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A Tale of Two Outlines

By Amy Bitterman

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After teaching Legal Research and Writing for over a decade, I was asked to put together an Academic Support Program for the fall of 2013. As part of the new program, I taught a course that focused on reinforcing key analytical and organizational skills. One issue that became clear during the class was that some struggling students gave short shrift to outlining, while others wrestled with the crucial differences between a study outline for exams and a structural outline for a legal memo or brief. As a way of underscoring and understanding these differences, we worked on both types of outlines, basing each set on a single legal issue chosen from the first-year curriculum.

We began by noting that both exam answers and memos/briefs apply Rule-Application organization. However, exams usually asked for rule-based reasoning, wherein the basic legal rules are applied to a client's facts, while briefs and memos usually required analogy-based reasoning, wherein the facts of prior cases are contrasted to or compared with the client's facts.¹ Consequently, outlines for a memo or brief need much more information about precedent, while details about the facts of specific cases are not only unnecessary in a study outline, but also divert attention from more crucial information. When looking at specific examples, we determined that a course outline that was longer than 25-30 pages was unlikely to serve the student very well as a tool for preparing for rule-based exams. Then, working in small groups of 3-5, the students drafted two outlines based on a restrictive covenant problem. This exercise generated the following two samples:

1. Sample Outline of Restrictive Covenant Law for Use as a Course Outline:

General Rule—Restrictive covenant on employee's future employment must be reasonable

Tests:

Time limitation

Subtest—How long it took employer to acquire a customer list

Geographic limitation

Subtest—Where employer does or is likely to do

Employer must have protectable interest

Split in law: Some courts treat customer list as inherently confidential and worthy of protection; however, at least one court reasoned that if the customer list was generated from publicly available information, it was not protected

Employee must be able to make a living

Public interest can't be adversely affected

Concern with creating monopolies

Public entitled to the benefit of the employee's labor

2. Sample Outline for a Legal Memo on Restrictive Covenants:

Factor 1: Unreasonable restriction on employee's ability to work in field

Case A: Holding: Clause restricting employee's ability to manage an iron/welding manufacturing company was not unreasonable as he could be employed in the field in other capacities

Reasoning/Facts: Employee was still able to work as a welder

Case B: Holding: Clause was reasonable where it restricted the employee from "directly or indirectly" selling similar products to any customers he worked with or knew about while employed by employer

¹ See Cassandra L. Hill & Katherine T. Vukud in *Legal Analysis 100 Exercises for Mastery* at 14-15 (Matthew Bender & Co., Inc. 2012).

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Reasoning: Precedent upholding clauses that only restricted ability of former employee to work in sales

Case C: Holding: Restriction was unreasonable as it prevented the employee from working in the temp placement field in any capacity

Reasoning/Facts: The contract didn't just restrict her to not doing sales; she was employed in a completely different capacity in her new job as she no longer interviewed or referred candidates, but managed temps already placed

Factor 2: Unreasonable time limit

Case A: Holding: five-year limitation was not unreasonable

Reasoning/Facts: Time restriction not unreasonable period for protecting confidential information, including client lists that it took years to compile

Case B: Holding: 24 months not unreasonable

Reasoning/Facts: Relied on precedent dealing with time restrictions on contacting former customers in anti-sales covenants

Case C: Holding: Two years was unreasonable

Reasoning/Facts: Two years was an unreasonable time period as the employee was not involved in sales or solicitation, and her new job didn't involve interviewing or referring temps to companies

Factor 3: Unreasonable geographic limitation

Case A: Holding: covenant with a statewide geographic limitation was reasonable

Reasoning/Facts: Geographic restriction was not unreasonable if it protected the employer in areas where he did business; the employer did business in 25-75 towns in the state and had over 1,000 customers located throughout the state

Case B: Holding: Covenant was reasonable where the geographic restriction was limited to the city where the employer was located and its surrounding area

Reasoning/Facts: The covenant only limited employee from soliciting customers that he dealt with while working for former employer

Factor 4: Public interest must not be adversely affected

Case A: Holding: The public's interest in benefitting from the employee's labor was not unreasonably affected where he could still work in his chosen field

Reasoning/Facts: The employee could still work as a welder, even though he could not work in a management position

Case B: Holding: The covenant did not unreasonably impact on the public interest where there was no evidence that it created a monopoly

Factor 5: Protection of employer's interests

Cases A and B: Holding: The restriction was reasonable as employers have an interest in protecting confidential information, including customer lists

Case C: Holding: The restriction was not reasonable as there was no employer interest that needed protection where the customer list was generated through publicly available information

Reasoning/Facts: The employer temp agency found candidates to match client needs by putting ads in a newspaper; it used the Yellow Pages to find potential new clients. The court noted, however, that the outcome might have been different if the employee had worked in sales or solicitation for her new employer.

The students noted that the format of the second outline not only provided an easy reference for key information they would need to make analogies in a memo or brief, but did so in a way that forced them to synthesize caselaw by focusing on factor-by-factor treatment. A number of students were still using case-by-case outlines as foundations for memos and briefs, which resulted in a tendency toward case-by-case analysis in their Discussion and Argument sections.

Using the same fact pattern, the students then discussed how they might answer the client's question on an exam essay versus how they would draft a response to the question for a legal memo.

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The students concluded the following: while it was key in both instances to first lay out the legal rule and then apply it to the facts, the legal rule for the analogy-based memo required a longer, more detailed description.² By contrast, the description of the legal rule for an essay was shorter and more general. Thus, while outlines are a crucial preparatory tool for both types of writing, there was no need for extensive details about specific cases for the course outlines. As the students all agreed that this process was helpful and a number of them opined that they wished they had been exposed to it earlier, I plan to incorporate it into my first-year legal writing class.

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² See Jeff Minneti & Catherine Cameron, *Using Student Learning Preferences to Compare and Contrast Objective Memo Writing with Essay Exam Writing*, *The Second Draft* Vol. 22, No. 2 at 10 (Spring 2008).

Another Perspective

Law libraries can offer assistance to academic support programs in various ways; three of these are discussed below. First, in the law library's role as a collection of information containers, academic support programs can benefit from working with the library in the arena of collection development. Second, in the library's role as a place, it can function as an academic resource center. Finally, in the library's role as a collection of services offered by information professionals well versed in the language of the law, law librarians can participate directly in academic support.

Deborah Maranville, *Lessons for Legal Education from the Engineering Profession's Experience with Outcomes-Based Accreditation*, 38 *Wm. Mitchell L. Rev.* 1017, at 1017 (2012).