice of law.

3. Attorney and Client ⇨14

As officer of court, attorney's obligation to courts and public is as significant as obligation to clients.

4. Attorney and Client ⇨105

Relationship between attorney and client is special one of trust that entitles client to attorney's fidelity.

5. Attorney and Client ⇨64

To force all attorney-client agreements into conventional status of commercial contracts ignores special fiduciary relationship created when attorney represents client.

6. Attorney and Client ⇨76(1)

Client's discharge of attorney is not breach of contract of employment, but, rather, exercise of client's absolute right to discharge attorney, which is term of contract implied by public policy based on peculiar relationship between attorney and client.

7. Attorney and Client ⇨134(1)

Provision in retainer agreement between attorney and corporate client requiring payment of 50% of sums due under remaining term of agreement if client terminated agreement was unenforceable; requiring client to pay damages eviscerated client's absolute right to discharge attorney, using economic coercion to deter exercise of that right.

8. Damages ⇨76

For contract provision to be enforceable as liquidated damages, injury must be difficult to estimate accurately, parties must intend to provide damages, rather than penal-

1. The question presented was: "Whether the Court of Appeals opinion with respect to retainer contracts creates any confusion regarding the ethical conduct expected of an attorney toward a client." This opinion deals only with contracts

ty, and sum must be reasonable estimate of probable loss. O.C.G.A. § 13-6-7.

9. Damages ⇨78(1)

Provision in retainer agreement between attorney and corporate client requiring payment of 50% of sums due under remaining term of agreement if client terminated agreement was unenforceable as liquidated damages clause; provision required client to pay unreasonably high sum as damages, required payment without considering attorney's duty to mitigate damages, and obligated client to pay even if attorney was discharged for cause. O.C.G.A. § 13-6-7.

Thomas S. Carlock, Brian R. Neary, Webb, Carlock, Copeland, Semler & Stair, Atlanta, Joseph L. Waldrep, Hatcher, Stubbs, Land, Hollis & Rothschild, Columbus, for AFLAC, Inc.

Ben L. Weinberg, Jr., Emily J. Brantley, Long, Weinberg, Ansley & Wheeler, Atlanta, for Williams.

L. Ray Patterson, Walter R. Phillips, School of Law, University of Georgia, Athens, Jack L. Sammons, Walter F. George School of Law, Mercer University, Macon, Forrest L. Champion, Jr., Champion & Champion, Columbus, for amici curiae.

FLETCHER, Justice.

[1] We granted the writ of certiorari to determine whether a client must pay legal fees to an attorney under a long-term retainer contract after terminating the contract.¹ Reversing the Court of Appeals, we hold that an attorney may not recover damages under a penalty clause when a client exercises the legal right to terminate the attorney's retainer contract.

John Amos, chairman and chief executive officer of AFLAC, Incorporated and Peter Williams, an attorney in private practice, entered into a seven-year agreement in 1987 for Williams to provide legal advice to com-

of attorneys in private practice and does not address the employment relationship between employers and in-house counsel or other full-time employees.

pany officers on an "as needed" basis. Williams was not required to devote 100 percent of his time to the company's business. He was to be paid a monthly retainer and was entitled to additional compensation for work on assigned projects that required an "extraordinary" amount of his time. The contract provided for automatic renewal in 1995 for an additional five years unless terminated. If the company ended the contract, even for good cause, it agreed to pay "as damages an amount equal to 50 percent of the sums due under the remaining terms, plus renewal of this agreement."²

After Amos died in 1990, AFLAC's new CEO terminated Williams' monthly retainer in 1991. AFLAC filed a declaratory judgment action to determine the validity of the contract. Williams filed a counterclaim, seeking more than \$1 million in damages for breach of contract. Declaring the 1987 contract unenforceable, the trial court granted summary judgment to AFLAC in its declaratory judgment action and on Williams' counterclaim. The Court of Appeals reversed in part, holding valid the retainer agreement and Williams' claim for damages under the original term of the contract, but disallowing his claim based on the renewal provision. See *Williams v. AFLAC, Inc.*, 209 Ga.App. 841, 434 S.E.2d 725 (1993).

[2, 3] 1. This court has the duty to regulate the practice of law. *Sams v. Olah*, 225 Ga. 497, 501, 169 S.E.2d 790 (1969), cert. denied, 397 U.S. 914, 90 S.Ct. 916, 25 L.Ed.2d 94 (1970). In exercising this duty, we have sought to assure the public that the practice of law "will be a professional service and not simply a commercial enterprise. The primary distinction is that a profession is a calling which demands adherence to the public interest as the foremost obligation of the practitioner." *First Bank & Trust Co. v. Zagoria*, 250 Ga. 844, 845, 302 S.E.2d 674 (1983). As an officer of the court, the lawyer's obligation to the courts and the public is as significant as the obligation to clients. *Sams*, 225 Ga. at 504, 169 S.E.2d 790.

2. The disputed provision of the contract provides specifically: "This agreement will automatically renew on the same terms and conditions beginning December 31, 1995, for an additional 5 years, unless terminated for just cause at least

[4, 5] The relationship between a lawyer and client is a special one of trust that entitles the client to the attorney's fidelity. See *Ryan v. Thomas*, 261 Ga. 661, 662, 409 S.E.2d 507 (1991); *Freeman v. Bigham*, 65 Ga. 580, 589 (1880). This "unique" relationship is "founded in principle upon the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney." *Demov, Morris, Levin & Shein v. Glantz*, 53 N.Y.2d 553, 556, 428 N.E.2d 387, 389, 444 N.Y.S.2d 55, 57 (1981). To force all attorney-client agreements into the conventional status of commercial contracts ignores the special fiduciary relationship created when an attorney represents a client. *Fox & Associates Co., L.P.A. v. Furdon*, 44 Ohio St.3d 69, 541 N.E.2d 448, 450 (1989).

[6] Because of this fiduciary relationship, "a client has the absolute right to discharge the attorney and terminate the relation at any time, even without cause." *White v. Aiken*, 197 Ga. 29, 32, 28 S.E.2d 263 (1943). A client's discharge of his attorney "is not a breach of the contract of employment but the exercise of his right." *Dorsey v. Edge*, 75 Ga.App. 388, 392, 43 S.E.2d 425 (1947). This right to terminate is a term of the contract implied by public policy because of the peculiar relationship between attorney and client. See *Martin v. Camp*, 219 N.Y. 170, 114 N.E. 46, 48 (1916). A client must be free to end the relationship whenever "he ceases to have absolute confidence in either the integrity or the judgment or the capacity of the attorney." *Fracasse v. Brent*, 6 Cal.3d 784, 494 P.2d 9, 100 Cal.Rptr. 385 (1972) (quoting *Gage v. Atwater*, 136 Cal. 170, 172, 68 P. 581 (1902)).

[7] Our obligation to regulate the legal profession in the public's interest causes us to favor AFLAC's freedom in ending the attorney-client relationship without financial penalty over Williams' right to enforce the

ninety (90) days prior to the expiration of the term, in which the Company will pay you as damages an amount equal to 50 percent of the sums due under the remaining terms, plus renewal of this agreement."

damages provision in his retainer contract.³ Requiring a client to pay damages for terminating its attorney's employment contract eviscerates the client's absolute right to terminate. A client should not be deterred from exercising his or her legal right because of economic coercion. Since the contract improperly imposes a penalty by requiring AFLAC to pay damages equal to half Williams' retainer, we conclude that the provision is unenforceable.⁴

[8] 2. We reach the same conclusion even when evaluating the damages provision under contract law. The Georgia Code provides for liquidated damages when the parties agree what the damages for a breach shall be, "unless the agreement violates some principle of law." OCGA § 13-6-7. In deciding whether a contract provision is enforceable as liquidated damages, three factors must exist. The injury must be difficult to estimate accurately, the parties must intend to provide damages instead of a penalty, and the sum must be a reasonable estimate of the probable loss. *Southeastern Land Fund, Inc. v. Real Estate World, Inc.*, 237 Ga. 227, 230, 227 S.E.2d 340 (1976). "A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty." Restatement (Second) of Contracts § 356(1).

[9] Contrary to the Court of Appeals, we conclude that the contract's damages provision improperly imposes a penalty by forcing AFLAC to pay damages for exercising its legal right to end the attorney-client relationship. The peculiar language of the provision demonstrates that the parties intended to deter AFLAC from discharging Williams and to punish the company if it did. The contract

3. See generally Brickman & Cunningham, *Non-refundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law*, 57 Fordham L.Rev. 149, 156-57 (1988) (arguing that most nonrefundable retainers are unethical and illegal).

4. Because we base this decision on the invalidity of the damages provision, which was not involved in any case cited by the Court of Appeals, we find those cases distinguishable. See *McNulty, George & Hall v. Pruden*, 62 Ga. 135 (1878); *Henson v. American Family Corp.*, 171 Ga.App. 724, 728, 321 S.E.2d 205 (1984).

specifies AFLAC must pay 50 percent of the remaining sums due Williams under both the original seven-year term and the five-year renewal period.⁵ This provision requires AFLAC to pay an unreasonably high sum as damages, requires payment without considering Williams' duty to mitigate his damages, and obligates AFLAC to pay even if Williams is discharged for cause.⁶ Because the damages provision is not a reasonable estimate of Williams' damages and instead is a penalty imposed to punish AFLAC, we find it is unenforceable as a liquidated damages clause.

Judgment reversed.

All the Justices concur.



264 Ga. 355

HENNLY

v.

RICHARDSON et al.

FIRST FEDERAL SAVINGS &
LOAN ASSOCIATION OF
VALDOSTA, INC.

v.

RICHARDSON et al.

Nos. S93G1813, S93G1841.

Supreme Court of Georgia.

June 27, 1994.

Reconsideration Denied July 14, 1994.

Former bank receptionist sued bank vice president for battery, intentional infliction of

5. The critical time for examining the parties' intent is when they entered into the contract in 1987. We disagree with the Court of Appeals that it can disallow the damages for the renewal period based on AFLAC's intent as expressed by its termination of Williams in 1991. Either the damages provision is valid as liquidated damages for the entire term of the contract, including the renewal period, or it is invalid as a penalty.

6. The effect of this provision would be to require a client to pay an attorney terminated for embezzling client funds.