IN THE SUPREME COURT OF FLORIDA

The Florida Bar Re: Petition To Amend Rules Regulating The Florida Bar (Anti-Discrimination)	)))	Case No. 81,010

BRIEF IN SUPPORT OF JOINT PETITION TO AMEND RULES REGULATING THE FLORIDA BAR

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INTRODUCTION

Former Chief Justice Raymond Ehrlich entered an administrative order on December 11, 1989 that created the Florida Supreme Court Racial and Ethnic Bias Study Commission (the "Commission") to determine, in part, whether race or ethnicity affect "the dispensation of justice, either through explicit bias or unfairness implicit in the way the civil and criminal justice systems operate." During the ensuing two years, the Commission engaged in extensive fact-finding through public hearings, meetings, surveys, interviews, case analyses, and review of relevant literature.

The Commission found that racial and ethnic minorities are underrepresented in positions of responsibility in the state's judiciary, prosecution, and public defender offices. Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission (1990), Appendix Tab 1 at 24-26. The Commission also found that racial and ethnic minorities are similarly under-represented in private sector law firms. Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission (1991), Appendix Tab 2 at 71-87. Those findings prompted the Commission to recommend,

among numerous remedial measures,[1/] that the Court amend the rules governing Florida's legal profession by explicitly proscribing discrimination on account of race or ethnicity. Petitioners seek to have the Court implement that recommendation not only with respect to the racial and ethnic discrimination addressed by the Commission, but also discrimination based on gender, religion, national origin, disability, marital status, sexual orientation and age. The inclusion of these categories in other rules and laws which proscribe discrimination reflects the need for the protection of these classes as well.

In Florida, as in the nation, the legal profession remains virtually segregated in fact, although not by law. Several surveys administered by the Commission document the underrepresentation of minority attorneys in Florida's private law firms. A sample of 40 large Florida law firms showed that Hispanics comprise 6.5% of the attorneys employed in those firms and that African-Americans comprise less than 1.6%. Appendix Tab 2 at 74. According to another study, the rate of minority attorney employment in 50 small Florida law firms

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[1/]The Commission proposed to ameliorate certain institutional barriers by increasing law school admissions for minorities, recruiting from law schools with historically high minority enrollment, improving cultural sensitivity in the interviewing process, utilizing a summer associate pool of minority law school students, and applying hiring criteria evenhandedly. Appendix Tab 2 at 76-86.

tracks the rate of underrepresentation in large Florida firms. More startling perhaps is that African-American attorneys in small firms outside Miami represented 1.1% of the attorneys, and none were employed in the Miami firms sampled. Appendix Tab 2 at 86. See also Ch. 85-104, 1985 Fla. Laws 627, 629 (finding that "blacks are represented in the professional, executive, and managerial work force in substantially smaller percentages than non-minorities and other minorities and tend to be much more highly concentrated in the lower paying, lower status manual labor and domestic service sector than the rest of the population, including other minorities").

Florida's private sector law firms have an abysmal record of employing minority attorneys. Nationally, Hispanics represent 9% of the population, and 2.7% of the nation's attorneys. African-Americans represent 12.1% of the population, and 3.2% of the attorneys. Appendix Tab 2 at 72. Florida's performance with regard to African-American attorneys falls below the employment experience of the nation's 250 largest law firms, where African-Americans represent 1.7% of the associate ranks. Appendix Tab 2 at 73 (citing Jensen, Minorities Didn't Share in Firm Growth, 12 Nat'l L. J. 1, Feb. 19, 1990).

More distressing than limited entry-level employment opportunities are the prospects for promotion or lateral hiring of minority attorneys who aspire to partnership positions in

national firms. Only 20 of the 250 firms surveyed nationally retained one or more Hispanic partners, and 49 retained one or more African-American partners. Overall, racial and ethnic attorneys comprised 2% of the partners nationally. Appendix Tab 2 at 73. A lack of evidence that Florida's minority lawyers participated in the unprecedented growth experienced by national firms in the 1980s further underscores their plight. Significantly, the proportion of minority lawyers nationally remained practically static during the decade. Appendix Tab 2 at 72-73. The employment experience during the current decade offers little hope of progress, "particularly for minorities." MacLachlan and Jensen, Progress Glacial for Women, Minorities, 14 Nat'l L. J. 1, 31 (Jan. 27, 1992).

The Commission expressed special concern about the institutional barriers that confront minority women attorneys. They face deeply entrenched dual barriers based on race and gender, which systematically close the door to employment opportunities. Appendix Tab 2 at 80-81. See also Report of the Florida Supreme Court Gender Bias Study Commission (Gender Bias), 216-19 (1990). And within the court environment, minority women attorneys are often the object of race or gender-based comments by judges and court personnel. Appendix Tab 2 at 55-56. See also Gender Bias, at 200-06. Such expressions of disrespect for an officer of the court are professionally reprehensible, perpetuate unacceptable

stereotypical attitudes, and undermine the quality of justice due the client.

Disproportionate representation of minorities in Florida's legal system has lasting and pervasive consequences:

> First, the underrepresentation of minorities as attorneys and judges serves to perpetuate a system which is, through institutional policies or individual practices, unfair and insensitive to individuals of color in the ways described in the Commission's first report. Second, the underrepresentation of minorities as attorneys deprives the public debate of voices which speak with conviction about the social consequences of loosing so many minorities to imprisonment.
>
> Third, the dearth of minority attorneys deepens despair among young minorities who have no personal association with anyone who has become an attorney. Fourth, by threatening the withdrawal of the tacit "consent of the governed," the underrepresentation of minorities in positions of responsibility in the judicial system weakens the very system of ordered liberty upon which our democracy is based.

Appendix Tab 2 at vii-viii. Justice cannot be blind to the consequences of minority exclusion from the legal profession.

Apart from the discrimination evidenced by minority underrepresentation in positions of employment, a more invidious discrimination occurs daily in the workplace:

> [T]he interaction between minority and non-minority lawyers is unduly limited due to the low representation of minority attorneys in private law firms. Testimony received by the Commission would confirm that, where contact does occur, it is, unfortunately, oftentimes still characterized by tension, rancor, and humiliation indicative of racial conflict.
>
> This tension, rancor, and humiliation extends, unfortunately, beyond Florida's law firm walls into the

> chambers of the courthouse. As discussed in its first report, while the Commission found no widespread evidence of an overtly discriminatory demeanor among judges, numerous incidences described for the Commission confirm that sensitivity in this area must be enhanced. Derogatory name-calling; judges questioning the intelligence of minority attorneys, especially minority female attorneys; courtroom personnel displaying insensitivity to minority attorneys or witnesses in the presence of the judge. . . . These and similar events happen on a much too frequent basis in Florida's judicial system. For the sake of the system's vitality and perceived fairness, they must stop.

Appendix Tab 2 at 87. Sly, racially demeaning affronts are potentially more insidious than overt displays of racial animus, in part because they may be less recognizable.

I. THE BOARD OF GOVERNORS HAS APPROVED A SENSIBLE AND NECESSARY PROPOSAL TO RENDER DISCRIMINATORY CONDUCT ETHICALLY IMPERMISSIBLE

A. The proposal is responsive to serious problems identified by the Commission.

The Board of Governors has submitted to the Court for adoption a sensible proposal that is responsive to the concerns raised by the Commission about disparaging, humiliating, and discriminatory conduct in the adjudicatory process. The proposal focuses on the type of conduct that fact-finders are regularly called upon to identify in a host of civil and criminal contexts. It sets forth language that is simple, direct and unaccompanied by a need for prior adjudication:

RULE 4-8.4 MISCONDUCT

A lawyer shall not:

* * * * *

(d) engage in conduct that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation or age;

Such an approach is in keeping with decisions of this Court which prohibit racial discrimination in judicial processes. Most notably, the line of cases beginning with State v. Neil, 457 So. 2d 481 (Fla. 1984), clarified, State v. Castillo, 486 So. 2d 565 (Fla. 1986), and State v. Slappy, 522 So. 2d 18 (Fla.), cert. denied, 487 U.S. 1219 (1988), recognized that the right of the criminally accused to an impartial jury guaranteed in Article I, section 16 of the Florida Constitution prohibits the state from striking minorities from the jury panel solely on the basis of race. Neil's standard is applied strictly[2] and relies on the discretion of a color-blind judiciary to decide matters of fact.[3] Neil is especially instructive in its recognition that the harm caused by discriminatory conduct

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[2] See Williams v. State, 574 So. 2d 136, 137 (Fla. 1991) ("Whenever a sufficient doubt has been raised as to the exclusion of any person on the venire because of race, the trial court must require the state to explain each of the allegedly discriminatory challenges") (emphasis in original).

[3] See Reed v. State, 560 So. 2d 203, 206 (Fla.), cert. denied, 111 S.Ct. 230 (1990).

extends beyond the individual who is the object of discrimination in the courtroom and touches society as a whole.[4] Neil forcefully advances a policy of non-discrimination by promoting the fundamental values of equality under the law,[5] trial fairness,[6] and the appearance of justice.[7]

The Rules Regulating The Florida Bar state that lawyers

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[4] Tillman v. State, 522 So. 2d 14 (Fla. 1988); Batson v. Kentucky, 476 U.S. 79, 87 (1986); Rose v. Mitchell, 443 U.S. 545, 556 (1979) (plurality).

[5] Batson, 476 U.S. at 79; Tillman, 522 So. 2d at 14.

[6] See Scott v. Anderson, 405 So. 2d 228, 234 (Fla. 1st DCA 1981) ("'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. [O]ur system of law has always endeavored to prevent even the probability of unfairness'") (quoting In re Murchison, 349 U.S. 133, 136 (1955), review denied, 415 So. 2d 1359, 1361 (Fla. 1982)); Bryant v. State, 363 So. 2d 1141, 1144 (Fla. 1st DCA 1978) (same).

[7] Attorneys and judges must appear to do justice to establish public confidence in the legal institutions they serve. Understandably, "[t]he appearance of justice is no less important than justice itself." See Mitchell, 443 U.S. at 555-56 ("Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not of another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process"); Florida Code of Judicial Conduct, Canon 2 (Commentary) (1992)(requiring judges to "avoid all impropriety and appearance of impropriety").

have "a special responsibility for the quality of justice"[8] and prohibit lawyers from engaging in conduct that is "prejudicial to the administration of justice."[9] Florida's judiciary similarly adheres to an implicit policy of non-discrimination. See, e.g., Florida Code of Judicial Conduct, Canon 2A. ("A judge should . . . promote[] public confidence in the integrity and impartiality of the judiciary").

Displays of racial animus in courts of justice and by judicial officers shake public confidence in the institution and bring the system into disrepute. Similarly, discrimination based on ethnicity, gender, religion, national origin, disability, sexual orientation or age reflects adversely on public perception of courts and strikes at the very ideals of equality, fairness, and appearance of justice underpinning Neil.

B. Efforts to improve working conditions of already licensed minority practitioners facilitate recruitment of additional individuals through the "pipeline" to the profession.

The disparagement of minority practitioners, court employees and litigants makes the courts a hostile work environment that impedes efforts to recruit additional

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[8] Fla. Bar Rules of Prof. Conduct Preamble.

[9] Id. at Rule 4-8.4(d).

minorities into the profession and court-related employment. As the Commission's reports show, many of the strategies for strengthening the judicial system depend upon increasing the supply of minorities available for hiring, promotion and appointment. Educators refer to this as the "pipeline" challenge. Cf. Postsecondary Education Planning Commission, Programs to Enhance the Participation of Minority and Disadvantaged Students in Florida Postsecondary Education (December 1992). The judicial system faces the same challenge. Hence, it must address the linkage between workplace mistreatment of already licensed professionals and efforts to attract additional individuals to the profession.

II. BY VIRTUE OF THE DEMOGRAPHICS OF THE PROFESSION AND APPLICABLE STATUTORY THRESHOLDS, THE BOARD'S PROPOSAL ON EMPLOYMENT DISCRIMINATION WOULD LEAVE THE PROFESSION LARGELY UNAFFECTED

A. The Board of Governor's proposal would, in operation, exempt from its reach the vast majority of lawyers in Florida.

To be effective, any disciplinary rule banning employment-related discrimination by attorneys in Florida must be applied to all lawyers across the state in a fair and consistent manner. The alternative language proposed by petitioners achieves that goal. Accordingly, the petitioners have submitted the following language for the Court's

consideration as an alternative to the Bar's proposed Rule 4-8.7:

Rule 4-8.4

A lawyer shall not:

* * *

(h) discriminate in employment, partnership, or compensation decisions on the basis of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, or age.

Comment

* * *

The legal profession must eradicate the vestiges of racism, bigotry, and bias from the administration of justice. Discriminatory conduct violates the Oath of Admission, which requires every lawyer to "maintain the respect due to Courts of Justice and Judicial Officers." The country adheres to a national policy of non-discrimination. The legal profession should do no less than adhere to explicit principles of non-discrimination in matters of employment.

Discrimination is often insidious, making difficult the presentation of a successful claim. Grievance procedures require a searching inquiry for which the judicial branch must take responsibility. Discrimination brings the administration of justice into disrepute, particularly when practiced by lawyers in dealings with each other and with employees of lawyers.

The Bar's proposal on employment-related discrimination is a pledge of non-discrimination in principle but an assurance of non-enforcement in fact.

If the Bar's position is adopted, the serious issue of employment discrimination would be largely unaddressed by virtue of that proposal's incorporation of statutory thresholds which, as applied to Florida's legal profession, exclude the lion's share of the state's legal workplaces. Chapter 760,

Florida Statutes, vests in the Florida Commission on Human Relations the authority to hear employment discrimination complaints -- but only against employers with fifteen or more employees. Fla. Stat. §760.10 (1991) Similarly, federal employment discrimination claims under Title VII may only be asserted against employers with fifteen or more employees. See 42 U.S.C. §2000e-2 (1981).

Yet, according to the Bar's own 1992 survey of law firms in Florida:

> Four out of five (82%) Florida law firms have 15 or fewer lawyers; and
>
> Nearly two out of three (64%) Florida law firms have 15 or fewer total employees.

Memorandum from John F. Harkness, Jr. to Mike J. Garcia, January 22, 1993. The records of the Florida Department of Labor and Employment Security show these similar results:

> Four out of five (81.55%) Florida law firms paying unemployment compensation taxes have fewer than ten employees; and
>
> Two out of three (66.31%) of such Florida law firms have fewer than five employees.[10]

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[10] These figures were generated by the Florida Department of Labor and Employment Security's Bureau of Labor Market Information, ES-202 Program. They are based on those law firms which are subject to Florida's unemployment compensation laws. While this database does not include solo practitioners who are not salaried or "payrolled" employees, it would include the vast majority of lawyers in Florida.

Thus, by providing that the Bar may prosecute discrimination claims only after a prior adjudication elsewhere, the Bar's proposed language effectively exempts from its reach most of the lawyers to whom it is intended to speak. In this light, the Bar's proposal will seem disingenuous to many Floridians -- as it pledges non-discrimination in principle but does little in practice to stop it.

The Court should charge the Bar with the responsibility to prosecute and discipline unlawful discrimination. As a result of the recommendations of the Commission, profound policy changes have been made. (See Appendix Tab 2 at 2-3). Among other things, <u>every</u> police officer will ultimately receive more extensive training on race and ethnic bias issues, a cause of action has been made available to <u>all</u> victims of police brutality, and <u>every</u> judicial nominating commission will be diversified. Especially when viewed against the backdrop of these sweeping changes, a proposal from The Florida Bar to proscribe employment discrimination in only one fifth of the state's legal workplaces is an inappropriately weak response to the seriousness of the issues at hand.

B. The Bar's proposal would lead to the creation of standards of professional accountability that would vary according to geographic location and the enforcement of which would sometimes be at the discretion of county and municipal officials.

Anti-discrimination policies should be clearly and consistently enforced. The Bar's proposed Rule 4-8.7 would

actually result in an enforcement pattern varying substantially by coincidence of practice location.

A number of local jurisdictions in Florida have civil rights ordinances enforced by local human relations commissions, which adjudicate claims filed locally or deferred by state or federal agencies to local entities. In terms of both the thresholds invoking local jurisdiction and the classes of discrimination prohibited, these local ordinances vary dramatically throughout the state.

The neighboring counties of Dade and Broward provide a vivid example. Under the Dade County Human Rights Act, all employers, including law firms, which employ five or more employees in each of four or more calendar weeks are subject to the anti-discrimination provisions and penalties of the ordinance. See Chapter 11A, Dade County Code of Ordinances. Under the Broward County Human Rights Act, however, only those employers which employ fifteen or more employees each working day in each of twenty calendar weeks are so subject. See Chapter 83-380, Broward County Code of Ordinances. Similar contrasts in thresholds are evident all the way up the state. In Gainesville, for example, a law firm employing just two employees may be prosecuted for discrimination, while the same law firm, if operating in Jacksonville, could not be so prosecuted under that city's 15-employee threshold. See

Section 10B-8, City of Gainesville Code of Ordinances; Chapter 402, City of Jacksonville Code of Ordinances.

Likewise, different jurisdictions prohibit discrimination against different classes of individuals. Lee County prohibits discrimination in employment on the basis of marital status, but Jacksonville does not. See Chapters 86-28 and 88-19, Lee County Code of Ordinances; Chapter 402, City of Jacksonville Code of Ordinances. Moreover, Orlando prohibits employment discrimination on the basis of age against individuals aged 40 and 70, while St. Petersburg does so no matter what the age. See Chapter 57, City of Orlando Code of Ordinances; Chapter 12 1/2, City of St. Petersburg Code of Ordinances.

The scales of justice in lawyer discipline should not tilt solely by reason of the geographic situs of the workplace in which the discrimination claim arises. What may be a disciplinary offense in one county or city would not be grounds for discipline -- against a similarly-situated lawyer -- in another Florida county or city.

The discrimination which gives rise to a disciplinary complaint should be the same no matter who you are, no matter where you live. The standard should be promulgated by this Court and enforced by the Bar -- not left to a multitude of county and municipal officers. The Bar is enjoying at least three years of progressive leadership by individuals who are fully capable of using great imagination in devising effective

enforcement approaches. Approval of the proposal of the Board of Governors would constitute a monumental forfeiture of the opportunity to make significant advances.

C. The Supreme Court, as one of three co-equal branches of government, should not allow a claim of administrative inconvenience to forestall regulation of the Bar in matters of invidious discrimination.

In support of its proposed language and against the alternative language submitted by the listed petitioners, the Bar argues that it has neither the administrative resources nor expertise to prosecute claims of discrimination in the first instance. No other officials acting under the color of law could claim administrative inconvenience or inability as the basis for refusing to act in the face of the clear underrepresentation of minorities noted by the Commission.

D. Some other jurisdictions have rules that do not require a prior adjudication.

Florida would not be the first state to adopt a rule barring employment discrimination by its attorneys in the form submitted by the listed petitioners. To date, at least three other states or state Bars, including Vermont, the District of Columbia, and Michigan, have adopted an explicit employment-discrimination rule which vests in their respective state Bars the authority to prosecute discrimination claims. See Vermont Code of Professional Responsibility DR 1-102 (1986); District of Columbia Court Rules 9.1 (1991); Michigan

Rules of Professional Conduct 8.4 (1991). In fact, the record of claims filed in each jurisdiction suggests that their rules are having the intended prophylactic effect: no claims have ever been filed in Vermont or Michigan, and only one claim has been filed in the District of Columbia, but that one was expeditiously dismissed by the Bar as lacking in merit.[11/]

It should be pointed out that at least three other state courts, including New Jersey, New York, and Minnesota, and one other state Bar, California, have approved anti-discrimination rules for lawyers which either encourage or require the state's Bar to await a prior adjudication by another entity. See New Jersey Rules of Professional Conduct 8.4 (1991); New York Code of Professional Responsibility DR 1-102 (1991); Minnesota Rules of Professional Conduct 8.4; California Rules of Professional Conduct 2-400. In all four of those states, the jurisdictional threshold for enforcement by the non-Bar entities is no higher than five employees, and for two of the states, Minnesota and New Jersey, the threshold is a mere one employee!

Based on this record from other states, it is probable that the Bar would be able to administratively handle all claims

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[11/]The claims record of each state was determined through phone conversations, held within two weeks prior to the filing of this petition, with Bar counsel knowledgeable of applicable discrimination rules.

filed under this proposed rule with minimal disruption. The Bar certainly cannot suggest that Florida lawyers are reluctant to take their oath of admission seriously and abide by the rules of conduct promulgated by this Court.

Moreover, the Bar's claim of lack of expertise ignores the reality that a disciplinary system already exists within the Bar to investigate and prosecute a wide array of sensitive and complex inquiries. The Bar currently scrutinizes applications for admission and carefully investigates the character of potential lawyers. With its procedures for discipline established, any additional claims brought under these proposed rules would fit into the same framework which now sanctions attorneys for prohibited conduct.

The Bar's proposed rule is akin to Rule 3-7.2, which provides that a lawyer will be suspended if found guilty of a felony. However, current Rule 4-8.4 also provides that a lawyer may be sanctioned for "engaging in conduct involving dishonesty, fraud, deceit or misrepresentation." The latter rule does not require that the lawyer first be found guilty in court before the Bar may impose appropriate discipline. Comment to Rule 4-8.4 states: "Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate a lack of those characteristics relevant to the law practice."

The petitioners maintain that the practice of discrimination is, likewise, conduct for which lawyers should be professionally answerable. Just as the Bar does not wait for another tribunal to act before it sanctions lawyers under Rule 4-8.4, nor should it wait here.

A "priority" is defined as what an organization does when it lacks sufficient funds to do everything demanded of it. The Court can legitimately set forth priorities for the Bar. The Bar should make the eradication of the present effects of past exclusionary conduct a priority. Virtually every other contemporary institution, public and private, has been required to do so. The Bar should do no less.

In sum, the Bar argues that it cannot afford to enforce a policy of non-discrimination itself. Given the demonstrated urgency for the rule and the legitimacy of the Bar at stake in its strong enforcement, the real question is: Can the Bar afford not to do so? Commendably, a few jurisdictions explicitly prohibit discrimination or harassment by attorneys on account of race, ethnicity, or gender in matters of employment and professional dealing. Similar canons are under consideration in other states. This petition presents a unique opportunity this Court to implement the recommendations of its Commission.

CONCLUSION

The time is ripe for this Court to decide, as a matter of policy, that all attorneys and law firms in Florida -- no matter their size -- should be subject to anti-discrimination precepts. With that policy determination made, should the Court agree with the administrative concerns expressed by the Bar, the Bar may be charged to develop a creative approach which ensures the policy's vigorous application to Florida's legal profession.

Respectfully submitted,

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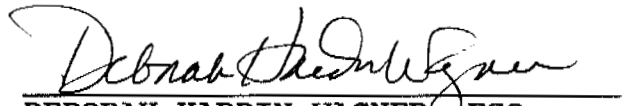
CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of this Additional Comment has been delivered by U. S. Mail to John F. Harkness, Jr., 650 Apalachee Parkway, Tallahassee, FL 32399 this 1st day of April, 1993, and to all other parties who have noted appearances in this action.



DEBORAH HARDIN WAGNER, ESQ.

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