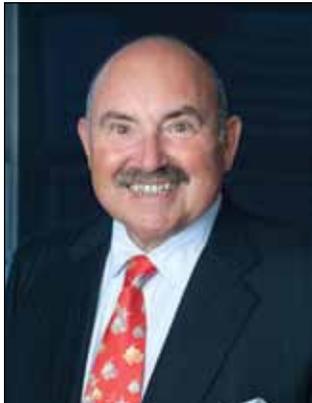


Working With Eminent Domain Valuation Witnesses



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The key to an accurate valuation is the expert's report; and the key to a good report is your involvement in its preparation.

ANY LITIGATOR KNOWS that an expert witness can make or break a case. Experts in eminent domain matters are particularly critical and, in many instances, may represent the only witness produced by a party at trial. This article discusses some of the key issues to consider and address when retaining expert witnesses and working with them in the preparation of their reports in real estate valuation matters.

IDENTIFICATION AND SELECTION OF EXPERTS • Consider and develop the theme of the case and the issues presented in determining the types of experts needed. In addition to appraisers, cases may present issues which call for experts in planning, zoning, architecture, engineering, construction estimating, brokers, and also from specific property uses/industries (e.g., golf course, car wash, automobile dealerships, etc.). The attorney needs to ensure that the experts are properly coordinated and that any appraiser relying upon a “predicate” witness is fully familiar with that witness and his or her opinion.

How many experts do you need? Having more experts not only becomes more costly, but increases the chance that there will be inconsistencies between the experts. Will hiring additional experts simplify the case or make it more complicated or confusing?

Traits and characteristics to consider can include:

- Reputation;
- Experience, both in the expert's field and in providing expert testimony in court and other legal settings;
- Appearance, demeanor, and communication skills;
- Age/sex/race;
- Qualifications/licenses/memberships; and
- Past experiences, concerns or "baggage."

When representing the owner and condemnor experts are already known, the attorney must consider the "match-up" in selecting the owner's experts.

The forum in which the case is presented may have an impact upon the number of experts used, the types of experts and the personality/style of the experts selected. A jury may not be as receptive to multiple experts with highly technical subject matters or presentations as would be an experienced trial judge or panel of condemnation commissioners or arbitrators.

RETENTION OF THE EXPERTS • Once you have identified the type of experts needed in the case, and the candidates for that particular area of expertise, the next step is the actual retention of the expert. In many cases, the lawyer will have previously worked with the expert. In some instances, however, it will be necessary to interview one or more possible expert witnesses. Care should be given to what information is shared with the potential expert witness for the reasons discussed below.

If practical, an in-person interview should occur, particularly if you have not worked with the expert before. Whether the client should attend the interview depends on the particular case and how actively involved the client intends to be during the course of the case. Whether the expert is one you have previously worked with or not, it is always important to determine whether the expert has taken any positions that may be in conflict with the issues the expert is being asked to address.

After the expert is selected, a decision must be made concerning how that expert will be retained. Distinctions are made in most rules of civil procedure as to what discovery can be taken concerning a testifying and non-testifying witness. Careful consideration should be given at the outset of each expert relationship in deciding whether to retain the expert initially as a testifying or non-testifying expert. A non-testifying expert can later be converted to a testifying expert witness, but the reverse is less likely. Additional considerations arise in jurisdictions where the expert fees and costs are reimbursable, as some jurisdictions will only allow recovery of such fees and costs for testifying experts.

A determination must also be made as to whether the expert will be retained by the client or the lawyer. Experts are hired because they determine truth through an impartial analysis of the facts and an application of those facts to their area of expertise. Lawyers, on the other hand, advocate their clients' positions. Because the clients pay the expert and do not retain him or her to advocate the attorney's position, most lawyers believe the expert should be hired by the client rather than the lawyer. In those states where fees and costs for expert witnesses are recoverable from the condemning authority, extra care should be given to the nature of the retention to ensure the recovery of such fees and costs.

After the expert is retained, the lawyer and expert should work together at the outset of the relationship to determine what information will

be provided to the expert by the lawyer and what information will be collected by the expert. In addition, there should be an initial understanding of what work product the expert will provide during the course of the case as well as the time line for providing that work product. Finally, it is never too early to begin discussing the types of exhibits that will assist the factfinder in understanding the expert's opinion.

THE RELATIONSHIP BETWEEN ATTORNEY AND EXPERT(S)

• The attorney is the quarterback of the client's team. Accordingly, the lawyer should take the lead in coordinating necessary meetings between members of the expert team, particularly when one or more experts will be providing predicate testimony for the main expert witness — typically the appraiser. The lawyer should also determine the nature of the communications that will occur between the expert and lawyer and between the experts on the team. Consideration should be given to whether the communications will occur through in-person meetings, telephone calls, emails, or letters.

If the opposing side is conducting tests on the subject property, the lawyer should determine whether members of his or her expert team should be present at the inspection or testing and whether split samples are needed. Often an agreement can be reached in this regard with opposing counsel but, if not, a motion to the court may be appropriate.

Both the lawyer and the appraiser should physically inspect all of the comparable sales before the preparation of the expert report and, if there is a significant delay, again before the trial. Whether these inspections should be done individually or together is a tactical decision for each case. In addition, the lawyer should double-check with the appraiser to confirm that he or she, or a reliable member of the appraiser's staff, has confirmed the sales and data.

DISCOVERY, PRIVILEGE, AND PRACTICAL CONSIDERATIONS

• Each jurisdiction has its own rules about experts, including what can and cannot be discovered from testifying and non-testifying experts. Great care must be given to what is provided to the expert, lest your work-product be discovered. The issue arises as the courts grapple with the common requirement that the expert report disclose all information "considered" by the expert.

Some courts have held that this requirement mandates that all documents provided to an expert, even work-product revealing the mental impressions of the attorney, be produced regardless of whether the expert relied upon that information in forming his or her opinion. *See e.g. Synthes Spine Co. v. Walden*, 232 F.R.D. 460 (E.D. Pa. 2005) (collecting cases); *American Fidelity Assurance Co. v. Boyer*, 225 F.R.D. 520 (D.S.C. 2004); *TV-3, Inc. v. Royal Insurance Company*, 194 F.R.D. 585 (S.D. Miss. 2000) (collecting cases on both sides). Other courts have continued to protect opinion work-product in the hands of the expert. *See e.g. Ladd Furniture, Inc. v. Ernst & Young*, 1998 WL 1093901 (M.D.N.C. Aug. 27, 1998); *Chopper v. R.J. Reynolds Tobacco Co.*, 195 F.R.D. 648 (N.D. Iowa 2000). Given the evolving case law in this area, great care must be given to what an attorney decides to physically provide and orally state to the testifying expert.

Similarly, it is important to understand the law in your jurisdiction concerning the need for experts to preserve drafts of their reports and the discoverability of such documents. Particularly when there is a legal requirement to preserve all drafts, an instruction should be given to the expert, preferably in writing, to preserve such documents at the outset of the relationship.

Remember that communications between the expert and the client are, in all likelihood, not subject to any privilege, while communications between the expert and the attorney may be considered attorney work-product.

As depositions and trial approach, the amount of time spent with your expert team will increase. Thorough and careful preparation of the experts for their testimony will not only insure that your client's position is fully and effectively presented but will assist the factfinder in determining the truth.

PREPARATION OF REPORT(S) • The reports are crucial. Here are some things to keep in mind about their preparation:

- **You must be involved.** Do not simply give the assignment to the appraiser and accept his or her final product. Instead, visit the property with the potential appraiser and review your theme and range of values with him or her. If the appraiser realizes you are knowledgeable in law and the facts, he or she will feel more comfortable embracing the high end of the valuation range. Also, if you explain a jury's tendency to average, this will help in raising his or her opinion. If the potential appraiser is unwilling to embrace your theme and/or range of value, carefully listen to the explanation. You might be wrong, which could result in your attempting to "overreach" in the case. If the adjudicator of value believes you are overreaching, you are likely to be severely penalized. The client will usually attempt to overreach and you must control this tendency. If, on the other hand, you find an appraiser who is willing to embrace your theme and range of value, then you should disengage the previous potential appraiser;
- **Valuation data.** Once a testifying appraiser is selected, you should inform him or her of valuation data as a cost savings shortcut, but he or she must independently verify such data. You should also review the data he or she has obtained;
- **Oral review.** Before a report is first drafted, you should conduct an oral review of the report, the estimated opinion and the basis of the opinion, so that there are no surprises;
- **Review draft report.** You should then review a draft of the report, and double-check the math!
- **Report communications.** All communications regarding the report should be through you and not directly to the client or other experts. The appraiser may, of course, gather data directly;
- **Final report.** The final report should be accurate and comprehensive as it will likely control the parameters of the experts' testimony. It is harmful to subsequently change a final report and hard to "back-fill" with additional bases for opinion after the appraiser opinion has been reached. The form of the report should comport with eminent domain law. Decide whether you want a limited restricted report or a complete self-contained report. Review the "assumptions and limiting conditions" portion of report;
- **Alternative approaches.** The appraiser may consider different approaches to the valuation of the same property depending on subsequent rulings by the court on such issues as second takings, acceptable appraisal methodology, etc.;
- **Client "On Board."** The client must be a part of the team throughout the process. You, the client, and the appraiser need to be on the same page. There should be no surprises. Clients are often unrealistic; to control this tendency, suggest the client bring you data that supports the client's view.

REVIEWING EXPERTS' REPORTS • You should review and verify the information set forth in every report. Never accept anything at face value.

If what you are reviewing is a real estate appraisal, the first step is to make sure that it complies with the law of your state and the local rules. Never assume that the appraiser is familiar and compliant.

An example of a legal requirement would be preparing a before-and-after appraisal in a partial taking and making sure that damages are then expressed as direct and either severance or consequential. You should also confirm that all of the basic requirements set forth in USPAP are in the report.

An example of a court rule requirement would be New York Uniform Rules, which require every appraisal report to contain a statement of the method of appraisal relied on and the conclusions as to value reached by the expert together with the facts, figures and calculations by which the conclusions were reached. Sales and lease relied must be set forth with sufficient particularity as to permit the transaction to be readily identified. Comparable sales should also have a photograph. N.Y. Comp. Codes R. & Regs. tit. 22, §202.60.

One of the most important issues in any condemnation case will be the highest and best use of the property. This opinion must be carefully reviewed with your expert. If a different highest and best use is opined other than the actual use, the highest and best use must be supported by evidence independent of just the appraiser's opinion. Other experts must be used and their opinions supported by evidence. If, for example, it is believed that the property had a reasonable probability of re-zoning, a zoning expert or land planner will be necessary. If the property had wetlands, a wetland scientist or experienced land planner will be required. If the highest and best is a high-rise development, a professional engineer and cost estimator might be necessary. In other words, you would need to prove

by a land residual approach that the opined highest and best use was economically feasible.

Naturally, not every case merits or can afford multiple experts. Expert witnesses are expensive but, if possible, there should be a separate expert for each key issue. Put another way, don't leave holes in your case or push an appraiser to venture into an area where the appraiser is not qualified. If it is an important area, use a specialized witness.

All of these experts should understand the appraisal problem. All should be on the same page. This requires coordination of the joint effort.

Now for the tricky part: Do not re-write your expert's report. As we will discuss shortly, prior reports may be used for impeachment purposes. Dramatic changes in values present one's expert in a difficult setting. It impeaches the veracity of the expert's independent opinion and provides a basis to argue that the tainted report is not really the expert's but that of the attorney. Be careful of how much change is made.

THE APPRAISAL RULE • Each state has different rules regarding expert reports and discovery. New York (which has non-jury eminent domain trials) provides by court rule for the exchange of appraisals and expert reports. The "Appraisal Rule" makes discovery in a condemnation case particularly unnecessary because there are supposed to be no surprises at trial. This is because of the requirement to first exchange a written appraisal or other expert report. N.Y. Comp. Codes R. & Regs. tit. 22, §202.61. *See Miriam Osborn Memorial Home Ass'n v. Assessor of the City of Rye*, 2004 WL 1656500 (N.Y. Sup Ct. July 22, 2004) where Justice Thomas A. Dickerson provides a remarkable history of the appraisal rules in New York.

In New York, condemnation trials are limited by the information set forth in the parties' appraisals. After the exchange of appraisals, each side may file a rebuttal report within 60 days after receipt of the document sought to be rebutted. As noted

above, appraisal reports are required to contain a statement of the method of appraisal relied on and the conclusions as to value reached by the expert together with the facts, figures, and calculations by which the conclusions were reached.

At trial, expert witnesses are limited in their proof of appraised value to information set forth in their reports. Under the rules, the court has the ability to relieve any party of a default. It should be noted that the rule only applies to expert witnesses who are offering opinions. No report need be filed by a fact witness. In fact, the Third Department held in *Faulkner v. State of New York*, 669 N.Y.S. 2d 435 (N.Y. App. Div. 1998) that an expert may be permitted to testify without first submitting an expert report if the testimony is factual and does not constitute opinion evidence. In *Faulkner*, the issues concerned the testimony of a surveyor who testified as to square footage of the area taken.

The Appraisal Rule allows the parties to prepare for trial with knowledge of each other's valuations and the foundations and justifications thereof. *Parisi v. State*, 308 N.Y.S. 504, 508-09 (N.Y. Ct. Cl., 1970). As the Fourth Department stated in *Novickis v. State of New York*, 355 N.Y.S. 2d 667, 670 (N.Y. App. Div. 1974), "[s]imply expressed, the rule attempts to require full disclosure, to take the game aspect out of the case, to prevent surprises, to permit the court to determine just compensation based solely upon the facts unhindered by gamesmanship." In *Matter of White Plains Properties Corp. v. Tax Assessor of City of White Plains*, 396 N.Y.S. 2d 875 (N.Y. App. Div. 1977), *aff'd*, 380 N.E. 2d 326 (N.Y. 1978), the Second Department affirmed the trial court's preclusion of expert testimony when no report was exchanged. We often hear the argument that only appraisals need to be exchanged and filed but this is not true at all as *Matter of White Plains Properties Corp.* makes clear. The Appraisal Rule is not limited to just appraisal reports but extends to other experts as well such as professional engineers, which was viewed in *White Plains Properties*

Corp. as an attempt to introduce expert testimony as to value since the valuation depended on that report and the failure to exchange the report upon which testimony was based precluded the use of such evidence.

The Appraisal Rule finds its basis in section 508 of New York's Eminent Domain Procedure Law which is titled, "Filing of Appraisals; Reports of Other Expert Witnesses." The text of the rule clearly indicates that in addition to appraisals, there must also be filed "all other reports of expected witnesses, intended to be relied upon at the trial, other than the valuation experts." EDPL section 508 also provides that each judicial department and the Court of Claims shall adopt rules requiring at a reasonable time before trial, the filing and exchange of written appraisal and other expert reports.

The Uniform Rules of New York trial courts provide for the exchange and filing of appraisal reports no later than nine months after service of the claim unless extended by the court or stipulation. N.Y. Comp. Codes R. & Regs. tit. 22, §202.61 (a)(1). While the court rules use the more inclusive term of appraisal reports, it is clear that "reports" is not limited to appraisals.

If one intends to call a witness as an expert to give opinion evidence, a report must be filed first. The report must set forth the sum and substance of the witnesses' testimony. Not every word of the witnesses' testimony, but the substance.

If the witness is an appraiser, the report must include a statement of the method of appraisal relied on and the conclusion as to value reached by the expert, together with the facts, figures, and calculations by which the conclusions were reached. If sales, leases, or other transactions involving comparable properties are to be relied on, they shall be set forth with sufficient particularity as to permit the transaction to be readily identified.

A non-appraiser expert must provide the basis for the expert's opinions with a narration of the facts that support the conclusions made.

But it should be again noted that the rules have as its primary reason for requiring the disclosure on the facts and source materials on which the appraisal is based is to allow opposing counsel to effectively prepare for cross-examination. In that regard, the rule does not require that an appraisal report contain a detailed narrative explaining each of the adjustments made in the report.

It is important to note that the requirement of filing an expert report is to enable a party to adequately and intelligently prepare for trial of the issues. There are no surprises at a condemnation trial. Since in most instances the trial of a condemnation claim takes place within a special proceeding, discovery is very limited. Indeed, discovery flies in the face of the purpose and policy of the Eminent Domain Procedure Law which is to reduce litigation and expedite payment to property owners. EDPL sections 101 and 301.

The rule requiring the filing and exchange of other expert reports allows an attorney to prepare for cross-examination so that the trial will proceed quickly and efficiently. While the expert report is absolutely required for opinion evidence, it is not in and of itself designed to take the place of evidence, but rather to supplement evidence given by a person under whose direction it is prepared. *Homer v. State of New York*, 320 N.Y.S. 2d 349 (N.Y. App. Div. 1971), *aff'd*, 283 N.E. 2d 767 (N.Y. 1972).

In other words, the report should be utilized as a tool which, by adequate examination of its author, helps fully explain to the court the theory of the party introducing the report so the trier of the fact is fully cognizant of the issues involved in the case. In addition, testimony will allow a reviewing court to delve into aspects underlying the report so as to make an intelligent review of the trial court's decision.

PRIOR APPRAISALS • While appraisals that are not exchanged may not be discoverable, prior reports prepared by the expert who testifies are cer-

tainly available for use or impeachment. Appraisers typically send a draft of the appraisal report to attorneys for prior review or comment before finalizing the report. This review can be extremely helpful to ascertain if there is something missing from or inaccurate in the appraisal. There may also be factual information that is inaccurate. The appraiser may not be aware that the property should be valued as part of a larger holding. Consequential damages to the remainder may have resulted from the use that the property taken has been devoted. A change in access to the highway may have created consequential damages if it changes the highest and best use of the remainder property. There is also a very good rationale for having the appraisal reviewed for accuracy and completeness in terms of the comparable sales or comparable leases used by the appraiser. In short, it is a good idea to review a report before it is finalized if only to check the math. The danger is that the reviewer may so revise the report so as to put the appraiser's credibility in question. It becomes increasingly difficult for any expert to continue to provide meaningful reliable testimony when it is shown that the appraiser drastically changed his or her opinion of value after the submission of a draft appraisal.

Prior appraisals can be used to impeach an appraiser on cross-examination. But before we focus on this, one should also be aware of The Appraisal Foundation's requirements regarding appraisal report retention. The Appraisal Standards Board has adopted Uniform Standards of Professional Appraisal Practice ("USPAP"). USPAP was adopted to promote and maintain a high level of public trust in appraisal practice by establishing requirements for appraisers. USPAP addresses the ethical and performance obligations of appraisers through definitions, rules, standards, and statements. USPAP also provides advisory opinions.

USPAP requires an appraiser to maintain a work file for each appraisal. The work file must contain the name of the client and related information;

true copies of any written reports, documented on any type of media; summaries of oral reports or testimony, or a transcript of testimony; and all other data, information, and documentation necessary to support the appraiser's opinions and conclusions.

The appraiser must retain the work file for a period of at least five years after preparation or at least two years after final disposition of any judicial proceeding in which the appraiser provided testimony related to the assignment, whichever period expires last. This is a mandatory part of USPAP's ethics rule. Thus, the failure to maintain copies of prior reports can be shown to violate the appraiser's ethics rule which alone may result in substantial impeachment.

In a recent New York case, the condemnor's appraiser was sanctioned and a negative inference was made when the appraiser destroyed his prior drafts. *Matter of Village of Port Chester (Bologna)*, 2010 WL 1254658 (N.Y. Sup. Ct. Apr. 2, 2010). The Appellate Division affirmed, noting "the Supreme Court providently exercised its broad discretion in granting the claimants' request to impose sanctions for the spoliation of evidence to the extent of according an adverse inference with respect to the destruction of the draft appraisal reports prepared by the Village's appraiser." 943 N.Y.S. 2d 575, 578 (N.Y. App. Div. 2012).

The same trial court applied the rule when confronted with an engineer that delivered several drafts of a feasibility study to counsel for comment and extensive changes. The court ruled that when such reports were not retained and thus not available for cross-examination of the witness, an adverse inference with regard to the destruction of prior drafts would be made. *Matter of Rockland County Sewer District No. 1 (Split Rock)*, 2012 WL 5844728 (N.Y. Sup. Ct. Nov. 13, 2012).

Once it has been determined that a prior opinion of value exists it must be produced for use on cross-examination. It doesn't matter what label has been put on the prior report, "draft," "attorney's

work product," "confidential," etc. If prepared by the witness, it qualifies as a prior appraisal.

On cross-examination, the rules of evidence allow a party to impeach the credibility of his adversary's witness through the use of prior inconsistent statements. "Once a proper foundation is laid, a party may show that an adversary's witness has, on another occasion, made oral or written statements which are inconsistent with some material part of the trial testimony, for the purpose of impeaching the credibility and thereby discrediting the testimony of the witness." §6-411, Prince, Richardson on Evidence, Eleventh Edition citing *People v. Duncan*, 385 N.E. 2d 572 (N.Y. 1978), *cert denied*, 442 US 910 (1979), 56 NY2d 646; *Larkin v. Nassau Electric R.R.*, 205 NY 267, 98 NE 465.

Allowing a prior appraisal to be produced provides counsel with a fair opportunity for effective cross-examination, consistent with a party's constitutional right of confrontation and with Rule 4514 of the New York Civil Practice Law and Rules.

It is well-established law in New York that a prior appraisal prepared by an expert witness testifying at trial may be introduced into evidence to impeach the credibility of that witness's testimony. *Matter of Hicksville Properties, Inc. v. Board of Assessors of County of Nassau*, 498 N.Y.S. 2d 24, 25 (N.Y. App. Div. 1986) ("where an unfiled appraisal report was prepared by a party's trial expert and is inconsistent with his trial testimony, the unfiled report may be introduced into evidence for impeachment purposes and used to cross-examine the witness") citing *Swartout v. State of New York*, 354 N.Y.S. 2d 254 (N.Y. App. Div. 1974); *Matter of City of New York (Brooklyn Bridge Southwest Urban Renewal Project)*, 270 N.Y.S.2d 703 (N.Y. Sup. Ct. 1966).

But the prior reports are to be produced only after the expert testifies. The First Appellate Department held in *CMRC Corp. v. State of New York*, 704 N.Y.S. 2d 219, 220 (N.Y. App. Div. 2000):

“The motion court improvidently exercised its discretion when it ordered the State to turn over an appraisal report dated November 22, 1995. The report, which was prepared in contemplation of the settlement of an eminent domain proceeding, ‘enjoy[s] the conditional immunity from disclosure which is conferred on material prepared by litigation by CPLR 3101(d).’” Citing *Schad v. State of New York*, 659 N.Y.S. 2d 765, 765-66 (N.Y. Sup. Ct. 1997) the court stated:

“To the extent that the report might become relevant and discoverable for the purpose of impeaching the State’s appraisal expert at trial, disclosure at this juncture is premature. We note that if the State chooses to call the expert to testify, a reasonable adjournment will sufficiently protect claimant’s right to cross-examination, but we also note the possibility that the State may choose not to call the expert as a witness.”

Id. at 220.

In another case, *Erie County Industrial Development Agency v. Muszynski*, 629 N.Y.S. 2d 646 (N.Y. Sup. Ct. 1995), the Supreme Court, Erie County, 165 Misc. 2d 362, held:

“The rule in New York is that an appraisal prepared by an expert who is not called as a witness and which was intended to be used solely for litigation, or for negotiation in an effort to accomplish a settlement prior to trial, or to establish a basis for

a pre-taking advance payment is not admissible at trial, as the appraisal enjoys a conditional immunity from disclosure as material prepared for litigation per CPLR 3101 (d). *Swartout v. State*, 44 A.D. 2d 766, 254 N.Y.S. 2d 254 (4th Dept. 1974), and *Sullivan v. State*, 57 Misc. 2d 308, 292 NYS2d 244 (1968). The one exception to that rule is that all appraisals prepared by an expert witness who is called to testify must be produced as such are admissible when used to impeach said witness’s credibility by developing prior statements inconsistent with his testimony at trial. *See Sullivan*, supra.”

The court also stated:

“Because earlier Courts have relied so heavily on the concept of allowing, for impeachment purposes, the discovery of prior inconsistent statements by the opposing party, this Court must conclude that statements made prior to the within litigation by the litigation appraiser relative to the value of the contested properties may form the basis to permit discover thereof. *See Sullivan*, supra, and *Matter of Carriage House Motor Inn v. City of Watertown*, 136 A.D. 2d 895, 524 N.Y.S. 2d 930 (4th Dept. 1988).”

Thus, it can be shown that prior appraisals must be maintained by the appraiser. And once that appraiser has testified, any conditional immunity for a prior report disappears. An appraiser can be substantially impeached by the prior appraisal. *See Gerosa Inc. v. State of New York*, (N.Y. App. Div. 1992).

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