

## **APPENDIX D**

### **Planning Guide and Learning Objectives for Practicum Exercises**

# **LEARNING MATERIALS for the PRACTICUM SERIES EXERCISES**

**Planning Guide and Checklist  
and  
Learning Objectives**

## **PLANNING GUIDE AND CHECKLIST**

The planning guide and check list is an outline that assists in the preparation of legal substance and presentation. It provides the basis for the preparation of more detailed planning.

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## PLANNING GUIDE AND CHECKLIST

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### SECTION 1 – GENERAL

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#### A. Professional Responsibility

- Pervades all exercise activities
- Role of attorney
  - Fact-finding
  - Evaluating evidence
  - Analyzing applicable law, legal elements and precedent
  - Developing legal theories
  - Applying applicable law to specific facts
  - Assessing strengths and weaknesses of client's case
  - Assessing strengths and weaknesses of opponent's case
  - Presenting options
  - Evaluating and prioritizing options with client input
  - Counseling client
  - Negotiating an advantageous result for client
  - Advocating zealously for client
  - Drafting and reviewing documents
  - Keeping client reasonably informed
  - Advising client of legal rights, obligations, implications and consequences
- Attorney/client privilege
- Confidentiality
  - Model Rules of Professional Conduct: Rule 1.6: Confidentiality of Information
- Conflict of interest
  - Model Rules of Professional Conduct: Rule 1.7: Conflict of Interest: Current Clients
  - Model Rules of Professional Conduct: Rule 1.8: Conflict of Interest: Current Clients: Specific Rules
  - Model Rules of Professional Conduct: Rule 1.9: Duties to Former Clients
  - Model Rules of Professional Conduct: Rule 1.10: Imputation of Conflicts of Interest: General Rule
  - Model Rules of Professional Conduct: Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees
  - Model Rules of Professional Conduct: Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
- Authority to settle
  - Model Rules of Professional Conduct: Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer
    - 62(a) “A lawyer shall abide by a client's decision whether to settle a matter.”

#### B. Client/Witness Interviews

- Preparation
  - Confirm time and location with client/witness
  - Have client/witness bring all relevant documents or other evidence
  - Develop a basic understanding of client's/witness' situation
  - Conduct preliminary research and investigation
- Rapport
  - Know client's/witness' name and preferred form of address
  - Make client/witness feel at ease
  - Establish trust

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## PLANNING GUIDE AND CHECKLIST

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### SECTION 1 – GENERAL

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- Efficient factual inquiry
  - Elicit all facts, favorable and unfavorable
  - Find out what client/witness needs and hopes to accomplish
  - Focus on pertinent issues, avoid tangential, non-relevant inquiry
- Anticipate and analyze pertinent legal issues
  - Statutes of limitations
  - Evaluate all possible causes of action and remedies
  - Eliminate frivolous or marginal theories
- Assess client's case
  - Be realistic
  - Compare probable outcomes with client's expectations and needs
  - Consider emotional and financial impact of contemplated action
  - Estimate time required to effectively represent client
- Reject client if necessary
  - Clearly explain reasons for rejection to client
  - Inform client of applicable statutes of limitations and filing deadlines
  - Encourage client to seek another opinion as soon as possible
  - Refer client
  - Confirm rejection by email and written letter, clearly stating reasons and deadlines
- Develop preliminary strategy with client
  - Negotiation
  - Mediation
  - Arbitration
  - Litigation
- Have client sign all necessary documents
  - Representation agreement
  - Information releases (school, medical, work place)
  - Waivers

#### C. Representation Agreements

- Specifically tailored to the identity and needs of the individual client
- Client is clearly identified
- Scope of the representation is clearly defined
- Clearly defining allocation of authority
- Responsibility for attorney fees, costs and expenses is adequately explained
- Reasonable, customary fees, costs and expenses are explained
- Billing procedures are clearly stated
- Attorney responsibilities are adequately defined
- Client responsibilities are adequately defined
- Appropriate termination provisions are included
- Agreement overall complies with local Rules of Professional Responsibility
- Coherent grammar
- Proofread
- Client can easily understand agreement
- Reviewed and signed by client

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## PLANNING GUIDE AND CHECKLIST

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### SECTION 1 – GENERAL

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#### D. Fees

- Abide by applicable Rules of Professional Responsibility
  - See Model Rules of Professional Conduct: Rule 1.5: Fees
  - Give client a simple memorandum or copy of customary fee agreement including:
    - General nature of legal services
    - The basis
    - Rate or total amount of fees (reasonable and customary)
    - Whether and to what extent fees are subject to change
    - Whether and to what extent client is responsible for costs, expenses or disbursements
    - The responsibilities of the attorney and client under the agreement
- Contingency
  - Must be in writing, stating method by which fee is determined and percentage
  - Conforms to legal limitations
    - Ceiling on percent
    - Required alternative fee offering
  - Clearly explained to client
  - Including how disbursements and costs affect contingency fee and client's recovery
- Straight time (hourly)
- Price per project
- Billable time
  - Client and witness interviews
  - Phone calls
  - Email
  - Consultation with other attorneys
  - Research
  - Prepare exhibits and schedule
  - Legal assistant/law clerk time
  - Drafting/reviewing documents
  - Depositions
  - Filing court documents
  - Negotiation
  - Mediation
  - Arbitration
  - Court time/appearances
- Billing procedures
  - Accurate timekeeping
  - Itemized statements
  - Clear explanation of payment terms
  - Regular billing cycle

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## PLANNING GUIDE AND CHECKLIST

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### SECTION 1 – GENERAL

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#### **E. Costs and Expenses**

- Filing and other court fees
- Notary/service of process fees
- Investigation costs
- Expert witnesses
- Fees and travel
- Court reporters
- Exhibits
- Travel and mileage
- Phone charges
- Postage
- Copies
- Couriers/service fees

#### **F. Sources of Law**

- Statutes
  - Specific to issues
  - Source of substantive law
  - Time limitations on claims—*see* local statutes for applicable law
- Case Law
  - Source of substantive law
  - Interprets the elements of a claim
- Other Sources
  - Treatises/hornbooks/textbooks
  - Practice guides/CLE materials
  - Digests and annotations
  - Looseleaf services
  - Specialized publications and periodicals/law review articles
  - Legal dictionaries and encyclopedias
  - Electronic services/CD-ROM
  - Consultation with others
  - Administrative materials
  - Briefs

#### **G. Rules of Evidence and Procedure**

- The Rules of Evidence and Procedure may vary. Check with Judge/Arbitrator.
- For persuasive purposes, foundations for testimony and exhibits should be presented even if not required
- Check local rules and practice
  - Elements of the claim
  - Sufficiency of evidence
  - Burden of proof
  - Order of evidence
  - Validity of claims
  - Limitation of remedies
  - Damages/Measure/Mitigation

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## PLANNING GUIDE AND CHECKLIST

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### SECTION 1 – GENERAL

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- Admissibility of potential evidence, testimony and exhibits
  - Federal Rules of Evidence, Rule 105: Limited Admissibility
  - Federal Rules of Evidence, Rule 404: Character Evidence Not Admissible to Prove Conduct: Exceptions: Other Crimes
  - Federal Rules of Evidence, Rule 802: Hearsay Rule
  - Federal Rules of Evidence, Rule 804: Hearsay Exceptions: Declarant Unavailable
- Relevancy of potential evidence, testimony and exhibits
  - Federal Rules of Evidence, Rule 104(a): Preliminary Questions of Admissibility
  - Federal Rules of Evidence, Rule 104(b): Relevancy Conditioned on Fact
  - Federal Rules of Evidence, Rule 401: Definition of “Relevant Evidence”
  - Federal Rules of Evidence, Rule 402: Relevant Evidence Generally Admissible: Irrelevant Evidence Inadmissible
  - Federal Rules of Evidence, Rule 403: Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
- Objections to potential evidence, testimony and exhibits
  - Mischaracterization of evidence
  - Misstatement of facts
  - Irrelevant question
  - Misleading or confusing question
  - Outside the scope of rebuttal argument
  - Multiple or compound questions
  - Leading question
  - Improper impeachment
- Local Rules of General Practice/Civil Procedure
  - Primary source of procedural law at trial level
  - Venue specific rules
- Litigation timing
- Pleading and motion requirements
  - Federal Rules of Civil Procedure, Rule 4: Summons
  - Federal Rules of Civil Procedure, Rule 4.1: Serving of Other Process
  - Federal Rules of Civil Procedure, Rule 5: Serving and Filing Pleadings and Other Papers
  - Federal Rules of Civil Procedure, Rule 7: Pleadings Allowed: Form of Motions and Other Papers
  - Federal Rules of Civil Procedure, Rule 7.1: Disclosure Statement
  - Federal Rules of Civil Procedure, Rule 8: General Rules of Pleading
  - Federal Rules of Civil Procedure, Rule 10: Form of Pleadings
  - Federal Rules of Civil Procedure, Rule 11: Signing of Pleadings, Motions, and Other Papers: Representations to Court: Sanctions
  - Federal Rules of Civil Procedure, Rule 15: Amended and Supplemental Pleadings



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## PLANNING GUIDE AND CHECKLIST

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### SECTION 1 – GENERAL

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- Discovery options and limitations
  - Federal Rules of Civil Procedure, Rule 16: Pretrial Conferences; Scheduling; Management
  - Federal Rules of Civil Procedure, Rule 33: Interrogatories to Parties
  - Federal Rules of Civil Procedure, Rule 34: Production of Documents, Electronically Stored Information and Tangible Things and Entry Upon Land for Inspection and Other Purposes
  - Federal Rules of Civil Procedure, Rule 35: Physical and Mental Examination of Persons
  - Federal Rules of Civil Procedure, Rule 36: Requests for Admission
  - Federal Rules of Civil Procedure, Rule 37: Failure to Make Disclosures or Cooperate in Discovery: Sanctions
- Pre-trial responsibilities
  - Federal Rules of Civil Procedure, Rule 3: Commencement of Action
  - Federal Rules of Civil Procedure, Rule 4: Summons
  - Federal Rules of Civil Procedure, Rule 5: Service and Filing Pleadings and Other Papers
  - Federal Rules of Civil Procedure, Rule 7: Pleadings Allowed: Form of Motions and Other Papers
  - Federal Rules of Civil Procedure, Rule 7.1: Disclosure Statement
  - Federal Rules of Civil Procedure, Rule 8: General Rules of Pleading
  - Federal Rules of Civil Procedure, Rule 10: Form of Pleadings
  - Federal Rules of Civil Procedure, Rule 11: Signing of Pleadings, Motions, and Other Papers: Representations to the Court: Sanctions
  - Federal Rules of Civil Procedure, Rule 15: Amended and Supplemental Pleadings
  - Federal Rules of Civil Procedure, Rule 16: Pre-trial Conferences: Scheduling; Management

#### H. Practical Considerations

- Internal memos
  - Used as a preliminary internal analysis of the strengths and weaknesses of the case
  - Not to exceed reasonable page length
  - Appropriate margin, font, and line spacing adjustments
  - Coherent overall, paragraph, and sentence structure
  - Proofread and checked for misspelling
  - Pertinent issues clearly identified
  - Applicable procedural and substantive law identified
  - Applicable law applied to specific case facts
  - Neutral assessment as to how the pertinent issues may be resolved
  - Appropriate substance and level of analysis for intended audience
  - Easy to read and informative
- Demand for payment on policy (if insurance company is involved)
  - Information disclosure
  - Deadline for responses
  - Negotiations
- Pleadings
  - Summons and Complaint
    - Short and plain statement showing pleader is entitled to a specific relief demanded
    - Filed within statute of limitations
    - Appropriate jurisdiction and venue, service of process
    - Proper format, caption, acknowledgments and signatures
    - Clearly identifies the court's, party's and attorney's name and address

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## PLANNING GUIDE AND CHECKLIST

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### SECTION 1 – GENERAL

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- States a valid cause of action necessary elements
  - Alleges facts sufficient to support prima facie claims
  - Timely served on court and opposing party
- Answer and Counterclaim
  - Short and plain defenses to each claim
  - Admit/deny each allegation
  - Appropriate challenges to sufficiency of process and service of process
  - Must state if not enough information to admit/deny
  - Appropriate challenges to jurisdiction and venue
  - Appropriate challenges to stated claims
  - Proper format, caption, acknowledgments and signatures
  - Answer raises applicable avoidance or affirmative defenses
  - Answer adequately responds to all allegations of the complaint
  - Counterclaim states a valid cause of action/necessary elements
  - Counterclaim alleges facts sufficient to support prima facie claims
  - Counterclaim clearly specifies and requests appropriate relief
  - Timely served on court and opposing party
- Reply to Counterclaim
  - Appropriate challenges to stated counterclaims
  - Proper format, caption, acknowledgments and signatures
  - Raises applicable affirmative defenses
  - Adequately responds to all allegations of counterclaim
  - Timely served on court and opposing party
- Motions
  - Failure to state a claim upon which relief can be granted
  - Challenges to jurisdiction and venue
  - Challenges to sufficiency of process and service of process
- Pleading Deadlines
- Discovery Deadlines
- Pre-trial motions
  - Dispositive
  - Non-dispositive
- Pre-trial settlement conference/hearing

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## PLANNING GUIDE AND CHECKLIST

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### SECTION 2 - NEGOTIATION

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#### A. Negotiation Preparation

- Preliminary Negotiation Preparation
  - Initial client meeting—derive basic factual picture
  - Alternate questions—open, follow-up, closed, leading, summary
  - Convey expectations and recognition of full, relevant disclosure
  - Anticipate and overcome etiquette barriers (e.g., talk of trauma, medical problems)
  - Gather information—funnel, chronological order, quietly persist, prove, re-create events
  - Review conflicts, nature/scope of representation
  - Maintain normal client-attorney relations, if client mentally or physically disabled
  - Decision making—lawyer-centered or collaborative
  - Decide attorney role(s)—draftsman, agent, negotiator, advocate, spokesperson
  - Obtain client objectives and prioritize
- Strategy
  - Style—working with client: directive or facilitating, broad v. narrow focus
  - Goals—problem resolution considering any future relations
  - Research facts and law
  - Plan and prioritize arguments and evidentiary support
  - Anticipate counter arguments
  - Concessions
  - Worst Alternative to a Negotiated Agreement (WATNA)
  - Likely and Best Alternative to a Negotiated Agreement (LATNA, BATNA)
  - Value of case, minimum/maximum ranges, remedies, aim high
  - Liability, elements, special damages, insurance coverage, past verdicts
  - Develop multiple, creative options
  - Discuss non-legal (psychological, social, economic, and moral) options, pros/cons
  - Discuss legal options—best, likely and worst consequences (% probability of each)
  - Set flexible time allowed for negotiation and deadline(s)
  - Communicate logistical requirements, concerns
  - Confer—who is permitted at negotiation?
  - Confirm prior:
    - authority to settle
    - attendees
    - agenda
    - format
    - method(s) of recordation
    - publicity parameters
    - confidentiality
  - Inventory, classify, compare both sides' needs, interests and objectives
  - Outline other's potential gains and losses
- Style Decision
  - Effective competitive negotiation style:
    - high opening demands
    - few concessions
    - positions related to interests
    - exaggeration

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## PLANNING GUIDE AND CHECKLIST

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### SECTION 2 - NEGOTIATION

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- threats
  - aggression
- Alternatively, effective cooperative negotiation style:
  - high opening demands
  - rational, logical persuasion
  - ours, theirs and shared interests
  - objective criteria
  - fairness
  - trusting open exchanges
  - concessions to demonstrate good faith
  - realistic and analytical
- Negotiation Location and Arrangements
  - Make physical arrangements
  - Decide on beneficial psychological environment
  - Neutral site, or any reason to allow one party to host, advantages/disadvantages

#### **B. The Negotiation**

- Pay attention to non-negotiation conversation
- Establish rapport
  - Facilitate open communication to net valuable information
  - Avoid religion, politics, personal or sensitive subjects
- Nonverbal behaviors
  - Observe nonverbal signals
  - Gauge eye contact for honesty, confidence, effect of communication
  - Watch facial expression, posture and gestures
  - Check for surprising nonverbals
- Listen
  - To acquire previously undisclosed information
  - Recognize interests, needs and fears
  - Evaluate counterpart's position
  - Actively listen, reflect, paraphrase, clarify interests and positions
  - Acknowledge hostility, blame, nondefensiveness (example: I see you are upset, so what *do you feel* is a fair solution that we might accept?)
- Information Protection
  - Judiciously use “blocking techniques” to protect sensitive information
  - Ignore question
  - Declare question off limits (example: attorney-client privilege)
  - Answer a question with a question (evade by seeking clarification or elaboration)
  - Under/over-answering (generally to a specific question or conversely)
  - Answer honestly but incompletely
  - Beneficially reframe
  - Answer a different question than the one asked (example: I understand you want to know . . .)
  - Answer a recently asked question again

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## PLANNING GUIDE AND CHECKLIST

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### SECTION 2 - NEGOTIATION

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- Communication
  - Convince opposing parties to change their resistance point by a cost-benefit summary
  - Frame options in reference to negotiator's objectives, as gain to other offer
  - Dissuade rejection, solely from "reactive devaluation" of other's offer
  - Reasonable, analytical, realistic and rational
- Communicating offers and concessions
  - Briefly (to reduce counterpart's response time)
  - Specifically address conflict areas
  - Justify with objective reasons
  - Clearly state solutions, remedies, damage figures
- Reacting to offers
  - React immediately to an inadequate offer
  - Avoid bidding against yourself, ask opposing how much better the offer has to be
  - React strongly to outrageous offers
  - Remain silent as long as possible, until the other speaks
  - State that offer appears acceptable but final approval is by someone else
- Assessing negotiating competence and effectiveness
  - Outcome measures of effectiveness
  - Obtained profit-maximizing amount(s) and/or desired outcome in settlement
  - Reached agreement considering all relevant information and arguments
  - Compromised and conceded only what you had decided in advance
  - New information was factored into your negotiation
  - Used the probable trial outcome as a baseline for evaluation
  - Accurately estimated the value of particular items to the other side
  - Able to reconcile style, strategy and acceptability of offers with your client
  - Process handled cost-effectively in terms of time, energy and money
  - If applicable, preservation of relationship to facilitate compliance, long-term relations
- Post-Negotiation Self-Analysis
  - Decided in advance on style and strategy, yet remained flexible
  - Analyzed the other side's style and strategy and adopted accordingly
  - Reassessed client's BATNA, WATNA after receiving any new information
  - Accurately estimated the value of case with appropriate minimum/maximum range
  - Set/accomplish goals
  - Set the desired tone
  - Controlled the agenda
  - Received sufficient information—clarification or elaboration
  - Did not reveal too much
  - Failed to reveal information that should have been revealed (misrepresentation/fraud)
  - Kept in mind that it is always an option to walk out
  - No agreement reached, was result appropriate in the context of this negotiation
  - In case of deadlock, what might have been done to break the deadlock?
  - Maximize a fair, reasonable settlement
  - What could have been done differently in this negotiation and why?

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## **PLANNING GUIDE AND CHECKLIST**

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### **SECTION 2 - NEGOTIATION**

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- Visual Aids
  - If an indexed settlement brochure was used, were visual aids and factual history included to bolster credence, confidence and preparedness?
  - Were visual aids used tactfully to persuade, influence and increase understanding?
  - Does the cover letter have conditions for use, provide for its return and limit its evidentiary use?

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## PLANNING GUIDE AND CHECKLIST

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### SECTION 3 – MEDIATION

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#### A. Mediation Preparation

- Preliminary Mediation Preparation
  - Initial contacts—derive basic factual picture
  - Alternate questions—open, follow-up, closed, leading, summary
  - Distinguish problem, positions and interests (hidden agendas)
  - Decide style—evaluative or facilitating, broad v. narrow focus
  - Goals—problem resolution considering parties future relationship, if any
  - Research facts and apply to pertinent law(s)
  - Plan and prioritize agenda
  - Anticipate arguments/counter arguments
  - Concessions either side may need to make and reciprocal expectations
  - Anticipate Worst Alternative to a Negotiated Agreement (WATNA)
  - Anticipate Likely and Best Alternative to a Negotiated Agreement (LATNA, BATNA)
  - Value the case, minimum/maximum ranges and creative remedies
  - Send mediator a brief
  - Expect but do not be overly concerned over high opening demands
  - Develop many creative options
  - Set flexible timeframe allowed for negotiation deadlines(s)
  - Communicate logistical requirements and concerns
  - Confer—who is permitted to attend
  - Confirm immediately prior to mediation: formal authority to settle, attendees
- Procedure
  - Consensus on ground rules, enforcement, just and fair standards/guides
  - Breaks, recesses, breakdowns
  - Be concrete but flexible
  - Identify issues
  - Relate positions to interests (security, recognition, control, belonging)
  - Rational, logical persuasion
  - Identify conflicting, shared and compatible interests
  - Ensure buy-in through all parties participation
  - Acknowledge but do not react to emotional outbursts
  - Recast attacks on mediator as an attack on the problem
  - Dovetail differing interests
  - Insist on objective criteria
  - Agreement on fair standards/procedures
  - Expectations of fairness determined by party's perceptions
  - Facilitate trusting, open exchanges
  - Surrender something of value to the other side—give to get
  - If impasse, focus on positions, emotions; data, value or relationship conflicts—continue mediation to later date as last resort
  - Keep caucusing as an option (straight talk to each side)
  - Ask for concessions to demonstrate good faith/confront if none
- Mediation Location and Arrangements
  - Make physical arrangements
  - Decide on beneficial psychological environment
  - Neutral site, or any reason to allow one party to host, advantages/disadvantages

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## PLANNING GUIDE AND CHECKLIST

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### SECTION 3 – MEDIATION

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#### B. The Mediation

- Pay attention to non-mediation conversation
- Establish rapport
- Facilitate open communication to net valuable information
- Avoid religion, politics, food, dress, personal or sensitive subjects
- Nonverbal behaviors
  - Observe nonverbal signals
  - Telltale mannerisms and furtive expressions (example: tension shown by fidgeting)
  - Gauge eye contact for honesty, confidence, effect of communication
  - Watch facial expression, posture and gestures
  - Check for surprising nonverbals (example: intentional false signals, pounding desk)
  - In diverse context—careful interpretation
- Listen
  - To acquire previously undisclosed information
  - Recognize interests, needs and fears
  - Evaluate counterpart's position by hearing others' point of view
  - Ask for preferences
  - Actively listen, reflect, paraphrase, clarify interests, positions and arguments
  - Acknowledge hostility, blame, defensiveness (example: I see you are upset)
  - Do not accept a stalemate (example: so what *do you feel* is a fair solution that the other side might accept?)
  - Repeat opponent's proposals and concerns to clarify
- Information Protection
  - Watch for "blocking techniques" and probe for relevant hidden information
    - ignoring questions and moving to other's area of interest
    - declaring questions off limits (example: attorney-client privilege or other plausible reason)
    - answering a question with a question (evade by seeking clarification or elaboration)
    - under/over-answering (generally to a specific question or conversely)
    - answering honestly but incompletely
    - beneficially reframing to avoid revealing sensitive information
    - answering a different question than the one asked (example: I understand you want to know . . .)
    - answering a recently asked question again
- Communication
  - Reasonable, analytical, realistic and rational
  - Convince opposing side to change resistance by cost-benefit summary
  - Frame options as gain to other side
  - Dissuade rejection from "reactive devaluation"
- Communicating offers and concessions
  - Briefly stated (to decrease opposing party's reflection/ response time)
  - Specifically addressed to conflict areas
  - Relay justification with objective reasons
  - Clearly stated solutions, remedies, damage figures
  - Cleanly end final "niggling" (just one more thing) by other
  - Finalize bargaining
  - In drafting agreement, obtain buy-in on the language used



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## PLANNING GUIDE AND CHECKLIST

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### SECTION 3 – MEDIATION

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- Closure
  - Trade concessions
  - Give up enough to settle but not more
  - If niggling—can agree by asking what they will give up in return
  - Encourage movement toward closure
  - Decide who drafts, what conditions to include, who monitors compliance
  - Provisions for time extension, compliance standards, follow through
  - Provide for future differences, back to mediation or arbitration?
  - Any exceptions to confidentiality
  - Draft formal settlement agreement and execute (sign)
  - Drafting fees agreed upon

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## PLANNING GUIDE AND CHECKLIST

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### SECTION 4 - DISCOVERY

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#### A. Discovery

- Mandatory Disclosures
- Interrogatories (only to opposing parties)
  - Proper citation and form (adequately inform of information requested)
  - Do not exceed total number allowed (25 maximum absent court order or local rule)
  - Appropriate set of reasonable instructions
  - Appropriate definitions, if needed
  - Reminder to opponent of duty to update answers
  - Original questions, not copied from a book or set of forms
  - Clear, precise and direct questions
  - Questions not vague, multiple, broad or overly inclusive
  - Focus on appropriate subject matter
  - Comprehensive in overall scope, do not overlook important areas
  - Narrow and clarify issues
  - Not objectionable
  - Pin down witness statements, recollections, opinions or contentions
  - Clarify or corroborate specific relevant facts
  - Identify undiscovered witnesses, persons, documents or other evidence (tangible things)
  - Disprove the opponent's theory and damage/relief claims
  - Require answers that are non-evasive and complete
  - Can be used with other methods of discovery
  - Properly served on opposing party

#### B. Answers to Interrogatories (in writing under oath)

- *See* Federal Rules of Civil Procedure
  - Objections to interrogatories
  - Failure to answer and evasive answers
  - Proper citation and form
  - Reasonable and rational interpretation of interrogatories
  - Appropriate and reasonable objections with specificity, executed by attorney
  - Appropriate, accurate and complete answers to all interrogatories
  - Phrase answers to present best position of client
- Requests for production of documents
  - Proper caption and form
  - States time, place, and manner for production or inspection
  - Defines documents in a broad sense, including all known media
  - Reasonable number of requests
  - Not objectionable, requiring reasonable compliance and disclosure
  - Requests adequately defined, identified, or otherwise described
  - Will produce all documents reasonably related to those requested
  - Probes for additional sources of documents
  - Properly served on opposing party
- Responses to requests for production of documents
  - Reasonable compliance with non-objectionable requests
  - Appropriate method of compliance
  - Seek protective order if necessary
  - Properly served on opposing party

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## PLANNING GUIDE AND CHECKLIST

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### SECTION 4 - DISCOVERY

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- Requests for admissions
  - Proper caption and form
  - Appropriate preface or instructions
  - Appropriate definitions
  - Short, simple precise requests
  - No unnecessary adjectives, adverbs or other characterizations
  - Singularly listed in separately numbered paragraphs
  - Not objectionable
  - Call for unqualified responses
  - Require reasonable admittance or denial of request
  - Confirm key facts and contentions relating law to facts
  - Establish the genuineness of documents
  - Properly served on opposing party
- Responses to requests for admissions
  - Proper caption and form
  - Appropriate and reasonable objections
  - Phrase answers to present best position of client
  - Properly served on opposing party

#### C. Witness Depositions

- Prepare client before deposition
  - Reduce witness' anxiety
  - Address any new information that witness has learned
  - Deposition procedures
  - Different deposition styles
  - Review documents with witness in preparation for deposition
  - Brief witness on applicable substantive law
  - Brief witness on privileged areas of the law
  - Explain objectionable questions
  - Explain that witness must respond to objectionable questions unless otherwise ordered not to respond
  - Outline of direct and expected cross-examinations
  - Demeanor and appearance to eventual fact finder
  - Instruct witness not to bring anything regarding the case to the deposition
  - Instruct witness what not to say
  - Where and when to meet on the day of the deposition
  - Federal Rules of Evidence that govern expert/lay person testimony
- Questioning of Witness
  - Focus on learning witness' version of the facts
  - Begin with open ended questions
  - Clarify information received
  - Finish with closed questions suggesting answer to lock in testimony
  - Continue a line of questioning until all information has been extracted/exhausted
- Expert witness depositions
  - Prepare the witness before the deposition
    - Deposition procedures
    - Outline of direct and expected cross-examinations

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## PLANNING GUIDE AND CHECKLIST

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### SECTION 4 - DISCOVERY

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- Demeanor and appearance to eventual fact finder
- Be ready to object when appropriate
- Direct examination
  - Identify time, place, and individuals present
  - Qualify the witness as an expert
  - Properly lay foundation for and introduce exhibits
  - Elicit the basis for expert's opinion
  - Define technical terms
  - Establish the opinion to a reasonable degree of certainty
  - Introduce any harmful information
- Cross-examination
  - Control the witness with leading questions
  - Challenge the expert's qualifications
  - Challenge the basis for the expert's opinions
  - Challenge the expert's opinions
  - Reinforce helpful information
- Re-direct
  - Rehabilitate expert's qualifications and opinions
  - Clarify ambiguities and misstatements
  - Reinforce helpful information

#### **D. Defending Depositions**

- Provide emotional comfort and support to client
- Preserve the record for anticipatory judge and jury
- Sit next to client
  - Enables conferral with client
  - Enables protection of client's interests
- Be prepared to object when appropriate
  - State objection for preservation
  - Relevancy
  - Prejudicial
  - Hearsay
  - Confusion of the issues
  - Competency
  - Question form
  - Foundation
  - Privilege
- Cross-examination
  - Clarify previous answers
  - Clarify answers (particularly where answers are subject to more than one interpretation)

---

**PLANNING GUIDE AND CHECKLIST**  
**SECTION 5 - MOTIONS/ORAL ARGUMENT**

---

**A. Briefs**

- Follow rules as to format and composition
  - Does not exceed page limits
  - Does not use margin, font, or line spacing adjustments to meet page limit
  - Coherent overall, paragraph, and sentence structure
  - Proofread and checked for misspelling
  - Pertinent issues clearly identified
  - Applicable procedural and substantive law identified
  - Applicable law applied to specific case facts
- Table of contents
  - Clearly label all parts of brief
  - Provide accurate page references
- Table of authorities
  - Separate authority by category
  - List all authorities used in alphabetical order
- Legal issues
  - Phrase issues concisely, in a way favorable to client
  - Give the referee's answer to each issue
- Statement of the case
  - State the procedural history of the case chronologically
  - Provide citation to authorities, the transcript, and appendix
- Statement of facts
  - Provide all facts necessary to support argument
  - State facts in a neutral manner
  - Present facts in a logical order
  - Provide citation to the transcript and appendix
- Argument
  - Use appropriate subheadings (point headings)
  - Outline standard of review
  - Address each issue separately and thoroughly
  - Apply applicable law to specific facts
  - Provide compelling reasons why client should prevail
- Conclusion
  - Briefly recap reasons client should prevail
  - Ask for appropriate relief
- Appendix
  - Properly indexed and paginated
  - Contains all necessary exhibits and record excerpts

**B. Oral Argument**

- Obey all court rules
- Proper appearance and demeanor
- Proper verbal pacing and body movement
- Properly manage allotted time
- Reserve time for rebuttal, if desired

---

**PLANNING GUIDE AND CHECKLIST**  
**SECTION 5 - MOTIONS/ORAL ARGUMENT**

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- Be totally familiar with client's and opponent's case
- Be familiar with all authorities cited by either side
- Avoid using notes
- Attorney for Plaintiff goes first
- Ask judges if they need a recitation of the facts
- Recite facts if necessary
- Present argument in a coherent manner (attorney is to educate judge on the law)
- Concede losing arguments when appropriate
- Be prepared to answer questions from judges
- Be honest with judges if you don't know an answer
- Ask for appropriate relief

---

**PLANNING GUIDE AND CHECKLIST**  
**SECTION 6 - TRIAL (Court / Jury) - ARBITRATION**

---

**A. Trial (Court / Jury) – Arbitration**

- By mutual agreement, pre-existing contract, statute, or court order
- Analyze case
  - Client's strengths and weaknesses
  - Opponent's strengths and weaknesses
- Plan appropriate strategy
  - Become familiar with rules of arbitration
  - Informal or strict trial-like setting
  - Relaxed or strict evidentiary standards
  - Witness preparation
  - Opening statements and closing arguments
  - Witness examinations
  - Exhibits
- Select neutral time and location for arbitration
  - Court appointed or selected by parties' agreement
  - Experience
  - Bias
  - Acceptable time and location for all concerned
  - Appropriate scheduling and total time allocation
  - Division/payment of arbitration/trial fees and facility costs
- Witness preparation
  - Explain arbitration/trial procedure
  - Instruct witness to tell the truth (answer yes or no, do not volunteer information)
  - Outline of direct and expected cross-examinations
  - Demeanor and appearance
    - Clothing
    - Body language
    - Pace
    - Tone
    - Voice
  - Time and place of proceeding
  - Subpoena non-cooperative witnesses, if allowed
  - Trial/Arbitration notebooks should contain:
    - All pleadings, motions, discovery requests, and responses
    - Applicable substantive and procedural law
    - Trial briefs
    - Evidentiary objections
    - Witness statements or prior testimony
    - Voir dire questions
    - Outlines of direct and cross-examinations
    - Outlines of opening and closing statements
    - Jury instructions (when applicable)

## **PLANNING GUIDE AND CHECKLIST**

### **SECTION 6 - TRIAL (Court / Jury) - ARBITRATION**

- Statement of the case similar to trial brief, by attorneys
  - Advocacy document designed to persuade fact finder of case
  - Statement of the issues
  - Statement of facts
  - Applicable law
  - Theory of the case
  - Conclusion (relief requested)
  - Exhibit list (may be separate documents)
  - Witness list (may be separate documents)
- Joint statement of the case
  - Often required by judge/arbitrator
  - Establishes and narrows issues and areas of agreement and conflict
  - Focuses the presentation
  - May help with settlement
  - Assists judge/arbitrator in deciding case
- Exhibits
  - Marked as per judge's/arbitrator's procedure
  - Proper foundation
  - Accepted by judge/arbitrator
- Stipulations
  - Negotiated between parties and accepted by judge/arbitrator
  - Avoids argument over uncontested issues or facts
  - Jury selection (where applicable)
- Jury Selection (Procedure varies. Check local court rules.)
  - Introduction (attorneys, parties, witnesses)
  - Question jurors individually and as a panel
  - Have a workable system for charting response (example: clerks label response by juror number)
  - Explain trial procedures
  - Gather relevant information about jurors
  - Educate jurors about client and theory of the case
  - Detect favorable and unfavorable bias
  - Challenges for cause
  - Pass the panel for cause
  - Peremptory challenges
- Opening statements
  - Plaintiff/Party with burden of proof goes first
  - Appropriate appearance and demeanor
    - Clothing
    - Body language
    - Pace
    - Tone
    - Voice
  - Use appropriate visual aids
  - Tell client's story
  - Explain what will be proved
  - Do not make promises that cannot be kept



## **PLANNING GUIDE AND CHECKLIST**

### **SECTION 6 - TRIAL (Court / Jury) - ARBITRATION**

- Ask for relief that client wants
- Avoid being argumentative
- Use proper verbal pacing, body motion and eye contact
- Case in chief
  - Plaintiff/Party with burden of proof proceeds with its evidence first
    - Call witnesses in strategic order
    - Primacy and recency effects
    - Logical order that will not be confusing
    - Designed to provide maximum impact
  - Direct examination
    - Use appropriate demeanor
    - Use effective structure
    - Calm the nervous witness, if necessary
    - Establish appropriate background information
    - Establish credibility of witness
    - Use appropriate leading questions (See F.R.E. 611c)
    - Avoid leading questions regarding important testimony
    - Keep the scope of the examination focused
    - Elicit all desired information from witness
    - Use witness to identify and lay foundation for exhibits
    - Have witness explain any harmful information
  - Cross-examination
    - Use appropriate demeanor
    - Use effective structure
    - Ask only leading questions
    - Short questions
    - Insist on one word answers
    - Be persistent
    - Avoid arguing with the witness
    - Do not ask a question if the answer is not known
    - Impeach the credibility of the witness
    - Undermine the witness' perception of events
    - Point out inconsistencies with prior statements
    - Point out inconsistencies with other witnesses' testimony
    - Emphasize information helpful to client
  - Re-direct examination
    - Limited to scope of cross-examination
    - Rehabilitate the credibility of the witness
    - Reestablish the witness' perception of events
    - Explain any inconsistencies
    - Clarify any ambiguities or misstatements
    - Use sparingly, do not repeat what has been covered
    - Making appropriate objections
    - Listen carefully to opponent's examination
    - Consider the tactical or strategic implications of objecting
    - Object promptly and decisively
    - Follow correct procedure
    - Briefly state a valid evidentiary reason for the objection

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**PLANNING GUIDE AND CHECKLIST**  
**SECTION 6 - TRIAL (Court / Jury) - ARBITRATION**

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- Be prepared to counter opposing arguments
- Expert Witnesses
  - Scope of expert examination
    - Expert witnesses, technical, or other specialized knowledge of the expert will assist the fact finder in understanding evidence or in determining a fact that is in issue.
  - Who is the expert?
    - A person with specialized knowledge by education, training, experience, or skill may be qualified as an expert. Professionals who have extensive formal education and training may be readily qualified, such as doctors, engineers and economists.
  - Areas of expertise
    - An area of knowledge that contains scientific, technical, or other specialized information may constitute an admissible area of expertise.
  - The law of expert testimony
    - Federal Rules of Evidence 702
    - Federal Rules of Evidence 705
    - Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)
    - Frye v. United States, 293 F.1010 (D.C.C.C. 1923)
  - Qualifying the expert
    - Expert has education, training, experience or skill beyond general knowledge of the fact finder
    - Expert has sufficient information on which to testify in the particular case
    - Expert opinion is based on education, training, experience and skill of the expert as applied to the information and not on unfounded speculation or conjecture
- Direct Examination (see also direct examination generally)
  - Purpose
    - Provide fact finder with factual information
    - Apply expert knowledge to the facts and render an opinion
    - Explain scientific principles and theories
    - Explain test procedures and results
    - Explain real evidence introduced in the case
    - Interpret facts and render an opinion regarding the likelihood of an event
    - Explain the amount of recoverable damages in a civil case
    - Give an opinion that contradicts the conclusions of an expert for the opposing party
  - Outline of expert direct examination
    - Subject matter of the opinion
    - Theories or principles that support the area of expertise and opinion
    - Sources of information relied upon by the expert
    - Standard tests or procedures used in a case
    - Other basis of the opinion of the expert
    - The opinion of conclusion
    - Explanation of the opinion and conclusion
    - Identify sources of information
    - Personal, firsthand information perceived prior to the trial or hearing
    - Information obtained from experts, documents, records, files, witnesses and other sources prior to or during the trial or hearing
    - Evidence including testimony heard by or told to the expert during the case
    - Hypothetical questions

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**PLANNING GUIDE AND CHECKLIST**  
**SECTION 6 - TRIAL (Court / Jury) - ARBITRATION**

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- Cross-Examination (see also cross-examination generally)
  - Preparing and presenting an effective supporting and discrediting cross-examination of an expert witness that:
    - Categories/Factors of Expert Cross-Examination
    - Supportive Cross-Examination
- Obtain concessions
  - Criticize the other side's positions
    - Discrediting Cross-Examination
      - \* Disclose expert fees and financial interests
      - \* Establish bias or prejudice
      - \* Attack sources of information
      - \* Show unreliable or insufficient information
      - \* Dispute facts
      - \* Show lack of thoroughness
      - \* Show insufficient testing
      - \* Attack validity and reliability of test
      - \* Establish existence of other causes
      - \* Show inappropriate or insufficient expertise
      - \* Establish differences of opinion among experts
      - \* Establish subjective opinions
      - \* Introduce inconsistent prior statements
      - \* Discredit hypothetical questions
      - \* Expose other deficiencies
      - \* Expose unreliability of expertise
      - \* Use conflicting treatises
  - Responding to objections
    - Stop the testimony
    - Listen carefully to opponent's objection
    - Offer an appropriate response
    - Continue if objection is overruled
    - Try another approach if objection is sustained
  - Closing Arguments
    - Plaintiff /Party with burden of proof goes last. (In some jurisdictions, Plaintiff argues first, then Defendant followed by Plaintiff's rebuttal.)
    - Use proper verbal pacing, body motion/language, eye contact, tone and voice
    - Be persuasive and compelling
    - Use appropriate visual aids
    - Explain why the facts support the client's case
    - Explain why the law supports the client's case
    - Tell why the client should win
    - Tell why the opposing client should lose
    - Explain how the verdict form should be completed
  - Jury instructions (where appropriate)
    - Before or after closing arguments, or combination (in complex and long trials, instructions may be read during the trial)
    - Listen carefully as judge instructs jury
    - Ask to approach bench if judge misinstructs jury

# LEARNING OBJECTIVES

The Learning Objectives provide a method to measure achievement.

- ***Oral*** – the oral learning objectives assist in planning and delivering the assigned oral skill.
- ***Written*** – the written learning objectives assist in the development and presentation of both written and oral skills.

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## **LEARNING OBJECTIVES**

### ***TRIAL (Court/Jury) – ARBITRATION***

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#### **ORAL**

##### **Oral Objective A - Trial - Arbitration**

- Demonstrate effective advocacy skills in a trial / arbitration, including effective procedure and practice.
- Oral Objective A is achieved by:
  - preparing, practicing and presenting opening statements, direct examinations, cross-examinations and final argument
  - preparing witnesses and exhibits
  - representing the client at a prehearing conference
  - representing a client: opening statement and closing argument, direct examination and cross-examination of witnesses
  - developing a trial/arbitration notebook

##### **Oral Objective B - Opening Statement**

- Demonstrate an understanding of effective opening statement strategy and skills.
- Oral Objective B is achieved by:
  - preparing and presenting an opening statement which demonstrates:
    - effective organization and structure
    - effective storytelling
    - a clear explanation of the theory of the case
    - effective use of persuasive approaches and techniques
    - effective explanation of weaknesses in case
    - effective delivery and presentation
    - avoidance of objectionable and argumentative opening statement
  - demonstrating an understanding of personal strengths and weaknesses by clearly articulating:
    - areas where attorney wants feedback
    - techniques that will be used
    - risks and experiments to be taken
    - personal strengths and weaknesses

##### **Oral Objective C - Direct Examination**

- Demonstrate an understanding of effective direct examination strategy and skills.
- Oral Objective C is achieved by:
  - preparing and presenting a direct examination which demonstrates:
    - a detailed story (for the portion of the examination conducted)
    - questions that solicit sufficient foundation and detail
    - an ability to deliver an interesting and persuasive story
    - simple, understandable questions
    - non-objectionable questions and responses
    - understanding evidentiary rules and purpose of objections

## LEARNING OBJECTIVES

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### ***TRIAL (Court/Jury) – ARBITRATION***

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#### **ORAL (continued)**

- effective structure—examination conducted in a chronological or orderly fashion
- effective pace and follow-up—listening and clarifying answers
- appropriate demeanor and presence—eye contact, voice projection, facial expressions, gestures, physical posture and avoidance of distractions
- clearly articulating:
  - areas where attorney wants feedback
  - techniques that will be used
  - risks and experiments to be taken
  - personal strengths and weaknesses

#### **Oral Objective D - Cross-Examination**

- Demonstrate an understanding of effective cross-examination strategy and skills.
- Oral Objective D is achieved by:
  - preparing and presenting a cross-examination which demonstrates:
    - effective leading questions
    - sufficient and appropriate details
    - questions and delivery that hold the interest of the fact finder
    - simple questions that are understandable
    - questions that are appropriate—not argumentative, not objectionable—understanding evidentiary rules, evidentiary objections, and understanding of objections
    - effective structure: thematic—chronological—orderly
    - effective follow-up, listening and clarifying answers
    - demeanor and presence—appropriate eye contact, voice projection, facial expressions, gestures, physical posture, and avoidance of distractions
  - demonstrating an understanding of personal strengths and weaknesses by clearly articulating:
    - areas where attorney wants feedback
    - techniques that will be used
    - risks and experiments to be taken
    - personal strengths and weaknesses

#### **Oral Objective E - Closing Argument**

- Demonstrate an understanding of effective closing argument strategy and skills.
- Oral Objective E is achieved by:
  - preparing and presenting a closing argument which demonstrates:
    - persuasiveness—effective presentation
    - interest—developed and maintained interest
    - organization—presentation well organized
    - balance—appropriate balance of facts, law, reasons

## LEARNING OBJECTIVES

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### ***TRIAL (Court/Jury) – ARBITRATION***

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#### **ORAL (continued)**

- demeanor and presence—appropriate eye contact, voice projection, facial expressions, gestures, physical posture, and avoidance of distractions
- avoidance of objectionable summation
- demonstrating an understanding of personal strengths and weaknesses by clearly articulating:
  - areas where attorney wants feedback
  - techniques that will be used
  - risks and experiments to be taken
  - personal strengths and weaknesses

## LEARNING OBJECTIVES

---

### ***TRIAL (Court/Jury) – ARBITRATION***

---

#### **WRITTEN**

#### **Written Objective A - Trial (Court/Jury) - Arbitration**

- Identify and analyze the legal issues involved in representing a client including:
  - the basic law involved in this exercise
  - the essential facts, the client's position, applicable law, initial research and supporting arguments, and the relevant rules and procedures involved in this exercise
- Provide a framework for analyzing the client's case, which includes:
  - a preliminary opinion as to the likelihood of success
- Written Objective A is achieved by:
  - [Four Page Limit]**
    - writing a case analysis based on the procedural and substantive law provided in this exercise that demonstrates:
      - a clear and complete understanding of each party's theory of the case
      - a clear and complete understanding of themes for each party
      - an understanding of the elements necessary for each party to prevail at the trial
      - an understanding of the weakness and strength of each party's case
      - an understanding of appropriate remedies

#### **Written Objective B - Opening Statement**

- Demonstrate an understanding of effective opening statement strategy and skills.
- Written Objective B is achieved by:
  - [Three Page Limit]**
    - preparing a written analysis of the opening statement which demonstrates an understanding of the following:
      - the specific approach to the opening statement
      - how the opening fits the theory of the case
      - how the opening is consistent with the closing
      - the structure of the opening
  - [One Page Limit]**
    - demonstrating an understanding of personal strengths and weaknesses by clearly articulating:
      - areas where attorney wants feedback
      - techniques that will be used
      - risks and experiments to be taken
      - personal strengths and weaknesses



## LEARNING OBJECTIVES

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### *TRIAL (Court/Jury) – ARBITRATION*

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#### **WRITTEN (continued)**

#### **Written Objective C - Direct Examination**

- Demonstrate an understanding of effective direct examination strategy and skills.
- Written Objective C is achieved by:
  - [Three Page Limit]**
    - preparing a written analysis of the assigned direct examination which demonstrates the following:
      - the specific approach to this direct examination
      - how the direct examination fits the theory of the case
      - addressing the strengths and weaknesses of the witness
      - an effective structure of the direct examination
  - [One Page Limit]**
    - demonstrating an understanding of personal strengths and weaknesses by clearly articulating:
      - areas where attorney wants feedback
      - techniques that will be used
      - risks and experiments to be taken
      - personal strengths and weaknesses

#### **Written Objective D - Cross-Examination**

- Demonstrate an understanding of effective cross-examination strategy and skills.
- Written Objective D is achieved by:
  - [Three Page Limit]**
    - preparing a written analysis of the assigned cross-examination which demonstrates the following:
      - the specific approach to this cross-examination
      - how the cross-examination fits the theory of the case
      - addressing the strengths and weaknesses of the witness
      - an effective structure of the cross-examination
  - [One Page Limit]**
    - demonstrating an understanding of personal strengths and weaknesses by clearly articulating:
      - areas where attorney wants feedback
      - techniques that will be used
      - risks and experiments to be taken
      - personal strengths and weaknesses

## LEARNING OBJECTIVES

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### *TRIAL (Court/Jury) – ARBITRATION*

---

#### **WRITTEN (continued)**

#### **Written Objective E - Closing Argument**

- Demonstrate an understanding of effective closing argument strategy and skills.
- Written Objective E is achieved by:
  - [Three Page Limit]**
    - preparing a written analysis of the assigned closing argument which demonstrates the following:
      - the specific approach to the closing
      - how the closing fits the theory of the case
      - how the closing is consistent with the opening
      - an effective structure
      - how the evidence will be explained to the fact finder
      - the techniques to tell an interesting and compelling story
      - how to explain to the fact finder what the case is all about including theories, issues, claims, defenses, and positions
      - how to persuade the fact finders of the merits of the case
      - how to motivate the fact finder to want to render a favorable verdict
  - [One Page Limit]**
    - demonstrating an understanding of personal strengths and weaknesses by clearly articulating:
      - areas where attorney wants feedback
      - techniques that will be used
      - risks and experiments to be taken
      - personal strengths and weaknesses

## LEARNING OBJECTIVES

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### *DEPOSITIONS*

---

#### **ORAL**

##### **Oral Objective A - Taking a Deposition**

- Demonstrate effective deposition skills, including:
  - the ability to ask appropriate and sufficiently detailed questions with appropriate follow-up to obtain necessary information
  - the ability to control witness and guide the pace and scope of the deposition
- Oral Objective A is achieved by:
  - implementing a deposition plan
  - assessing the relevant issues of the case
  - evaluating the witness's ability to provide valuable information
  - engaging in fact finding by asking appropriate questions—either open or close ended
  - eliciting all necessary information, good or bad, from each deponent

##### **Oral Objective B - Defending a Deposition**

- Demonstrate effective client defense skills, including:
  - the ability to support and protect the witness during deposition
  - the ability to preserve and clarify the testimony produced during deposition
- Oral Objective B is achieved by:
  - providing emotional support for client through appropriate preparation and counseling
  - preserving the record through appropriate objections
  - protecting client's interests through clarification of testimony during cross-exam
  - ensuring adequate counseling through conferral during depositions

##### **Oral Objective C - Individual Analysis**

- Demonstrate an understanding of personal strengths and weaknesses.
- Oral Objective C is achieved by clearly articulating:
  - areas where attorney wants feedback
  - techniques and strategies that will be used
  - risks and experiments to be taken
  - personal strengths and weaknesses

## LEARNING OBJECTIVES

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### *DEPOSITIONS*

---

#### **WRITTEN**

#### **Written Objective A - Identifying and Analyzing Issues**

- Identify and analyze the legal and equitable issues inherent in this dispute between potential litigants, specifically demonstrating:
  - an understanding of a framework for evaluating the dispute
  - an understanding of legal principles
  - an understanding of state statutory law, local government ordinances and regulations, case law, and public policy concerns
  - the ability to identify and formulate a plan for resolving issues in a negotiation involving non-monetary interests
  - the ability to identify and formulate applicable legal issues and theories
  - the ability to identify the appropriate questions necessary to elicit information pertinent to the theory of the case
  - the techniques that will be used to achieve the goals of the deposition
- Written Objective A is achieved by:
  - [Four page limit for each memorandum]**
  - writing a memorandum to a senior partner providing an analysis based on the facts and research of procedures, statutes, regulations, and case law, in the participant's jurisdiction that demonstrates:
    - the specific approach to the deposition
    - a clear and complete understanding of each party's theory of the case
    - a clear and complete understanding of the themes for each party
    - an understanding of the elements necessary for each party to prevail at the trial
    - an understanding of the weakness and strength of each party's case
    - an understanding of appropriate remedies
  - preparing a memorandum to a senior partner describing the results of the deposition and how the results were consistent with/inconsistent with and were affected by the deposition plan and the other party

## LEARNING OBJECTIVES

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### *NEGOTIATION*

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#### **ORAL**

#### **Oral Objective A - Negotiation**

- Demonstrate effective strategy and negotiation skills.
- Oral Objective A is achieved by:
  - Resolving conflicts by negotiating with opposing counsel/interested third parties
  - Implementing client goals in accord with interests
  - Conveying client needs/interests to opposing counsel
  - Applying style, strategies and negotiation plan
  - Generating maximum creative problem solving options
  - Evaluating with opposing counsel their gains/losses from alternate options
  - Ignoring, exposing, ruling out or responding to inappropriate negotiation tactics
  - Narrowing opposing counsel's focus to the win-win option(s)
  - Perfecting and obtaining agreement on settlement details

#### **Oral Objective B - Individual Analysis**

- Demonstrate an understanding of personal strengths and weaknesses.
- Oral Objective B is achieved by clearly articulating:
  - SWOR analysis (strengths, weaknesses, opportunities, risks)
  - Opportunities passed or taken
  - End results of risks and experiments
  - Techniques that will be used
  - Areas where attorney wants feedback

## LEARNING OBJECTIVES

### NEGOTIATION

#### **WRITTEN**

##### **Written Objective A - Identifying and Analyzing Issues**

- Specify and analyze the legal and equitable issues involved in representing a client.
- Written Objective A is achieved by:
  - [Four Page Limit]**
    - Writing a memorandum to a senior partner providing an analysis based on research of procedural and substantive law that demonstrates a clear, complete understanding of:
      - the elements necessary to reach an agreement in client's best interests
      - the theory and themes of the case
      - the strengths, weaknesses, opportunities and risks of the case
      - appropriate remedies
      - expertise in pertinent basic case and statutory law, ordinances, regulations and public policy
      - an effective pre-negotiation outline
      - knowledge of relevant facts, client's position, supporting research/arguments and applicable rules/procedures
      - a plan for a negotiation allowing for relevant third-party interests
      - a framework for case analysis, including:
        - \* theory of likelihood of success
        - \* cooperative or adversarial problem resolution
        - \* legal and non-legal theories and arguments
        - \* plan allowing for third party interest
    - Writing a memorandum to a senior partner detailing the negotiation results and evaluating their consistency and effects from the negotiation plan.

##### **Written Objective B - Negotiation Planning**

- Demonstrate effective negotiation strategies and techniques in the negotiation plan.
- Written Objective B is achieved by:
  - [Three Page Limit]**
    - Preparation of a negotiation plan that:
      - clarifies all elements of the plan
      - is legally astute and uses good judgment
      - is structurally sound/organized
      - uses clear/concise plain language
      - employs impact words and phrases
      - addresses strengths, weaknesses, opportunities and risks
      - anticipates problems including third-party interests
      - considers legal/procedural ramifications
      - applies law to relevant facts
      - supports a maximum fair settlement in accord with client needs
      - allows for relief requested
      - encompasses confidentiality provisions
      - facilitates future relations, if that is a goal

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## LEARNING OBJECTIVES

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### *MEDIATION*

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#### **ORAL**

#### **Oral Objective A - Mediation**

- Demonstrate effective mediation strategy and skills.
- Oral Objective A is achieved by:
  - Conferencing between counsel or with mediator pre-mediation
  - Applying facilitative or evaluative style, strategies, plan
  - Deciding objective standards, i.e., custom, industry practice or ethical norms
  - Ascertaining and conveying client needs/interests to opposing parties and counsel
  - Implementing party's goals in accord with interests
  - Helping parties realistically value the case
  - Generating maximum creative problem-solving options
  - Evaluating opposing party's/counsel's gains and losses from alternate options
    - “trashing” (tear apart weaknesses to give parties a reality check)
    - “bashing” (at initial offers with goal of settling somewhere in the middle)
    - “hashing it out” (encourage direct communication between parties)
    - freeform brainstorming with parties (suspending judgment)
    - conditional proposals
    - Socratic questioning to expose weak proposals/positions
    - questions to facilitate agreement
    - creating movement toward settlement
  - Caucusing, at mediator's discretion
  - Narrowing opposing counsel's focus to win-win option(s)
  - Obtaining/perfecting agreement on settlement including payment in kind, installment payments, abiding by third party expertise and apology
  - Obtaining buy-in of opposing counsel and interested third parties who could affect post-agreement compliance
  - Forging and finalizing terms of agreement

#### **Oral Objective B - Individual Analysis**

- Demonstrate an understanding of personal strengths and weaknesses.
- Oral Objective B is achieved by clearly articulating:
  - SWOR analysis (strengths, weaknesses, opportunities, risks)
  - Opportunities passed or taken
  - End results of risks and experiments
  - Techniques that will be used
  - Areas where attorney wants feedback

## LEARNING OBJECTIVES

### *MEDIATION*

#### **WRITTEN**

##### **Written Objective A - Identifying and Analyzing Issues**

- Specify and analyze the legal and equitable issues involved in representing a client.
- Written Objective A is achieved by:
  - [Four Page Limit]**
    - Writing a memorandum to a senior partner providing an analysis based on research of procedural and substantive law that demonstrates a clear, complete understanding of:
      - the elements necessary to reach an agreement in client's best interests
      - the theory and themes of the case
      - the strengths, weaknesses, opportunities and risks of the case
      - appropriate remedies
      - expertise in pertinent basic case and statutory law, ordinances, regulations and public policy
      - an effective pre-mediation outline
      - knowledge of relevant facts, client's position, supporting research/arguments and applicable rules/procedures
      - a plan for a mediation allowing for relevant third-party interests
      - a framework for case analysis, including:
        - \* theory of likelihood of success
        - \* cooperative or adversarial problem resolution
        - \* legal and non-legal theories and arguments
  - [Four Page Limit]**
    - Writing a memorandum to a senior partner detailing the mediation results and evaluating their consistency and effects from the mediation plan.

##### **Written Objective B - Mediation Planning**

- Demonstrate effective mediation strategies and techniques in the mediation plan.
- Written Objective B is achieved by:
  - [Three Page Limit]**
    - Preparation of a mediation plan that:
      - clarifies all elements of the plan
      - is legally astute and uses good judgment
      - is structurally sound/organized
      - uses clear/concise plain language
      - employs impact words and phrases
      - addresses strengths, weaknesses, opportunities and risks
      - anticipates problems including third-party interests
      - considers legal/procedural ramifications
      - applies law to relevant facts
      - supports a maximum fair settlement in accord with client needs
      - allows for relief requested
      - encompasses confidentiality provisions
      - facilitates future relations, if that is a goal



## LEARNING OBJECTIVES

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### *MOTIONS / ORAL ARGUMENT*

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#### **ORAL**

#### **Oral Objective A–Motion/Oral Argument**

- Demonstrate effective motion/oral argument strategy and skills.
- Oral Objective A is achieved by:
  - preparing and presenting a motion/oral argument which demonstrates:
    - how the argument relates to the brief
    - how to deal with the strengths and weaknesses
    - how to deal with the opponent's argument
    - how to respond to questions
    - how to balance law and facts
    - persuasiveness–effective presentation
    - interest–developed and maintained interest
    - organization–presentation well organized
    - balance–appropriate balance of facts, law, reasons
    - responses to questions–appropriate answers
    - demeanor and presence–appropriate eye contact, voice projection, facial expressions, gestures, physical posture and avoidance of distractions
    - avoidance of objectionable argument

#### **Oral Objective B– Individual Analysis**

- Demonstrate an understanding of personal strengths and weaknesses.
- Oral Objective B is achieved by clearly articulating:
  - areas where attorney wants feedback
  - techniques that will be used
  - risks and experiments to be taken
  - personal strengths and weaknesses

## LEARNING OBJECTIVES

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### *MOTIONS / ORAL ARGUMENT*

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#### **WRITTEN**

#### **Written Objective A–Identifying and Analyzing Issues**

- Identify and analyze the legal issues involved in representing a client in a motion/oral argument, including:
  - the basic law involved in this exercise and
  - the essential facts, the client’s position, applicable law, initial research and supporting arguments, and the relevant rules and procedures involved in this exercise.
- Provide a framework for analyzing the client’s case, which includes:
  - a preliminary opinion as to the likelihood of success
- Written Objective A is achieved by:  
**[Four Page Limit]**
  - writing a memorandum to a senior partner providing an analysis based on the procedural and substantive law that demonstrates:
    - an understanding of the elements necessary to prevail at the hearing
    - a clear and complete understanding of the theory of the case
    - a clear and complete understanding of themes
    - an understanding of the weakness and strength of the case
    - an understanding of appropriate remedies

#### **Written Objective B - Analysis of Argument and Brief/Memorandum**

- Demonstrate an understanding of effective motion/oral argument and written argument strategy and skills.
- Written Objective B is achieved by:  
**[Three Page Limit]**
  - preparing a written analysis of the motion/oral argument and brief which demonstrates an understanding of the following:
    - the specific approach to the brief and oral argument
    - how the argument fits the theory of the case
    - the structure of the oral argument
    - how to present a persuasive brief and oral argument
    - the techniques that will be used

## LEARNING OBJECTIVES

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### *MOTIONS / ORAL ARGUMENT*

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#### **WRITTEN (continued)**

#### **Written Objective C - Brief/Memorandum**

- Demonstrate an understanding of effective appellate brief writing skills.
- Demonstrate an effective and persuasive use of facts, law, transcribed record and other evidence.
- Written Objective C is achieved by:
  - [Ten Page Limit]**
  - preparing, filing and serving a written appellate brief in the support of client's position that is:
    - clear
    - structured/organized
    - simply written in plain English
    - uses impact words
    - deals with strengths and weaknesses
    - applies law to facts
    - offers solutions/options
    - presents the relief requested

## LEARNING OBJECTIVES

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### *EXPERT WITNESSES*

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#### **ORAL**

##### **Oral Objective A - Direction Examination**

- Demonstrate an understanding of effective expert witness direct examination strategy and skills in a trial setting.
- Oral Objective A is achieved by:
  - Preparing and presenting a direct examination of an expert witness that demonstrates:
    - a detailed story (for the portion of the examination conducted)
    - questions that solicit sufficient foundation and detail
    - questions and delivery that hold the interest of the fact finder
    - simple, understandable questions and responses
    - understanding evidentiary rules, evidentiary objections and purpose of objections
    - effective structure-examination conducted in a chronological-thematic-orderly fashion
  - Preparing and presenting an effective direct examination of an expert witness that:
    - provides fact finder with factual information
    - applies expert knowledge to the facts and renders an opinion
    - explains scientific principles and theories
    - explains test procedures and results
    - explains real evidence introduced in the case
    - interprets facts and renders an opinion regarding the likelihood of an event
    - explains the amount of recoverable damages in a civil case
    - gives an opinion that contradicts the conclusions of an expert for the opposing party
  - Clearly articulating:
    - areas where attorney wants feedback
    - techniques that will be used
    - risks and experiments to be taken
    - personal strengths and weaknesses

##### **Oral Objective B- Cross-Examination**

- Demonstrate an understanding of effective expert witness cross-examination strategy and skills.
- Oral Objective B is achieved by:
  - Preparing and presenting a cross-examination which demonstrates:
    - effective leading questions
    - sufficient and appropriate details
    - questions and delivery that hold the interest of the fact finder
    - simple questions that are understandable
    - questions that are appropriate—not argumentative, not objectionable
    - understanding evidentiary rules, evidentiary objections and purpose of objections
    - effective structure: thematic—chronological—orderly
    - effective follow-up, listening and clarifying answers
    - demeanor and presence—appropriate eye contact, voice projection, facial expressions, gestures, physical posture and avoidance of distractions

## LEARNING OBJECTIVES

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### *EXPERT WITNESSES*

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#### **ORAL (continued)**

- Preparing and presenting an effective supporting and discrediting cross-examination of an expert witness that:
  - utilizes categories/factors of expert cross-examination
    - \* supportive cross-examination
      - + obtains information that supports the case, facts, witnesses and themes
      - + obtains concessions
      - + criticizes the other side's positions
      - + discrediting cross-examination
    - \* discloses expert fees and financial interests
      - + establishes bias or prejudice
      - + attacks sources of information
      - + shows unreliable or insufficient information
      - + disputes facts
      - + shows lack of thoroughness
      - + shows insufficient testing
      - + establishes existence of other causes
      - + shows inappropriate or insufficient expertise
      - + establishes differences of opinion among experts
      - + establishes subjective opinions
      - + introduces inconsistent prior statements
      - + discredits hypothetical questions
      - + exposes other's deficiencies
- Demonstrating an understanding of personal strengths and weaknesses by clearly articulating:
  - areas where attorney wants feedback
  - techniques that will be used
  - risks and experiments to be taken
  - personal strengths and weaknesses

## LEARNING OBJECTIVES

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### *EXPERT WITNESSES*

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#### **WRITTEN**

#### **Written Objective A - Direct Examination**

- Demonstrate an understanding of effective expert witness direct examination strategy and skills.
- Written Objectives A is achieved by:
  - [Three Page Limit]**
    - preparing a written analysis of the assigned direct examination which demonstrates the following:
      - the specific approach to this direct examination
      - how the direct examination fits the theory of the case
      - dealing with strengths and weaknesses of the witness
      - an effective structure of the direct examination
  - [One Page Limit]**
    - demonstrating an understanding of personal strengths and weaknesses by clearly articulating:
      - areas where attorney wants feedback
      - techniques that will be used
      - risks and experiments to be taken
      - personal strengths and weaknesses

#### **Written Objective B - Expert Witness Cross-Examination**

- Demonstrate an understanding of effective expert witness cross-examination strategy and skills.
- Written Objective B is achieved by:
  - [Three Page Limit]**
    - preparing a written analysis of the assigned cross-examination which demonstrates the following:
      - the specific approach to this cross-examination
      - how the cross-examination fits the theory of the case
      - dealing with strengths and weaknesses of the witness
      - an effective structure of the cross-examination
  - [One Page Limit]**
    - demonstrating an understanding of personal strengths and weaknesses by clearly articulating:
      - areas where attorney wants feedback
      - techniques that will be used
      - risks and experiments to be taken
      - personal strengths and weaknesses

## LEARNING OBJECTIVES

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### *EXPERT WITNESSES*

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#### **WRITTEN (continued)**

#### **Written Objective C - Individual Analysis**

- Demonstrate an understanding of personal strengths and weaknesses.
- Written Objective C is achieved by clearly articulating:
  - areas where attorney wants feedback
  - techniques that will be used
  - risks and experiments to be taken
  - personal strengths and weaknesses

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## **Mitchell Hamline Law Review**

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