JULY 2021

ESSAY QUESTION 1 OF 5

Answer All 5 Questions

California Bar Examination

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 1

Jiff, a California citizen who resides in Truckee, California, just west of Reno, Nevada, provides cleaning services. At Jiff's request, customers submit written evaluations of his services so he can monitor their satisfaction.

Jiff entered into a contract with Shearer, a Nevada citizen who operates a beauty salon in Reno, Nevada. The contract, signed in Reno, obligated Jiff to use due care in cleaning. One night while cleaning, Jiff accidentally broke an antique vase, which Shearer claimed was worth $100,000.

Shearer sued Jiff for negligence in the United States District Court for the Eastern District of California, which includes Truckee. The complaint alleged that Jiff's lack of due care caused breakage of the vase. Shearer moved to compel production of evaluations completed by Jiff's customers in the past year. The court denied the motion.

Following a trial, the jury returned a general verdict in favor of Jiff and the court entered judgment on the verdict. Shearer did not appeal.

Six months later, Shearer sued Jiff again in the same court for breach of contract. The complaint alleged that Jiff's lack of due care caused breakage of the vase.

1. Was venue properly laid in the Eastern District of California? Discuss.

2. Did the court err in denying Shearer's motion to compel? Discuss.

3. May Jiff take advantage of the judgment in the first suit in defending against the second suit? Discuss.

JULY 2021

ESSAY QUESTION 2 OF 5

Answer All 5 Questions

California Bar Examination

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QUESTION 2

Laura is a lawyer. She practices family law in a suite she shares with Alex, a tax attorney. Laura and Alex share a conference room, a printer, and a receptionist. Their receptionist is Laura's son, Sam. Laura and Alex each use separate letterhead, business cards, and telephone numbers.

Laura represented Wendy, who was divorcing her husband Henry. Laura filed a request for child support from Henry. In his financial statement, Henry claimed that he had no significant assets and that he lived alone. Wendy told Laura that she suspected Henry was not being truthful, that he had more income and assets than he claimed, and that he lived with and shared expenses with his girlfriend, Ginny.

One morning, while picking up papers from the office printer, Laura saw and read a document addressed to Alex left on the printer by Sam. The document was a property deed in the names of Henry and Ginny, and listed Ginny's address as the same as Henry's. Henry had not disclosed the property on his financial statement. Alex had received the document from Ginny, whom Alex represented on a matter unrelated to Henry's divorce.

Because Laura did not want to get her son into trouble, she never mentioned the property deed to Alex, Wendy, or the court. Wendy received a lower award of child support from the court than she should have, based on Henry's incorrect financial statement.

1. What ethical violations, if any, has Laura committed? Discuss.

2. What ethical violations, if any, has Alex committed? Discuss.

Answer according to California and ABA authorities.

JULY 2021

ESSAY QUESTION 3 OF 5

Answer All 5 Questions

California Bar Examination

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QUESTION 3

State Hospital, a public hospital funded and managed by State, entered into a contract with Cook's Catering, a business owned and operated by Kimberly Cook, to provide on-site meal service to patients, staff, and visitors.

Recently, Denise Davis, the Chief Executive Officer of State Hospital, received a series of anonymous email messages threatening to carry out "a massive attack" at the hospital. In response to these threats, Davis decided to reassign a security guard from patrolling the kitchen area to patrolling the hospital lobby and entrance area. Davis did not share the information concerning these threats with anyone else at the hospital.

Several days later, Frank, a former patient, entered the hospital kitchen shortly before lunchtime and mixed peanut powder into a serving tray full of mashed potatoes. Neither Kimberly Cook nor any of her employees were present in the kitchen at the time because they had all left to use the restroom. A state health code provides that food served in a hospital must never be left unattended before, during, or after meal service in order to prevent contamination or tampering. At lunchtime, Patrick, a patient, consumed the mashed potatoes. Patrick, who had a serious allergy to peanuts, suffered severe injuries.

Patrick sued Cook, Davis, and State Hospital. Cook was found negligent for failing to comply with the state health code.

1. Is State Hospital liable for Cook's negligence? Discuss.

2. Does State Hospital owe Patrick a duty to protect him from Frank? Discuss.

3. What defense(s), if any, may Davis reasonably assert against the claim that she was negligent for her decision to reassign the security guard from the hospital kitchen? Discuss.

JULY 2021

ESSAY QUESTION 4 OF 5

Answer All 5 Questions

California Bar Examination

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QUESTION 4

Detective Anna was about to subject David, who was lawfully in custody, to interrogation because she had received a tip from an anonymous informant that David was involved in transporting heroin. Detective Anna advised David of his *Miranda* rights and asked him if he knew anything about heroin shipments. David replied, "I am not sure if I need a lawyer or not." Detective Anna next asked David how he was transporting the heroin. David responded, "If I had anything to do with it, I would use my car." Detective Anna released David from custody when he refused to answer any more questions. Detective Anna then sent a message to all police officers, describing David's car, stating that it was believed to be involved in transporting heroin.

Later that day, Officer Baker, who had heard Detective Anna's message, saw the car described in the message. Officer Baker decided to follow the car to see if the driver would do anything that could justify stopping the car. When the car ran a red light, Officer Baker stopped the car and ordered the driver, who was in fact David, out of the car. Officer Baker then did a pat-down search of David and found a cell phone in his pocket. Officer Baker turned on the cell phone, saw a text message icon, clicked on the icon, and found a message to David stating, "The heroin is in the trunk; deliver it to the warehouse." Officer Baker then searched the trunk of the car, where he found 30 pounds of heroin. He arrested David and arranged for the car to be taken to the police impound lot for processing.

David is charged with transportation of heroin. David moves to suppress:

1. His statement, "If I had anything to do with it, I would use my car";

2. The text message that stated, "The heroin is in the trunk; deliver it to the warehouse"; and

3. The heroin found in the trunk of the car.

How should the court rule on each of the motions to suppress? Discuss.

JULY 2021

ESSAY QUESTION 5 OF 5

Answer All 5 Questions

California Bar Examination

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QUESTION 5

In 2016, while single and living in State X, Hank downloaded a form will and filled it out, stating, “Because I have no children, I leave all my property to Sis.” Hank signed his will in the presence of only two disinterested witnesses. Hank did not realize that a valid will in State X requires three witnesses.

In 2017, while still living in State X, Hank married Wendy. After the marriage, Hank kept land he had inherited from his mother titled in his name alone. Hank started working at a construction job, and kept all of the wages he received from the job in a bank account that he opened in his own name. Daughter was born to Hank and Wendy while they lived in State X.

State X is not a community property state.

In 2021, Hank and Wendy moved to California. Hank suffered a fatal injury on the first day of his new job in California. Hank never wrote any will after the State X will.

At the time of Hank’s death, there was $100,000 from his wages in his bank account, and he still owned the land inherited from his mother. In the probate of Hank’s estate in 2021, claims have been made by Sis, Wendy, Daughter, and Son, a ten-year-old child who has proved by DNA testing that he is Hank’s son, although Hank never knew of Son’s existence.

1. Is Hank’s will valid? Discuss.

2. What rights, if any, do Sis, Wendy, Daughter and Son have in Hank’s estate? Discuss.

Answer according to California law.

July 2021

California Bar Examination

Performance Test

INSTRUCTIONS AND FILE

INDUSTRIAL SANDBLASTING, INC. v. MORGAN

PERFORMANCE TEST INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. This performance test is designed to be completed in 90 minutes. Although there are no parameters on how to apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Sylvia Baca and Associates, P.C.
2343 Whitetail Road
Columbia City, Columbia

MEMORANDUM

TO: Applicant
FROM: Sylvia Baca
DATE: July 27, 2021
RE: Industrial Sandblasting, Inc. v. Samuel Morgan

The firm represents Samuel Morgan, who works as a sandblaster and bid manager for Columbia Coatings Corporation. Until about three months ago, Morgan worked for a competitor named Industrial Sandblasting, Inc. (Industrial). Morgan had a contract with Industrial that contained a covenant not to compete if Morgan ever left Industrial.

Industrial has sued Morgan for breach of contract. Industrial wants to enjoin him from doing any work at all at Columbia Coatings for one year. We agreed to a bench trial and held a hearing three weeks ago. I attach transcripts of the relevant portions of testimony at that hearing. I also attach the relevant provisions of the contract between Morgan and Industrial, dated February 15, 2016.

The judge has scheduled us for closing argument on whether the covenants are valid. Please prepare a draft of the oral argument that I might present, using the attached cases as authority.

Excerpt of Transcript from Hearing
Industrial Sandblasting, Inc. v. Samuel Morgan

Held on July 6, 2021

Testimony of Samuel Morgan

. . . . .

Att'y Baca: When did you start work at Industrial Sandblasting, Inc.?

Morgan: In February 2013.

Baca: What did you do for Industrial?

Morgan: I specialize in commercial sandblasting. For several years, I operated a crew and did estimates for my old employer, Industrial Sandblasting, Inc.

Baca: Describe what commercial sandblasting means.

Morgan: We take paint and rust off of buildings, industrial equipment, pipelines, that kind of thing. Then we recoat them with a more durable covering.

Baca: How much did Industrial pay you at the start?

Morgan: They offered me $35,000 per year and I was glad to get it.

Baca: Did you have experience?

Morgan: No. It was entry-level, with no contract. They offered on-the-job training.

Baca: What happened after you got hired?

Morgan: They started me off with the simplest equipment. I figured that out pretty quickly and eventually learned how to operate all of the equipment. I got so good that different foremen would ask for me for the harder jobs.

Baca: How did your responsibilities change after those first few years?

Morgan: About five years ago. The company decided that it would help their business if they could advertise that they had people with certain kinds of certifications. So they paid me while I obtained certifications from the Society for Protective Coatings (SPC), starting six years ago. The SPC has different levels of certification, all labelled QP. In the end, I got a QP1 for external structures, a QP2 for removing hazardous coatings, a QP6 for applying metalized coatings, and a QP8 for coating concrete with polymer.

Baca: How long did that take you?

Morgan: A few months for each certification. I would find a course that introduced me to how to handle the particular task, then worked with the company to make sure that it had the equipment and management to meet SPC standards. Then we'd apply. An auditor would come and spend a week or so making sure of our capacity, and then we'd get the certification.

Baca: How did it help Industrial's business?

Morgan: We started to get a lot of different kinds of jobs, and a lot of different regular customers, mostly because we could handle a bigger range of work.

Baca: What other responsibilities did you take on?

Morgan: One year, I took over from the foreman of that crew who got sick and couldn't continue. So the company asked me to take over. I got it done early and under estimate. Both the town and the company were very satisfied. Industrial kept me with that team and promoted me to team manager.

Baca: What happened after that?

Morgan: My work was always on time and on budget and my people were always happy. One day, someone I knew in the home office asked me to help him put together a bid, as well as an estimate. He wanted to figure out how to make lower bids, and he knew that I had figured out how to do it.

Baca: How did that work out?

Morgan: It worked out well. Eventually the boss, Roger Cole, called me in and said that they couldn't promote me to the office, because they needed me in the field. But Cole also said that they wanted to keep me, so he offered me a raise and a contract. I accepted. It was good money.

Baca: Is that the contract they say you've broken?

Morgan: Yes. We signed it around 5 years ago.

Baca: What happened after you signed?

Morgan: Pretty much the same as before, except I was paid more. I kept bouncing between doing jobs and helping with estimates. Eventually, it became a strain.

Baca: Why?

Morgan: After the contract, I never got another raise. And he kept pushing me to take on more jobs. That was fine for my team; they got overtime. But I was on salary, which stopped going up.

Baca: At that point, what did you know about Columbia Coatings?

Morgan: Columbia Coatings started up about three years ago, but they were very aggressive about bidding, and often took jobs away from us – not always, but enough to notice. They never got one of my customers. Eventually, I got a call from them.

Baca: What did they say?

Morgan: They were up front. They said that they wanted to get more business, and they knew that I was valuable to Cole and Industrial. They asked whether I would come to work with them instead. I told them my problem with Cole, and they said no problem. They said that they would pay me $20,000 more,

give me an office position, and let me work in the field as much or as little as I wanted.

Baca: When did this conversation occur?

Morgan: About three months ago. I thought it over, then let them know that I would accept. I gave Cole two weeks notice and left.

Baca: How did Cole take it?

Morgan: He was angry. He asked where I was going, and he got angrier. He made all kinds of threats and cursed me out. He said I'd regret making this decision and that I'd never work in the industry again.

Baca: Just a few more questions. When you worked for Industrial, you said you worked only in Columbia City. Is that right?

Morgan: I did one job in Sidalia, in the northeast part of the state. I did one job in Crescent, a suburb about 20 miles from Columbia City. Otherwise, all the work was in Columbia City, in the northwest corner of the state.

Baca: Where does Columbia Coatings want you to work?

Morgan: I have jobs in the south and southeast. And my office work deals with work all over the state.

Baca: How long will it take Industrial to replace you?

Morgan: They hired another foreman the week before I left. They already had someone doing the bidding – the man in the home office who asked me to help with bids and estimates. He knew pretty much what I knew.

Baca: What would happen if the court applies the non-compete clause to you?

Morgan: I won't have any work at all, after years of experience in the field.

Baca: No further questions.

Att'y Rice: Cross-examination, Your Honor?

Judge Yan: Go ahead.

Rice: You learned everything you knew about sandblasting at Industrial. Isn't that right, Mr. Morgan?

Morgan: Yes.

Rice: They invested a lot in getting you trained and qualified, didn't they?

Morgan: No. They didn't.

Rice: They paid you to get trained, didn't they?

Morgan: No. I paid for the QP certifications myself; all they did was let me do some of the coursework during work hours. It didn't cost much, but Cole sure didn't pay out for it.

Rice: Without you, Industrial won't be able to use those certificates, will it?

Morgan: Wrong again. By now, other foremen have gotten certified. Industrial won't miss me.

Rice: Columbia Coatings doesn't have any of these certifications?

Morgan: They do not. But they have foremen who do.

Rice: You learned how to estimate job costs at Industrial, didn't you?

Morgan: Yes, I did.

Rice: And now you want to use that to harm Industrial, isn't that right?

Morgan: I just want a job that pays me what I'm worth.

Rice: No further questions.

Excerpt of Transcript from Hearing
Industrial Sandblasting Inc. v. Samuel Morgan

Held on July 6, 2021

Testimony of Roger Cole

. . . . .

Att'y Rice: What impact will Mr. Morgan's working at Columbia Coatings have on your business?

Cole: A big impact. Morgan was a key employee, especially when it came to pricing out jobs. He's bringing them expertise that we trained him to have. We can already see the effect it's having.

Rice: What do you mean?

Cole: We have lost several bids to Columbia Coatings already – bids we wouldn't have lost if Morgan weren't there.

Rice: You say that you trained him to have his current expertise. What do you mean?

Cole: We paid him for the days that he attended the QP certification courses. We gave him the work that let him figure out how to price jobs. We provided him with the support and equipment to work his projects. He got all of that while working for us.

Rice: What do you want this court to do?

Cole: Enforce the contract, keep him from working in the industry for one year, anywhere in Columbia.

Rice: Is that all?

Cole: At a minimum, the court should keep him out of Columbia City, at least for long enough for us to train someone the way we trained him.

Rice: You would accept that change?

Cole: Yes. He agreed to what's in the contract, so he ought to accept less.

Rice: No further questions.

Baca: No cross-examination, Your Honor.

Employment Contract

The parties to this contract are Industrial Sandblasting, Inc. (“Employer”) and Samuel Morgan (“Employee”).

. . . . .

11. For a period of one (1) year after the termination of Employee’s employment for any reason, Employee will not own, operate, or work at any business in direct competition with Employer by providing sandblasting or similar industrial cleaning services to industries and businesses anywhere in the State of Columbia.

. . . . .

_____	_____
Samuel Morgan, Employee	Michelle Abebe, President Industrial Sandblasting, Inc.
February 15, 2016 Date	February 15, 2016 Date

July 2021

California Bar Examination

Performance Test

LIBRARY

INDUSTRIAL SANDBLASTING, INC. v. MORGAN

LIBRARY

Strom v. Knox Broadcasting Corporation
Columbia Supreme Court (2014) .....

Fawcett Railway Relief, Inc. v. Columbia Rail Services, Inc.
Columbia Court of Appeal (2015).....

Strom v. Knox Broadcasting Corporation

Columbia Supreme Court (2014)

This appeal arises from a trial court decision upholding the non-compete provisions of an employment contract between George Strom and Knox Broadcasting Corporation. Strom left Knox Broadcasting Corporation to work for a competing broadcaster, WCAP-TV. WCAP-TV brought the action below to invalidate the non-compete provision and permit Strom to appear on air for WCAP-TV.

The trial court findings indicate that, from 2008 until 2013, George Strom was employed by Knox Broadcasting Corporation ("Knox") as a meteorologist and "television personality." That contract ended on September 1, 2013 and included the following contractual provision:

> Employee shall not, for a period of one hundred-eighty (180) days after the end of the Term of Employment, allow his/her voice or image to be broadcast 'on air' by any commercial television station whose broadcast transmission tower is located within a radius of thirty-five (35) miles from Company's offices in Columbia City, Columbia.

During Strom's employment with Knox, Knox spent in excess of a million dollars promoting Strom's name, voice, and image as an individual television personality and as part of Knox's Action News Team. Strom is one of the most recognized television personalities in the Columbia City area. Local television personalities are strongly identified in the minds of television viewers with the stations upon which they appear.

In April 2013, Strom entered into a five-year contractual agreement with WCAP–TV, a competitor of Knox, to work for WCAP as a meteorologist and "television personality" when his contract with Knox expired.

After learning of Strom's prospective departure, Knox instituted a "transition plan" to reduce the impact Strom's departure would have on the station's image. That plan depended on Strom not appearing on air for WCAP-TV for at least six months after leaving Knox. To permit Strom to appear on air for WCAP-TV during those six months would disrupt Knox's plans for a transition to a replacement for Strom.

Strom's contract with WCAP-TV does not require him to appear "on air" during the first six months of his employment. Under this contract, Strom would perform substantial duties and services to WCAP–TV for which he is being compensated. To permit Strom to appear on air, WCAP-TV would take advantage of the substantial investment Knox had put into developing Strom's public persona, in which Knox had a legitimate and protectable interest.

Finally, Strom will suffer no financial harm from staying off the air during the six months following his departure from Knox.

This case requires us to apply Columbia Stat. Ann. § 24-6-53(a), which states in relevant part:

> (a) Enforcement of contracts that restrict competition during the term of a restrictive covenant, so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities, shall be permitted.

The statute applies to contracts between employers and employees and thus applies to the contract between Strom and Knox.

Under the statute, we should uphold such a covenant only when strictly limited in time, territorial effect, and scope of the prohibited activities. In doing so, we must weigh the interest the employer seeks to protect against the impact the covenant will have on the employee.

The provision in this contract should be upheld. The time limit is appropriate, restraining Strom from appearing on air for six months, during which time he will

not appear on WCAP-TV in any case. It permits Strom to appear on air after a transition period tailored to allow Knox to develop an alternative broadcasting identity.

The geographical scope is appropriate, applying only to that broadcast area surrounding Columbia City. The provision restricts Strom's activity in the same media market as that in which his former employer operates.

The scope of the services covered is appropriate; the contract prohibits Strom from using an on-air personality in which Knox has a legitimate and protectable interest. Strom remains free to work for WCAP-TV as an off-air consultant.

Finally, enforcing the covenant in Strom's contract with Knox represents a fair balance of a distinct and substantial harm to Knox, when compared to a relatively minor and incidental harm to Strom.

We affirm.

Fawcett Railway Relief, Inc. v. Columbia Rail Services, Inc.

Columbia Court of Appeal (2015)

Fawcett Railway Relief, Inc. ("Fawcett") appeals from a declaratory judgment that voided a noncompetition covenant with Peter Markham ("Markham"), a former employee, and his new employer, Columbia Rail Services, Inc. ("CRS").

Fawcett is in the business of providing emergency disaster remediation services for railroads and industries with rail siding and rail yards in the lower 48 states, Canada, and Mexico. Markham began work for Fawcett in 2006 in Illinois, and over the course of seven years provided services in parts of Tennessee and Kentucky before locating in Columbia and performing services entirely within this state.

On December 2, 2011, after the move to Columbia, Markham entered into a renewed employment agreement with Fawcett that contained a non-compete provision. The non-compete provision prohibited Markham from working for three years in all of Florida, Columbia, Illinois, Ohio, Georgia, Kentucky, or Tennessee in any capacity.

On June 1, 2013, Markham left Fawcett and went to work for CRS, a direct competitor. Markham has worked for CRS only in Columbia. On April 7, 2014, CRS instituted this declaratory judgment action against Fawcett to have the covenant voided. The trial court agreed with CRS that the covenant involved was overly broad as to geographical scope, time period, and scope of services. It invalidated the covenant. Fawcett appealed.

The parties agree that Markham was an employee under this statute regulating covenants not to compete, Columbia Stat. Ann. § 24-6-53(a), and thus that the statute applied to this contract.

Fawcett contends that the trial court erred in invalidating the restrictive covenants as to their geographic scope, the scope of the services prohibited, and the time period of the restriction. For the reasons that follow, we disagree.

Geographic Scope

This geographic scope far exceeds the area within which Markham worked for Fawcett. This Court will accept as prima facie valid a restriction that covers the territory where the employee worked and the employer does business. However, a restriction that extends that territory to areas in which the employee did not work is overly broad on its face, absent a strong justification other than the desire not to compete with the former employee.

This restrictive covenant prohibited Markham from providing competing services in Florida, Columbia, Illinois, Ohio, Georgia, Kentucky, or Tennessee. The trial court's finding of fact noted that no east-west or north-south mainline railroad east of the Mississippi could operate without passing through this territory. Markham did not perform work in the entire eastern seaboard and in fact, performed work only in a limited area of some of the states listed in the restrictive covenant.

A restriction that covers a geographic area in which the employee never had contact with customers is overbroad and unreasonable. This covenant is unreasonably broad because it covers a region and areas of states where the plaintiff never worked.

Scope of Activity

The restrictive covenant in this case prevented Markham from performing work for any competitors of Fawcett both in the provision of emergency remediation services and "in any other capacity whatsoever."

Under our cases, a former employer may validly restrict an employee from performing services for a competitor that are identical to those performed for the

former employer. Our courts have approved as reasonable restrictions that specifically state those activities related to the employer's business in which the employee was trained by the employer or worked for the employer. Such a restriction protects the employer's interests from competition in that area of service.

By contrast, a restrictive covenant that prohibits work for a competitor “in any capacity” does not protect a legitimate interest of the employer and imposes a greater limitation on the employee than is necessary. In this case, the contract prohibits Markham from working for a competitor in any capacity, including activities that have nothing to do with the services that he performed for Fawcett. This provision is unreasonably broad.

Duration of Restriction

The restrictive covenants in this case restricted Markham from competitive activity for a period of three years after the termination of his employment with Fawcett.

Our cases do not state a specific time period past which a given time restriction is per se unreasonable. Instead, the cases require employers who seek to uphold a time restriction to demonstrate how the restriction is necessary to the protection of the employer during the employee’s transition to work for a competitor. An employer must prove specific facts and circumstances that support a finding of necessity. Absent such proof, our courts have invalidated time periods as short as one year or less.

The trial court in this case found that Fawcett offered no proof of the relationship between the time restriction and Fawcett’s need for protection from competition. Moreover, we note that in none of our cases have we or our sister courts approved restrictions of longer than two years. We see no error in the trial court’s conclusion that the three-year restriction in this case was unreasonable.

“Blue Pencilling”

Fawcett argues that the trial court erred in failing to “blue pencil” this covenant by modifying it to a more reasonable form, consistent with the situation and intentions of the parties. Fawcett argues that the court should have modified the provisions as follows: to restrict them to territories in which Markham had worked; to cover only the services that Markham had provided; and to be limited to the maximum time period approved by our prior cases (two years).

We disagree. The facts indicate that the covenants in this case bore no relationship to Fawcett’s need for protection from competitive practices after Markham left its employ. This covenant not to compete is invalid and should not be revised. In such a situation, a trial court does not err in refusing to “blue pencil” the contract.

For all of the foregoing reasons, we affirm.