IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,
v.

ANNA L. BROWN,

Respondent.
_____/

CASE NO.: SC04-2119
TFB NO. 2003-11,109(20B)

REPLY/CROSS ANSWER BRIEF OF THE FLORIDA BAR

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES PAGE

RULES OF DISCIPLINE

FLORIDA RULES OF COURT

SYMBOLS AND REFERENCES

In this Brief, the Petitioner, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar." The Respondent, Anna L. Brown, will be referred to as "Respondent."

"TT1" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC04-2119 held on November 10, 2005. "TT2" will refer to the transcript of the final hearing held on November 18, 2005.

The Partial Final Judgment of Referee will be referred to as "RR1."

The Report of Referee dated December 1, 2005, will be referred to as "RR2."

"TFB Exh." will refer to exhibits presented by The Florida Bar and "R. Exh." will refer to exhibits presented by the Respondent at the final hearing before the Referee in Supreme Court Case No. SC04-2119.

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar. "Standard" or "Standards" will refer to Florida Standards for Imposing Lawyer Sanctions.

SUMMARY OF ARGUMENT

Respondent has challenged the Referee's recommendations of guilt, but the Referee's findings of fact are supported by substantial competent evidence and should not be disturbed. The Referee correctly applied the appropriate standard to determine that an attorney-client relationship did exist between Respondent and Spillman. Based on that determination, the record evidence is more than sufficient to support the Referee's recommendation of guilt as to Rule 4-1.3 (diligence) and Rule 4-1.4 (communication). The evidence also supports the Referee's finding that Respondent's misrepresentations were intentional and, therefore, violated Rule 4-8.4(c).

The Bar's allegations regarding conflict of interest were improperly dismissed with prejudice. Respondent's argument to the contrary fails to address her own failure to obtain her client's informed consent, which is required even if the conflict is only potential.

The Referee's recommended sanction was insufficient. Respondent has provided no legal authority to support the Referee's recommendation, but instead bases her argument on sanctions appropriate for negligent misconduct, rather than the intentional misconduct found by the Referee.

The Referee's assessment of costs was within his discretion and should not be disturbed. If the issue were revisited, all or most of the Bar's costs should be assessed

against Respondent, rather than a small portion.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS OF GUILT ARE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE IN THE RECORD AND SHOULD BE UPHELD.

A referee's findings of fact regarding guilt carry a presumption of correctness that will be upheld unless clearly erroneous or without support in the record. If the referee's findings are supported by competent, substantial evidence, this Court will not reweigh the evidence and substitute its judgment for that of the referee. Florida Bar v. Rue, 643 So. 2d 1080, 1082 (Fla. 1994). The party contending that the referee's findings of fact and conclusions of guilt are erroneous "carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions." Id. (citations omitted). Respondent has alleged numerous errors in the Referee's findings of fact, but has failed to meet this burden as to any of the alleged errors. Each of the Referee's findings of fact and recommendations as to guilt is strongly supported by the record.

A. The Referee correctly ruled that Respondent represented Mr. Spillman.

Respondent's challenge to the Referee's finding of guilt on Rules 4-1.3(diligence) and 4-1.4(communication) is based on her assertion that she did not represent Renfred Spillman ("Spillman") or that she only accepted a limited

responsibility for the representation of Spillman. This assertion was also central to her defense at the final hearing before the Referee and the determination of whether an attorney-client relationship existed was the sole issue at the first part of the bifurcated final hearing. The Referee's finding that Respondent did represent Spillman is well-supported by the evidence and the law.

The Referee analyzed the issue of whether an attorney-client relationship existed under the correct precedent of this Court. In Florida Bar v. Beach, 675 So. 2d 106 (Fla. 1996), this Court adopted the test for determining the existence of an attorney-client relationship established in Bartholomew v. Bartholomew, 611 So. 2d 85 (Fla. 2nd DCA 1992). The determination of whether an attorney-client relationship exists is based on the subjective belief of the client, provided that the client's belief is reasonable. Beach, at 109.

Applying this test, the Referee made numerous specific factual findings to support his conclusion that Respondent represented Spillman. The Referee found that Respondent "actively represented, performed services for, collected fees from, and appeared in court for Renfred L. Spillman in the defense of his 2001 felony charge in Collier County" and that "Spillman had a multitude of reasons to believe that he was represented by Respondent. . . . " (RR1). The basis for Spillman's reasonable belief included the following facts: (1) Spillman signed an employment agreement in

Respondent's office on her stationery (later modified and signed by attorney Peter T. Flood ("Flood") without Spillman's knowledge); (2) Spillman's only significant contact with anyone in the case was through Respondent's office; (3) Spillman's letters went to Respondent's address; and (4) Spillman's money went to Respondent. (RR1, paragraph 4).

The Referee's detailed findings of fact concerning the relationship between Respondent and Spillman are supported by the evidence in the record. Spillman testified that, in December of 2001, he went to Respondent's office to seek legal representation with regard to his criminal charges. (TT1 33). While there, he met with Respondent's paralegal, Mark Patterson ("Patterson"), and signed Respondent's form representation agreement. (TFB Exh. 1). At the same time, Spillman issued a check payable to Respondent in the amount of $700, pursuant to the representation agreement. (TFB Exh. 2, TT1 35-36). The changes to the representation agreement were made without Spillman's knowledge. (TFB Exh. 1, TT1 34-36). As of December 4, 2001, Spillman believed that he had retained Respondent to represent him. (TT1 36-37, TT2 40). He subsequently met with Patterson, who took photographs of Spillman's vehicle. (TT1 37). In or about January 2002, Spillman sent a letter to Respondent, asking about the status of his case and enclosing a check in favor of Respondent for an additional payment of $250, pursuant to the

representation agreement. (TFB Exhs. 3 & 4, TT1 38-39). Spillman subsequently sent one more $250 payment, but then stopped sending payments when he became frustrated with his inability to obtain substantive information about his case. (TT1 40, 64). None of Spillman's payments were returned to him; his checks were cashed by Respondent.

Respondent ignores this evidence and points to other evidence in the record which she claims supports her contention that she never represented Spillman. Pointing out conflicting evidence, however, is not enough. The party challenging the referee's findings of fact must demonstrate that those findings were not supported by substantial competent evidence. Respondent did not and could not meet that burden.

Implicit in Respondent's challenge to the Referee's finding that Respondent represented Spillman is a disagreement regarding the applicable standard for determining whether an attorney-client relationship existed. Respondent repeatedly asserts that Flood was Spillman's "record counsel" as if that were dispositive of the issue of representation. Respondent has not cited any authority in her brief for the contention that Flood's formal appearance on behalf of Spillman in the criminal proceeding is determinative of the issue of representation for the purposes of attorney disciplinary proceedings. At the final hearing, Respondent asserted that the determination of representation should be based on application of Rule 2.060, Florida

Rules of Judicial Administration. (TT1 9-10). The Referee correctly rejected this standard. Rule 2.060 regulates relations between parties, counsel, and courts. Rule 2.060 was neither designed nor intended to regulate relations between attorneys and their clients. Applying Rule 2.060 to such situations would result in a variety of absurd results, such as negating the possibility of an attorney-client relationship on non-litigation matters. In this case, Respondent seeks to have Rule 2.060 applied to make Flood, not Respondent, the attorney for Spillman, despite the fact that Spillman had never met Flood or authorized Flood to represent him.

Respondent also asserts that any attorney-client relationship which she had with Spillman was strictly a limited relationship. As a result, Respondent asserts that any obligation which she had toward Spillman was also limited. Respondent provides no legal authority to support this creative assertion. The applicable standard for determining whether an attorney-client relationship existed is the Bartholomew test adopted by Beach. The Referee correctly applied that test and the record evidence amply supports the Referee's conclusions.

B. The evidence supports the Referee's finding that Respondent violated Rules 4-1.3 (diligence) and 4-1.4 (communication).

Having correctly concluded that an attorney-client relationship existed between Respondent and Spillman, the Referee was compelled to find violations of Rule 4-1.3 and Rule 4-1.4. Substantial competent evidence demonstrates that Spillman's case

was neglected and that no one kept Spillman informed about the status of the case.

The record contains ample evidence supporting the finding of violations as to Rules 4-1.3 and 4-1.4. Respondent testified about numerous problems with the representation of Spillman, although she blames these failures on Flood. (TT1 114, 121, 127-28). For example, she stated that the representation of Spillman, "just didn't seem to be going anywhere." (TT1 121). She also stated that Flood "was dropping the ball." (TT1 127). Flood agreed that there was negligence in the handling of Spillman's case. (TT2 89). This evidence, including repeated testimony from Respondent herself about the insufficiency of the representation of Spillman, provides ample support for the Referee's finding of a violation of Rule 4-1.3.

The evidence also supports the Referee's finding that Respondent failed to communicate with Spillman. Respondent not only failed to communicate to Spillman that Flood would be representing him, she also failed to maintain communication with Spillman throughout the representation, or keep him informed about the progress of his case.

Spillman testified that he had three or four telephone conversations with Respondent's paralegal, but those conversations always occurred on Spillman's initiative and Spillman was unable to obtain any substantive information about the case. (TT2 30-31). Flood also testified that he never spoke with Spillman during the

course of the representation (TT1 86), though he claimed to have spoken to Spillman the day Spillman hired Respondent (TT1 84). Respondent was aware of communications between Spillman and her paralegal, but claimed not to be representing Spillman. The only evidence of communication by Respondent is two letters purportedly sent in September 2002, nine months into the representation. (TFB Exhs. 6, 8). The evidence clearly demonstrates that Spillman received little communication from anyone and no substantive information about his case.

In her testimony at the final hearing, when asked why she filed multiple motions to withdraw in Spillman's case, Respondent admitted that her law practice was "fundamentally dysfunctional at that point in time." (TT2 130). She also admitted that her law office was not organized, that she did not have adequate help, and did not review her documents properly before filing them with the court. (TT2 129-30). The evidence of her own disorganization further supports the Referee's finding of violations of Rule 4-1.3 and Rule 4-1.4.

C. The evidence supports the Referee's finding that Respondent violated Rule 4-8.4(c).

Respondent argues that she cannot be found guilty of violating Rule 4-8.4(c) (misrepresentation) because she had no intent to deceive Spillman or any one else. The Referee found by clear and convincing evidence that Respondent misrepresented her status with Spillman, and further found that "her misrepresentation was, without

question, intentional." (RR2). The Referee's finding of intentional misrepresentation is supported by substantial evidence in the record.

Respondent is correct that in order to find an attorney guilty of misrepresentation under Rule 4-8.4(c), the Bar must show the necessary element of intent. Florida Bar v. Fredericks, 731 So. 2d 1249, 1252 (Fla. 1999). In order to meet this burden, however, the Bar need only demonstrate that the conduct was "deliberate or knowing." Id. In Florida Bar v. Smith, 866 So. 2d 41 (Fla. 2004), an attorney argued that she did not have the requisite intent to be found guilty of violating Rule 4-8.4(c) when she deposited a client's trust funds into her operating account, and spent the funds on unrelated expenses. Smith asserted that her financial misconduct was the result of sloppiness and negligence. Citing Fredericks, this Court found that Smith's misconduct was "deliberate or knowing," and approved the Rule 4-8.4(c) violation. This Court stated, "[i]n Federicks, this Court noted that the motive behind the attorney's action is not the determinative factor. Rather, the issue was whether the attorney deliberately or knowingly engaged in the activity in question." Id. at 46.

Respondent argues that, because the Referee found that Respondent did not act with a selfish motive or for her own personal gain, she cannot be found guilty of misrepresentation. Respondent is confusing motive with intent. The referee concluded that Respondent intentionally misled both the court and the client,

notwithstanding his additional finding that her motive was relatively benign.

The misrepresentation which Respondent committed was two-fold. First, she never told Spillman that Flood would be formally appearing on Spillman's behalf and intentionally withheld this information. Second, she intentionally had Flood sign papers as if he were the true attorney for Spillman, while doing all of the work herself. The evidence demonstrates a pattern of behavior by which Respondent intentionally misled both her client and the criminal court.

First, Spillman signed a representation agreement with Respondent's name and contact information on it. (TFB Exh. 1, TT1 34-35). Spillman was never advised that that agreement was later modified or that Respondent would not be representing him. (TT1 40). This duplicity in altering an already-executed contract demonstrates intent.

Second, the initial pleadings prepared for Spillman's case identified Flood as the attorney, but used Respondent's contact information. (TFB Exhs. 19, 20). In that way, Flood would appear to be the attorney, but Respondent would receive all notices and could take all necessary action.

Third, Exhibits 7 and 8 clearly demonstrate knowledge that Spillman was misled about Flood's appearance and an intent to continue to mislead Spillman. In September 2002, the determination was made that it was necessary to withdraw from

representation because Spillman had discontinued payments. Flood did not communicate that decision directly to his purported client, but instead sent a letter to Respondent regarding the need to withdraw. (TFB Exh. 7). Respondent, in turn, sent a letter to Spillman, whom she claims not to have represented, and advised that, due to lack of payment, a motion to withdraw had been set. (TFB Exh. 8). If Flood had truly represented Spillman, he would never have sent Exhibit 7 to Respondent, but would have written to his client directly. Exhibit 8 is simply not a letter which any attorney would send to another attorney's client. The only logical explanation for sending Exhibit 8 is that Respondent knew that Spillman had no idea about Flood's involvement, and she intended to keep him uninformed. Respondent's explanation for why she sent Exhibit 8 is that Flood is computer illiterate and it was easier for her to send a letter. (TT1 133). That explanation is illogical, particularly given the fact that Flood had managed to conquer the technological challenges necessary to prepare and send Exhibit 7 to Respondent the week prior.

Fourth, we have the conduct of Flood and Respondent at the time of the withdrawal. After the hearing on the motion to withdraw, Flood and Respondent needed to meet with Spillman to explain the status of the matter. They both went to the jail to meet with Spillman. Flood went because, according to the criminal court, he was the attorney who had just withdrawn. Respondent went because both she and

Flood knew that Spillman thought she was his attorney. These examples demonstrate a pattern of conduct, which literally extends from the very beginning to the very end of representation, in which Respondent deliberately misled Spillman and the criminal court. The evidence of this pattern of conduct is more than sufficient to support the Referee's finding of a violation.

II. IT IS NOT NECESSARY THAT RESPONDENT ENGAGE IN AN ACTUAL CONFLICT OF INTEREST IN ORDER TO VIOLATE RULE 4-1.7(b).

The Florida Bar did not need to prove that an actual conflict of interest existed in order to state a violation of Rule 4-1.7(b). Similarly, the Bar did not need to assert that the Respondent's conduct caused actual prejudice or harm to her client(s) for it to state a violation of Rule 4-1.7(b). The Rule states:

> (b) **Duty to Avoid Limitation on Independent Judgment.** A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation.

The suggestion by Respondent that a violation of Rule 4-1.7 requires proof of actual conflict and prejudice to her client might apply to Rule 4-1.7(a), but it is simply inapplicable to 4-1.7(b). The Respondent never identified which section of the Rule

she was addressing in the Answer Brief and appears to have entirely ignored the provisions of the Rule 4-1.7(b) cited in the Bar's Initial Brief.

Respondent's reliance on case law involving the appeal of criminal convictions that involve Sixth Amendment issues of conflict is simply not on point in regard to Rule 4-1.7(b). A violation of Rule 4-1.7(b) by the Respondent does not require proof of a violation of the Sixth Amendment rights of the Respondent's client. In this instance, the potential for conflict was acknowledged by the Respondent. (TT2 132). In such instance, the appropriate action would have been to consult with the client in compliance with Rule 4-1.7(b)(2). However, instead of consulting with the client, and openly acknowledging the potential conflict, the Respondent engaged in a course of conduct that disguised her dual representation from the court. This concealment also deprived the trial court of the opportunity to inquire into the potential conflict.

The Bar's Complaint alleged that "Respondent failed to consult with and obtain Spillman's consent to the dual representation." (Complaint, paragraph 103). There is simply no indication in the record that this consultation occurred as required by the Rule. Although it is clear that Spillman was aware that Respondent represented both himself and Antoine Parks, this knowledge does not constitute consent. In Florida Bar v. Dunagan, 731 So. 2d 1237, 1241 (Fla. 1999), this Court explained that the burden is on the attorney to consult with the client and obtain consent:

> …it is not the responsibility of the client or the client's new

> attorney to raise the issue of conflict. The rules require the actual consent of the client after consultation, and as the comment to rule 4-1.7 states, it is "primarily the responsibility of the lawyer undertaking the (conflicting) representation" to obtain necessary consent. *Cf. Snyderburn v. Bantock*, 625 So. 2d 7, 13 (Fla. 5th DCA 1993)(concluding conflict of interest could not be waived by failure to seek disqualification because ethical rule is designed for the benefit of client and client informed attorney of conflict.)

The burden of consultation falls upon the lawyer. In order for there to be consent, the consultation must be sufficient to allow the client to make an informed decision. This concept of informed consent was discussed by the court in General Cigar Holdings, Inc. v. Altadis, 144 F. Supp. 1334 (S.D. Fla. 2001) in relation to Rule 4-1.7(a). Although this section refers to actual adverse interest, the language requiring consent in Rule 4-1.7(a)(2) and Rule 4-1.7 (b)(2) both require that the "client consents after consultation." The court in Altadis stated that "attorneys are required to fully disclose the adverse effects of the representation and obtain the consent of the parties. . . . The burden of proving full disclosure and consent is on the attorney seeking to represent adverse interests." Id. at 1338. Respondent has entirely ignored her failure to consult with her client, Spillman, as required by Rule 4-1.7(b)(2).

Furthermore, the allegation regarding the actual conflict of interest was simple and straightforward. At the traffic stop, there were two occupants of the vehicle and one gun. The occupant to which the gun was attributed would face additional charges; the other occupant would not.

The Bar should have been allowed to proceed forward on the allegations of conflict of interest. The dismissal with prejudice of all allegations relating to a conflict of interest was in error.

III. GIVEN THE VIOLATIONS FOUND BY THE REFEREE, THE RECOMMENDED SANCTION IS INADEQUATE.

The recommended sanction of admonishment is insufficient based on the violations found by the Referee. In support of an admonishment, Respondent cites to several Standards for Imposing Lawyer Sanctions which she claims are applicable to the "undisputed" facts of this case. (RB 28-29). Of course, this Court does not impose sanctions based solely on the undisputed facts, but on the findings of fact made during the disciplinary proceeding.

All of the Standards cited by Respondent apply to conduct by an attorney that is merely negligent, not intentional. The Referee specifically found Respondent's "failure to communicate with the client and court, and her misrepresentation was, without question, intentional. . . ." (RR2). Respondent's argument in support of an admonishment is, therefore, entirely dependent on a rejection of the Referee's recommended findings of fact. As discussed more fully above, the Referee's findings of fact are well-supported by the record and should not be disturbed.

Respondent cites no case law (and undersigned Bar counsel is aware of no reported decision) in which this Court has imposed a mere admonishment on an

attorney who was found guilty of intentional misrepresentation. Even the harsher sanction of a public reprimand has only rarely been deemed sufficient in cases involving intentional misrepresentation. Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989)(public reprimand ordered for secondary attorney involved in misrepresentation to court; suspension ordered for lead attorney).

This Court has held that a public reprimand should be reserved for "isolated instances of neglect" or "lapses of judgment." See Florida Bar v. Forrester, 818 So.2d 477, 484 (Fla. 2002). In this case, Respondent's intentional misrepresentation to her client and to the court, was not a single error, but a pattern of misconduct extending over the course of a year. Given the Referee's finding of intentional misconduct, the Bar reasserts that a 90-day suspension is required by the facts of this case, as discussed more fully in its Initial Brief.

IV. THE REFEREE DID NOT ABUSE HIS DISCRETION BY AWARDING A PORTION OF THE BAR'S COSTS AGAINST THE RESPONDENT.

Respondent argues that it was inequitable for the Referee to assess all of the Bar's costs against the Respondent and requests that the case be remanded to determine a more equitable assessment of costs. First, Respondent's statement that the Referee assessed all of the Bar's costs against the Respondent is incorrect. The

Referee found that the Bar reasonably incurred costs in the amount of $9,143.84, but recommended that Respondent be charged with only $1,000.00 of the Bar's costs. (RR2). Second, the Referee was extraordinarily generous in assessing such a small portion of the Bar's costs against Respondent.

The applicable standard for an award of costs to the Bar is set forth in Rule 3-7.6(q)(3), Rules Regulating The Florida Bar: "When the Bar is successful, **in whole or in part**, the referee may assess the bar's costs against the respondent unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated." (emphasis added). The Rule further provides that "[t]he referee shall have discretion to award costs, and absent an abuse of discretion, the referee's award shall not be reversed." Rule 3-7.6(q)(2). This Court has not disturbed a referee's decision regarding an award of costs except in the most extreme cases, such as awarding costs to a losing party. Florida Bar v. Kassier, 730 So.2d 1273 (Fla. 1999)(upholding referee's assessment of all costs against respondent despite recommending a finding of guilt on only five of eight counts); Florida Bar v. Williams, 734 So.2d 417 (Fla. 1999)(reversing assessment of half of the bar's costs against respondent who prevailed on all issues).

The Referee in this case found Respondent guilty of violating Rules 4-1.3, 4-1.4, and 4-8.4(c). The Bar contends that Respondent should also be found guilty of

violating Rule 4-1.7. Regardless of the determination of the conflict issue, the Bar has clearly prevailed in part in these proceedings and is ordinarily entitled to full reimbursement of its costs. In fairness, the Bar's costs were higher in part because of geography – Bar counsel and Respondent's counsel were located in Tampa; the referee was in Bradenton; Respondent and Flood were in Naples; and Spillman was in Miami. Nevertheless, a review of the record also demonstrates that additional costs were incurred as a result of Respondent's unnecessary filings. For example, Respondent filed a counterclaim and an amended counterclaim in the disciplinary proceeding despite the complete absence of any legal authority. Under the circumstances, the Referee's assessment of costs was extremely generous to Respondent and certainly did not constitute an abuse of discretion. If this Court were to revisit the issue of costs, it should assess a larger portion of the Bar's costs against Respondent, so that those costs are not borne by the other members of the Bar who have complied with the Rules.

CONCLUSION

The Referee's findings of fact and recommendations of guilt are supported by substantial competent evidence and should be upheld. The Referee's dismissal of allegations related to conflict of interest was in error. Based on the violations found by the Referee, the recommended sanction was inadequate; this Court should impose a 90-day suspension. Finally, the Referee's assessment of costs was within his discretion and should not be revisited by this Court. If the issue were to be revisited, this Court should assess all of the Bar's costs against Respondent.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Airborne Express, Airbill Number 34358724842 to **The Honorable Thomas D. Hall**, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U.S. Mail to **Brett Alan Geer**, Attorney for Respondent, 3837 Northdale Boulevard, Tampa, FL 33624; by regular U.S. mail to **John Anthony Boggs**, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, all this _____ day of March, 2006.

_____
Troy Matthew Lovell, Esq.
Assistant Staff Counsel

CERTIFICATION OF FONT SIZE AND STYLE

Undersigned counsel does hereby certify that this brief complies with the font standards required by the Florida Rules of Appellate Procedure for computer-generated briefs.

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