

Revamping Retirement Episode 79

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Intro: Covering the ever evolving retirement plan landscape to help identify the biggest opportunities for plan sponsors, CAPTRUST presents Revamping Retirement.

Audrey Wheat: Hello and welcome to Revamping Retirement. This is Audrey Wheat, and today I'm joined by Pete Ruffle. I think this is our first time co-hosting a podcast together,

Peter Ruffel: Yeah, I think that's something that you find to be a relief because I've been asking for a while to work with you and you just have not agreed to. So let's see if I can earn my keep today and maybe get another shot at this

Audrey Wheat: That is not true, by the way. Definitely not true. we are wrapping up summer, if you can [00:01:00] believe it or not. I can't believe how quickly it's gone. And, I have actually had the pleasure at the very beginning of the summer. I met today's guest, Eric Dyson.

Audrey Wheat: Eric is the executive director of 90 North Consulting. So welcome Eric.

Eric Dyson: thanks so much for having me. it's, A, honor and a pleasure.

Audrey Wheat: I've gotten to know you in various roles. I would love for you to introduce yourself and tell our listeners about your company, 90 North Consulting and the various roles you have, and then we'll be digging into one of those roles today.

Eric Dyson: Okay. I'll be brief with that. but spent. 10 years as a submarine officer. I'm a Naval Academy graduate. That doesn't really have much to do with what we're gonna talk about today, but, left the Navy in 1994. So I did seven years of wealth management. total of 30 years experience in this business, actually a little more than 30.

Eric Dyson: started out as wealth management. It was, in 2000 when I started time. In the ERISA business at a national record keeper. I've been at some of the

national consulting firms. USI [00:02:00] Gallagher, did some time at a small boutique firm, but, 90 North Consulting, was launched July, 2020. And what a great time to launch a new business in the middle of a global pandemic, right?

Eric Dyson: But, so far we've made it half of what I do roughly is expert witness work, which we're gonna talk about. Today and the other half is the biggest project. advisor searches and on behalf of plan sponsors and, help them find their next, or sometimes, it's a plan without an advisor that they need to finally get one.

Eric Dyson: I love the speaking engagements, things like this where we can truly educate the listener. I serve as a committee member on a couple plans. those are I don't wanna say unique circumstances, but they're right where a committee is looking for help on their process and, engaging a little better with the advisor.

Eric Dyson: And then the last couple things I'm working with, the Behavioral Governance Institute on an AI agent, and also do fiduciary training

Audrey Wheat: we appreciate you taking the time. did you mention that you have a podcast as well?

Eric Dyson: I've got a podcast and a newsletter, but if the audience wants to look, [00:03:00] it's the Be More Than a Fiduciary podcast. find me on LinkedIn and you can click through or if you do a Google search or go to Apple or any other podcast platform, it'll come up. If you type in, be more than a fiduciary.

Peter Ruffel: Awesome. Thanks Eric. And as you alluded to, Audrey and I are very. Interested in the work you've done as an expert witness? like many who are playing this industry, they know it's a highly litigated one. So often we're learning lessons from those eventual outcomes of those cases as well as the process that it entails.

Peter Ruffel: So can you first summarize the purpose that an expert witness serves, and then also tell us a little bit about how you got involved in that type of work.

Eric Dyson: a lot of these lawsuits settle and we don't learn a whole lot from them. That's why I enjoy the speaking engagements, that if I am an expert witness in a case that settles.

Eric Dyson: I typically can't talk about the particulars, but there are lessons to be learned and I just keep the details generic. So how I got engaged first time as an expert witness, is if on the playground in elementary or middle school you ever got picked [00:04:00] last for kickball, that's what happened to me.

Eric Dyson: it was 2018 and it was actually the **Duke University class action lawsuit**, and plaintiff's attorney needed somebody with 403B experience. They needed somebody that had experience as a ERISA 321 investment advisor, someone that had experience as an ERISA 338 investment manager.

Eric Dyson: Basically, I checked all the boxes except for one. Never having prior expert witness experience. So it was on a short timeline and it was like, well, I guess we'll take you, I got picked last on the playground for kick wall and so I got through that case. My second case actually went all the way to trial, and that was in 2020 and 2021.

Eric Dyson: So my first two engagements got me going, especially the second one, going all the way to trial. Pete, and answer your question, what does an expert do, for any court case or risk of court case that goes all the way to trial? The judge's decision, the court's decision will be titled something called Findings of [00:05:00] Fact and Conclusions of Law.

Eric Dyson: And experts fill in the gap. findings of fact would be. The plan and the p fiduciaries did an RFP, that would be a fact or the plan met once a quarter. That's again, a fact. And then the conclusions of law, where I fill in the gap is two pieces, both experience and analysis. so let me give you a very generic example. but this is a good application for the listeners. Let's say there's a question about target date funds, And I've said over and over as an industry, we can analyze a large cap growth fund all day long, all night. the target date funds are, you know, we're trying to analyze eight funds versus another eight funds. So I cannot go to a case as an expert and say, based on my opinion, this is what I typically see. That's an incomplete. Presentation. and again, we're being very generic here, but what I can say is, based on my experience, I typically see a good committee adhere to these rules from [00:06:00] 2013, that Department of Labor is published and they do the following things, and then I will.

Eric Dyson: Produce a sample target date fund report. the court's not just relying on my, mental opinion and experience, but I have to give, a backup a basis. And, to answer the question, I had one engagement with the Department of Labor and what really surprised me, they started asking some details about, well, what do I normally see for an investment policy statement?

Eric Dyson: what do I normally see? And I Paused and wanted to say all these attorneys from the Department of Labor. Wait a minute, you're the people that make the rules.

Eric Dyson: why are you asking me? But that's what it boils down to. They, the courts, the attorneys, and in this case the Department of Labor, aren't the ones every day in our business knowing what's normal.

Eric Dyson: it's really about methodology and what my experience is, and then backing it up with analysis.

Peter Ruffel: I think that background that you gave Eric about all the work that you've done in this industry. Leans into you actually being an expert witness and Exactly. that anecdote that [00:07:00] you.

Audrey Wheat: So Eric, does an expert witness get to choose which types of cases they're involved in? what's your criteria for kind of, delineating which ones you get involved in and which ones you don't?

Eric Dyson: do I have a choice? The answer's yes. and to a degree, just because I'm interested in a case, doesn't mean I get on it. But, first step is, are there any conflicts?

Eric Dyson: and I'll give an easy example of that. I've been a paid speaker and sponsored by a number of service providers, record keepers and DCIO fund wholesalers, So I, as a matter of choice, will never take a case where a service provider is a named defendant,

Eric Dyson: And when I say servicer provider, that.

Eric Dyson: For me by choice would be if the advisor is a named defendant. I have done those in the past. I no longer will because I'm engaged in, the search process there's too much conflict there. So that's the first thing. A do I have a conflict? and the next is, What are the merits of the case and what is the reputation of the law firm? Some of the law firms out [00:08:00] there are hoping to get a quick settlement and not go to trial ever, and they may or may not be good or not so good trial attorneys. but example of merits of the case, I can give a very easy example is some of these forfeiture lawsuits that are out there,

Eric Dyson: We were all waiting, Hey, which direction are these gonna go? And there's only one time I would take a forfeiture lawsuit is that if the plan

clearly violated the plan documents, but all these other things that are a little nebulous, I didn't want to get involved with that because it was to me still a little nebulous on which way these were running to go.

Eric Dyson: so I look at the merits of the case and decide, first of all, does my opinion align and does it make sense for me to take it?

Audrey Wheat: after you've. Said Yes. Talk through what you can typically expect and can you characterize what your typical timeline and preparation for that work looks like?

Eric Dyson: sure. Let me start out with, typical is like many other things in our business, it varies widely. but, it was very recently I took on a case and the attorney said, okay, we need your report in two weeks. [00:09:00] excuse me. And that was a heavy lift in two weeks.

Eric Dyson: typically by the time I get involved or any expert witness gets involved, the case is somewhat mature. Meaning it was probably filed 12 or 18 months ago when it first entered court. And the judge has allowed it to continue to the discovery phase. So I'm asked by an attorney, Hey, we're looking for an expert witness.

Eric Dyson: Are you interested? And if we pass those other tests that I said before, I'm not conflicted, willing to look at this. typically get an interview by the attorneys if I've not already worked with them, They just need a feel for what am I gonna be like under deposition? but here's what goes next.

Eric Dyson: I typically will talk about the case, what they are looking to have an expert give an opinion on. And there's sometimes, at that point, even though I've been invited and we had a conversation, I said, no, I can't take this case because my opinion does not align with what you're trying to do. If I move forward.

Eric Dyson: Then I'm given a just a truckload of documents to review. worst case, and I want the listener to consider [00:10:00] this, to have your documents all in order you should, but 250,000 pages of documents I had in one case. Now I don't necessarily review every one of them. For example, if I come to the trust agreement and it's 35 pages of a trust agreement and the trustee is not an issue, after I've reviewed the first page, I move on.

Eric Dyson: But I'm typically looking at investment policy statement committee meeting minutes, and I'm trying to figure out. Did they have a good

process or did they not? I typically am given somewhere between six and eight weeks to do all that review and produce a report that's submitted to the court and then what in many cases happen, assuming I'm working for plaintiffs, plaintiffs typically file a report first.

Eric Dyson: Defense experts will now give. A rebuttal to that. and I jokingly say their report will say, Mr. Dyson's an idiot, and he doesn't know what he's talking about.

Eric Dyson: not really, but they are, they're going to, figure out where they can find holes in my report. And then if it's typically plaintiffs and defense, then plaintiffs get one more [00:11:00] round at saying, no, I don't agree with what they said.

Eric Dyson: Opposing counsel will then have a deposition with me where I'm grilled for about seven hours on, why did you say this? Isn't it true? We think contradicts, et cetera, et cetera. I want you to imagine. That someone in the future is gonna spend roughly 60, 80, a hundred hours, and that's a real life number, evaluating all your fiduciary process documents for the last six years.

Eric Dyson: I don't want to, run this into fear, but that's what happens in this litigation. it's 60, 80, a hundred hours of work by the time I get to deposition that I've looked at a company's process. And you're gonna find where mistakes were made nobody's perfect.

Eric Dyson: I'm gonna find errors.

Audrey Wheat: Eric, you talked about being deposed for eight hours at a time. So let's recreate that experience for a second. You would say, an attorney might start a question by saying, would you agree? So I'm gonna do a, would you agree?

Peter Ruffel: I would agree with that.

Peter Ruffel: Good. So then to what I was saying before, would you agree that there isn't a best practice, [00:12:00] but instead good practices?

Eric Dyson: let's talk about that because there's a little bit of a conundrum here, We go to the dictionary conundrum, an unsolvable riddle, What can everybody typically quote as a fiduciary standard that's exclusively in.

Eric Dyson: The best interest of the participants and the beneficiaries. Not exclusively in a good interest, Not exclusively in a bare minimum legal requirement. So there's a little bit of a conundrum there that I once had an attorney say, to your point, Pete. Best practice is not necessarily the law meeting the legal minimum standards.

Eric Dyson: That's not an exact science on what is best and what is good. certainly good enough and meaning legal standards is where the lawsuit should focus.

Audrey Wheat: Eric, continuing on that path of what a plan sponsor should care about and having a lock type process. specifically in our prep, you mentioned, meeting minutes and investment policy statements. can you break down some of your thoughts and [00:13:00] recommendations regarding those two things specifically as actionable, steps for our plan sponsor listeners.

Eric Dyson: absolutely I can. And that's. not all of the cases where there's a failure, but if you can get your investment policy statement, your investment reviews and your meeting minutes in order, you've handled a lot, What that does not address is record keeping, administration and cost.

Eric Dyson: but that's fine. So if I were to look at a case and this is what I want the listener and the committee members to consider, if I had access to your investment policy statements. And your investment reviews and your committee meeting minutes, I should be able to see a story there, what happened in the past, what's happening right now, and what you're proposing for the future.

Eric Dyson: And if I can put that all together with all the right reasons, then that's gonna tell a story of a prudent process. so let's start where the problems come in. and we'll start with the investment policy statements. Two general areas I see that are typically misunderstood. One, that investment policy statement committee members is your document.

Eric Dyson: most committee members think, that's my [00:14:00] advisor's document. We just signed and acknowledged it. And the reason I know that is when I give. Speaking engagements I can see out of the corner of my eye when I tell an audience of plan sponsors that is not the advisor's document, it's yours. I see them quietly look around and the pens go to paper and they start taking notes.

Eric Dyson: When I say that, it's not the advisor's document, it's yours. so it moves into the second thing is. Do you as committee members really

understand that now? Sure, you still hired an advisor and they're helping you with that and you can rely on them, but you need to understand what's going on with your investment policy statement.

Eric Dyson: That, and I would also compare the investment policy statements to. Your investment monitoring report. So a very easy example, let's say that if your investment policy statement says, we will look at risk adjusted returns, and it mentions sharp ratio. And I go to your investment report and Sharp Ratio is not anywhere on the investment report. There's a problem. Yes, I have seen that in litigation. so do they match

Eric Dyson: Committee I serve on does a great [00:15:00] job with this. They challenge the advisor on what are our limits. they recognize the investment policy statement as their document as a committee, and they ask a lot of questions, not just to ask questions and create dialogue, but they wanna make sure they understand it.

Eric Dyson: And then I'll go on to meeting minutes. It is important. Everybody understands a couple things about meeting minutes, not gospel. What I mean by that is if it gets to litigation, then the courts recognize that the meeting minutes are one story. Meaning if somebody gets on the stand and say, here's what I remember happened to this meeting, X, Y, Z, and the meeting minutes, say something different.

Eric Dyson: The court will recognize that's a possibility. Just two people could tell a different story. What the listeners need to understand is meeting minutes can save the day, They're not gonna necessarily lose the day for you, but if you're meeting minutes, show what you did, why you did it. They tell a story and here's the last two things that I add on,

Eric Dyson: Your minutes need to demonstrate prudence and loyalty. Did we do what was in the best interest of the participants? Did we have a good process? And

Peter Ruffel: Eric, that's [00:16:00] so important. It's the true north of this all, and meeting minutes are this one thing that you certainly in your chair as an expert witness, have seen such a variety of how those have been drafted from long to short. I'm sure there's a goldilock zone that you typically see in that regard, but,

Peter Ruffel: what you shared is very valuable for, our committee members to understand about what they should be putting in there.

Peter Ruffel: Eric, I'd like to dive a little bit deeper in what you were just touching on. more specifically about just some of the good practices and bad practices that you've seen in your role as an expert witness. anything that you could bring to light to us or any anecdotes you can share in that regard? I.

Eric Dyson: Yeah, and lemme start out with anything I say to answer this question. The listeners who are committee members. I'm gonna ask you for more time. I mean, saying you should do this, you should do this, you should do this. these are professionals who are pressed for time and a little bit of a sidebar, but in the ERISA world, the people with the least amount of time and the least amount of training.

Eric Dyson: Are the ones that have the most risk, and those are the committee members, Somebody we call lay fiduciary. So I [00:17:00] wanna recognize that's why the committee members hire good advisors, Hire good record keepers to help you with this. but in answer to the question, I wanna start out with dumb emails and dumb text messages.

Eric Dyson: Your text messages and emails can become discoverable. and I have been involved in a case where text messages became part of the evidence and they were very damning to the case. same thing with emails and just give you two hypothetical examples. the committee member or benefit manager sends an email to the advisor saying, Hey, um.

Eric Dyson: We really need to talk about this one fund, those are good emails and you should save them An email such as, Hey Fred, the CFO never attends committee meetings. Does he really need to be on the committee? putting in writing that you have a committee member that never shows up can be discoverable.

Eric Dyson: So save that for a phone call. when those things happen. consider your emails and text messages, and the guidance is you're not willing to see it in the headlines, don't write it.

Eric Dyson: Uh, we've already been over a well-written IPS committee understand the IPS. The last two big pieces are [00:18:00] make sure you're doing regular benchmarks for your plan. That's both record keeping fees, advisor fees, investment fees, So I'll help you out with the term regular. Can't really define that, but I read a Callen study that all those plans in this study were over a hundred million dollars.

Eric Dyson: the last thing is be familiar with target date fund guidance from the Department of Labor February, 2013. Most of the listeners, there are other default options beside target date funds, but typically the large majority of assets in the plan and cashflow are going into target date funds.

Eric Dyson: So that's a real quick summary. and the last thing I should add is some solid fiduciary training. Make sure you document that.

Peter Ruffel: Those are good ones. Okay. I, let's go 30,000 foot view here for a second, Eric.

Peter Ruffel: last year the Supreme Court turned over the Chevron deference. can you remind folks what that is and talk about how that decision may impact retirement plan litigation to come.

Eric Dyson: yeah, the exact wording of that question is important, that it impacts litigation, but litigation sometimes changes the course [00:19:00] of. Certain decisions across all plans. So I try to keep this to what's important for the plan sponsor. So very basically, remember back from your, civics class, and this is just my silly way of interpreting the Chevron deference,

Eric Dyson: We've got three branches of government, legislative, judicial, and, the executive brands, the Chevron deference previously said there was a nebulous law or ruling, it's vague. How do we handle this? It would be left up to those agencies such as the Department of Labor to rule on it.

Eric Dyson: Vacating that decision by the Supreme Court said, no, those agencies make the rules. We're gonna leave it up to the judicial system. To interpret them, which means if there's something nebulous or unclear with the Department of Labor. It's a potential litigation issue. And now the courts are gonna decide one way or another and we may or may not know what's going on there.

Eric Dyson: And the last thing I would add to that, and there's a great very recent example in, a forfeiture in the Hewlett Packard case, But the Department of Labor wrote what's called an amicus brief, [00:20:00] Amicus being friend, Friend of the court. And the Department of Labor said, this is what we feel the right answer is, The Chevron deference allows litigation to maybe a little easier, but there's still ways for the Department of Labor to weigh in. We think this is the right answer, and they still do that.

Audrey Wheat: Eric, we can't bring up one Supreme Court decision without addressing a more recent one, **the Cornell decision**. is that decision weighing on you like it has. Many critics of the decision or

Audrey Wheat: do you think it won't really change the frequency of suits in our space?

Eric Dyson: I don't think it should change anything, and maybe that's a hopeful or a naive view, but we'll get into that, First of all, let's start with the criticism,

Eric Dyson: The criticism is, in very basic terms, the Supreme Court was pressed to say, if you decide this method or this way, then you're opening up the floodgates for litigation. And the court's response was, that's not our job. To determine whether it's something that opens up litigation.

Eric Dyson: Our job is to interpret the law [00:21:00] as written, and here's how we see it now. They gave some other things to say, Hey, here are ways to mitigate this potential floodgate of litigation we'll get into. the Cornell decision as it stands was. About prohibited transactions.

Eric Dyson: a prohibited transaction has three pieces, number one, there's a transaction by the plan. Number two for goods or services. And number three, with a party at interest. If you are using plan assets to pay for your record keeping fees, as an example, that is by definition of prohibited transaction and everybody's Whoa, whoa.

Eric Dyson: wait a minute. What? What you mean? the good news, it's an exempt. Prohibited transactions. so what I would like the listeners to understand from that case and what they need to do is a lot of things happen in our business regularly that are quote unquote exempt, prohibited transactions. And listeners, if you want more, talk to your advisor and find that out.

Eric Dyson: So what does that mean? It means if you are using plan assets to pay for those services, you need to have an [00:22:00] accurate. Understandable. ERISA 408B two disclosure, and that's your service provider disclosure for fees and services. If you don't have that.

Eric Dyson: Then by definition you have failed to consider, you have a reasonable arrangement. so the things that you **need** to do, plan sponsors are, one, you have to determine that this service is necessary. Generally speaking, record keeper, advisor, audit, Those are all considered necessary. You have your fee disclosures in order, and you've determined by some method, such as

a benchmark or an RFP. That it's reasonable. so the last piece that came out of that decision is something that's called an affirmative defense. And the affirmative defense is, yes, we engaged in a prohibited transaction. We use plan assets to pay for services, but. We've checked all the boxes to do this in the right way, and the Supreme Court weighed in on this.

Eric Dyson: If litigation happens, then the court can say, show us all your fee disclosures and that you've done the right thing, and then [00:23:00] the court can shut it down. So long way to say that I don't think it changes what plan sponsors **should** be doing. Vet all your service providers, do your benchmarks, do your analysis, is it appropriate, et cetera, et cetera.

Peter Ruffel: Eric, I know that this is probably something you get asked often, but

Peter Ruffel: What should plan sponsors be thinking about in the future as far as retirement plan litigation? what are the topics and trends that you think are just starting to emerge? forfeitures probably was what we were thinking about last year. What else is out there?

Eric Dyson: we're gonna see this more and more in health plans 'cause they are ERISA plans, especially everything we just talked about on the **Cornell** case. a lot of companies don't understand that. the health plans and ERISA plan, if employees are paying their money to be part of it, then most all of the same rules apply.

Eric Dyson: So I take a look at that. my crystal ball. would say target date funds, Collective investment trust and managed accounts is what you need to pay attention to target date funds because that's where most of the money is.

Eric Dyson: And I've seen plans that do a great job. adhering to Department of Labor guidance and some that just [00:24:00] do not. for example, even the whole round of those target date funds, suits, they involved BlackRock where the claim was, well, you just went for the lowest expense.

Eric Dyson: A lot of those got dismissed by the court. But that doesn't mean those companies didn't have costs for litigation to get past that. So make sure your target date fund, due diligence is in order. And then I said collective investment trust. And actually you can marry target date funds with collective trusts.

Eric Dyson: For the listener who's in a smaller plan, you may not even know what a collective trust is. Never heard of it. But the availability to plans of all size for collective trust is becoming much more available. for example, an organization like CAPTRUST will make that available to plan sizes that are much smaller than we talked about five years ago.

Eric Dyson: so the plan sponsors the committee members that are listening. Ask your advisor. Are we eligible for collective trust? Should we look into this? And if you educate yourself with everything involved, go through a nice process. That's the start. then lastly, managed accounts. I wanna be clear, I'm very neutral on managed [00:25:00] accounts.

Eric Dyson: I'm not saying that they are a problem or that they're all gonna get litigated, but like everything else, managed accounts need a process. You need to have a process by which you're evaluating. And I tell people I have good news and bad news with that. And it's the same news. There's not really a standard way to monitor and analyze managed accounts.

Eric Dyson: so the bad news is you can't go to this template and say, this is how we've done it. The good news is if you have a process, it's gonna be hard for somebody to say you're doing it wrong. But, that's what I think health plans, target date funds, collective trust and managed accounts is what folks should.

Eric Dyson: still have a good process no matter what.

Audrey Wheat: those are some great, tips Eric, again, we wanna thank you so much for your time. You are just a wealth of knowledge. I have a feeling this is not gonna be your last time on the podcast,

Audrey Wheat: We would love to have you back at some point to talk about the other 50 things that you do. but to wrap up, we're gonna ask you the question that, we find ourselves being famous for on this podcast. What does retirement look like for you, Eric Dyson, if you've thought about it at [00:26:00] all.

Eric Dyson: So you wanna know what's gonna happen lunchtime, the day of my funeral. Is that pretty much what you're asking? I jokingly say that all the time, but My answer is, right now in my early sixties, I don't see myself as ever fully retiring. Will I scale back? Absolutely.but now I'll answer the question.

Eric Dyson: I have two things that are near and dear to my heart. My wife's love language is luxury hotels.

Audrey Wheat: Wow.

Eric Dyson: How do I know that she specifically told me my love language is luxury hotels. So although it sounds pretty generic for retirement, I want to travel a lot. Having been in the Navy, I've seen a lot of parts of the world that my wife has not seen.

Eric Dyson: And, I want to take her to see those places and enjoy the time with her. And, it's not retirement time yet, but I've booked two and a half weeks in the spring of 2026. We're going to Italy and that's the first, and then. I just can't say this enough. I got four spectacular grandchildren and as much time as I can spend with them, in retirement, there'll be teenagers and young adults, and hanging out with your grandparents may not be cool, but I'm gonna force 'em to.

Audrey Wheat: If you [00:27:00] take them to luxury hotels, I'm sure they'll be happy to hang out with you and your wife.

Peter Ruffel: yes.

Eric Dyson: They might not appreciate good bathroom hardware like my wife does.

Thank you so much, Eric for your time. thanks for Pete for co-hosting and we just wanna remind our listeners please, like and subscribe to the podcast. We're available on all the platforms, and we will, talk to you next month. Thanks everyone. The discussions and opinions expressed in this podcast are those of the speaker and are subject to change without notice. This podcast is intended to be informational only. Nothing in this podcast constitutes a solicitation, investment advice, or recommendation to invest in any securities. CAPTRUST Financial Advisors is an investment advisor registered under the Investment Advisors Act of 1940.

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