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SHOULD LEGAL RESEARCH BE INCLUDED ON THE BAR EXAM? AN EXPLORATION OF THE QUESTION

by Steven M. Barkan

It can hardly be doubted that the ability to do legal research is one of the skills that any competent legal practitioner must possess.¹ So stated the highly regarded report *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM*, commonly referred to as the MacCrate Report after Robert MacCrate, the chair of the American Bar Association (ABA) task force that produced it in 1992. The lengthy report described the gap between what is taught in law schools and what the task force believed is necessary to practice law competently. Among other things, the report described a number of “essential lawyering skills,”² one of which was legal research. Surveys and conversations with practicing lawyers frequently agree with this assessment.³ Because law is an information profession, the ability to find both the law and accurate information about the law is crucial to legal problem solving and decision making, and to a lawyer’s ability to function competently.

Arguably, legal research skills are becoming even more important to lawyers as the legal information environment becomes more complex and costly. More choices must be made among resources and methods. More discernment is necessary in

evaluating information that is available from a wide variety of sources: the World Wide Web, LexisNexis, Westlaw, CD-ROMs, DVDs, microforms, and others, as well as traditional sources in print format.

Yet, at the same time, it is commonplace to observe that lawyers, especially new lawyers, lack competence in the methods and techniques of legal research. In 1990, Joan Howland and Nancy Johnson’s study in the *JOURNAL OF LEGAL EDUCATION* reported “the consensus of many law faculty, attorneys, and law librarians that summer clerks and recent graduates lack knowledge of available sources and are unable to develop efficient research strategies.”⁴

While the importance of legal research is frequently acknowledged, most U.S. law schools have not devoted serious attention to training students to perform this essential lawyering skill. One of the constants of legal education in the United States has been the ongoing struggle of legal research to gain stature in the law school curriculum.⁵ It is the exception, rather than the rule, for a law school to afford legal research the level of respect given to substantive law courses or other skills courses. Few regular faculty members are willing to teach legal research. Except for some elective advanced legal research

courses offered at a few schools, training is typically limited to the first or second semester of law school, usually offered by a reference librarian, a legal writing instructor, a student teaching assistant, or by the representative of an information vendor.⁶ Teachers of legal research, primarily law librarians, have argued for more and better legal research training in law schools. Yet their advocacy has not significantly improved the situation. Are legal educators oblivious to the needs of the profession, or do legal research teachers overestimate the need for enhanced legal research instruction?

INCLUDING LEGAL RESEARCH ON THE BAR EXAM

In a commentary on the Howland and Johnson survey, I. Trotter Hardy suggested that, perhaps, legal research instruction has not improved over the years because it is already adequate to meet the needs of the profession.⁷ The balance between law school instruction and on-the-job training might already be appropriate, and the quality of legal research instruction a problem only in the eyes of legal research instructors. Hardy posited that legal research instruction has not improved because there has not been sufficient demand for improvement from the bench and bar.⁸ Presciently, he argued that the inclusion of legal research questions on the bar exam would increase the demand for better legal research instruction:

One may wonder why it is not already there. Nearly everyone gives lip service to the need for research skills, so there cannot be any objection in principle to testing research as a condition for admission to the bar. The objections will all be practical: research

cannot effectively be tested; it varies too much from state to state and among different areas of practice; because questions would require references to private publishers, the test would unfairly boost or disparage certain publishers; testing research skills would add to the complexity and cost of an already burdensome exam; research is a nuts-and-bolts matter and the exams are designed to test thinking; and so forth.

SOME OF THESE OBJECTIONS ARE PATENTLY GROUNDLESS. RESEARCH CAN BE TESTED AS WELL AS ANYTHING CAN BE, AND IT IS TESTED IN MANY LAW SCHOOLS.

Some of these objections are patently groundless. Research can be tested as well as anything can be, and it is tested in many law schools. Research does not vary across state lines as much as law does. Research teachers refer to, discuss, and teach about private publishers in law schools and law

firms every day of the week. Other objections prove to be groundless as well. The complexity and cost of bar exams are secondary to the issue of exam relevance and validity. If research skills are necessary to the proper practice of law but cannot be added to existing bar exams, then something is wrong with existing bar exams, and it is time to overhaul them. Anyone who thinks that bar exams only test high-level thinking skills must not know what "thinking" is. Every bar requires an immense amount of memorization, often about such procedural nuts-and-bolts issues as when and where to file lawsuits. To the extent that research involves matters of detail, it differs not one whit from existing detailed bar questions. More to the point, research is a skill that often requires highly

abstract thinking about how to solve problems; in this respect, research differs not one whit from the “best” questions on bar exams. After all, if research were so trivial a matter that it needed no testing, why are so many lawyers so poor at it?⁹

Including legal research on state bar exams would be an effective way to create incentives for improving legal research instruction in law schools. Each state controls admission to its bar, and all states offer some form of bar exam.¹⁰ The bar exam is intended to serve as a gatekeeper to ensure that new lawyers are minimally competent. A graduate of an accredited law school who earns a passing score on the bar exam is deemed to possess the minimal knowledge and skills needed to practice law.¹¹

Proponents of the bar exam argue that it serves an important purpose in protecting the public interest. The bar exam is perceived to be both a healthy educational stimulant for law schools and an outside check to encourage them to maintain high standards. Quality control is reflected in a high (or low) bar passage rate.¹² The bar exam influences what is taught and ensures that all lawyers are exposed to a common body of knowledge in law school.¹³ It discourages narrow specialization in law school in favor of a generalized legal education. Since U.S. law students are not required to take a comprehensive exam to earn their degrees, the bar exam is a way to require recent graduates to organize and synthesize the substantive law they studied in law school.¹⁴

Testing legal research skills on the bar exam would send a clear message that a certain level of research competency is necessary before a law school graduate receives a license to practice law. It would also increase awareness of the discipline of legal research, and certainly would lead to more and better legal research instruction in law schools because

of students’ and schools’ concerns about bar passage rates. More and better research instruction would result in increased legal research competency among recent law school graduates.

WHAT IS LEGAL RESEARCH? THE IMPORTANCE OF DEFINING THE DISCIPLINE

The mere consideration of whether legal research should be included on the bar exam would foster serious discussions between and among the bar, bar examiners, and legal educators about the definition, scope, nature, and importance of legal research.

Including legal research on the bar exam raises three broad, interrelated, and crucial questions. First, how should legal research be defined and described? In other words, what is the substance of legal research? Second, what is minimal competency in legal research? Third, how would that competency be measured or tested? These questions need to be considered in relation to each other because how we conceptualize legal research will determine how and what we test or measure, and limitations on what we can test and measure will, in turn, influence how we determine legal research competency.

Legal research can be narrowly defined as the process of identifying and retrieving the law-related information necessary to support legal decision making. Legal (and law-related) research should be distinguished from the other research (factual, medical, statistical, etc.) necessary to support legal decision making. The definition focuses on the materials of and about law, and assumes that this research is only a part of the research and investigation that lawyers must conduct to solve a problem. Legal research also should be distinguished from legal scholarship—the work that most law faculty members do.¹⁵ Research in support of scholarship may or may not include

legal research as defined here, and legal scholars are not necessarily competent at the kinds of practical legal research that lawyers are expected to perform. Perhaps this is a reason why so few faculty members are willing to teach legal research, and why the subject has traditionally suffered in status.

The difficulties in isolating legal research from the entire process of analysis, research, and writing through which lawyers solve problems must also be noted. Without the ability to analyze problems and determine what information is needed, or to effectively formulate and communicate results, research skills are of minimal value. Without accurate substantive information about the law, analysis and problem solving are ineffective. What might initially be perceived as poor writing often is actually a manifestation of inadequate research. Although it is problematic and artificial to segregate one aspect of what is in practice an integrated process, legal research still presents an identifiable competency worthy of mastering.

NARROWLY DEFINED, YET BROADLY PERCEIVED

Beyond the working definition, it is critical to determine what is the substance of legal research. The doctrinal subjects tested on the bar exam have substantive outlines from which corresponding narratives can be created that describe the subject matter that the examinee is expected to know. This should

be done for legal research as well. Before we can measure competency, we need to identify what competency the exam is attempting to measure.

The MacCrate Report provides guidance about what might be included. In its Statement of Fundamental Lawyering Skills and Professional Values, the report offers a description of legal

WITHOUT THE ABILITY TO ANALYZE PROBLEMS AND DETERMINE WHAT INFORMATION IS NEEDED, OR TO EFFECTIVELY FORMULATE AND COMMUNICATE RESULTS, RESEARCH SKILLS ARE OF MINIMAL VALUE. WITHOUT ACCURATE SUBSTANTIVE INFORMATION ABOUT THE LAW, ANALYSIS AND PROBLEM SOLVING ARE INEFFECTIVE. . . . ALTHOUGH IT IS PROBLEMATIC AND ARTIFICIAL TO SEGREGATE ONE ASPECT OF WHAT IS IN PRACTICE AN INTEGRATED PROCESS, LEGAL RESEARCH STILL PRESENTS AN IDENTIFIABLE COMPETENCY WORTHY OF MASTERING.

research that includes much more than knowledge of legal information sources and their use. "This Statement . . . treats legal research as far more than a mechanical examination of texts; the formulation and implementation of a research design are analyzed as processes, which require a number of complex conceptual skills . . . [L]egal research is in essence a process of problem solving."¹⁶

Although somewhat dated, the Statement provides a useful starting point for describing legal research. The report finds competency in legal research to include a working knowledge of three broad areas—the nature of legal rules and legal institutions, the fundamental tools of legal research, and the process of devising and implementing a coherent and effective research design—and presents separate discussions of each area.¹⁷

In discussing knowledge of the nature of legal rules and institutions, the report states that "[t]he identification of issues and sources to be researched in a particular situation requires an understanding of the various sources of legal rules and the processes by which these rules are made,"¹⁸

“[w]hich of the sources of legal rules . . . tend to provide the controlling principles for resolution of various kinds of issues in various substantive fields,”¹⁹ and “[t]he variety of legal remedies available in any given situation.”²⁰

Knowledge of and the ability to use the most fundamental tools of legal research consists of general familiarity with the nature of the tools, their use, and how they might be located. Fundamental tools include sources of primary texts and secondary, interpretive materials. Competency would include knowledge of how cases and statutes are interpreted, awareness of alternative forms of access, and the ability to evaluate content for authoritativeness and suitability for a particular research purpose.²¹

The third area, “Understanding of the Process of Devising and Implementing a Coherent and Effective Research Design,” includes formulating issues to be researched, as well as identifying, evaluating, and implementing research strategies and alternatives.²² This is what might be referred to as both the art and the science of legal research—creating a model of how the concepts, tools, and methods of legal research fit together as a coherent process.

A 1997 report of the Research Instruction Caucus of the American Association of Law Libraries (AALL) is also useful. *CORE LEGAL RESEARCH COMPETENCIES: A COMPENDIUM OF SKILLS AND VALUES AS DEFINED IN THE MACCRATE REPORT*²³ sought to add some substance to the outline of legal research offered in the MacCrate Report. The AALL report elaborates on the first two of the three major legal research sections of the ABA report (knowledge of the nature of legal rules and institutions, and knowledge of and the ability to use the most fundamental tools of legal research) by providing narrative text for each of the MacCrate Report’s descriptive points. Like the MacCrate Report, the AALL report needs updating

and refinement. It offers too much detail on some subjects and does not deal with the third aspect of the MacCrate Report’s description of legal research (understanding the process of devising and implementing a coherent and effective research design). Nevertheless, *CORE LEGAL RESEARCH COMPETENCIES* is a valuable effort to describe the discipline of legal research.

As described in both the ABA and AALL reports, competency in legal research must include understanding of how legal information is created and distributed, what types of information are needed to respond to a given question, and how the information is to be used. It requires viewing law, and the bar exam, from a comprehensive perspective rather than subject by subject. It requires both practical jurisprudence and knowledge of legal process, as well as an understanding of the relationship between the legal system and the published sources of law. These are topics that cut across traditional subject areas and are otherwise overlooked on the bar exam.

As a part of defining and conceptualizing legal research, assumptions need to be made about the nature of the current research environment. Specifically, do we assume that research is conducted in a mixed paper and electronic environment, so as to require examinees to be competent in using both law books and electronic resources? Alternatively, can we assume that the research paradigm has changed and that we have now moved to an electronic research environment so that bar examiners can be comfortable limiting their testing to electronic research skills?²⁴ It is clear that what is assumed about the research environment will significantly affect both the substance and method of testing and the determination of minimal legal research competency.

TESTING FOR LEGAL RESEARCH COMPETENCY

Perhaps the most challenging aspect of including legal research on the bar exam will be determining the form and content of specific questions to determine minimal competency. Bar exams present significant economic, grading, security, and resource challenges. They are costly to develop and administer. They are administered to thousands of examinees simultaneously. Bar exams need to be administered in a secure, supervised environment. All examinees need equal access to resources. Because it is a mass test, a bar exam needs to be efficiently gradable, yielding scores that can be measured and compared. It is not practical to draft a multitude of different questions and let examinees complete unique tests on their own time, or to release a large number of examinees in a given law library to work on bar exam questions.

The typical bar exam consists of two or three forms of questioning: performance tests, essay questions, and multiple-choice questions. As a general proposition, if we want to evaluate how well a person performs a particular skill, our inclination is to ask the person to perform that skill for our evaluation. This suggests that the best way to evaluate legal research skills would be to evaluate an examinee's performance of legal research.

In a performance test, examinees are given a set of prepared materials from which to solve a problem. Performance tests in law, such as the Multistate

Performance Test (MPT) developed by the National Conference of Bar Examiners, attempt to test what lawyers actually do.²⁵ They focus on the skills of analyzing and sorting facts; reading and analyzing cases, statutes, administrative materials, and secondary sources; and writing documents such as a client letter, a brief, a will, and a contract provision.

Examinees are given the sources from which relevant information is to be drawn, which means that actual legal research is omitted from the typical performance test.

Critics of performance tests argue that they ultimately measure the same skills that essay questions measure, and that the scores closely parallel those earned on essay exams. Performance tests also increase the burden on bar examiners to create and grade the tests, and therefore are more expensive.²⁶

In an electronic research environment where every examinee has access to a computer workstation through which all research sources are available, a performance test might be an effective method for measuring research competency. Examinees could be given narrative problems to solve using an electronic library. Through either a single complex question or a series of questions, examinees would need to determine what kinds of information are needed and where that information might be found, and to work with and evaluate the information until competent answers are determined. The answers might be graded using a predetermined scale to measure the relevance and accuracy of the responses and methodology used.

SHORT-ANSWER ESSAY QUESTIONS AND MULTIPLE-CHOICE QUESTIONS, OR A MIXTURE OF THE TWO, MIGHT BE THE MOST VIABLE OPTIONS FOR TESTING LEGAL RESEARCH COMPETENCY. . . . IN THIS CONTEXT, HOWEVER, MULTIPLE-CHOICE QUESTIONS AND SHORT-ANSWER ESSAY QUESTIONS WOULD MEASURE THE EXAMINEE'S KNOWLEDGE OF LEGAL RESEARCH, RATHER THAN THE EXAMINEE'S LEGAL RESEARCH SKILLS.

The focus would be on identifying and retrieving relevant information, rather than on using the information after it has been found. If an electronic research environment is employed, the current form of the MPT could be expanded to include legal research. It could test legal research simply by not providing the examinees with the legal information needed to complete its questions.

In a mixed paper and electronic research environment, a performance test probably would not be an effective method for evaluating research competency because of the difficulties in providing access to research sources. Providing examinees with the sources needed to solve a problem would eliminate the identification and search aspects of the research process, fundamental aspects of legal research. On the other hand, releasing a large number of examinees in a law library to conduct research would create serious logistical and security problems.

As a result, short-answer essay questions and multiple-choice questions, or a mixture of the two, might be the most viable options for testing legal research competency. Short-answer essays reduce opportunities for guessing, requiring the examinee to organize and explain the response. But, because answers to essay questions are subjective, essays are difficult and time-consuming to grade. Multiple-choice questions, on the other hand, can cover more aspects of a subject and are objective, and, therefore, more easily gradable.

In this context, however, multiple-choice questions and short-answer essay questions would measure the examinee's knowledge of legal research, rather than the examinee's legal research skills. Can we assume a correlation between an examinee's knowledge of the research process and the ability to conduct legal research, just as we might assume that knowledge of the rules of evidence and trial

procedure correlates to the ability to conduct a trial? Perhaps this is the best we can do if the test cannot be offered in a fully electronic research environment.

Questions might provide a fact scenario and then ask a series of questions about what information the lawyer needs to find and where it might be found. Further questions might tell the examinee to assume that certain types of information were found and then to distinguish between and among what was found. Perhaps a tax question might send the examinee to the Internal Revenue Code, the tax regulations, and case law from different courts or jurisdictions that need to be interpreted and reconciled.

Regardless of the type of test, the questions would prove to be a challenge to draft. The standard—what a competent lawyer needs to know—must be clearly stated and understood. The questions cannot be too specialized or trivial, testing things that do not need to be tested, or so general that they do not measure competence. Because of their familiarity with research sources, law librarians as well as legal research and writing instructors should be participants in the question-drafting process, but the task should not be delegated to these groups alone. Rather, it will be important to involve a broad representation of the legal profession: lawyers from large and small firms (and locales), government lawyers, lawyers from other sectors, and judges. This should ensure that both the model of legal research and the perceptions of competency reflect realistic expectations. As with any subject on the bar exam, a group of competent attorneys should be able to draft questions about an essential lawyering skill if given guidance in question-drafting theory and technique. If not, it is doubtful that the skill is a legitimate indicator of attorney competence.

Questions should be as media-neutral as possible, focusing on the category of information rather

than the use of specific resources or the medium through which the resources appear. Good questions would refer to resources generically with a high level of generality, for example to “an annotated version of the United States Code,” rather than specifically to the UNITED STATES CODE SERVICE. Knowledge of specific resources should be required only when necessary. For example, it might be reasonable to expect a lawyer to know the nature and contents of resources such as the UNITED STATES CODE, the STATUTES AT LARGE, THE CODE OF FEDERAL REGULATIONS, and the FEDERAL REGISTER. But the examinee should not be expected to know the detailed differences between the UNITED STATES CODE ANNOTATED and the UNITED STATES CODE SERVICE.

CONCLUSION

Legal research should be included on the bar exam. Every new lawyer should know the fundamentals of identifying and retrieving the law-related information necessary to support legal problem solving and decision making. Everyone seeking a license to practice law should demonstrate some understanding of the relationships between the legal system and the published forms of the law.

Including legal research on the bar exam would measure important aspects of legal education and lawyer competency that are not otherwise assessed, and would create incentives for law schools to pay more attention to legal research instruction and for legal research instructors to advance the conceptual and methodological development of the discipline. It would initiate new conversation and debate on how the subject should be defined, described, practiced, and taught. Perhaps most importantly, including legal research on the bar exam would lead to better legal research. ■

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ENDNOTES

1. Task Force on Law Schools & the Profession: Narrowing the Gap, Am. Bar Ass’n, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 163 (1992) [hereinafter MACCRATE REPORT].
2. *Id.* at 138–40.
3. See, e.g., Robert A.D. Schwartz, *The Relative Importance of Skills Used by Attorneys*, 3 GOLDEN GATE U. L. REV. 321 (1973); John O. Mudd & John W. LaTrielle, *Professional Competence: A Study of New Lawyers*, 49 MONT. L. REV. 11 (1988).
4. Joan S. Howland & Nancy J. Lewis, *The Effectiveness of Law School Legal Research Training Programs*, 40 J. LEGAL EDUC. 381, 383 (1990).
5. See generally Robin K. Mills, *Legal Research Instruction in Law Schools, the State of the Art, or, Why Law School Graduates Do Not Know How to Find the Law*, 70 LAW LIBR. J. 343 (1977).
6. On the problems of legal research instruction in law schools, see Thomas A. Woxland, *Why Can’t Johnny Research? or, It All Started with Christopher Columbus Langdell*, 81 LAW LIBR. J. 451 (1989); Donald J. Dunn, *Why Legal Research Skills Declined, or, When Two Rights Make a Wrong*, 85 LAW LIBR. J. 49 (1993); Michael J. Lynch, *An Impossible Task but Everybody Has to Do It—Teaching Legal Research in Law Schools*, 89 LAW LIBR. J. 415 (1997).
7. I. Trotter Hardy, *Why Legal Research Training Is So Bad: A Response to Howland and Lewis*, 41 J. LEGAL EDUC. 221, 221–22 (1991).
8. *Id.* at 221, 224.
9. *Id.* at 224–25.
10. Wisconsin offers a diploma privilege to graduates of the Marquette and University of Wisconsin law schools who have successfully completed a prescribed program of study. Graduates of other law schools must take a bar exam. See

Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, WIS. L. REV. 645 (2000).

11. On the bar exam, see MACCRATE REPORT, *supra* note 1, at 277–84.
12. See E. Marshall Thomas, *The Bar Examination: Its Function*, 32 BAR EXAMINER 69, 70 (1963).
13. See Sam Hanson, *The Relationship between Bar Admissions and Law Schools*, 72 BAR EXAMINER, Aug. 2003, at 7, 9–10.
14. See Erwin N. Griswold, *In Praise of Bar Exams*, 60 A.B.A. J. 81, 82 (1974). There are also substantial criticisms of the bar exam. In 2002, the Society of American Law Teachers (SALT) offered a comprehensive critique of the bar exam that incorporated many historic and current criticisms. SOC'Y OF AM. LAW TEACHERS, STATEMENT ON THE BAR EXAM (July 2002), available at <http://www.saltlaw.org/BarExam.pdf>. According to SALT, bar examinations fail to adequately measure professional competence to practice law because they measure only some of the skills necessary to be a competent attorney (“The bar examination does not even attempt to screen for many of the skills identified in the MacCrate Report, including key skills such as the ability to perform legal research, conduct factual investigations, communicate orally, counsel clients and negotiate.” *Id.* at 2); negatively impact the law school admission process by putting too much emphasis on LSAT scores because of their correlation to bar exam passage rates and law school curricular development by serving as an incentive to focus on the doctrinal courses tested on the bar exam rather than clinic and skills courses (“[T]he exam overemphasizes the importance of memorizing legal doctrine.” *Id.*); and are a significant barrier to achieving a more diverse bench and bar because of their disproportionately negative impact on people of color. Although these criticisms are beyond the scope of this discussion, they are worthy of consideration.
15. James Huffmann, *Is the Law Graduate Prepared to Do Research?* 26 J. LEGAL EDUC. 520, 520 (1974) (“But what the law schools and lawyers call legal research is not research at all as the term is understood by physical and social scientists.”).
16. MACCRATE REPORT, *supra* note 1, at 163.
17. *Id.* at 157–63.
18. *Id.*, § 3.1(a), at 157 (The sources include case law, statutes, administrative regulations and decisions, rules of court, and Restatements and similar codifications.).
19. *Id.*, § 3.1(b), at 158.
20. *Id.*, § 3.1(c), at 158 (The remedies include litigation, legislative remedies, administrative remedies, and alternative dispute resolution.).
21. *Id.*, § 3.2, at 159–60.
22. *Id.*, § 3.3, at 160–63.
23. RESEARCH INSTRUCTION CAUCUS, AM. ASS'N OF LAW LIBRARIES, CORE LEGAL RESEARCH COMPETENCIES: A COMPENDIUM OF SKILLS AND VALUES AS DEFINED IN THE ABA'S MACCRATE REPORT (Ellen

M. Callinan ed., 1997), available at <http://www.aallnet.org/sis/tripssis/core.pdf>.

24. See generally Barbara Bintliff, *Context and Legal Research*, 99 LAW LIBR. J. 249, 2007 LAW LIBR. J. 15.
25. The MPT is given by more than half the states, including New York, Texas, Illinois, Ohio, and the District of Columbia. The National Conference of Bar Examiners (NCBE) also makes available the multiple-choice Multistate Bar Examination (MBE), the Multistate Essay Examination (MEE), and the multiple-choice Multistate Professional Responsibility Examination (MPRE). NCBE is a not-for-profit organization that works to support the efforts of state bar admissions authorities. Nat'l Conference of Bar Examiners, About the National Conference of Bar Examiners, <http://www.ncbex.org> (last visited Dec. 29, 2006).
26. MACCRATE REPORT, *supra* note 1, at 282.



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