12-2003

Long-Term Employment Agreements With In-House Counsel: Employment Security or Ethical Quagmire?

Richard E. Moberly
University of Nebraska, rmoberly2@unl.edu

John Hutchins
McKenna Long & Aldridge LLP

Published in GEORGIA BAR JOURNAL 9:3 (December 2003), pp. 20-29. Copyright 2003 State Bar of Georgia.

A Look at the Law

By Richard Moberly and John Hutchins

Employment Agreements

Long-Term Employment Agreements With In-House Counsel: Employment Security or Ethical Quagmire?

The relationship between a company and its in-house corporate counsel involves a fragile mixture of the corporate counsel's fiduciary obligations as the company's attorney and the company's legal and contractual responsibilities as the attorney's employer. Although these roles and expectations often blend smoothly, the relationship can become problematic when the corporate counsel's position as an attorney conflicts with the counsel's status as an employee. Put another way, when a company's expectations as a client are at odds with its responsibilities as an employer, the relationship between the employer-client and the employee-attorney can become strained and expose each to difficulty, if not liability.

One situation that may breed such tension occurs when an in-house attorney enters into a long-term employment contract with an employer-client. In a typical attorney-client relationship between a company and its *outside* counsel, the client may terminate its relationship with its attorney at any point.[1] The attorney would be entitled to *quantum meruit*, or payment for services rendered, but the attorney would not be entitled to payment for loss of future fees, even if the client already agreed to such payment.[2] In this situation, the law gives priority to the client's right as the beneficiary of a fiduciary relationship with its attorney to terminate the relationship (the client's "beneficiary rights").

A long-term employment contract with a corporate or *in-house* counsel, however, involves subtle, but important, differences. Depending on how such a contract is structured and the current state of the law in the jurisdiction at issue, in-house counsel may have an argument that the contract obligates the client to a continued employment relationship, even if the client desires to terminate the attorney-client relationship. If true, this would infringe upon the client's ability to terminate its relationship with its attorney immediately (or without future consequence). Enforcing this type of contract would implicitly value an attorney's contractual rights more than a client's beneficiary rights.

Thus, when an in-house counsel enters into a long-term employment contract with a client, a tension is created between the client's beneficiary rights and the attorney's contractual rights. This article addresses two issues that may arise as a result of this tension.

First, it is unresolved in Georgia whether long-term employment contracts are enforceable by in-house counsel through a breach of contract action. In Georgia, "express contracts between attorney and client as to compensation are generally recognized."[3] At the same time, it is also the state's public policy that "a client has the absolute right to discharge the attorney and terminate the relation at any time, even without cause."[4] At the intersection of these two competing forces are long-term employment contracts for in-house counsel. For example, a long-term contract that provides for a significant severance benefit should the employment be terminated prematurely may arguably limit the ability of a corporation to terminate the attorney's employment. Whether a discharged in-house attorney may succeed in a breach of contract action against a former employer is entirely dependent upon whether this type of contract is enforceable.

Second, if a general counsel is permitted to bring a breach of contract action against an employer-client, the limits on the attorney's ability to use the client's own confidential information against the client in that litigation are somewhat murky. This issue has been hotly debated in other jurisdictions in the context of wrongful discharge claims, but the issues are relevant even in a breach of contract action. Georgia's Rule of Professional Conduct 1.6 provides some guidance, in that it only permits an attorney to reveal a client's confidential information if the attorney reasonably believes it is necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."[5] In application, however, that standard can be difficult to apply, particularly in the context of an attorney taking the offensive against a client based upon a breach of contract claim.

Unfortunately, neither of these issues is resolved easily under current Georgia law, which should be unsettling to Georgia's in-house counsel and their clients alike.

THE ENFORCEABILITY OF A LONG-TERM EMPLOYMENT CONTRACT FOR GEORGIA'S IN-HOUSE COUNSEL

Two seminal Georgia cases dominate the issue of the enforceability of a long-term employment con-

tract between a company and its in-house counsel: *Henson v. American Family Corp.*[6] and *AFLAC, Inc. v. Williams*.[7] These cases, however, reach differing conclusions regarding the balance between a company's beneficiary rights as a client and an attorney's contractual rights as an employee.

Henson v. American Family Corp.: Contracts Should Be Enforced

In 1984, the Georgia Court of Appeals determined that a discharged general counsel could bring a breach of contract action against his former employer under a long-term retainer contract.[8] In *Henson*, a company and its general counsel executed a ten-year employment contract, "subject to removal by action of the board [of directors] at any time it shall be deemed necessary."[9] Six years later, the board removed the general counsel.[10] As part of litigation resulting from the termination, the general counsel filed a breach of contract claim to obtain the fee for the remainder of his contract.[11]

In permitting the action to go forward, the Court of Appeals rejected the company's argument that such a long-term retainer contract is against public policy. Relying on a 1922 Georgia Supreme Court case, the Court of Appeals stated that express contracts between an attorney and client are generally recognized, even if the contemplated services are not rendered.[12] The *Henson* Court stated that it was aware of no public policy precluding the enforcement of such contracts.[13] Therefore, although the board of directors was permitted to remove the general counsel, the company was bound by the general counsel's contractual rights.[14]

AFLAC, Inc. v. Williams: The Client Has the Absolute Right to Fire Its Attorney

The public policy apparently hidden from the *Henson* Court was identified a decade later by the Georgia Supreme Court in *AFLAC, Inc. v. Williams*.[15] In *AFLAC*, the Court held that a long-term retainer contract for an *outside* counsel was unenforceable because it contained a penalty clause if the client prematurely terminated the contract.[16] Under the contract in *AFLAC*, the company paid an outside counsel a monthly retainer under a seven-year contract; however, if the company terminated the contract early, 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."[17]

The Court relied upon important public policies underlying the attorney-client relationship to determine that such a contract was unenforceable.[18] Specifically, the Court held that this contract was void as against public policy, because "[r]equiring 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."[19] The Court consciously chose to uphold the client's beneficiary rights to the detriment of the attorney's contractual rights: "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."[20]

Yet, despite this apparent rejection of *Henson*'s reasoning, the *AFLAC* Court distinguished *Henson*, without expressly overruling it, by basing its decision on the invalidity of the AFLAC contract's damages provision, a type of provision which the Court noted was not involved in *Henson*.[21] Moreover, the Court specifically stated that it was not addressing the employment relationship between employers and in-house counsel, as that issue was not before the Court.[22] Therefore, the *AFLAC* Court's judicial restraint left unresolved what effect, if any, its emphasis on a client's right to terminate its attorney without consequence has on *Henson*'s contrary holding. In short, *AFLAC* may cause Georgia's in-house counsel to wonder whether their long-term employment contracts are enforceable.

The Conflict Between a Client's Beneficiary Rights and an Attorney's Contractual Rights

At its core, the conflict between *Henson* and *AFLAC* is a conflict between which value to uphold: a client's unfettered right to fire its attorney or an employee's right to rely on his or her contract. The policy arguments supporting each value are compelling.

The Georgia Supreme Court's articulation of the theoretical underpinning of its holding in *AFLAC* with regard to outside counsel applies equally to in-house counsel. The "relationship between a lawyer and client is a special one of trust that entitles the client to the attorney's fidelity."[23] In fact, the

[p.23 advertisement]

"unique" relationship between a client and its attorney, whether outside counsel or in-house, 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."[24] Therefore, it would seem logical that a client must be free to end the relationship with its in-house counsel whenever it "ceases to have absolute confidence in either the integrity or the judgment or the capacity of the attorney."[25]

Courts in other jurisdictions have expressly applied these policy rationales to in-house counsel and prohibited breach of contract and other actions between companies and their in-house counsel.[26] These courts note that permitting an attorney to bring a breach of contract action after being fired would intrude not only upon the right to fire one's attorney, but also upon the entire fiduciary relationship of trust that is the cornerstone of the attorney-client relationship.[27]

Indeed, permitting an in-house counsel to sue a client raises unique problems. For example, qualifying the right of a client to fire its attorney by subjecting the client to potential liability for that firing "would have a chilling effect upon the ability of a client to exercise the right to discharge as the cost of exercising that right could be litigation with the former attorney."[28] Such litigation is more threatening than typical litigation because the attorney has had unique access to the client's confidential information as a fiduciary and has an awareness of the client's strategies and resources that would be protected from any other plaintiff by the attorney-client privilege.[29] In short, employer-clients "will be put in the untenable position of having to rely on outside counsel that knows less about the [the company-client] than does the party suing it."[30]

Courts across the country, including Georgia, have reached different conclusions and assessments regarding which inherent value to uphold: the beneficiary rights of an employer-client or the contractual rights of an employee-attorney.

Thus, according to this line of reasoning, the right to terminate the relationship is an implied term of every employment contract between an attorney and client.[31] As the Georgia Supreme Court held in *AFLAC*, "[a] client's discharge of his attorney 'is not a breach of the contract of employment but the exercise of his right.'"[32] After *AFLAC*, clients in Georgia may assert that this reasoning should extend to in-house counsel as well.

By contrast, in permitting breach of contract actions by in-house counsel, courts in other jurisdictions have relied upon the inherent differences between an in-house lawyer and outside counsel, as well as the value of upholding the right to contract.[33] In the seminal case espousing this point of view, *General Dynamics Corp. v. Superior Court*,[34] the California Supreme Court enumerated several policy reasons to permit in-house counsel to bring a breach of contract claim against a former employer-client. For example, an in-house counsel is economically dependent upon the employer-client and also under unique and powerful organizational pressures to conform the counsel's legal advice to organizational goals.[35] Moreover, the Court asserted that the general rule permitting a client to fire an attorney for any reason or for no reason does not apply in every case, and it particularly does not always apply "without consequence."[36]

Another California court permitted a breach of contract action because it recognized that the employment relationship between a company and its in-house counsel had aspects that may override the client's right to terminate its attorney: for example, the in-house attorney "was a salaried employee, required to work exclusively for the employer. The employer had the sole discretion to determine the employee's duties and to supervise such duties."[37] Simply because the attorney also owed ethical obligations toward his employer, asserted the court, does not require that the attorney lose all contractual rights as an employee. Therefore, the attorney should be paid upon discharge in accordance with the attorney's contract.[38] Similarly, another court upheld an in-house attorney's breach of contract claim and stated that "an employee status as an attorney cannot excuse an employer's violation of its contractual or statutory obligations. Attorneys may be unpopular, but they are not yet fair game."[39] These courts, then,

echoed the type of reasoning used by the Georgia Court of Appeals in *Henson* by declaring that a company could fire its in-house attorney if it was dissatisfied, but that the attorney did not lose the contractual right to payment for the remainder of the contract.[40]

In summary, courts across the country, including Georgia, have reached different conclusions and assessments regarding which inherent value to uphold: the beneficiary rights of an employer-client or the contractual rights of an employee-attorney. Yet the battle for supremacy between these important values does not fully consider another aspect of these disputes that should, but only occasionally does, play a role in a court's analysis. Specifically, the danger of revealing attorney-client confidences during the course of a dispute between a client and an in-house attorney is significant. Regardless of which side of the dispute a court supports, both the parties and the court should be cognizant that the true danger of these disputes lies in their potentially destabilizing effect on the essence of the attorney-client relationship: the attorney's ethical obligation to maintain client confidences.

AN IN-HOUSE COUNSEL'S USE OF CLIENT CONFIDENCES IN LITIGATION AGAINST THE CLIENT

In Georgia, the boundaries of an attorney's ability to use client confidences in a dispute with a former client are set by Rule 1.6 of the Rules of Professional Conduct. Rule 1.6 provides that:

> (a) A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information . . . the disclosure of which would be embarrassing or would likely be detrimental to the client . . . .
>
> (b) (1) A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:
>
> . . .
>
> (iii) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . .
>
> (e) The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

The comments to Rule 1.6 clarify some of these requirements. For example, Comment 5 confirms that this rule applies to "all information related to the representation, whatever its source," not merely to matters communicated in confidence by the client. In other words, more than just the attorney-client privilege is protected — any of the client's information learned by the attorney during his or her role as attorney is protected from disclosure, whether or not the information also is a "privileged" communication.

At certain times, Rule 1.6 permits an attorney to disclose information "the attorney reasonably believes necessary," including when necessary "to establish a claim or defense."[41] Comment 17 to Rule 1.6 states that when a lawyer uses confidential information to establish a claim or defense, the lawyer "must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure."

The problem in litigation, of course, is where to draw the line between permissible and impermissible disclosure. Once a dispute has reached the litigation stage, it may involve a "no-holds-barred" confrontation in which neither party can be trusted to voluntarily maintain the lofty precepts embodied by the Rules of Professional Conduct. In other words, whether information is "reasonably necessary" to assert a claim or defense may be in the eye of the beholder. Is the client confidence technically required to prove an element of the breach of contract claim or does it merely provide the factual background of

the employee's dismissal? For example, if an attorney is discharged "for cause" related to job duties as an attorney under a long-term employment contract, then should the attorney be permitted to disclose purportedly confidential information to explain that a "for cause" firing was not justified? If this is permissible, then how does a court evaluate a case in which an attorney claims he or she was fired for conduct related to a confidential situation but the employer claims the discharge was for reasons not related to any confidential situation? The employer would argue the attorney does not need to use confidential information to prove the untruth of the employer's accusations, but the attorney will assert that it is necessary to reveal the confidential information in order to present the entire picture of the relationship. Even more problematic, this argument likely will be made "after the fact." The attorney may not wait to get a ruling from the court regarding the use of the client's information, but may simply include the information in a complaint.

These questions are not easily resolved and present a dilemma that lies beneath every dispute between a client and its attorney, particularly when that attorney is an in-house lawyer who has access to a broader swath of confidential information than a typical outside attorney who is retained for a specific matter. Although no Georgia appellate court has addressed in a reported opinion the scope of an in-house attorney's obligation to maintain the confidentiality of client information in a dispute with a client, other courts have analyzed this problem as integrally related to the issue of whether to permit in-house counsel to sue a client for breach of contract in the first place.

As a result of considering the impact of an attorney's obligation not to reveal confidential information, some courts present a compromise solution between the "contract rights" emphasis in *Henson* and the "beneficiary rights" emphasis in *AFLAC*. These courts permit breach of contract actions by in-house counsel, but restrict such claims to situations in which the claim is related to the attorney's relationship with the company as an employee, rather than as an attorney.[42] As long as the claim can be brought "without violence to the integrity of the attorney-client relationship," a breach of contract action will be permitted by these courts.[43]

For example, in *Nordling v. Northern States Power Co.*,[44] the Minnesota Supreme Court permitted a breach of implied contract claim by an in-house counsel who was fired without the employer following the progressive disciplinary steps required by the employee handbook.[45] According to the Court in that case, such an action was permitted because the firing was not related to the employee's role as an attorney; rather, it was "a case of deteriorating personal relations between an employee and his supervisor."[46] Seemingly recognizing the line between the two more-extreme viewpoints discussed above, the Court hinted that its holding would be different in a case in which the in-house attorney's discharge was the result of a dispute that implicated company confidences or secrets confided to the attorney.[47] In so doing, the Court rejected the attorney's argument (apparently based upon *General Dynamics*) that in-house counsel ought to be treated differently because their position has limited mobility and marketability. "Maybe so. But it is not clear to us that these circumstances, which may or may not be present in a particular case, entitle in-house counsel to consideration different from that of private attorneys. It can be argued with equal plausibility that many of those in private practice, who remain subject to the *quantum meruit* rule, are confronted also with problems of mobility and marketability."[48] Thus, the *Nordling* Court was willing to uphold contractual rights to some extent, but not at the expense of a client's beneficiary rights.

Similarly, in *Kiser v. Naperville Community Unit*,[49] a court in the Northern District of Illinois upheld the right of an in-house attorney to bring a breach of contract action because the client fired the attorney before the end of his contract and cited "cost effectiveness" as its rationale.[50] The client attempted to argue that it had the absolute right to fire its attorney, but the court rejected that argument.[51] Stating that the "right" asserted by the client to fire its attorney was merely a "general" — as opposed to an "absolute" — right, the court permitted the breach of contract claim to go forward because (1) the reason for the termination was not related to the attorney-client relationship; (2) the defendant company did not argue that litigating the attorney's claim would force disclosure of confidential communications or that allowing such claims generally would affect client trust or attorney autonomy; and (3) it appeared that the attorney's role was much broader than simply being an attorney — he had administrative duties to perform as well.[52] Thus, the

Kiser court attempted to balance the two competing interests: "A client may lose trust in and terminate his attorney for reasons that are wholly unrelated to the attorney's performance and therefore insufficient to constitute 'cause' under the contract. Post-termination breach of contract damages are generally unavailable to the terminated attorney in such a case, because a client must be free to fire an attorney he does not trust."[53] Moreover, as noted above, the fact that the dispute did not implicate attorney-client confidences made the court more willing to consider the attorney's claims.

Indeed, even the *General Dynamics* Court held that a claim by an employee-attorney should only be brought if it can be done without revealing any client confidences.[54] Thus, the seminal case undermining the client's "absolute" right to fire its attorney recognized that the fiduciary relationship between the employer-client and the employee-attorney demanded different treatment than the typical employment dispute.

Therefore, the unique access of in-house counsel to a client's confidential information may require different treatment of claims by such attorneys against their employer-clients. Even if a court takes a middle ground between *Henson*'s contractual rights focus and *AFLAC*'s beneficiary rights emphasis and permits limited breach of contract claims by in-house counsel, courts will have to consider the possibility that such litigation may reveal a client's confidential information. Revealing such information in litigation potentially could undermine the attorney-client relationship between a company and its in-house counsel, because companies may be wary of disclosing sensitive information to their in-house attorneys if they are concerned about it later being used against them.

PREEMPTIVE STEPS EACH PARTY CAN TAKE TO PROTECT THEIR INTERESTS WITHIN THE CONTEXT OF A FIDUCIARY RELATIONSHIP

Until the Georgia Supreme Court resolves the uncertainties faced by corporations and their in-house counsel as a result of the conflicting holdings of *Henson* and *AFLAC*, both parties have options they can utilize to bargain *ex ante* for a contractual resolution that provides protection to the attorney's need for financial security and the client's desire to protect its confidential information. Although it may seem odd to resolve a dispute about whether a contract is enforceable by proposing a contractual solution, one must remember that the tensions created by the fiduciary obligations of an in-house attorney with a long-term employment agreement are whether the client's right to fire its attorney has been infringed and whether the client's confidences are at risk. The suggestions below do not undermine these rights; rather, they reinforce them by providing up-front protections to both parties.

First, to protect client confidences, any employment agreement between a company and its in-house counsel should have a provision requiring the attorney, in any lawsuit the attorney brings against

the company, to seek a protective order upon initiating the litigation, prior to disclosing any client information, permitting both parties to file their pleadings under seal. Although this procedure may be met with resistance by the media in highly publicized cases, it should be noted that this exact procedure is recommended by Comment 17 to Rule 1.6 of the Rules of Professional Conduct, which suggests that a lawyer who seeks to utilize a client's confidences against the client in litigation "make every effort practicable" to limit the disclosure, and "to obtain protective orders or make other arrangements" to minimize the risk of disclosure. The absolute obligation of this contractual commitment should supplement the pliable language of Rule 1.6, which permits disclosure of confidential information if the attorney deems it "reasonably necessary," and only recommends the use of protective orders if "practicable." A contractual provision making a protective order mandatory would eliminate the dangerous possibility of confidential information being revealed improperly.

Second, in-house counsel should attempt to receive financial security up-front as a signing bonus rather than rely upon a tenuous contractual commitment for a specific number of years of employment. Such up-front payments will most likely be deemed to be a "general" retainer, which the attorney will be able to keep even if the contractual commitment is not fulfilled.[55] Moreover, a signing bonus may be appealing to a client if the attorney is willing to give up a contractual measure of damages should the client terminate the contract before the end of the contract's term. For example, rather than use a long-term contract to protect the in-house counsel, the agreement could provide for a signing bonus and a limited notice period before the contract can be terminated early. A court examining a short notice period might perceive that such a provision does not unnecessarily burden the client's right to terminate its attorney in the same manner that paying the attorney's salary for the remaining years on a long-term contract might burden the client.[56]

CONCLUSION

An in-house attorney is an employee and, to some degree, deserves to have contractual protections afforded other employees. A company is a client of its in-house counsel and deserves to have the right to terminate its relationship with its attorney without suffering drastic financial consequences or facing the public exposure of its confidential information. Balancing the rights and responsibilities of these complex and, at times, conflicting roles can be difficult, particularly when courts refuse to recognize the dual-roles of each party and attempt to characterize the relationship as solely employee-employer (as in *Henson*) or attorney-client (as in *AFLAC*). Until the Georgia Supreme Court resolves the *Henson-AFLAC* dichotomy, companies and their in-house counsel should work together to resolve these issues before a dispute arises. GBJ

Richard Moberly is an associate with McKenna Long & Aldridge LLP in Atlanta. Moberly's practice focuses on employment litigation, employment law consulting and complex commercial litigation. He represents employers in disputes involving ADA and FLSA issues, employment discrimination, workplace harassment, ERISA and the Family and Medical Leave Act. He also has extensive experience in litigating restrictive covenant and trade secret disputes in the employment context.

John Hutchins is a partner at McKenna Long & Aldridge LLP. He has served as lead trial counsel in jury trials in federal and state courts and has handled a wide range of cases in courts in Georgia, New York, Pennsylvania, Virginia, Missouri, Massachusetts, California and Wyoming. Hutchins focuses his practice on technology issues and has substantial experience litigating employment-related disputes involving technology companies. He is a frequent author and speaker on legal issues confronting technology companies and currently serves as litigation committee chair of the Bar's Technology Section.

Endnotes

1. *See* Dorsey v. Edge, 75 Ga. App. 388, 392, 43 S.E.2d 425, 428 (1947).
2. *See* Myszka v. Henson & Henson, P.C., 170 Ga. App. 878, 879, 318 S.E.2d 672, 673 (1984).
3. Henson v. Am. Family Corp., 171 Ga. App. 724, 728, 321 S.E.2d 205, 210 (1984) (*quoting* Pickens Co. v. Thomas, 152 Ga. 648, 652, 111 S.E. 27, 29 (1922)) (internal quotation marks omitted).
4. AFLAC, Inc. v. Williams, 264 Ga. 351, 353, 444 S.E.2d 314, 316 (1994) (*quoting* White v. Aiken, 197 Ga. 29, 32, 28 S.E.2d 263, 265 (1943)) (internal quotation marks omitted).
5. Georgia Rules of Prof. Conduct, Rule 1.6(b)(1)(iii).
6. 171 Ga. App. 724, 321 S.E.2d 205 (1984).
7. 264 Ga. 351, 444 S.E.2d 314 (1994).
8. *See* Henson, 171 Ga. App. at 728,

321 S.E.2d at 209-10. The contract in *Henson* makes clear that the attorney was the company's "general counsel" and was considered under the contract to be a full-time employee of the company; however, the arrangement also recognized that the attorney would receive a long-term retainer and would retain some independence through an outside practice. *Id*. at 726, 321 S.E.2d at 208. Therefore, it appears that the attorney's position had both outside counsel independence as well as the ongoing responsibilities and commitment of a typical in-house counsel. Regardless, in-house counsel in Georgia will certainly rely on its holding to support claims regarding the enforceability of their employment agreements.

9. *Id.* at 727, 321 S.E.2d at 209.
10. *Id.*
11. *Id.* at 724, S.E.2d at 207.
12. *Id.* at 728, 321 S.E.2d at 210 (*quoting* Pickens Co. v. Thomas, 152 Ga. 648, 652, 111 S.E. 27, 29 (1922)) (internal quotation marks omitted).
13. *Id.*
14. *Id.*
15. 264 Ga. 351, 352-53, 444 S.E.2d 314, 315-16 (1994).
16. *See* 264 Ga. at 353-54, 444 S.E2d at 317.
17. *Id.* at 352, 444 S.E.2d at 316.
18. *Id.* at 353, 444 S.E.2d at 316.
19. *Id.* at 353, 444 S.E.2d at 317.
20. *Id.* at 353, 444 S.E.2d at 316. Oddly, despite the *Henson* Court's upholding of the general counsel's contractual rights, the Court's opinion later recognizes the very concept emphasized by the Supreme Court in *AFLAC*. In rejecting a conspiracy claim, the *Henson* Court stated it was reluctant to permit a conspiracy claim "where the alleged wrongful act is the discharge of legal counsel, for due to the confidential and highly sensitive nature of the relationship between an attorney and client, public policy mandates that the client be absolutely free to discharge his attorney at any time, for any reason he chooses." *Henson*, 171 Ga. App. at 730, 321 S.E.2d at 211.
21. *AFLAC, Inc.*, 264 Ga. at 353-54 n.4, 444 S.E.2d at 317 n.4.
22. *Id.* at 352 n.1, 444 S.E.2d at 315 n.1.
23. *Id.* at 353, 444 S.E.2d at 316.
24. *Id.* (*quoting* 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) (internal quotation marks omitted).
25. *Id.* (*quoting* Fracasse v. Brent, 6 Cal.3d 784, 790, 494 P.2d 9, 13, 100 Cal. Rptr. 385, 389 (1972) (*quoting* Gage v. Atwater, 136 Cal. 170, 172, 68 P. 581, 582 (1902))) (internal quotation marks omitted).
26. *See, e.g.*, Anastos v. Chicago Reg. Trucking Assoc., Inc., 250 Ill. App.3d 300, 302-303, 618 N.E.2d 1049, 1051, 188 Ill. Dec. 479, 481 (1993) (rejecting a breach of contract claim by a former general counsel based upon a ten-year employment agreement); Cohen v. Radio-Electronics Officers Union, 146 N.J. 140, 154, 679 A.2d 1188, 1196 (1992) (refusing to award contractual damages to in-house attorney when client discharged attorney without giving contractually required notice of six months).
27. *See Anastos*, 250 Ill. App. 2d at 301-02, 618 N.E.2d at 1050; *Cohen*, 146 N.J. at 155-57, 679 A. 2d at 1195-97.
28. *Anastos*, 250 Ill. App.2d at 302, 618 N.E.2d at 1051.
29. *See* Santa Clara County Counsel Attorneys Assoc. v. Woodside, 7 Cal. 4th 525, 559, 869 P.2d 1142, 1162, 28 Cal.Rptr.2d 617, 637 (1994) (Panelli, J., dissenting) (noting that an in-house counsel's "insider's familiarity" will give him or her "an invaluable advantage in making legal argument, but particularly in pursuing settlement") (internal quotation marks omitted).
30. *Id.* at 560, 28 Cal.Rptr.2d at 637, 869 P.2d at 1162 ("When . . . in-house lawyers sue their clients, the former relationship of trust and confidence becomes an unfair tactical and informational advantage that the client may well view as a serious betrayal.").
31. *AFLAC, Inc.*, 264 Ga. at 353, 444 S.E.2d at 316.
32. *Id.* (*quoting* Dorsey v. Edge, 75 Ga. App. 388, 392, 43 S.E.2d 425 (1947)).
33. *See, e.g.*, General Dynamics Corp. v. Superior Ct., 7 Cal. 4th 1164, 1178-79, 876 P.2d 487, 496, 32 Cal.Rptr.2d 1, 10 (1994) (holding that in-house attorney could bring breach of implied contract claim); Chyten v. Lawrence & Howell Investments, 23 Cal. App. 4th 607, 612, 46 Cal.Rptr.2d 459, 462 (1993) (rejecting argument that client had absolute right to discharge attorney-employee); Slifkin v. Condec Corp., 13 Conn. App. 538, 549, 538 A.2d 231, 236 (1988) (permitting breach of contract action by in-house attorney against employer); Klages v. Sperry Corp., No. 83-3295, 1986 WL 7636, *3-5 (E.D. Pa. July 8, 1986) (same).
34. 7 Cal 4th 1164, 876 P.2d 487, 32 Cal.Rptr.2d 1 (Cal. 1994).
35. *Id.* at 1172, 876 P.2d at 491-92, 32 Cal.Rptr.2d at 5-6.
36. *Id.* at 1174-75, 876 P.2d at 493, 32 Cal.Rptr.2d at 7 (emphases added).
37. *Chyten*, 23 Cal. App. 4th at 613, 46 Cal. Rptr.2d at 463.
38. *Id.* at 614, 46 Cal. Rptr.2d at 464.
39. Golightly-Howell v. Oil, Chem. & Atomic Workers Intern'l Union, 806 F. Supp. 921, 924 (D. Colo. 1992).
40. *Henson*, 171 Ga. App. at 728, 321 S.E.2d at 210.
41. Rule 1.6(b)(1)(iii) of Georgia Rules of Prof. Conduct.
42. *See, e.g.*, Kiser v. Naperville Community Unit, 227 F. Supp. 2d 954, 965-66 (N.D. Ill. 2002); *Golightly-Howell*, 806 F. Supp. at 924; Nordling v. Northern States Power Co., 478 N.W.2d 498, 501-502 (Minn. 1991).
43. Nordling, 478 N.W.2d at 502.
44. 478 N.W.2d 498 (Minn. 1991).
45. *Id.* at 502.
46. *Id.*
47. *Id.*
48. *Id.* (internal footnote omitted).
49. 227 F. Supp. 2d 954 (N.D. Ill. 2002).
50. *Id.* at 966.
51. *Id.* at 964-65.
52. *Id.* at 966.
53. *Id.*
54. *General Dynamics*, 7 Cal. 4th at 1189, 876 P.2d at 503-505, 32 Cal. Rptr.2d at 17-18.
55. *See generally* Ryan v. Butera, Beausang, Cohen & Brennan, 193 F.3d 210, 216 (3rd Cir. 1999) (distinguishing between "general" and "specific" retainers); Brickman & Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. Rev. 1, 6 (1993) (discussing difference between general and specific retainers).
56. *See, e.g.*, *AFLAC, Inc.*