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AUGUST - TWO THOUSAND TWENTY



DETECTING SOURCES OF BIAS IN EXPERT WITNESSES

by Gary R. Rick, Ph.D.

Page 8

KATHRYN E. CLUNEN

DAVID KAREN

GREGORY W. HERRING

STANISLAUS PULLE

MICHAEL D. PLANET

PRESIDENT'S MESSAGE: LAW PROM CANCELED	3
HAVE YOU HEARD?	5
PROJECT ADVOCACY - 2021	10
OXNARD LAWYERS WIVES CLUB	11
THE LEGISLATURE TIGHTENS DV/CUSTODY CROSSOVER PROCEDURES	12
LAW SCHOOL SEEKS RESUMPTION WITH DISTANCE LEARNING	16
SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA COURT CLOSURES	17
UPCOMING AUGUST EVENTS	17
CLASSIFIEDS	17

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PRESIDENT'S MESSAGE: LAW PROM CANCELED

by Kathryn E. Clunen

Before I address the Annual Dinner, I would like to thank those who reached out to me about my July President's message. Overall, I received more positive feedback than criticism. Our journey for racial justice is not over and I am proud to see VCBA members and affiliate groups take action.

Those who know me know I really enjoy going to social events, including the VCBA Annual Dinner. I look forward to it every year, buy a new dress, and get my nails and hair done. I don't think I've skipped a year since 2006. When I joined the Dion Law Group in 2012, I invited all my co-workers – some of whom had never previously attended. We had a blast getting to know each other better outside of the office. After that year, my co-workers and I nicknamed the dinner Law Prom since we got all fancied up and rented a limo. Now it's a yearly tradition to rent a limo (or limo bus) and have a pre- and post-party. It's nice to get out for the evening with colleagues and not have to talk about work. It's a time to let loose and bid on great auction items that benefit Ventura County Legal Aid.

Ever since I was elected Secretary-Treasurer I've thought about what I would do for Law Prom when I became VCBA President. I had big shoes to fill after **Doug Goldwater's** unique and outrageous comedy night. I chose a hangar at the Camarillo Airport, which includes an outdoor area to tour some old planes. I was in the process of figuring out the entertainment. Would we have karaoke or ask **Dennis Jones** and his band Sgt. Pepper to play? But that came to a halt in March when everything was put on hold.

The Annual Dinner is a topic the VCBA Board has discussed since April, and in June we decided the best thing to do was cancel it. Our main reason was that, in order to finance the event and its auction benefiting Legal Aid, VCBA depends on the generosity of our community for sponsorships and auction items, and it didn't feel right to ask businesses suffering financially from COVID-19 closures for money or donations.

But even if the Board hadn't voted in June to cancel the event, surely we would had to do so in light of Governor Newsom's July 13 order requiring the closure of so many businesses, including indoor dining.

Because we aren't having the Annual Dinner this year, VCBA feels it cannot award the **Ben E. Nordman** Public Service Award either. This award recognizes outstanding contributions made by a Ventura County lawyer to the community by means of charitable, or other public service activities. It wouldn't be right to award this prestigious honor without having a celebration.

Mr. Nordman practiced law in Ventura County from 1939 to 1985. He believed it was important for lawyers to give back to the community. One of his favorite sayings was: "There's more to practicing law than

making a buck." In that spirit, he created and funded the Ben E. Nordman Public Service Award. It is now administered by the Ventura County Community Foundation. To see the past recipients from 1986 to 2019, please visit <https://www.vcba.org/public-service-award/>.

Since we can't have Law Prom this year, I would like for VCBA to have a service day instead – and I'm seeking suggestions for how we should go about doing that. And I hope the 2021 VCBA President, **Marc Anderson**, will let me help him plan next year's Law Prom to make it the best one yet.

Kathryn E. Clunen is of counsel at the Dion Law Group, APLC and practices family law. She can be reached at KatieC@dionlawgroup.com or (805) 497-7474.



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HAVE YOU HEARD?

In 2012, the Ventura County Diversity Bar Alliance ("VCDBA") began as a coalition of Ventura Bar Associations representing diverse members of the legal profession. VCDBA stands with the Black Lives Matter movement and against all forms of racism, oppression, and violence. It is our mission to advance and empower black, indigenous, people of color, LGBTQIA+ people, women, and all those who have been historically underrepresented and disenfranchised in the legal profession. We welcome and invite the participation of our diverse members and their allies and supporters within the legal community as we work together to promote equal access to justice in our community and achieve excellence and diversity in our legal profession through equity, inclusion, education, and advocacy.



VCDBA, currently led by **Jill Friedman**, plans to host a virtual panel event on Sept. 29. More details to follow. If you are interested in being involved with the VCDBA, please contact Friedman at jfriedman@mwglaw.com.



Roy Schneider of Schneider and Associates, LLP has been selected to serve as a new member of the Community Memorial Hospital Foundation Board of Directors, along with local CPA Michael Farrell. The Foundation is a nonprofit organization that supports and fundraises to allow Community Memorial Hospital state-of-the-art healthcare facilities, industry-leading programs and equipment, and comprehensive, accessible health services.

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DETECTING SOURCES OF BIAS IN EXPERT WITNESSES

by Gary R. Rick, Ph.D.



Bias in expert witness reports and testimony is a common concern in litigation involving scientific and factual matters. When assessing the potential forms of bias in the work of an expert, it can be beneficial to have a step-wise approach. Recently, cognitive neuropsychologist Dr. Itiel Dror provided an eight-factor model that attorneys and experts could use to ferret out possible bias (Dror, I. E. (2020), "Cognitive and Human Factors in Expert Decision Making: Six Fallacies and the Eight Sources of Bias," *Analytical Chemistry*, 92(12), 7998-8004. doi:10.1021/acs.analchem.0c00704).

Some of the bias sources are case-specific while others involve personal and human factors.

1. *The Data.* Some data may have an impact on an expert beyond its actual significance. Police and medical reports, for example, may be given undue weight by the expert since they come from presumably trained and objective individuals.

2. *Reference Materials.* Reference materials can influence how data are perceived and interpreted. An example of this can occur in psychological testing. A frustrated litigant might endorse test items suggesting a significant problem with anger. The evaluator could allow the testing material to color the interpretation of the overall data regarding this individual instead of seeing it in the context of other data. If this happens early in the assessment process it can cause

confirmatory bias, in which information leads to an early hypothesis the expert seeks to confirm in analyzing additional information.

3. *Contextual Information.* Irrelevant information that should be ignored may impact the analysis of reference materials. Declaring bankruptcy and dropping out of school are two examples of information that may be irrelevant to the forensic issue. However, they may generate a negative bias toward a litigant that influences the interpretation of data.

4. *Base Rate.* Work experience from past cases can be an asset for an expert. However, base rate bias exists when expectations from similar cases in the past lead to a perception of issues in the current case. For instance, an expert may have seen several custody relocation cases in which the moving party was deemed to have used relocation to abuse the non-moving party. The "eye of the beholder" may perceive the moving party with excessive scrutiny.

5. *Organizational Factors.* Dr. Dror points to a study (Murrie, D. C., Boccaccini, M. T., Guarnera, L. A., & Rufino, K. A. (2013) "Are forensic experts biased by the side that retained them?" *Psychol Sci*, 24(10), 1889-1897. doi:10.1177/0956797613481812) in which experts were deceived into thinking that they were, or that they were not, working for the party that retained them when presented with identical data.

There was an "allegiance effect" leading to conclusions more in line with the retaining party. The grossest example is the "hired gun" who supports the side that pays them with unsupported consistency and certainty.

6. *Education and Training.* Education and training often influence how evaluative work is conducted. Experts may have allegiances to various schools of thought in their fields such as psychoanalysis, family systems and cognitive modification. They may have been trained in techniques such as play therapy and eye movement therapy (EMDR). These viewpoints can color both the analysis of the case and recommendations regarding it.

7. *Personal Factors.* Changeable states such as stress and fatigue as well as long-term personal beliefs, ambiguity tolerance and a passion for certitude can have an impact on decision making. Project Implicit at Harvard University (implicit.harvard.edu/implicit) has used quick response to show how persons may harbor biases they might otherwise deny.

8. *Human and Cognitive Factors and the Human Brain.* The mechanics of the brain do not allow it to process all incoming information. The brain tries to make sense of the world and data around it. As a result, the actions of human cognition mean that we do not see the world as it is. The mind is not a camera. One example is seen in evaluators who rely on readily intelligible data while failing to adequately consider the complexities and nuances of other probative information.

Experts might review this list before finalizing reports and attorneys might consult it to look for weaknesses worthy of challenging when they rely on experts.



Gary R. Rick, Ph.D. is a clinical and forensic psychologist based in Ventura, California. He has been conducting expert witness evaluations and consultation primarily in family law for the past 39 years.



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Project Advocacy - 2021

by David Karen



For the past six years, the DK Law Group and Creative Dispute Resolution have been hosting a summer internship program open to all high school students who participated in the Ventura County Superior Court's annual Mock Trial program. After a fairly rigorous interview process, four students are selected as interns to work with DKL and CDR to enhance their advocacy skills over an eight-week period. Graduating interns are then invited back as mentors to help facilitate the next year's program and to work part-time as employees of the firm. To date, 24 students have participated in the program, and most of them are on

track to complete undergraduate degrees at UC Berkeley, UCLA, UCSB, Yale and Georgetown. The 2015 graduates and some from 2016 have already completed their degrees and some are in law school, including one with a full-ride scholarship at USC Law School.

During this vocational program, students are exposed to the inner workings of the practice of law. They learn the basics of legal vocabulary, including preparation of deposition summaries, client intake, receptionist skills, and the business of law, and they have "advocacy wars," all designed

to further their understanding of the reality of law practice.

Each summer, guest speakers have participated to share their views, the interns honing their questioning skills to discover the varying niches that the practice of law can provide. With great thanks, past guest participants have included retired Judges **David W. Long**, **Frederick Bysshe** and **Glen Reiser**; Presiding Judge **Kent M. Kellegrew**, Judge **Henry J. Walsh**, Commissioner **Jeffrey Harkavy**; VCBA Executive Director **Sandra D. Rubio**, attorneys **Jon Light**, **Panda Kroll**, **Dana Caudill**; and Colleges of Law Dean **Jackie Gardina**.

If you would like to become involved or learn more about the program, please email dk@dk4law.com. For more information about Project Advocacy, go to <http://www.dk4law.com/blog/dk-law-group-news/summer-internship-class-of-2019/> or follow [@projectadvocacydklg](https://www.instagram.com/projectadvocacydklg) on Instagram.

David Karen is founder and senior managing partner of DK Law Group, a Thousand Oaks firm known for successfully resolving all types of civil matters by way of litigation or mediation.

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Oxnard Lawyers Wives Club

The first meeting to organize the Oxnard Lawyers Wives was held at the Colonial House on April 4, 1957. Mrs. A.C. Reidel, vice-president of the Lawyers Wives of California, spoke on organizational procedure. Temporary officers were elected until the organization is under way. They are Mrs. Megl. Heily, president, Mrs. Irving Lowe, Director at Large, Mrs. John Marshall, Secretary, and Mrs. Donald Pollock, treasurer. Mrs. John Owens and Mrs. Jerome Berenson were nominated to the By-Laws Committee. The next meeting was scheduled for May 2nd when the By-Laws are to be discussed and formulated.

The charter members present at the initial meeting were Mrs. Irving Lowe, Mrs. O.A. Hunt, Mrs. Donald Pollock, Mrs. Jerome Berenson, Mrs. Marvin Lewis, Mrs. John Owens, Mrs. H.F. Rosenmund, Mrs. F.A. Sherni, Mrs. John Marshall, Mrs. C.L. White, Mrs. W. Mark Durely, Mrs. Dale Carnal, and Mrs. Megl. Heily.

Are there any additions or corrections to the minutes? The minutes stands approved as read.

Respectfully submitted,

Mrs. John B. Marshall, sec.

THE LEGISLATURE TIGHTENS DV/CUSTODY CROSSOVER PROCEDURES IN “RECOMMENDING” JURISDICTIONS LIKE VENTURA COUNTY

by Gregory W. Herring

Domestic violence (“DV”) is a potential game-changer in child custody contests. In 2014’s Assembly Bill (“AB”) 2089, the Legislature expressly declared, “There is a positive correlation between [DV] and child abuse, and children, even when they are not physically assaulted, suffer deep and lasting emotional, health, and behavioral effects from exposure to [DV].” (Uncodified section I of AB 2089.) When a parent in custody proceedings asserts the other committed DV within the past five years, Family Code section 3044 requires a court to make findings on the DV issues *prior* to making custody orders. If DV is established, the abuser faces a presumption against joint or sole custody.

Family Code section 3170 requires pre-hearing mediations in custody cases. Most counties treat them as truly confidential, consistent with Evidence Code sections 1119 and 1121. Mediations are typically time-pressed, usually lasting only a few hours. Parties and children (different counties assert different minimum age limits) attend.

A minority of counties, including Ventura, require mediators to issue written custody “recommendations” to the court and even testify as experts immediately following unsuccessful mediations. These types of mediations are effectively mini custody evaluations outside of the strict standards of Family Code sections 3111 and 3117 and the California Rules of Court. Because the “recommending” process defeats the confidentiality integral to true mediations, the sessions are called “Child Custody Recommending Counseling” (“CCRC”). CCRC Mediators are called “Child Custody Recommending Counselors” (“Counselors”).

Historically, the CCRC system would sometimes undercut section 3044’s policies and protections. The following could too often occur:

- An abused parent would file a Request for Orders based on DV allegations, with attendant requests for custody orders.
- The court would automatically schedule the case for the usual pre-hearing CCRC.

- The Counselor’s job would *not* include making legal determinations of DV, as that would be an improper delegation of judicial duties. (E.g., *Settemire v. Super. Ct.* (2003) 105 Cal.Ap.4th 666, 672.) They might suspect it and report their suspicions, but the focus would typically be the amorphous “children’s best interests” concept. (Fam. Code, § 3020, subd. (a).) (This is *not* criticism of these hard-working and committed professionals; they have most difficult jobs, and their scope is constrained.)
- If the parties could not agree on a custody plan, the Counselor would make written custody and parenting recommendations to the court based on their usual boilerplate template. They would make some minor customizations for the particular family. With the parties living separately, the Counselor’s concerns about past abuse might not be acute. “Now that you are living apart, the alleged abuse is much less likely to reoccur and we want the children having both parents significantly involved.”
- The parties would proceed to a hearing, where the time-pressed court would – as intended – typically approve the recommendations, perhaps with a few adjustments, through interim orders. “After all, the Counselor evaluated the children’s best interests.” Almost always the court would lack time for a formal hearing or trial on the DV issues prior to making these orders. (This is *not* criticism of our judicial officers, either; they also have most difficult tasks, their case loads are too high, and their resources are too limited.)
- The DV issues could be heard in a live hearing or trial some weeks, months, or years down the road. By then, though, the “interim” orders, possibly including joint custody, could have cemented a permanent *status quo*. It could be difficult to persuade a judicial officer to later reverse course absent some dramatic interim occurrence. The abuser would learn to mask their behavior; they might even, through ongoing intimidation and abuse, “set up” the victim so that *the victim* appears uncooperative, out of control, or otherwise unsuited for custody.

The Legislature addressed the above issues in making the following additions to section 3044, effective January 1, 2020:

- When a court makes a finding that a party has perpetrated DV, it may *not* base its findings solely on conclusions reached in CCRC. (Fam. Code, § 3044, subd. (e).)
- If a court provides custodial rights to an abuser because it finds that they overcame section 3044’s presumption, it must do all the following in writing or on the record:
 - Make certain findings, as specified in section 3044 subd. (b). (*Id.*, at subd. (f)(1).)
 - State its reasoning in specific terms. (*Id.*, at subd. (f)(2).)
 - State why its findings, on balance, support the legislative findings that, among other things, “... children have the right to be safe and free from abuse, and that the perpetration of ... [DV] in a household where a child resides is detrimental to [the child’s] health, safety, and welfare ...” (*Ibid.*)
- In a custody or restraining order proceeding involving DV allegations, the court shall inform the parties of the existence of section 3044 and give them a copy of the statute *prior* to any CCRC or mediation. (*Id.*, at subd. (h).)

Even where DV is alleged, courts can still issue temporary orders as before. (*Id.*, at subd. (g).) Under the new additions, though, such orders may only be “for a reasonable amount of time” prior to an evidentiary hearing or trial. (*Ibid.*) There, the court shall make a determination as to whether section 3044 applies prior to issuing a custody order. (*Ibid.*)

Counsel now have more tools for gaining a court’s early attention to the Legislature’s DV/custody crossover concerns and ensuring that DV allegations are given full weight. Best practices include pressing for a prompt evidentiary hearing before interim orders might effectively become the “*status quo*” before DV determinations. Counsel might also request expedited bifurcated DV proceedings *prior* to any regarding

custody. In cases where simultaneous criminal DV charges might cause a stay of those considerations in the family court, litigators can point to the Legislature's new unambiguous language in advocating against any custodial rights for the accused prior to DV findings.



Gregory W. Herring is a CFLS, and a Fellow of the AAML and the IAFL. He is the principal of HLG, a family law firm serving "the 805" with offices in Santa Barbara, Ventura and San Luis Obispo

Counties. His prior articles and blog entries are at www.theherringlawgroup.com.

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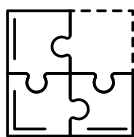
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CHECK MY REVIEWS

LAW SCHOOL SEEKS RESUMPTION WITH FULLY DISTANCE LEARNING PROGRAM

by Stanislaus Pulle Ph.D.



The Southern California Institute of Law has applied for degree-granting authority to commence a 100 percent online distance learning program building on its reputation of an accredited fixed facility law school for the past 25 years. The Institute expects its application to be acted on at the August meeting of the Committee of Bar Examiners.

The Institute has produced over 100 alumni attorneys. Several of its students were admitted and did successfully complete postgraduate professional law degrees at ABA-accredited law schools. These students were admitted following a review by ABA faculty committees and admissions officers on whether the Institute offered a traditional law program comparable to the academic quality offered at an ABA-accredited law school. Along these same lines, one of the Institute's attorney alumni was permitted to take the Michigan, Oregon and Washington state bar exams, which he passed on the first attempt. The quality of the program was addressed as recently in an Accreditation Field Inspection Report of October 2017 that stated:

[O]verall SCIL's curriculum, admissions, scholastic standards, faculty, library, facilities, Dean and administrators all compliant in offering students a *sound program of legal education*.

The Institute eschews a "teach-to-the-test" curriculum where commercial bar review entities are sourced with teaching test-taking skills. Indeed, the President of the National Conference of Bar Examiners, Eric Moeser wrote (*The Bar Examiner*, Vol.83, No.4, p.6) that:

Bar prep courses now offered within law schools are being outsourced to bar review companies, defeating a more reasonable relationship between such courses and sound, semester-long pedagogy with more deeply embedded understandings of the application of law.

The consequences of dispositive regulation based on bar pass rates have produced unfortunate consequences of law schools creating curricula that trend toward a "bar mill" model. The "bar mill" model is fraught with the danger of producing attorneys who write, as a federal court has observed, with "near incomprehensibility" with "little more than gibberish." *Stanard v. Nygren* (7th Cir. 2011) 658 F.3d 792, 798.) While aware of the need to inculcate test-taking skills, the Institute's deans and faculty have no intention to surrender the pursuit of serious jurisprudence to the study of black-letter outlines.

In 2017, the State Bar commissioned a Task Force to study its governance that produced *Parker-Walton* Report. Its

principal author is Elizabeth Rindskopf-Parker, Dean Emerita of McGeorge Law School and former Chief Executive of the State Bar (also former General Counsel of the CIA and NSA). The report concluded that accreditation of California law schools is "not part of the [California Supreme] Court's inherent authority to regulate the practice of law in California," and that "accreditation should be the responsibility of private, non-profit entities composed of peers and the public, and not done by government or government regulators."

This is a seismic shift in the understanding of the Supreme Court's powers where it was assumed that accreditation was part of the Court's *inherent* powers. The Institute has maintained that the delegation of non-inherent executive powers to the State Bar, whose functions are confined to its narrow mission as an administrative adjunct to the Supreme Court tasked with assisting in the courts inherent powers limited to attorney admission and discipline, makes for a viable claim of state separation of powers.

The Institute's commencement speakers have included three justices of the California Supreme Court including the Chief Justice. Others include the Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, an Attorney General of California, and the President of the UN International Criminal Court, and of course, the Presiding Justice of our state Court of Appeal, Division Six.

The Institute's new location is 1280 South Victoria, which is the same building previously occupied by Division Six, where the law school commenced its operations 34 years ago.

So, to our communities in Santa Barbara and Ventura, and of course our former faculty member **Kathryn Clunen**, now President of the VCBA, we expect that there will be law school "choices close by."

Stanislaus Pulle Ph.D., is Dean and former Visiting Scholar, Yale Law School.

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA COURT CLOSURES

Pursuant to *Government Code* §68106, the Superior Court of California, County of Ventura, is providing sixty (60) days notice of limited operation days.

The majority of the courtrooms and all of the clerk’s offices will be closed to mitigate the impact of employee furlough days on court operations on the following days:

**September 30, 2020,
October 21, 2020,
November 18 & 25, 2020,
December 16, 23, 24, 30 & 31, 2020,
January 15, 2021,
February 11, 2021,
March 10 & 17, 2021,
April 21, 2021,
May 5 & 19, 2021
June 9 & 23, 2021**

These days are not court holidays, so statutory deadlines will not be extended. Documents may be submitted through the United States mail or drop boxes located at the entrance to the Hall of Justice and Juvenile courthouses. In civil, family, probate, appeals and/or small claims, documents may also be submitted by eDelivery. The clerk’s offices will be closed to in-person services. Documents received by 4 p.m. and accepted for filing, will be filed that same business day. Documents received after 4 p.m. will be processed and filed the following business day. Documents placed in the drop boxes by 4:00 p.m. are deemed deposited for filing that same business day. An exterior walk-up window on the north side of the Hall of Justice at the Government Center near parking lots A, B and C will be open from 7:00 a.m. to 4:30 p.m. and the East County Courthouse walk-up window will be open from 8:00 a.m. to 4:30 p.m. for handling criminal/traffic and collections payments only.

Most cases already calendared for hearing will be rescheduled and the affected parties notified by the court. Limited courtrooms will be open to hear urgent criminal, juvenile, unlawful detainer, and temporary restraining order issues.

While the court regrets having to take the above actions, it is required to address the reduction in funding to the California court system caused by the COVID-19 pandemic. For the 2020-2021 fiscal year, the Governor and Legislature have approved a reduction of \$200 million, in budget cuts to the judicial branch. For fiscal year 2020-2021, the Ventura Superior Court budget has a structural deficit of \$5.7 million.

The court has instituted various cost saving measures, including furloughs, eliminating or freezing vacant positions, reengineering court processes for efficiencies and reducing expenditures of services and supplies. Limited court closures are needed to manage the large number of furlough days. The above dates were selected to minimize the impact on the public and court staff by spreading out the dates through the fiscal year and court business is generally slower in the middle of the business week and around holidays.

Anyone wishing to comment on this proposed plan may do so, by either regular mail or e-mail, by September 28, 2020. Please direct your response to:

Michael D. Planet, Court
Executive Officer
P.O. Box 6489
Ventura, CA 93006-6489
or closureresponse@ventura.courts.ca.gov

Upcoming August Events

August 3, 2020
Citations Editorial Board Meeting

August 6, 2020
Barrister Board Meeting

August 12, 2020
VCBA Board Meeting

August 20, 2020
FLBA Webinar

August 25, 2020
Immigration Webinar: Special
Immigrant Juvenile Status Training



When times get crazy, just remember what really matters: Family, friends and helping others. Blessings from the Lehrs during these troubled times!

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