Rel: June 30, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1180875

Fuston, Petway & French, LLP

v.

The Water Works Board of the City of Birmingham

Appeal from Jefferson Circuit Court
(CV-17-900765)

PER CURIAM.

Fuston, Petway & French, LLP ("the Firm"), appeals from a summary judgment entered by the Jefferson Circuit Court ("the trial

court") in favor of The Water Works Board of the City of Birmingham ("the Board") regarding the Board's termination of a contract between the parties.

Facts and Procedural History

In September 2015, the Firm and the Board entered into a one-year contract in which the Firm agreed to provide legal representation for the Board. In 2016, the Firm and the Board entered into negotiations for a new contract. Robert Mims, then the chairman of the Board, approached the Firm regarding the Board's need to have independent oversight and review of a program designed to attract "historically underutilized business entities," such as minority-owned businesses, which the parties refer to as "the HUB program." Several members of the Board were concerned that the HUB program, which was being administered by employees of the Board, was underperforming. One of the members of the Board drafted a memorandum expressing his desire to create a "contract-compliance program" to oversee the HUB program by (1) reviewing and monitoring all Board contracts and non-bid procurements, (2) developing an outreach program to minority-owned businesses to

solicit contracting and subcontracting opportunities, (3) developing a verifiable method of tracking minority-owned-business data for project utilization and timely payment for services from general contractors, (4) developing written guidelines for contract administration, (5) using bidders conferences to discuss utilization of minority-owned businesses, (6) developing a non-bid process that ensures fair administration and rotation of non-bid work. (7) monitoring and ensuring the legitimacy of contractor quotes submitted with bids in terms of the solicitation effect on minority-owned businesses, (8) engaging the banks that the Board does business with to better assist minority-owned businesses, (9) developing classifications that reflect the types of minorities owning businesses involved in the HUB program, and (10) reaching out to community colleges concerning programs that would aid minority-owned businesses. The Board member requested that $2 million from an economic-development fund be used to finance the contract-compliance program.

At its meeting held on November 10, 2016, the Board agreed to transfer "$2,000,000.00 from its Reserve Fund allotted for Economic Development to its Operational Fund relative to a Contract Compliance

Program." The adoption of a contract-compliance program was not presented to the Board or voted on at that time.

On November 22, 2016, the Board met and discussed the contract-compliance program and the proposed new contract with the Firm. The minutes of that meeting reflect the following:

> "[T]he Board was asked to approve an agreement with Fuston, Petway & French, LLP, as set forth in agenda item 6, to provide general legal services for a three-year period effective November 22, 2016, and to authorize the Chairman to accept said agreement. After the motions were made, Director Lewis indicated she was surprised to see the referenced item on today's agenda because she was not involved in any discussions concerning said agreement. She asked who wrote said agreement and Board Attorney French stated he drafted the agreement, pointing out said Firm's previous agreement that was executed in September 2015 for one (1) year has expired. Director Lewis stated her concern is the stipulations that are in the agreement because they do not protect the Board and they take away its control. Following, Director Lewis inquired as to why the referenced agreement was not discussed with her as a Board member. Attorney French replied he emailed said agreement to all Board members yesterday wherein Director Lewis pointed out said attorney's timeline allowed her less than 24 hours to review the agreement and she added it took more than said hours to prepare the referenced agreement wherein some prior discussion had to have taken place. Subsequently, Director Lewis asked the General Manager when he received said agreement, if he had read it, and if due process had been followed. The General Manager indicated he saw the

agreement yesterday afternoon. Following, Director Lewis inquired of the whereabouts of 'Exhibit A' that was referenced in the new agreement and Attorney French stated said Exhibit A was not included and indicated it was included in the previous agreement. After reading a portion of the new agreement that mentioned the exhibit as being a part of the new agreement, Director Lewis asked if someone could provide her with a copy. Following, the General Manager said the referenced exhibit in the previous agreement was a rate schedule that listed hourly rates from $125.00 to $250.00. He said the new hourly rate of $275.00 is listed in item six (6) on page three (3) of Attorney French's proposed new agreement. Following, Director Lewis expressed great concern with the Board relative to increasing the attorneys' fees at this point. She said the Board's previous attorneys were paid an hourly rate of $175.00 to $250.00. She also said under the previous agreement, the Board's current attorneys charged hourly rates based on the following: years of experience: 0 - two (2) years $125.00; two (2) - five (5) years $150.00; five (5) - ten (10) years $200,00; ten (10) - 15 years $225.00; and over 15 years $250.00 per hour wherein each lawyer would now be paid $275.00 under the current agreement. Following, Director Lewis asked how long it took the Board's previous attorneys to get a raise and the General Manager stated hourly rates for said attorneys remained the same from 2001 through 2015.

"Following, Director Lewis said the new agreement indicates the Board's current attorneys want to administer the Contract Compliance Program based on stipulations in said agreement. When she questioned whether the Board had voted to initiate said program, Director Muhammad said the Board had agreed. Director Lewis said she believes the Board voted to move $2,000,000.00 and indicated she does not recall the Board voting to start said program. Following, Director

Muhammad said the Board voted to move the money and to initiate the referenced program. Director McKie said there would be nothing to administer if the Board does not start said program. Director Lewis commented that it is strange such language would be included in the agreement and she again expressed her concern about the verbiage, pointing out according to item 4 on page two (2) of the new agreement, the Board would hand over its power to the attorneys, if it is approved. She then asked why it is not a part of the Board's duties to decide on said program. Director Lewis pointed out that a 'supermajority' of votes would be needed to terminate the new agreement with the Fuston Petway and French law firm and she questioned why the Board would accept an agreement that would be difficult to modify. Director Lewis said the wording is the same as language that was in Russell Management Group, LLC's (RMG) agreement, which the Board later rescinded. Following, Director McKie stated the new agreement would not make it difficult for the Board to make changes or affect how the Board could hire other attorneys to do whatever it could give to its current attorneys. Director Lewis pointed out the previous agreement specified things would be done with the Board's approval wherein such wording is not included in the new agreement. Director Lewis said she had not spoken with Attorney French and noted he does not respond to her emails.

"Subsequently, Director Lewis asked Attorney French why the new agreement indicates his law firm would manage the Contract Compliance Program and Attorney French said he had a conversation with Director Muhammad after the Board voted to approve the budget for said program at the November 10, 2016 Regular Board of Directors' Meeting, relative to his firm administering and helping to oversee the referenced program. Director Lewis asked Attorney French did he not think it would be wise to discuss a $2,000,000.00 project

with all of the Board members wherein Attorney French stated Director Muhammad indicated he had a two-hour telephone conversation with Director Lewis. Following, Director Lewis stated said discussion did not occur wherein Director Muhammad stated Director Lewis called him and Director Lewis indicated she returned Director Muhammad's call. Director Lewis then asked Attorney French if Director Muhammad had indicated she agreed with him and Attorney French said he believes this would be up to the Board to decide on today. Following, Director Muhammad said the aforementioned telephone conversation lasted two (2) hours, but it was not about the Contract Compliance Program. Director Lewis then asked how said program was included in the new agreement. Director Muhammad said he sent an email to all of the directors prior to the Board voting to move the referenced funds for said program and pointed out that he had also talked with the General Manager. He said in his email he requested that the Board consider the attorneys and independent engineer to administer said program because said entities report to the Board. Director Muhammad added he could easily see how this would be included in the new agreement. Following, Director Lewis said she believes the General Manager and the Assistant General Managers would be more knowledgeable about said program wherein Director Muhammad disagreed. Director McKie reminded Director Lewis of the Board's discussion concerning said program at the November 10th Board Meeting and he pointed out none of the $2,000,000.00 would be spent on any programs until the Board votes on it and designates some direction. He also pointed out that Attorney French would not spend said amount wherein Director Lewis stated said attorneys would have the right to say who would be hired. Following, Director McKie said the Board would have to set up the Contract Compliance Program. He said the Board would be made aware of some of the things that take place but it would not know everything that

happens, pointing out this is why said attorneys' firm would administer the above-mentioned program. Following, Director Muhammad said the Board's attorneys would ensure the general contractor is not just including a certain percentage on the form relative to the sub-contractor. Following, Director Lewis said she received an email from the General Manager last night that was also sent to the other directors. She asked the General Manager what said attorneys would do differently handling the Contract Compliance Program since it appears the Board is presently doing everything that the attorneys would do. Director Lewis said she believes the Board would be wasting $2,000,000.00 of ratepayers' money. Further, Director Lewis commented that Director Muhammad was just recently elected to the Board and indicated he places everything on the agenda without taking it through the proper channels. Director Muhammad stated he does this because he has three (3) votes wherein Director Lewis remarked that Director Muhammad discusses Board business outside of regular Board meetings and gets the required votes prior to said meetings. Following, Director Lewis said it is apparent that she is the only Board member who does not know the details relative to such matter and she pointed out Director Munchus is absent from today's meeting and could not voice his opinion. Subsequently, she said the manner in which Director Muhammad got the three (3) votes is questionable.

"Following, a copy of the guidelines for the Historically Underutilized Business (HUB) program was distributed to the directors. Subsequently, the General Manager stated for the record the Historically Underutilized Business (HUB) program was approved and updated in 2015. He said since then senior executive management, the Engineering, System Development, and Purchasing Departments have complied with guidelines established by said program. Following, the

General Manager said the memo that he sent to the directors yesterday indicated staff is complying with all rules in the referenced program with the exception of verifying and certifying the amount contractors are paying to sub-contractors and minority vendors. He stated said program does not require staff to certify the HUB contractors wherein staff relies on about 10 or 12 organizations to verify the minority vendors. Following, the General Manager said staff could easily verify amounts paid to HUB contractors, pointing out he had talked with managers in the above-mentioned departments. He said the general contractors must complete a form certifying they correctly paid the minority vendors after projects are completed. Subsequently, the General Manager said the verification process is simple and involves sending a letter to the minority contractors wherein said contractors would send staff confirmation that they were paid accurately.

"....

"Following, Director Muhammad commented on House Bill 647 which expanded the Board, stating he was firmly opposed to such an expansion. He stated that he is determined to protect assets of the citizens of Birmingham who purchased the Water Works from a private company for $20 million in 1950 and also purchased Inland Lake in 1939. Director Muhammad said in 1950 the people of Birmingham had a $20 million bond to purchase the Water Works from a private company which was not set up by the legislature. Director Muhammad said when the Mayor Council Act was passed, it gave some of the appointing powers of the council to the mayor, pointing out politically, it appears there is an attempt to take over the majority of the Board from the city council and the citizens of Birmingham. Following, Director Muhammad said the Water Works assets must be protected wherein the

Board has to make some moves in case said rumor of an attempt to refigure the current Board is realized. Following, Director Lewis asked Director Muhammad what does he believe giving the new agreement to Attorney French and his firm would protect the Board from. Following, Director Muhammad said he believes the Board has extenuating political circumstances such as legal cases that are happening wherein Director Lewis asked him if the Board is relinquishing power to its attorneys for this reason. Director Muhammad said he thinks handing over power to the attorneys would stabilize the Board's situation wherein Director Lewis asked him how this would be possible since the directors are the Board. Director Muhammad explained he believes this would steady the Board's position because if the overthrow takes place, politically the mayor would have two (2) appointees and there would be three (3) outside appointees. Following, Director Lewis said she thinks the directors are intelligent [sic] to make the right decisions, she asked what would cause the Board to set a precedent to give its power to an attorney out of some fear it has instead of working through a process. Director Lewis said during her years on the Board, she has never witnessed the manner in which decisions are being made lately, pointing out she realizes changes happen and indicated she never thought she would see board members turning their power over to an attorney. Subsequently, Director Lewis pointed out the previous attorneys did not control the Board.

"Following, a discussion ensued relative to the process in reviewing consultants agreements and the former attorneys' agreement with the Board. Director Muhammad asked the General Manager if the Board's legal fees for the previous attorneys were overbudgeted and if the Board is spending more in said fees for its current attorneys. The General Manager replied legal lees for 2015 totaled $1,250,000.00 and pointed out approximately $1.6 million

> would be spent in 2016. Director Muhammad asked if the Board is paying Fuston Petway & French more than it was paying Waldrep Stewart & Kendrick and the General Manager responded no. He added that the cost for the four (4) or five (5) additional attorneys the Board hired this year would put the total in excess of the amount that was paid to the Board's former attorneys. The General Manager stated legal fees are overspent for 2016, pointing out the budget for said fees was increased to $1.6 million because of the expected excess. Following, Director Muhammad said the Board hired additional attorneys to work on two (2) separate cases wherein the Board is paying the current attorneys less than it paid the previous attorneys. Subsequently, the General Manager said the Board's legal fees for 2016 are over budget. In response to Director Lewis's inquiry as to whether they anticipate hiring another attorney, Director Muhammad said he is not aware of such. Director McKie asked if the issues the Board spent the extra legal fees on in 2016 were not present in 2015 such as the bond circumstances and the hearing last week. The General Manager replied no because legal fees for bond issues are taken from bond issuance monies, pointing out said issues were not charged to the budget."

Subsequently, the issue whether to approve the proposed new contract with the Firm was called for a vote. The minutes reflect that the contract was approved, with three Board members voting in favor of the contract and one Board member opposing the contract. The contract between the Firm and the Board provided, in pertinent part, as follows:

> "1. Subject to the terms and conditions contained herein, [the Firm] shall provide the Board with professional legal

services and administer the [Board's] Contract Compliance Program from time to time upon request by the Board.

"2. With approval of the Board, [the Firm] shall be authorized to engage the services of agents, associates, independent contractors, or assistants that [the Firm] deems proper as well as employ, engage, or retain the services of such persons or corporations to aid or assist [the Firm] in the proper performance of its duties and obligations under this agreement.

"3. [The Firm] shall perform the professional legal services under this Agreement at the level customary for competent and prudent attorneys performing such services at the time and place where the services are provided and in accordance with the Alabama Rules of Professional Conduct. Said legal services will be provided by licensed attorneys and other professionals and individuals skilled in other technical disciplines, as appropriate.

"4. [The Firm] shall administer the Contract Compliance Program. The Contract Compliance Program services will be performed by such persons, corporations, or other entity as designated by [the Firm].

"5. This Agreement is not a contract of employment. No relationship of employer and employee exists between [the Firm] and the Board, or between the Board and any agent or employee of [the Firm]. [The Firm] shall at all times be deemed an independent contractor. The Board shall not be liable for any acts of [the Firm or] its agents or employees.

"6. Unless otherwise agreed to by the Parties, [the Firm] shall be compensated for services performed pursuant to this Agreement on the basis of time spent and expenses incurred.

> The hourly rate charged by [the Firm] shall be $275.00, in addition to all reasonable expenses.
>
> "7. Terms of the Agreement:
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> "(a) The term of this Agreement shall be for a period of three (3) years, commencing on the date first written above and shall continue thereafter for additional periods of one (1) year;
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> "(b) [The Firm] shall have the right at any time to terminate this Agreement by giving at least a ninety (90) day advance written notice to the Board that it does not desire to continue with this Agreement;
>
> "(c) The Board shall have the right at any time to terminate this Agreement:
>
> "(i) by vote of more than a supermajority of the total members of the board of directors (i.e., if a five (5) member board, by at least four (4) board members and if a nine (9) member board, by at least seven (7) board members;[1] and

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[1]According to the Firm, at the time the Board approved the contract, the Board was composed of five members; however, the Board, through state legislation, was increased by the appointment of four additional members -- making the Board a nine-member board as of January 2017. Because the Board was engaged in litigation fighting against the appointment of four additional Board members at the time the contract was approved, this specific provision of the contract was written to reflect

> "(ii) by giving at least ninety (90) days prior written notice to [the Firm] that more than a supermajority of the Board does not desire to continue with the Agreement. In the event that this Agreement is terminated, the Board agrees to pay [the Firm] for all services rendered and expenses incurred through and including the date of termination."

In January 2017, the membership of the Board was increased to nine members. See note 1, supra.

On January 27, 2017, the Firm sent the Alabama State Bar a letter asking (1) whether the provision in the termination clause of the contract requiring that a supermajority of the Board must vote to terminate the contract violated the Alabama Rules of Professional Conduct and (2) whether the provision in the terminate clause of the contract requiring the Board to provide the Firm with 90-days' prior written notice of intent to terminate the contract violated the Alabama Rules of Professional

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what would constitute a supermajority of both a five-member board or a nine-member board.

Conduct. The Firm noted that the Board's contract with its general manager also contained a supermajority provision.

On February 3, 2017, the Alabama State Bar responded:

> "I am writing in response to your letter of January 27, 2017, in which you requested an ethics opinion from this office. A copy of your letter is attached hereto for reference purposes. I am providing you the following which is an informal opinion of the Office of General Counsel and is not binding on the Disciplinary Commission of the Alabama State Bar.
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> "As I understand, your law firm currently represents the Birmingham Water Works Board ('BWWB'). Under the terms of the firm's contract with the BWWB, prior to terminating the firm's services, the BWWB must give your firm ninety (90) days written notice that more than a supermajority of the Board wish to cancel the firm's representation of the Board. According to your letter, the ninety (90) day provision was added at the request of the Chairman of the Board to ensure a smooth transition should your firm be terminated and new counsel retained by BWWB. In addition, the supermajority provision necessary to terminate your firm's representation is consistent with prior contracts entered into by the BWWB. You seek an ethics opinion from this office that these provisions are permissible under the Alabama Rules of Professional Conduct.
>
> "In providing you an opinion, please note the Comment to Rule 1.16, Ala. R. Prof. C., notes that a client has the right to discharge a lawyer at any time, with or without cause. Similarly, the Comment to § 32 of the Restatement of the Law Governing Lawyers, Third Edition, provides '[a] client may

> always discharge a lawyer regardless of the cause and regardless of any agreement between them.'
>
> "With this principal in mind, it is the opinion of this office that the ninety (90) day termination provision is likely unenforceable under Rule 1.16, Ala. R. Prof. C. In other words, if the BWWB elected to terminate your firm's representation, without providing the contracted for ninety (90) day notice, your firm would be required to immediately move to withdraw from representation of the BWWB in all pending matters. This opinion is not meant to suggest that the BWWB could not voluntarily abide by the ninety (90) day notice. However, if the BWWB chose to ignore the provision and requested the immediate termination of the representation, your firm would need to comply.
>
> "The other provision requires a super majority of the BWWB to terminate your firm's representation. This provision is permissible assuming that the Board ratified the contract and the provision. By ratifying the contract, the BWWB has presumably agreed to place the super majority restriction on its own ability to terminate counsel. I cannot speculate as to the reason for the decision, but the decision was their own to make. As such, the provision would not violate the Alabama Rules of Professional Conduct."

On February 9, 2017, at a Board meeting at which seven of the nine Board members were present, the Board voted to terminate the contract between the Firm and the Board. According to the minutes from that

meeting, the Board members voted five to two in favor of terminating the contract.[2]

On February 24, 2017, the Firm sued the Board, asserting claims of breach of contract and breach of the covenant of good faith and fair dealing. On April 10, 2017, the Board filed a motion to dismiss the claims against it, arguing that a client has the right to terminate an attorney-client relationship at any time. The Board argued that the Firm's efforts to be paid for services that it had not yet performed violated Alabama caselaw holding that attorneys can be compensated only for work they have actually performed before discharge. The Board further argued that, as a matter of public policy, in cases involving attorney contracts with

[2]In its brief to this Court, the Firm asserts that Board member Brenda Dickerson voted against the termination of the contract. In support, it argues that Dickerson sent an e-mail to the Board's general manager on February 10, 2017, stating that the record incorrectly reflected her vote as a "yes" when she voted "no" to terminating the contract. Dickerson included a link to an article on al.com, a news web site, that the Firm contends was written by an attendee of the meeting and shows that she voted "no." The Board asserts that Dickerson was silent during the vote and that, according to Section 13 of the Board's bylaws, her vote was, thus, recorded as a "yes."

governmental entities such as a water-works board, a board cannot bind a successor board to an attorney contract.

On June 19, 2017, the trial court granted the Board's motion in part, dismissing the Firm's claim of breach of the covenant of good faith and fair dealing because, the court noted, that claim is recognized only with respect to the breach of insurance contracts. The trial court specifically found that the contract between the Firm and the Board was for professional legal services and for the administration of the contract-compliance program and that, as a result, the Firm "may possibly prevail" on its breach-of-contract claim insofar as it applied to the administration of the contract-compliance program or insofar as the Firm was not paid for any services rendered before the contract was terminated. Accordingly, the trial court denied the motion insofar as it sought the dismissal of the breach-of-contract claim.

On June 29, 2018, the Board filed a summary-judgment motion. In its motion, the Board argued that it had never approved or adopted a contract-compliance program. Therefore, the Board asserted, the Firm could not maintain a breach-of-contract claim relating to a nonexistent

contract-compliance program. The Board also argued that the Firm could not maintain a breach-of-contract claim for unpaid services because, the Board asserted, the Firm had submitted all of its invoices to the Board for payment and those invoices had been paid. The Board further argued that any services provided by the Firm with regard to the contract-compliance program were part of the general legal services provided by the Firm, which could be terminated at any time, and that the firm could not prove any damages because it had been paid in full for all services rendered. The Board also argued that the contract was void on public-policy grounds public policy because it bound successor boards to the agreement with an attorney that they did not choose and because it required a vote of a supermajority of the Board to terminate the contract. The Board attached numerous evidentiary exhibits to its motion, including minutes from Board meetings, internal e-mails, and invoices submitted by the Firm.

On August 24, 2018, the Firm filed a response in opposition to the Board's summary-judgment motion in which it argued that there were genuine issues of material fact as to (1) whether the administration of the

contract-compliance program was a nonlegal service, (2) whether the Board had formally approved or adopted the contract-compliance program, (3) whether public policy invalidated the supermajority provision in the contract, and (4) whether the firm had demonstrated its damages.[3] The Firm supported its response with evidentiary exhibits.

The Board filed a reply to the Firm's response in opposition to its summary-judgment motion, in which it reiterated the arguments in its summary-judgment motion.

On June 25, 2019, the trial court entered a summary judgment in favor of the Board. In its judgment, the trial court found, among other things, that the entirety of the Firm's obligations in the contract entailed legal services and that, as a result, the contract was terminable by the Board at any time. The trial court stated:

> "The Court has reviewed the contract and finds that it is not ambiguous. A review of the contract as a whole, shows that the entirety of the contract was for legal services. There is no

[3]The Firm initially responded to the Board's summary-judgment motion by invoking to Rule 56(f), Ala. R. Civ. P., and stating that it needed to conduct additional discovery. The Board responded that the Firm had failed to show what would be learned from further discovery.

indication in the contract that contract compliance administration is not one of the legal services to be performed by the [Firm]. The contract does not say one word about 'non-legal' services. There is no distinction made between legal or non-legal services in the contract and there is no statement that the contract compliance services are not meant to be legal services nor does the contract set out what contract compliance administration would entail. Also, the contract only contains one hourly rate of $275.00. Because the contract was for legal services, the [Board] had the right to terminate it at any time for any reason. Gaines, Gaines & Gaines, P.C. v. Hare, Wynn, Newell & Newton, 554 So. 2d 445 (Ala. 1989).

"Even assuming the contract was not one for legal services and therefore terminable at will by the [Board], based on the terms of the contract, the [Firm] cannot establish the fourth element for a breach of contract claim, i.e., damages, and therefore cannot prevail as a matter of law. By the plain terms of the contract, the [Firm] could not be compensated other than for services it actually performed and on the basis of time it spent on such services and expenses incurred. The [Firm] was paid for all services rendered at its hourly rate for the services set out in the contract. The contract stated that the services would be provided 'from time to time upon request' by the [Board]. The [Firm] had no guarantee that it would ever be requested to perform work under the contract, if the [Firm] was not requested to perform services then it would not be entitled to any compensation. The [Firm] has not presented any evidence that it was requested to or performed any services of any type beyond the work set out in its invoices and for which it has been paid.

"Notwithstanding the provisions of the plain terms of the contract, the [Firm] argues that it is entitled to recover lost profits. However, profits that are speculative, conjectural or

> remote are not recoverable damages. Deng v. Scroggins, 169 So. 3d 1015 (Ala. 2014); Taylor v. Shoemaker, 38 So. 2d 895 (Ala. Civ. 1948). Given that the [Firm] was not guaranteed any future work and given that the [Firm] was only entitled to compensation for work actually performed, then any claim for lost profit would be mere speculation and therefore not due to be recovered."

On July 29, 2019, the Firm timely filed a notice of appeal to this Court.

Standard of Review

The standard of review applicable to a summary judgment is the same as the standard the trial court applied when granting the summary-judgment motion. McClendon v. Mountain Top Indoor Flea Mkt., Inc., 601 So. 2d 957, 958 (Ala. 1992). That is, we must determine whether there was a genuine issue of material fact and, if not, whether the moving party is entitled to a judgment as a matter of law. Id. at 958.

> "When the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to present substantial evidence creating such an issue. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala.1989). Evidence is 'substantial' if it is of 'such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala.1989)."

Ex parte General Motors Corp., 769 So. 2d 903, 906 (Ala. 1999).

Discussion

The Firm argues that there is a genuine dispute as to whether a supermajority provision, like the one in the contract at issue in this case, violates public policy and that genuine issues of material fact exist as to whether the Board violated the supermajority provision by terminating the contract with the Firm without a supermajority of the Board voting in favor of the termination. Second, the Firm says, there is a genuine issue of material fact as to whether the administration of the contract-compliance program was a legal or nonlegal service. Last, the Firm argues that there is conflicting evidence, i.e., a genuine issue of material fact, regarding the appropriate measure of damages it is entitled to on the breach-of-contract claim insofar as that claim relates to the administration of the contract-compliance program.

At the outset, we note that " '[t]he attorney-client relationship is similar to the doctor-patient relationship in that it is a "close, personal relationship built upon trust and confidence." ' " Ex parte Dunaway, 198 So. 3d 567, 586 (Ala. 2014)(quoting Boykin v. Keebler, 648 So. 2d 550, 552 (Ala. 1994)).

In Gaines, Gaines & Gaines, P.C. v. Hare, Wynn, Newell & Newton, 554 So. 2d 445 (Ala. Civ. App. 1989), the Court of Civil Appeals held that a client may discharge an attorney with or without cause and that, in certain circumstances, the discharged attorney may recover compensation for services performed before the discharge. 554 So. 2d 447-48.

In Garmon v. Robertson, 601 So. 2d 987, 989 (Ala. 1992), this Court quoted Gaines with approval, explaining:

> "The Court of Civil Appeals has correctly stated:
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> > " 'It is well recognized that the employment of an attorney by a client is revocable by the client with or without cause, and that such discharge ordinarily does not constitute a breach of contract even with a contract of employment which provides for the payment of a contingent fee. There are, of course, well recognized procedures where a discharged attorney may recover compensation for the services rendered to that client before the discharge.'
>
> "Gaines, Gaines & Gaines, P.C. v. Hare, Wynn, Newell & Newton, 554 So. 2d 445, 447 (Ala. Civ. App. 1989)."

In Cheriogotis v. White (In re Cheriogotis), 188 B.R. 996, 1000 n.4 (Bankr. M.D. Ala. 1994), the United States Bankruptcy Court for the Middle District of Alabama observed:

> "The existence of an attorney-client relationship gives rise to special duties and responsibilities. 'A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.' Ala. Rules of Prof. Conduct (1994), preamble. A lawyer serves as a legal advisor, but his role is not merely limited to the law. There is a fiduciary duty with regards to the client's financial and other interests. A lawyer acts as an advocate, a negotiator, an intermediary, and an evaluator. These disparate duties have been codified in the code of professional conduct in each of several states. Eg. Ala. Rules of Prof. Conduct (1994). ...
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> "Moreover, the attorney-client relationship is a very personal relationship. It must be based on some established and known arrangement between the counselor and the counseled. Attorneys are not fungible goods that may be traded one for another like pre-adolescent boys trading baseball cards of their sports heroes. A lawyer, absent consent of the client, has no right to assign the representation of a client to another member of the bar. See Ala. Rules of Prof. Conduct (1994), Rule 1.5(e)(2).
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> "We need hardly add that an attorney's power to represent a client may be limited and a lawyer is dischargeable by the client as a matter of right and without cause or justification. Doggett v. Deauville Corp., 148 F.2d 881 (5th Cir. (Ala.) 1945); Gaines, Gaines, & Gaines, P.C. v. Hare,

> Wynn, Newell, & Newton, 554 So. 2d 445 (Ala. Civ. App. 1989)."

See also Alabama State Bar Ethics Opinion RO-93-21 (discussing fee agreements and noting that "non-refundable fee language is objectionable because it may chill a client from exercising his or her right to discharge his or her lawyer and, thus, force the client to proceed with a lawyer that the client no longer has confidence in"); Alabama State Bar Ethics Opinion RO-92-17 (discussing Gaines and stating: "[T]he client has the absolute right to terminate the services of his or her lawyer, with or without cause, and to retain another lawyer of their choice. This right would be substantially limited if the client was required to pay the full amount of the agreed on fee without the services being performed."); and 7A C.J.S. Attorney & Client § 326 (2015) ("The right of a client to terminate his or her relationship with a lawyer is necessarily implied in the attorney-client relationship, and the right is absolute.").

Rule 1.16(a), Ala. R. Prof. Cond., provides, in part:

> "(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client, if:

"....

"(3) The lawyer is discharged."

The Comment to Rule 1.16 provides, in part: "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances." That is, a client has the unqualified right to hire and fire attorneys at will with no obligation at all except to pay for completed services.

In this case, the question is whether requiring a supermajority of the Board to vote in favor of terminating the contract conflicts with a client's right to discharge a lawyer at any time, with or without cause. The minutes from the Board's November 22, 2016, meeting indicate that the supermajority provision in the contract with the Firm was based on a similar provision in a contract that the Board had with an engineering firm. The Firm's letter to the Alabama State Bar indicates that the Board's contract with its general manager also contained a supermajority

provision. An attorney-client relationship is different from a client's relationship with other professions or a client's employees.

> "This Court has the inherent authority to admit lawyers to the practice of law, to approve or disapprove any rule governing lawyers' conduct, to inquire into matters of any disciplinary proceeding, and to take any action it sees fit in disciplinary matters. Board of Comm'rs of the Alabama State Bar v. State ex rel. Baxley, 295 Ala. 100, 324 So. 2d 256 (1975); Simpson v. Alabama State Bar, 294 Ala. 52, 311 So. 2d 307 (1975)."

Ex parte Case, 925 So. 2d 956, 962-63 (Ala. 2005).

> "The relationship of attorney and client is one of the most sacred relationships known to the law and places upon the attorney a position likened to a fiduciary calling for the highest trust and confidence, so that in all his relations and dealings with his client, it is his duty to exercise the utmost honesty, good faith, fairness, integrity and fidelity, and he may not at any time use against his former client knowledge or information acquired by virtue of the previous relationship. This rule is universal and hoary with age."

Hannon v. State, 48 Ala. App. 613, 618, 266 So. 2d 825, 829 (Crim. App. 1972).

The Supreme Court of Colorado addressed a city's termination of a law firm's services. In Olsen & Brown v. City of Englewood, 889 P.2d 673 (Colo. 1995), the city retained a law firm to represent it in tort litigation

on a noncontingent-fee basis.[4] The litigation required the law firm to devote substantially all of its time to the case and to forgo other employment. The city terminated the attorney-client relationship without cause. The law firm sued the city for damages, alleging breach of contract. The Colorado Supreme Court held that the law firm was entitled to recover the reasonable value of the services it had rendered before discharge, stating:

> "The relationship between an attorney and client is a distinct fiduciary affiliation which arises as a matter of law. Bailey v. Allstate Ins. Co., 844 P.2d 1336, 1339 (Colo. App. 1992). The foundation of this relationship is grounded upon a special trust and confidence, Enyart v. Orr, 78 Colo. 6, 15, 238 P. 29, 34 (Colo. 1925), and requires that a client have the utmost faith in chosen counsel.
>
> "To this end, attorneys are governed by and must adhere to specific rules of conduct which this court has the exclusive jurisdiction to oversee. Colorado Supreme Court Grievance Committee v. District Court, 850 P.2d 150, 152 (Colo. 1993). Thus, the attorney-client relationship may initially be distinguished from other business relationships by virtue of these specific rules and the uniqueness of the governing body

[4]The Colorado Supreme Court noted that its opinion addressed only the issue of terminating the services of attorneys in private practice and that it did not express any views on the applicability of its holding in that case to attorneys who are employees, including in-house counsel.

under which attorney conduct is regulated. See Rhode, Titchenal, Baumann & Scripter v. Shattuck, 44 Colo. App. 449, 619 P.2d 507, 508 (1980) (distinguishing attorney-client relationship from accountant-client relationship on this basis).

"These rules are not designed to alter civil liability nor do they serve as a basis for such liability. Code of Professional Responsibility, Preliminary Statement; Colorado Rules of Professional Conduct, Preamble, Scope and Terminology. See also Bryant v. Hand, 158 Colo. 56, 404 P.2d 521 (Colo. 1965).

"Rather, such rules are in place to provide guidance in the attorney-client relationship and to serve as a mechanism of internal professional discipline. Code of Professional Responsibility, Preliminary Statement; Colorado Rules of Professional Conduct, Preamble, Scope and Terminology.

"Although not controlling of the issue before us, we must be mindful of these rules and the influence they necessarily have in situations involving the attorney-client relationship.

"....

"[Rule of Professional Conduct] 1.16 requires an attorney's withdrawal from representation upon discharge by the client. The Comment to this rule states, in pertinent part: '[a] client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.'

"In order to assure no compulsion to retain an attorney where trust between attorney and client has been broken, and to further guarantee a client may always be confident with such representation, a client must, and does, have the right to discharge the attorney at any time and for whatever reason.

> See Thompson v. McCormick, 138 Colo. 434, 440, 335 P.2d 265, 269 (Colo. 1959). An attorney may not rely upon an indefinite continuation of employment but instead, enters an attorney-client relationship with knowledge that the relationship may be terminated at any time and for any reason.
>
> "The unique relationship between attorney and client prevents the agreement between them from being considered as an ordinary contract because doing so would ignore the special fiduciary relationship. AFLAC [Inc. v. Williams, [264 Ga. 351, 353], 444 S.E.2d [314] at 316 [(1994)](citing Fox & Associates Co., L.P.A. v. Purdon, 44 Ohio St. 3d 69, 541 N.E.2d 448, 450 (1989)).
>
> "The right to terminate the attorney-client relationship 'is a term of the contract implied by public policy because of the peculiar relationship between attorney and client.' AFLAC, [264 Ga at 353,] 444 S.E.2d at 316 (citing Martin v. Camp, 219 N.Y. 170, 114 N.E. 46, 48 (1916)). A client's discharge of chosen counsel is not a breach of contract but merely an exercise of this inherent right. AFLAC, [264 Ga at 353,] 444 S.E.2d at 316 (citing Dorsey v. Edge, 75 Ga. App. 388, 43 S.E.2d 425, 428 (1947))."

Olsen & Brown, 889 P.2d at 675-676 (emphasis added; footnote omitted).

In AFLAC, Inc. v. Williams, 264 Ga. 351, 444 S.E.2d 314 (1994), the Georgia Supreme Court determined that to afford all attorney-client agreements the conventional status of commercial contracts ignores the special fiduciary relationship created when an attorney represents a

client. In Williams, an insurance company entered in to a seven-year contract with an attorney to provide legal advice to company officers on an " 'as needed' basis." 264 Ga. at 352, 444 S.E.2d at 316. The attorney was paid a monthly retainer plus additional compensation for special projects. The contract provided for an automatic renewal for an additional five years unless terminated. If the company terminated 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 the agreement.' " 264 Ga. at 352, 444 S.E.2d at 316.

The chief executive officer of the company died, and the new chief executive officer stopped paying the attorney's monthly retainer. The company also commenced a declaratory-judgment action to determine the validity of the contract. The attorney filed a counterclaim, seeking more than $1 million in damages for breach of contract. The trial court declared the contract unenforceable and entered a summary judgment for the company on its declaratory-judgment claim and on the attorney's counterclaim. The lower appellate court reversed in part, holding that the provision providing for a monthly retainer was valid and, thus, that the

attorney had a valid claim for damages based on the company's breach of that provision but determining that summary judgment was appropriate as to the attorney's claim based on the renewal provision.

The Georgia Supreme Court held that a client's discharge of chosen counsel is not a breach of contract, but merely an exercise of the client's inherent right to terminate the attorney-client relationship.[5] The court stated:

> "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.
>
> "The relationship between a lawyer and client is a special one of trust that entitles the client to the attorney's fidelity.

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[5]The Georgia Supreme Court noted that its opinion dealt only with contracts involving attorneys in private practice and did not address the employment relationship between employers and in-house counsel or other full-time employees.

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. Purdon, 44 Ohio St. 3d 69, 541 N.E.2d 448, 450 (1989).

"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)).

"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 damages provision in his retainer contract. 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.
>
> "....
>
> "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 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. 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. 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."

Williams, 264 Ga. at 352-54, 444 S.E.2d at 316-17 (emphasis added; footnotes omitted).

Similar to the restrictions on the attorney-client relationship in Olsen & Brown and Williams, the supermajority provision in this case impedes a client's right to discharge an attorney with or without cause.

The relationship between the attorney and his or her client must be based on the utmost trust and confidence, and such trust and confidence is undermined by restrictions penalizing or impeding the client's right to terminate the relationship. As the United States Bankruptcy Court for the Middle District of Alabama recognized in Cheriogotis, supra, the attorney-client relationship is very personal and not "fungible goods that may be traded one for another." 188 B.R. at 1000 n.4. Applying general contract law to contracts governing the attorney-client relationship, especially with regard to the termination of the attorney-client relationship, ignores the unique relationship between an attorney and client. We recognize that the Board is an entity composed of members who act on behalf of the public by voting in order to conduct the business of the Board. However, the supermajority provision circumvents established Alabama public policy allowing a client to terminate the attorney-client relationship at any time, with or without cause. We also note that the minutes from the November 10, 2016, Board meeting indicate that the supermajority provision was added to protect the preference of a majority of the existing five-member Board with regard to

the attorney-client relationship, knowing that the Board might soon be increased to nine members, which it was.[6]

In addition to conflicting with the Board's right to terminate its attorney-client relationship with the Firm, the supermajority provision also conflicts with caselaw preventing a board from binding a successor board. The question presented in Willett & Willett v. Calhoun County, 217 Ala. 687, 117 So. 311 (1928), was whether a county board of revenue had authority to make a contract with the attorney for the board to extend they attorney's term of employment beyond the term of the board as it existed at the time of the execution of the contract. The Court answered that question in the negative, holding that doing so was contrary to public policy and injurious to the interest of the public because the effect would be "tying the hands of the succeeding board and depriving the latter of their proper powers." 217 Ala. 688, 117 So. at 311. The succeeding board, as constituted, the Court held, should at all times be free to select its own confidential legal adviser.

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[6]No such supermajority provision was in place when a majority of the Board terminated its previous legal counsel and hired the Firm.

In Galbreath v. Hale County Commission, 754 F. App'x 820 (11th Cir. 2018)(not selected for publication in Federal Reporter), the United States Court of Appeals for the Eleventh Circuit addressed an employment contract between a county and the county administrator that prevented the majority of the county commission from discharging the county administrator. The court distinguished Willett, supra, concluding that because the role of county administrator is largely administrative in nature, the reasoning of Willett -- that a succeeding board should at all times be free to select its own confidential legal advisor -- was not implicated.

The Rhode Island Supreme Court addressed a similar question in Parent v. Woonsocket Housing Authority, 87 R.I. 444, 143 A.2d 146 (1958), in which a housing authority entered into a five-year contract with the plaintiff to be the legal advisor for the housing authority. The housing authority agreed to pay the plaintiff for his services according to the fees allowable for legal expenses as set out and approved in its budget. The plaintiff performed legal services as required of him by the housing authority. However, after the membership of the housing authority had

partially changed, the housing authority terminated the plaintiff's employment before the expiration of the five-year period. It was conceded that plaintiff had received as compensation for services rendered to that date the amount of $2,041.67. The plaintiff sued the housing authority alleging breach of contract. The trial court determined that the contract was valid and enforceable. On appeal, the Rhode Island Supreme Court held that legislative bodies and municipal agencies having legislative powers may not by contract impair or prevent a succeeding body or agency from exercising a legislative or governmental function and that engaging a lawyer to act on behalf of the housing authority was related to the governmental functions of the housing authority.

In the present case, the supermajority provision is invalid. Therefore, there is no need to address whether there is a fact question as to whether the Board violated the supermajority provision by discharging the Firm. We recognize that the Firm requested an opinion from the Alabama State Bar as to whether the supermajority provision violated the Rules of Professional Conduct. The informal and nonbinding opinion letter provided by the Alabama State Bar addressed the Rules of

Professional Conduct, but the Alabama State Bar's conclusion that the supermajority provision was a valid attorney-client contractual provision was simply wrong. We note that, in its opinion letter, the Alabama State Bar even appears to question why the Board would agree to such a supermajority provision.

Next, the Firm argues that the contract was for legal and nonlegal services. Specifically, the Firm contends that the administration of the contract-compliance program was a nonlegal service and, thus, that it can maintain its breach-of-contract claim against the Board insofar as it relates to that nonlegal service.

The trial court found that the contract was for legal services. We agree. The record reflects that the contract contains no separate provisions identifying the administration of the contract-compliance program as a nonlegal service. The contract provides for one rate for all of the Firm's services, and the contract provides that the Firm would administer the contract-compliance program from time to time as requested by the Board. There is no definition of the services to be provided for administration of the contract-compliance program in the

contract, and those services were to be provided on an "as requested" basis. Even if we assume that the contract provided for both legal and nonlegal services and that administering a contract-compliance program was a nonlegal service, that program was never approved or adopted. The record shows that one of the members of the Board wrote a memorandum setting out the goals that he would like to see accomplished under such a program, and the Board approved transferring money from a reserve fund to an operational fund for such a program. However, as one of the Board members recognized, no money would be spent until a contract-compliance program was created. There is nothing in the record to indicate that such a program was created, approved, or adopted by the Board. Moreover, the record reflects that any contract-compliance program would have included oversight of the HUB program, which was already being administered by employees of the Board. The minutes of a governmental body are the best evidence of the official acts of the governmental body. Kimbrell v. City of Bessemer, 380 So. 2d 838 (Ala. 1980); Penton v. Brown Crumner Inv. Co., 222 Ala. 155, 131 So. 14

(1930). In this case, the minutes of the Board reflect that the contract-compliance program was never created, approved, or adopted.

Last, the Firm argues that there is conflicting evidence regarding the appropriate measure of damages it would be entitled to on a breach-of-contract claim relating to the administration of the contract-compliance program. However, because such a program was never created, approved, or adopted, we pretermit discussion of this argument.

Based on the foregoing, we affirm the judgment of the trial court.

AFFIRMED.

Bolin, Wise, Sellers, Mendheim, and Stewart, JJ., concur.

Parker, C.J., concurs in part and dissents in part.

Shaw and Bryan, JJ., and McCool, Special Justice,* dissent.

Mitchell, J., recuses himself.

*Judge Chris McCool of the Alabama Court of Criminal Appeals was appointed to serve as a Special Justice in regard to this appeal.

PARKER, Chief Justice (concurring in part and dissenting in part).

I agree that the supermajority provision was unenforceable as an unconscionable restriction of the right of The Water Works Board of the City of Birmingham ("the Board") to terminate the portion of its contract with Fuston, Petway & French, LLP ("the Firm"), that called for legal services. I dissent from the main opinion with regard to the contract-compliance-program portion of the contract. There was a genuine issue of material fact regarding whether that portion called for nonlegal services, for the reasons stated by Justice Shaw, see ___ So. 3d at ___ (Shaw, J., dissenting). Cf. Ellenstein v. Herman Body Co., 23 N.J. 348, 129 A.2d 268 (1957) (holding that contract with lawyer for labor-relations consulting was for nonlegal services). And, contrary to the main opinion, there was an issue of fact regarding whether the contract-compliance program was created. The Firm's invoices reflect that, in the weeks after the contract was signed, the Firm spent about 20 hours performing services related to the program. It is undisputed that the Board paid the Firm for those services, implying that they were requested by the Board. Further, there was an issue of fact regarding whether, if the Board had not terminated

the contract, the Board would have asked the Firm to perform further services related to the program. Finally, if the Board breached the contract-compliance-program portion of the contract, the Firm would have been entitled to at least nominal damages. See Knox Kershaw, Inc. v. Kershaw, 552 So. 2d 126, 128 (Ala. 1989). A nominal-damages award may be important for collateral reasons, such as seeking prevailing-party attorney fees. Accordingly, I would reverse the summary judgment with regard to the contract-compliance-program portion of the contract.

SHAW, Justice (dissenting).

This case involves the purported termination of a contract between the law firm of Fuston, Petway & French, LLP ("the Firm"), and The Water Works Board of the City of Birmingham ("the Board"). The Firm sued the Board alleging that the contract was not properly terminated and sought damages. The trial court entered a summary judgment in favor of the Board, and the main opinion affirms that judgment. I respectfully dissent.

The Board, as an entity, makes decisions through the collective agreement, by vote, of its governing board members. Although the organizational rules that determine how the board members make decisions by vote on behalf of the entity are not entirely disclosed, and although any law governing that voting process is not extensively addressed, it is clear from the facts that some actions of the Board are decided by a majority of the board members and some by a supermajority of the board members.

In this case, it is alleged that the contract between the Board and the Firm required a vote by a supermajority of the board members to

terminate the contract. As recounted in the main opinion, the minutes from the meeting by the governing board members on whether to agree to the contract show that the potential ramifications of the inclusion of the supermajority-vote requirement was fully discussed. It is undisputed that the board members later purported to terminate the contract by a simple majority vote.

"It is well recognized that the employment of an attorney by a client is revocable by the client with or without cause, and that such discharge ordinarily does not constitute a breach of contract ...." Gaines, Gaines & Gaines, P.C. v. Hare, Wynn, Newell & Newton, 554 So. 2d 445, 447 (Ala. Civ. App. 1989) (emphasis added; quoted with approval in Garmon v. Robertson, 601 So. 2d 987, 989 (Ala. 1992)). Rule 1.16(a)(3), Ala. R. Prof. Cond., states that "a lawyer ... shall withdraw from the representation of a client, if ... the lawyer is discharged." The Comment to that rule states: "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services."

The language of the contract and the description of the services to be provided make clear that the Board, as an entity, and not the

individual members of its governing board, is the "client" in this case.[7] Further, the issue in this case is not whether the Board could terminate the contract, but whether the board members actually did so.

The parties -- both sophisticated -- had a specific agreement as to the means required to terminate the contract: a supermajority vote. The Firm received an informal advisory opinion from the Alabama State Bar indicating that such an arrangement was permissible and did not violate Rule 1.16, Ala. R. Prof. Cond. There are numerous reasons given on appeal for the supermajority-vote requirement, including regular changes in membership/leadership of the governing board, which occurred in this case, and that such a requirement is a provision "routinely include[d]" in contracts negotiated and executed by the Board.

Our prior decisions recognize that we "highly value the freedom to contract" and that, as a result, "we will not alter the expressed intentions of the parties to a contract unless the contract offends some rule of law or

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[7]It is clear from the contract that the Firm was to provide the Board, as an entity, certain services; no legal representation for the individual members of the governing board is at issue.

contravenes public policy." Grimes v. Alfa Mut. Ins. Co., 227 So. 3d 475, 487 (Ala. 2017). As the Firm notes, in the absence of an ambiguity, courts are obligated to enforce lawful, freely negotiated contracts as written. See, e.g., Ex parte Dan Tucker Auto Sales, Inc., 718 So. 2d 33, 35 (Ala. 1998).

Contracts for legal services may be revocable by a client without cause, but this general public policy governs the reason for the termination. The agreement of the Board to require a supermajority vote in this case provides how a corporate body -- not an individual client -- will decide to effect any termination. Given the unique facts in this case, the sophistication of the parties, and the corporate nature of the Board and the way it conducts business, I do not believe that the general public policy of allowing a client to terminate legal representation on any basis is implicated in this case.

Further, it appears disputed that some of the services provided in the contract related to the contract-compliance program were nonlegal in nature. Specifically, numerous responsibilities regarding engagement, monitoring, and outreach outlined as necessary to the administration of

the contract-compliance program appear to be distinctly nonlegal in nature. In fact, the minutes of the meeting preceding the adoption of the contract reflect that, before its adoption, "the Board [was] presently doing everything that the [Firm was required to] do" under the contract.

Finally, the trial court concluded that the Firm was unable to demonstrate damages because it was not guaranteed any minimum amount of work under the contract and, instead, was obligated only to provide legal services when or if requested. However, the Firm produced substantial evidence indicating that the Board breached the termination provision of the contract; therefore, the Firm argues, it could be entitled to nominal damages. Knox Kershaw, Inc. v. Kershaw, 552 So. 2d 126, 128 (Ala. 1989) (quoting James S. Kemper & Co. Se., Inc. v. Cox & Assocs., Inc., 434 So. 2d 1380, 1385 (Ala. 1993)) (" '[W]hen the evidence establishes a breach, even if only technical, there is nothing discretionary about the award of nominal damages.' ").

Given the above, I respectfully dissent.

Bryan, J., concurs.

McCOOL, Special Justice (dissenting).

I respectfully dissent because I disagree with the main opinion's conclusion that public-policy considerations override the express and unequivocal intent of the employment contract between The Water Works Board of the City of Birmingham ("the Board") and Fuston, Petway, & French, LLP ("the Firm"), at issue in this case.

I agree with the main opinion's conclusion that public policy generally prohibits a breach-of-contract action for a client's termination of a lawyer's representation. This is so because, as the main opinion notes, a client has a right to terminate a lawyer's representation at any time and for any reason, and this right " ' "is a term of the contract implied by public policy because of the peculiar relationship between attorney and client." ' " ___ So. 3d at ___ (emphasis omitted) (quoting Olsen & Brown v. City of Englewood, 889 P.2d 673, 676 (Colo. 1995), quoting in turn AFLAC, Inc. v. Williams, 264 Ga. 351, 353, 444 S.E.2d 314, 316 (1994)).

However, like Justice Shaw, I believe the main opinion ignores the fact that this public-policy consideration is not implicated in this case. Simply put, nothing in the employment contract prohibits the Board from

terminating the Firm's representation at any time or for any reason. Rather, as Justice Shaw points out, the employment contract merely contains a supermajority provision that defines how that termination must occur, and I fail to see how it violates public policy to hold the Board to the manner in which it chose to bind itself with respect to the termination of the Firm's representation.

Furthermore, I am concerned that, by applying a public-policy principle that I do not believe is applicable in this case, the main opinion intrudes upon another public-policy consideration -- namely, the parties' freedom to contract with each other as they see fit. That is to say, although a client may, as a matter of public policy, terminate a lawyer's representation at any time and for any reason, is it not also a matter of public policy to allow a client to freely and voluntarily choose to enter into an agreement that restricts the manner in which that termination must occur? I believe it is, and, in fact, the Alabama Supreme Court has acknowledged that the freedom to contract is the " 'paramount public policy.' " Milton Constr. Co. v. State Highway Dep't, 568 So. 2d 784, 789 (Ala. 1990) (quoting 17 Am. Jur. 2d Contracts, § 178 (1964)), rev'd on other

grounds, Ex parte Alabama Dep't of Transp., 978 So. 2d 17, 23 (Ala. 2007). As both the main opinion and Justice Shaw note, the Alabama State Bar Association has apparently reached the same conclusion by opining that the supermajority provision is permissible and that the Board was free to " 'place the super majority restriction on its own ability to terminate counsel.' " ___ So. 3d at ___ (quoting February 3, 2017, opinion letter of the Bar). Of course, that opinion is not binding upon the Alabama Supreme Court. However, I do believe that that opinion letter provides support for the conclusion that the supermajority provision does not intrude upon the public-policy principle that allows a client to terminate a lawyer's representation at any time or for any reason.

In Poole v. Prince, 61 So. 3d 258, 281 (Ala. 2010), this Court stated:

> "The power to declare a contract void based on a violation of public policy ' "is a very delicate and undefined power and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." ' Milton Constr. Co. v. State Highway Dep't, 568 So. 2d 784, 788 (Ala. 1990) (quoting 17 Am Jur. 2d Contracts § 178 (1964)). ' "The courts are averse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain .... [T]he courts will not declare an agreement void on the ground of public policy unless it clearly appears to be in violation of the public policy of the state." ' Id."

I do not believe that the supermajority provision of the employment contract actually violates the public policy of allowing a client to terminate a lawyer's representation at any time or for any reason. By concluding otherwise, the main opinion does infringe upon the parties' right to contract as they see fit. Therefore, I respectfully dissent.