Squaring the Circle: Can Bad Legal Precedent Just Be Wished Away?

By C. Evan Stewart

Squaring the circle is a conundrum that has vexed mathematicians dating back to Ancient Babylon; in 1862, a solution was proven to be impossible by Ferdinand von Lindemann (because pi is a transcendental rather than an algebraic irrational number), and subsequent attempts have not moved the dial.[1] Unconstrained by notions of mathematical certitude, some lawyers are not so easily stopped, thinking that when they pronounce a cow to be a pig they can in fact make it so. Add the New York County Lawyers' Association's Professional Ethics Committee (the "NYCLA Committee") to that group.

But before we get to the NYCLA Committee, let's properly set the stage.

"[I]n 1862, a solution was proven to be impossible by Ferdinand von Lindemann (because pi is a transcendental rather than an algebraic irrational number), and subsequent attempts have not moved the dial. Unconstrained by notions of mathematical certitude, some lawyers are not so easily stopped, thinking that when they pronounce a cow to be a pig they can in fact make it so."

Rivera: The Outlier of Outliers (The Prequel)

Faithful readers of this august journal may remember that several years ago I introduced them to a truly wacky decision: *Rivera v. Lutheran Medical Center*.[2] For those who do not have photographic memories, as well as for our new readers, a recap of *Rivera* and the judicial bad apples that laid the groundwork for its wackiness is in order.

It all started in 1990, when the New York Court of Appeals decided *Niesig v. Team I*.[3] In that case, the Court held that a lawyer representing an injured worker suing his company could interview, *ex parte*, employees of the company. New York's "no-contact" rule[4] was held to apply only to those current employees "whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter egos') or important to the corporation for purpose of its liability, or employees implementing the advice of counsel." Believing that the "alter ego" test it created would "become relatively clear in application," the Court concluded that its ruling would further the "informal discovery of information" and "serve both the litigants and the entire judicial system by uncovering relevant facts, thus promoting the expeditious resolution of disputes."

In adopting its definition for what constitutes a party for purposes of the "no-contact" rule, the Court considered and rejected not only a standard based upon that which had been determined by the U.S. Supreme Court in *United States v. Upjohn* (where each corporate employee was deemed to be a client for purposes of the attorney-client privilege),[5] but also a "control group" test (i.e., only those who "control" a company may not be contacted) because of "practical and theoretical problems." With respect to the *Upjohn* decision, the New York Court of Appeals determined that the attorney-client privilege was "an entirely different subject" from the "no-contact" rule, and that "a corporate employer who may be a 'client' for purposes of the attorney-client privilege is not necessarily a 'party' for purposes of the ['no-contact' rule]."

No sooner had the *Niesig* decision been handed down than it was clear that there were a number of problems/issues with the "relatively clear" decision. The first concerned the risk of disqualification or professional sanctions. How is an attorney who wants to interview a current employee going to know in advance whether he or she is a corporate "alter ego"? As one California court looking at this quandary expressed: an attorney in such circumstances would be forced to make a "unilateral decision...based upon *expectations or predictions*."[6]

An obvious illustration of this quandary is posed by the hearsay exceptions set forth in Rule 801(d)(2)(D) of the Federal Rules of Evidence. A statement is not hearsay if it is "offered against a party and is...a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Before conducting an *ex parte* interview, however, an attorney will be at risk as to whether the employee's knowledge of relevant facts comes from outside the scope of his or her employment.

The *Niesig* Court brushed this issue to one side because the hearsay rule in New York is different from Rule 801(d)(2)(D); in New York, very few employees are in a position to bind their companies by their statements.[7] But what about jurisdictions that do not have an evidentiary rule similar to New York's but which nonetheless choose (or have chosen) to follow *Niesig*?[8] Or what about a New York court sitting in diversity, seeking to apply *Niesig's* substantive rule, while being bound to apply the Federal Rules of Evidence—once having allowed the interviews,

the New York federal court would also have to allow into evidence any statements made by the employee within the scope of her employment, pursuant to Rule 801(d)(2)(D).[9]

Another concern relates to whether the "alter ego" test is in fact "relatively clear in application" (as the New York Court of Appeals prophesized) or whether it leads to another procedural/litigation layer, with lawyers uncertain on how best to proceed. One look at the federal courts in New Jersey would suggest a not-so-sanguine answer.[10] And the disparate treatment in just that one federal district is only the tip of the iceberg as to the satellite litigation that has been spawned in this area.[11]

Niesig also represents the diminishment of the attorney-client privilege. Notwithstanding the New York Court of Appeals' declaration that the privilege has nothing whatever to do with the "no-contact" rule, just saying so does not make it so. In fact, one of the basic policies underlying that rule is the need to protect communications and information covered by the privilege and the attorney work product doctrine.[12] And as the U.S. Supreme Court made clear in *Upjohn*, "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[13] Consistency with *Upjohn* would therefore require that an employee who is a "client" for privilege purposes (i.e., one who gives information and receives advice) should also be a "party" for purposes of the "no-contact" rule.[14]

The Court of Appeals subsequently compounded its error by expanding the "yes" to the "no contact" rule,[15] but it was others who really grabbed the *Niesig* precedent and ran with it (into bad places). First came *Gidatex v. Campaniello Imports, Ltd.*[16] In that case, a plaintiff's lawyer in a trademark enforcement case sent undercover investigators into the defendant's furniture showroom in order to prove that the defendant had engaged in "bait and switch" tactics. Wearing hidden wires, the investigators taped their discussions with the defendant's employees; the plaintiff's lawyer then sought to introduce the tapes at trial to impute liability to the defendant. An outraged defendant moved to preclude the tapes on the ground that a lawyer cannot send a non-lawyer to do that which a lawyer is ethically barred from doing (e.g., be deceptive, violate the "no-contact" rule, etc.).[17]

The *Gidatex* court, in the Southern District of New York, relying upon *Niesig's* non-"bright-line rule" and "informal discovery" policy goal, as well as a New Jersey federal court decision that had applied *Niesig* in a similar situation,[18] ruled that the tapes were admissible. Although the judge found that plaintiff's counsel had "technically" violated applicable ethics rules (i.e., he engaged in deception; he violated the "no-contact" rule; etc.), she also found that the lawyer had not "substantively" violated those rules "because his actions simply do not represent the type of conduct prohibited by the rules."[19] Huh?!

The NYCLA Committee (Part I)

On May 23, 2007, the NYCLA Committee decided to join in on the fun, issuing Formal Opinion 737. Inspired by the *Gidatex* decision, the NYCLA Committee embraced the plaintiff's lawyer's conduct and explicitly endorsed an ethical safe harbor for lawyers who employ "dissemblance" in the evidence-gathering process; in other words, this ethics group opined that there should be formal exceptions to the broad admonition against lawyers engaging in "dishonesty, fraud, deceit, or misrepresentations"—so long as *Niesig's* policy goal of "informal discovery of information" is promoted.

As if this was not bad enough, as we will soon see, the NYCLA Committee's creative juices were only just getting started.

Rivera: The Outlier of Outliers (Part Deux)

In *Rivera*, a prominent, international law firm was retained by a hospital to defend against an employment discrimination claim. Shortly thereafter, the firm did what every experienced lawyer I know (including me) would do: it contacted the hospital's current and former employees with first-hand knowledge of the facts, assured them that the firm could ethically represent them (i.e., there were no conflicts of interest), and offered to represent them at the hospital's expense; four current and former employees accepted the offer. Thereafter, the plaintiff moved to disqualify the law firm from representing those four individuals, citing various purported ethics violations.

The trial judge did not agree that the law firm had violated any conflict of interest rule (there was in fact no evidence whatever that the multiple representations constituted a potential or actual conflict of interest). But the judge did find that the firm had violated the "non-solicitation" rule. That rule bars lawyers from "soliciting" clients directly (e.g., in person), unless the prospective client "is a close friend, relative, former client or current client."[20]

The judge's legal authority for this unusual finding? *Niesig*:

> [The employees] were clearly solicited by [the law firm] on behalf of [the hospital] to gain a tactical advantage in this litigation by insulating them from informal contact with plaintiff's counsel. This is particularly egregious since [the law firm], by violating the Code in soliciting these witnesses as clients, effectively did an end run around the laudable policy

> consideration of *Niesig* in promoting the importance of informal discovery practices in litigation, in particular, private interviews of fact witnesses. This impropriety clearly affects the public view of the judicial system and the integrity of the court.[21]

As I have previously opined,[22] the *Rivera* decision is simply dead wrong. Unfortunately, the Appellate Division, Second Department did not agree with me, affirming the trial judge in a terse opinion: "the record supports the Supreme Court's determination" that the law firm violated the non-solicitation rule.[23] Equally unfortunate is that a federal magistrate judge in New York has cited *Rivera* with approval;[24] of not much use to New York lawyers is the fact that a federal judge in Oklahoma agrees with me and expressly rejected *Rivera*.[25]

Faced with this state of play (which is still the state of play today),[26] I publicly explored in this distinguished journal a number of possible ways to deal with this crazy precedent: (i) pretend it does not exist; (ii) have non-lawyers engage in the non-solicitation efforts; and/or (iii) enact a corporate policy that would permit the non-solicitation/representation arrangement. None of these I found to be terribly useful or likely to be successful.[27] One other alternative—which would clearly work—was put forward by the Committee on Professional Responsibility for the Association of the Bar of the City of New York: change the "non-solicitation" rule so it would not trip up lawyers in *Rivera* type situations; unfortunately, that proposal went nowhere.[28]

The NYCLA Committee (Part Deux)

On June 9, 2014, the NYCLA Committee weighed in to save the day with Formal Opinion 747. Employing the same keen analysis it utilized when it endorsed lawyer "dissemblance" in civil litigation (Formal Opinion 737), the group purportedly "solved" the *Rivera* problem by basically opting for the first alternative I identified several years ago.

Evidently (according to the NYCLA Committee), the problem with the law firm's conduct in *Rivera* was that the firm's "primary, if not exclusive, purpose...from its inception" was to "insulate the witnesses from opposing counsel's informal contact." Where the NYCLA Committee divined that "primary, if not exclusive, purpose" is a bit unclear, since evidence thereof does not exist in either of the *Rivera* decisions (or in the litigation record). But having constructed that Trojan Horse, the NYCLA Committee then rode it into the city of Troy, opining that all will be well *so long as* "the primary purpose of the in-person meeting at its inception is not to offer the lawyer's services to the employee, but to interview the employee as a potential witness." After that, it will then be perfectly okay to offer to represent the individual (in addition to representing the company) *so long as* the "lawyer's 'primary purpose' is not to secure legal fees" from that individual. This two-step scenario, according to the NYCLA Committee, is "meaningfully distinguishable" from *Rivera* and thus hunky dory from an ethics standpoint. Really?

The solution proffered by the NYCLA Committee actually runs afoul of the same "problem" that concerned the trial court in *Rivera*; it merely delays it by a matter of minutes. In other words, the same "tactical advantage" will accrue to the company's lawyer—she will still be able to block *ex parte* communications with the individual.[29] But because that lawyer will act with "purer" motives the first time she speaks with the individual, and has no pecuniary interest in representing the individual (a factor *not* in play in *Rivera* or in *any* of the corporate multiple representation situations of which I am aware), somehow her conduct will not fall on the wrong side of *Rivera*. If you buy that one, there is a bridge that spans the East River that is up for sale at a very attractive price.

"For Rivera to truly 'sleep with the fishes,' it either must be expressly rejected by the New York Court of Appeals, or there must be an amendment to the 'non-solicitation' rule. Until then, caution remains the watchword for New York lawyers addressing multiple representation situations."

Conclusion

Neither wishing away bad legal precedent, nor constructing non-substantive "steps" that do not alter reality, works in the real world. For *Rivera* to truly "sleep with the fishes,"[30] it either must be expressly rejected by the New York Court of Appeals, or there must be an amendment to the "non-solicitation" rule. Until then, caution remains the watchword for New York lawyers addressing multiple representation situations.

Endnotes

1. *See* J.J. O'Connor & E.F. Robertson, *Squaring the Circle* (Apr. 1999), http://www-history.mcs.st-andrews.ac.uk/HistTopics/Squaring_the_circle.html. Those who have tried to solve this problem (or mused upon it) include: Charles Lutwidge Dodgson ("Lewis Carroll"), Dante, Alexander Pope, Gilbert and Sullivan, O'Henry, and James Joyce. FRANCINE F. ABELES, CHARLES L. DODGSON'S GEOMETRIC APPROACH TO ARCTANGENT RELATIONS FOR PI, 153–54 (Historia Mathematica 20, 1993), *available at* http://ac.els-cdn.com/S031508608371013X/1-s2.0-S031508608371013X-main.pdf?_tid=2bbfc544-6628-11e4-a625-00000aacb35f&acdnat=1415328524_56da8a44378397fad3a2b68517062a21; Peter Kalkavage, *In the Heaven of Knowing: Dante's Paradiso*, THE IMAGINATIVE CONSERVATIVE (Aug. 10, 2014), http://www.theimaginativeconservative.org/2014/08/heaven-knowing-dantes-paradiso.html; GEORGE GILFILLAN, THE POETICAL WORKS OF ALEXANDER POPE 288; *see*

Princess Ida, INTERNET ARCHIVE, *available at* http://archive.org/stream/princessidaorcas00sulliala/princessidaorcas00sulliala_djvu.txt; O'Henry, *Squaring the Circle*, *available at* http://www.readbookonline.net/readOnLine/14958/; *see* JAMES JOYCE, ULYSSES (1922). Stevie Wonder released his "In Square Circle" album in 1985, for which he won the Grammy Award for Best Male R&B Vocal Performance. *Stevie Wonder Biography*, Rolling Stone, http://www.rollingstone.com/music/artists/stevie-wonder/biography (last visited Nov. 20, 2014). And for film aficionados, you can watch Bollywood's *The Square Circle* (1996), starring Nirmal Pandey, Sondi Kulkarni, and Faiyyaz. *The Square Circle*, IMDB, http://www.imdb.com/title/tt0116002/ (last visited Nov. 20, 2014).

2. 22 Misc. 3d 178, 866 N.Y.S.2d 520 (Sup. Ct., Kings Co. 2008), *aff'd*, 73 A.D.3d 891,899 N.Y.S.2d 859 (2d Dep't 2010). *See* C. Evan Stewart, *Just When Lawyers Thought It was Safe to Go Back into the Water*, N.Y. BUS. L.J., vol. 15, no. 2, at p. 24 (Winter 2011).

3. 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990).

4. The "no-contact" protocol under the ABA's Model Rules is Model Rule 4.2, which provides that "a lawyer shall not communicate... with a person the lawyer knows to be represented by another lawyer in the matter." MODEL RULES OF PROF'L CONDUCT R. 4.2 (2014) (Communication with Person Represented by Counsel). This rule, which many (but not all) states have adopted in whole or in part, was clarified in 1995, when the word "person" was substituted for "party" so as to ensure that the *ex parte* ban covered, inter alia, pre-litigation contexts. *Id.* Unlike ABA Model Rule 4.2, New York's "no-contact" rule has always applied to a "party," as opposed to a "person." NEW YORK CITY BAR, FORMAL OP. 2002-3, *available at* http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=125 (last visited Nov. 20, 2014).

5. 449 U.S. 383 (1981). In *Upjohn*, the Supreme Court recognized that "[m]iddle-level—and indeed lower level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that their employees would have relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties." *Id.* at 391.

6. *Mills Land & Water Co. v. Golden West Refining Co.*, 189 Cal. App. 3d 116, 130, 230 Cal. Rptr. 461, 468 (1986).

7. *See* Comm. on Prof'l Ethics of the Ass'n. of the Bar of the City of N.Y., Inquiry Ref. No. 46 (1980).

8. *See, e.g., Messing, Rudavsky & Weliky v. President and Fellows of Harvard Coll.*, 764 N.E.2d 825, 832–33 (Mass. 2002); *Strawser v. Exxon Co. U.S.A.*, 843 P.2d 613, 621 (Wyo. 1992); *Dent v. Kaufman*, 406 S.E.2d 68, 72–73 (W. Va. 1991).

9. *See Polycast Tech. Corp. v. Uniroyal Inc.*, 129 F.R.D. 621, 626–27 (S.D.N.Y. 1990).

10. *Compare Pub. Serv. Elec. & Gas Co. v. Assoc. Elec. Gas Ins. Serv. Ltd.*, 745 F. Supp. 1037, 1042–43 (D. N.J. 1990) (*ex parte* communication barred with present or former employees) *with Curley v. Cumberland Farms Inc.*, 134 F.R.D. 77, 82–83 (D. N.J. 1990) (*ex parte* communications allowed with former employees, unless they played a central role in the controversy in dispute) *with In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 911 F. Supp. 148, 154 (D. N.J. 2000) (*ex parte* communications allowed with former employees, except for those in the company's "litigation control group").

11. *Compare Orlowski v. Dominick's Finer Foods Inc.*, 937 F. Supp. 723, 735 (N.D. Ill. 1996); *Valasses v. Samuelson*, 143 F.R.D. 118, 126 (E.D. Mich. 1992); *Dubois v. Gradco Sys. Inc.*, 136 F.R.D. 341, 347 (D. Conn. 1991) *with Amsey v. Medshores Mgmt. Servs. Inc.*, 184 F.R.D. 569, 574 (W.D. Va. 1998); *Lang v. Reedy Creek Improvement Dist.*, 888 F. Supp. 1143, 1149–50 (M.D. Fla. 1995); *Midwest Motor Sports Inc. v. Arctic Cat Sales Inc.*, 144 F. Supp. 2d 1147, 1160 (D. S.D. 2001); *Palmer v. Pioneer Inn Assocs., Ltd.*, 59 P.3d 1237, 1248–49 (Nev. 2002), BNA U.S. Law Week 1411 (Jan. 14, 2003).

12. *See Blanchard v. Edgemark Fin. Corp.*, 175 F.R.D. 293, 302, n.10 (N.D. Ill 1997); *Candler v. Md.*, 910 F. Supp. 115, 119–20 (D. Md. 1996); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 396 (1995); S. Miller & A. Cairo, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary; Is It Ethical?* 42 BUS. LAW. 1053, 1054–55, 1060–65 1071 (1987). Another reason for the rule is to protect unknowledgeable people from unscrupulous lawyers.

13. 449 U.S. at 390.

14. *See* GEOFFREY C. HAZARD & W. WILLIAM HODES, LAW OF LAWYERING 437 (1985) (an employee covered by the privilege, as per *Upjohn*, should be considered a "party" under the ethical rules). Indeed, the *Niesig* court's client/party dichotomy does not stand up to scrutiny because the status, knowledge, and/or responsibility of an employee should be irrelevant for purposes of whether an ex parte contact is permissible. An employee who can bind the company may be just as much in possession of underlying facts as one who cannot. Moreover, if "uncovering relevant facts" is the uppermost policy goal, should there be any difference as to which type of employees may invoke this protection? Finally, as indicated above, the policies served by the privilege and the "no contact" rule are, in fact, aligned.

15. The Court first pushed ahead in *Muriel Siebert & Co. v. Intuit Inc.*, 8 N.Y.3d 506, 836 N.Y.S.2d 527, 868 N.E.2d 208 (2007). In that case, the chief operating officer of Siebert, who was directly involved in ongoing litigation with Intuit, was contacted and interviewed by Intuit's lawyers immediately upon their hearing of his termination by the company. Notwithstanding that the COO had indisputably been a Siebert "alter ego" for purposes of the *Niesig* test, the Court reasoned that because he was no longer an employee at the time of the *ex parte* interview that meant that Intuit's lawyers had done nothing wrong.

    The Court further reasoned that because Intuit's lawyers had been careful not to elicit privileged information from the ex-COO, the interview had merely served to facilitate *Niesig*'s policy goal of furthering the "informal discovery of information," and thus there were no other ethical issues of any kind implicated by their actions.

    Just months after *Siebert*, the New York Court of Appeals struck again in *Arons v. Jutkowitz*, 9 N.Y.3d 393, 880 N.E.2d 831, 850 N.Y.S.2d 345 (2007). There, the Court held that defense lawyers in a medical malpractice action could conduct *ex parte* interviews with the plaintiff's doctor. After reviewing its prior rulings in *Niesig* and *Siebert*, the Court determined that there was no reason why there should not be informal discovery in this context, as well. As to whether doctors would be "gulled into making an improper disclosure," the Court was unmoved, having previously rejected such a concern for corporate employees (*Niesig*) and former corporate big-wigs (*Siebert*).

16. *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999).

17. *See* ABA Formal Op. 95-396 (1995); *see also* MODEL RULES OF PROF'L CONDUCT, R. 5.3(c) & 8.4(a); DR 1-102(A)(1), DR 1-102(A)(4), & DR 1-104(D) (New York's then-existing, applicable ethics rules).

18. *See Apple Corp. Ltd., MPC v. Int'l Collectors Society*, 15 F. Supp. 2d 456 (D. N.J. 1998).

19. For contrary authority on this point, see *Midwest Motor Sports v. Arctic Sales Inc.*, 347 F.3d 693 (8th Cir. 2003).

20. The "non-solicitation" rule in play when the *Rivera* judge ruled was DR 2-103(A)(i). When New York State revamped its ethics rules, the rule became Rule 7.3, with no substantive change.

    The rationale for the "non-solicitation" rule is to deal with ambulance-chasing behavior and is best expressed in Comment 1 to ABA Model Rule 7.3: "There is a potential abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained

advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching." MODEL RULES OF PROF'L CONDUCT, R. 7.3 cmt. 1.

This rationale is obviously not present in the *Rivera* case—the law firm was chasing no ambulance; furthermore, it told the four individuals that their decisions were completely voluntary and there would be no impact on the two employees' employment status if they declined representation.

21. The *Rivera* judge also reported the law firm's "misconduct" to the New York State Disciplinary Committee. *Rivera v. Lutheran Medical Center*, 866 N.Y.S.2d 520, 526. (Sup. Ct., Kings Co. 2008).
22. *Id.*
23. *Rivera v. Lutheran Medical Center*, 73 A.D.3d 891, 891 (2010).
24. *See Matusick v. Erie County Water Authority*, 2010 WL 2431077 (W.D.N.Y. Feb. 22, 2010).
25. *See Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n*, 2010 WL 1558554 (W.D. Okla. Apr. 19, 2010).
26. *See* Michael J. Dell, *Ethical Considerations in the Representation of Multiple Clients*, PRACTICING LAW INSTITUTE (Aug. 21 2014), http://www.pli.edu/Content/Seminar/Ethics_in_Banking_and_Financial_Services/_/N-4kZ1z12evy?ID=173702.
27. C. Evan Stewart, *supra* note 2.
28. *Id.*
29. The "tactical advantage" concern of the *Rivera* judge just underscores how wacky the ruling truly is. Of course the law firm was seeking a tactical advantage in the litigation—that is what lawyers are supposed to do. *See* Simon H. Rifkind, *The Lawyer's Role and Responsibilities in Modern Society*, 10 RECORD (1975).
30. A la Luca Brasi in GODFATHER (Paramount 1972) (done in by Bruno Tattaglia, son of Philip Tattaglia, head of the Corleone's rival crime family). All of life's important lessons can be learned from GODFATHER and GODFATHER PART II (Paramount 1974); none can be learned from GODFATHER PART III (Paramount 1990), which is a terrible movie.

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