



BOULDER COUNTY BAR NEWSLETTER

DECEMBER 2012

ATTORNEYS AS BUSINESS ASSOCIATES UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)

By PHILIP M. BLUESTEIN

We have all heard about the Health Insurance Portability and Accountability Act (HIPAA) over the last decade. But for most attorneys its' relevance has seemed quite remote to our practices. After all, isn't HIPAA something that only healthcare attorneys and healthcare providers have to worry about? Unfortunately, the answer is no. HIPAA issues can be extremely relevant in non-healthcare attorneys' practices and can create obligations and liabilities on the part of attorneys that we must address. The most notable is that attorneys are often HIPAA Business Associates.

In order to properly address attorneys and their obligations as HIPAA Business Associates, I will start with an extremely brief overview of HIPAA and give only broad-brush description of legislation. It is not possible to fully address all the issues relating to attorneys as HIPAA Business Associates in such a short article, so my purpose is to raise the issue for my fellow attorneys and

give them a brief understanding. With that knowledge, they can spot the issue if and when it comes up in their dealings with clients and then take the necessary time to determine how best to address the issue and protect their clients and themselves.

The Health Insurance Portability and Accountability Act (HIPAA) is an important and well-known law and regulatory scheme relating, among other things, to the disclosure and use of Protected Health Information (PHI). Unfortunately, HIPAA is not well understood, and often misspelled (HIPPA), outside of hospitals, doctors' offices and other healthcare providers and entities. Even within the healthcare realm, HIPAA is frequently misunderstood. Even worse is the general public's misunderstanding of their rights under HIPAA, which often results in inaccurate beliefs about patients rights, leading to unfounded threats and allegations against healthcare providers and their representatives, including attorneys.



**A VERY MERRY CHRISTMAS,
HAPPY HANUKKAH
AND
HAPPY NEW YEAR!**

What is HIPAA? The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Public Law 104-191, is a federal law that in part relates to patients' rights regarding the use and disclosure of their Protected Health Information (PHI). The relevant portion of this law is divided into two parts, the Privacy Rule (relating to the use and disclosure of PHI) and the Security Rule (focusing on electronically stored PHI). Violations of these rules can bring significant monetary penalties and in some circumstances even criminal sanctions. The consequences of violating HIPAA can be quite high. Civil

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CALENDAR OF EVENTS

Pre-registration is required for all BCBA CLE programs. Register by e-mailing lynne@boulder-bar.org, or pay online with a credit card at www.boulder-bar.org/calendar.

Wednesday, December 5
Boulder Interdisciplinary
Committee
Homeschooling and Custody
Evaluations
A Spice of Life Event Center
Flatirons Golf Course
11:30 to 12:00 Networking,
Noon to 1:15 Lunch and speaker
RSVP the Friday prior to the meet-
ing. 720-232-4573
www.Boulderidc.org to pay
1 CLE and lunch \$20 for members,
\$25 for non-members

Thursday, December 6
All Bar Holiday Happy Hour
5:30 p.m. at St. Julien Hotel
Bon Voyage for Lynne Barnett
and share some Holiday Spirit.

Tuesday, December 11
Employment Law and Alternative
Dispute Resolution
Non-Monetary Considerations in
Mediating Employment Cases:
Where do Emotions go
When the Case is Over?
Presenting Panel: Steve Meyrich,
mediator; Patricia Bellac, plain-
tiff's perspective; Chris Leh,
defense perspective. Questions
from ADR co-chairs John Tweedy
and
Tom Bache-Wiig
Noon at the Garnett Conference
Room of the Boulder County
Justice Center
1 CLE \$20, \$10 for new/young
lawyers

Tuesday, December 11
Intellectual Property
Navigating the Copyright
Application Process
Presenter: Kirstin Jahn
Noon at Hutchinson Black and
Cook
1 CLE \$20, \$10 new/young lawyers
Lunch \$11

Wednesday, December 12
Solo/Small Firm Happy Hour
5:00 at Connor O'Neill's
13th between Walnut and
Pearl in Boulder

Tuesday, December 18
Business Law
Funding for Small Businesses
Crowd Funding
Presenter: Joyce Colson
Noon at Hutchinson
Black and Cook
1 CLE \$20, \$10 for new/young
lawyers
Lunch \$11

Thursday, December 20
Bankruptcy Roundtable Lunch
Noon at Agave Bistro
2845 28th Street in Boulder

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HEALTH INSURANCE (HIPAA) *(continued from page 3)*

Monetary Penalties can range from \$100.00 to \$50,000.00 per violation, depending on various factors, up to \$1,500,000.00 per calendar year. Criminal Penalties range up to \$100,000.00 and 10 years imprisonment, again depending on various factors.

The privacy and security obligations under HIPAA apply to Covered Entities and their Business Associates. Covered Entities are defined as Health Care Providers, Health Plans and Health Care Clearinghouses. Covered Entities are permitted to disclose PHI to certain individuals and entities without patient authorization, and to other individuals or businesses to perform various services. These individuals or businesses are known as Business Associates. Business Associates are persons or entities that perform certain functions or activities that involve the use or disclosure of protected health information on behalf of, or provide services to, a covered entity. To protect PHI, HIPAA requires that Covered Entities and Business Associates have written contracts or agreements meeting certain legal requirements. Originally under HIPAA, Business Associates were not directly subject to HIPAA. Rather, the Business Associate Agreement itself determined the Business Associate's obligations and liabilities. However, the HITECH Act (Health Information Technology for Economic and Clinical Health Act), which was part of the American Recovery and Reinvestment Act of 2009, changed this. HITECH made Business Associates directly subject to HIPAA including its obligations and penalties. In addition, it is expected that upon final implementation of currently proposed rules, that these obligations will further increase.

45 C.F.R. § 160.103(1)(ii) defines Business Associates as a person who "Provides, other than in the capacity of a member of the workforce of such covered entity, legal, actuarial, accounting, consulting, data aggregation (as defined in § 164.501 of this subchapter), management, administrative, accreditation, or financial services to or for such covered entity, or to or for an organized health care arrangement in which the covered entity participates, where the provision of the service involves the disclosure of individually identifiable health information from such covered entity or arrangement, or from another business associate of such covered entity or arrangement, to the person." (Emphasis Added)

As with other individuals and businesses providing services to Covered Entities, attorneys can often become Business Associates of their clients, whether they are aware of it or not. Attorneys frequently receive, hold, review, use, communicate and create written documents with PHI in their interactions with Business Clients that happen to be healthcare providers or businesses. Attorneys often look to the rules of professional conduct for guidance on how to address this type of confidential information; however, not only do we as attorneys have to

comply with confidentiality requirements under our rules of professional conduct, we have dual obligations when it comes to this type of information. We are in fact Business Associates under HIPAA and must act accordingly.

There are many circumstances where the Business Associate relationship might arise. For example, something as simple as discovery in litigation (if simple can ever be considered the correct adjective to use when discussing discovery) can result in the attorneys having access to PHI. This may result in the need for additional written assurances of protection, protective orders or even a Business Associate Agreement. Even where a matter is not a traditional "Healthcare" matter or litigation, questions may arise where the fulfillment of various discovery requests to examine documents, computer files or even computer hard drives or other storage devices open up issues about PHI. Litigation is not the only legal area where these issues arise. Employment relationships, landlord tenant relationships, collections, healthcare business operations, sales, purchases and dissolutions of healthcare related businesses to name a few, can all result in non-

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HEALTH INSURANCE FOR THE BUDGET-MINDED, INVESTMENT-SAVVY, DOCTOR-VISIT-HATING CROWD

BY: TODD N. STONEMAN

I need health insurance in case I get run over by a car and live to tell about it. Or, I become terminally ill with some rare disease that requires expensive designer drug therapy. No, really, this is my perspective on health coverage. My wife, on the other hand, has the Cadillac of policies - anything for her. Me, I'm on the Yugo plan (super cheap car reference, but also, "you go to the doctor only if dying" reference).

This article is for solos, small firm owners, and anyone else out there who works for themselves in any

capacity. If you fall into this category, and you share my perspective on health insurance, allow me to introduce you to the best thing you've probably never heard of: the self-directed health savings account.

Health savings accounts (HSAs) have been around since George W. signed them into law in 2003. An HSA is a tax advantaged medical savings account. In laymen's terms, an HSA provides someone who has a high deductible health insurance plan with a savings vehicle for future medical expenses. My health

insurance comes with a whopping \$5,000 deductible. I am paying for health insurance I don't even use! So, why not make the best of it? Let me explain how.

If you are considering taking the plunge and buying health insurance (and you should be based on the fact that Obamacare is likely here to stay), but, you don't want to be tied down by some ungodly monthly premium payment for health care you may never need, pay close attention. What follows is in my estimation the best compromise. It keeps you from going bust while simultaneously bolstering your retirement. I like it and so should you, here's how it works:

In 2012, the contribution limit for a single individual was \$3,100; for a family it was \$6,250. These limits are currently set to rise each consecutive year, but who knows for certain. You can deposit up to this amount until tax day, year of contribution. Whatever amount you contribute is treated as a tax deduction (not a credit) on your return. This effectively decreases your income, dollar for dollar, by what you contributed. Let's say for example that your taxable income in 2012 was \$55,000 and you contributed \$3,100 to your HSA. As a result of your contribution(s), your taxable income now becomes \$51,900. We can all agree that the less taxable income the better. So, there you go, benefit # 1 of an HSA ... and they just get better. Keep reading.

As I mentioned earlier, the money in your HSA can be spent on "qualified medical expenses". Funds you with-

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-Arthur Mazirow, Esq.

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PRESIDENT'S PAGE

BY KEITH COLLINS



The Holiday Spirit

During holidays, leisure replaces work as a priority. You are filled with the enthusiasm to explore, travel and learn. So indulge in laziness. Spend time with your loved ones and let your heart dance. – Roger Bannister

Ah, the holiday season is upon us. Time to break out the decorative lights, warm sweaters, and eggnog. Since childhood, I have always loved the holiday season. Some of my fondest childhood memories are from the holidays. As a small child the weeks leading up to Christmas seemed to drag on forever. The anticipation on Christmas Eve was almost unbearable. And despite my best efforts, I was never successful in staying awake all night to catch Santa. I would fall asleep in the wee hours of the morning and inevitably that was when Santa always managed to show up. I would start looking forward to the next Christmas while still opening my presents on Christmas morning. I would think to myself that I have to wait another whole year before this magical day happens again, so I better savor every moment.

Christmas may not hold the magical lore it once did for me, but I still look

forward to it every year. My excitement is no longer generated by the hope that Santa will deliver all of the requested items on my letter that I mailed to him, it is actually quite the opposite.

Now, as a father of two young children, my excitement for the holidays is in the anticipation of their reactions during the holiday festivities. Recently, my wife and I took our children down to the Pearl Street mall for the celebration of the lighting of the

Christmas lights. Their eyes were wide with wonderment and smiles from ear to ear. They were completely captivated by the magic and wonder of it all.

Certainly, a part of what I enjoy about the holidays is sharing it with my children but it is more than that. Not to sound cliché, but I enjoy the holiday spirit that seems to inspire the masses.

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PRO BONO PAGE

Pro Bono Referrals

Twenty-two cases were referred during October. Thank you to the following attorneys:

Norm Aaronson – CULADP
Evan Branigan
Christina Ebner
Mary Louise Edwards
Joseph French
Graham Fuller
Judson Hite
Emily Nation
Scott Osgood
Craig Small
Helen Stone
Sharon Svendsen
John Taussig
Richard Vincent

Bruce Wiener
Pro Se Program Volunteers

Sheila Carrigan
Mary Louise Edwards
Lauren Ivison
Chris Jeffers
Tucker Katz
Michael Morphew
Leonard Tanis

BCAP Volunteers

Thank you to the following attorneys who accepted pro bono referrals for the Boulder County AIDS Project in October.

Barre Sakol

Pro Bono Corner

Interested in a
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Boulder County Bar Association Professionalism Committee On-Call Schedule

December 3	Helen Stone	303.442.0802
December 10	Curt Rautenstrauss	303.666.8576
December 17	Bruce Fest	303.494.5600
December 24	Trip DeMuth	303.494.7775
December 31	Lee Strickler	303.443.6690



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PRESIDENT'S PAGE *(continued from page 5)*

It is that infectious selfless attitude that takes hold of our community and brings cheer to all. As we age from adolescence into adulthood the holidays become less about receiving and more about giving. We begin to find true joy and happiness by giving to others. Whether it is the literal giving of a gift to a friend or loved one, or giving one's time to catch up with those dear to us, it is the act of giving that causes our spirits to be uplifted during the holidays.

Giving during the holiday season should not be limited to our personal lives. There are many ways we can give back this holiday season in our professional lives as well.

The past couple of years the Boulder Bar Association has been focused on reaching out and recruiting young lawyers to join and get involved with the Bar. As a result, we have a very active and energetic young-lawyers section that is spearheaded by two enthusiastic attorneys, Adam Lewis and Josh Anderson. Adam and Josh have created an opportunity for us all to get active in giving this holiday season. The Young Lawyer section has partnered with A Precious Child to create a gift-drive for disadvantaged and displaced children this holiday season. You may have noticed this gift-drive advertised in our weekly e-briefs, but if not, this is a great cause and an easy way to help a child experience the magic of the holidays. The information is on the bar's Facebook page with all the details on how to get involved with this wonderful project.

There are a number of other ways you can give this holiday season as a professional. Your time is perhaps the most precious gift you can give this season.

Take a pro bono case. The holiday season can be very stressful on those struggling financially. Many people who might need legal assistance will often put off or completely forgo hiring counsel in order to provide some holiday cheer for their family. Taking a case pro bono or even at a reduced fee could be a wonderful present for a family this holiday season.

If you have seen your ghost of Christmas past and are looking to change your ways this year, contact Boulder County Legal Services, (BCLS). BCLS is a non-profit organization that provides free civil legal services to low-income families in Boulder County. They are always looking for attorneys in a variety of practice areas to refer cases to. Not only is this a great way to give back to your community, but it is often educational and rewarding work. You may contact BCLS at 303.449.7575.

Another rewarding way to give your time is to be a mentor. As stated earlier, the Bar has an eager group of young talented attorneys. Many of these young lawyers would welcome the opportunity to

work with a seasoned Boulder attorney. Passing on pearls of wisdom to the next generation is truly a gift that lives on. If you are interested in mentoring a young lawyer, please call our offices and we will get you matched up with someone.

I am sure there are many more wonderful and meaningful ways you can give this holiday season. I encourage you all as lawyers to find a way to give back a little this year and spread the holiday spirit. It may not be as enjoyable as playing Santa Claus for your children, but I think you will find it to be a fulfilling and pleasurable way to kick off your holiday season.

From the staff and the board of directors of the Boulder Bar Association, we wish you a very joyous holiday season.

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BOULDER HOMELESS SHELTER NEEDS YOUR SUPPORT



The Boulder Shelter is encouraging the community to support its winter sheltering program – a program that provides safe shelter, warm beds, hot meals and supportive services to homeless men and women each year.

The Shelter is inviting individuals, companies, volunteer groups, and faith communities to adopt the Shelter for one winter night, between October 15 and April 30, by giving a tax-deductible gift of \$487.

This gift will provide a warm, clean bed and two hot, nutritious meals for 160 men and women in need. In addition, you will be recognized as the Shelter sponsor for a particular winter night of their choosing.

There are 212 nights in the winter sheltering season, and up to 160 homeless people will call the Shelter home each of those nights. By filling up the calendar, \$103,244 will be raised to help the Shelter provide much needed services for the homeless in our community!

To reserve your night, contact Caroline Goosman; Caroline@BoulderShelter.org, 303-468-4326, or www.bouldershelter.org for additional information on the **Adopt a Night Program.**

THANK YOU to the following for taking the lead and adopting nights at the Boulder Shelter for the Homeless.

- Ruth Cornfeld Becker, LLC – 4/5/2012*
- Lyons Gaddis Kahn and Hall – 11/11/2011 and 11/12/2012;*
- Colson Quinn Attorneys at Law – 2/14/2011, 11/24/2011 and 2/14/2012;*
- Cooper, Tanis & Cohen, P.C. – 12/30/2011;*
- Goff & Goff, LLC – 12/1/2011 and 12/1/2012*
- Holland & Hart – 12/24/2011;*
- Steve Cook & Associates – 3/1/2012*
- E winner & Associates – 4/10/2012;*
- McElroy, Meyer, Walker & Condon, P.C.- 2/20/2012;*
- Caplan & Earnest, LLC- 1/1/2012;*
- St. Clair & Greschler, P.C. – 1/27/2012*



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A Warm Welcome to
Sarah Flinn

to the Boulder County Bar Association staff.

She is the new executive assistant
as of November 15, 2012
You will have an opportunity to meet her at
the Bar's Happy Hour on December 6th

AND

Thank you to Lynne Barnett for
your 8.5 years of great service to the
Boulder County Bar Association
members for always having a warm
smile to greet each member at our events.
We wish you well in your new adventures.

The Furthest City Light



Jeanne Winer

GOOD-BYE AND A SHAMELESS PLEA

As many of you know, I practiced as a criminal defense attorney here in Boulder for more than twenty-five years. It was an honor and a privilege to have been a member of such a professional and collegial community. But enough is enough. I have finally made the leap to full-time fiction writer. My debut novel, The Furthest City Light (about a female public defender), has just been published by Bella Books.

Here's the shameless plea: If you remember me, please don't say farewell or wish me luck, just buy my book. It's available on Amazon or through Bella Books. If you really liked me, order it through the Boulder Bookstore (to make me eligible for a reading there). Their phone number is 303-447-2074.

If you've ever cared too much about a case, you're the kind of reader I'm looking for. Also, please visit my website at www.jeannewiner.com

HEALTH INSURANCE *(continued from page 4)*

draw to spend on these items will not be subject to taxation. What gets the coveted descriptor “qualified”? Examples include co-payments and many other expenses not covered under medical plans. For example, expenses relating to dental, vision, and chiropractic care, or actual durable medical care like eyeglasses and hearing aids, even transportation expenses related to your medical care.

Now, what’s really nice about the money you deposit into your HSA is that these funds roll-over annually. For instance, if you put in \$3,100 this year and don’t use this entire amount this year, whatever is left simply rolls over into the following year. HSAs, unlike flexible spending accounts, are not of the “use it or lose it” variety. HSAs are not tied to any particular year and may even be applied towards qualified medical expenses from previous years. Here’s the real kicker, you can designate your HSA as self-directed.

This is what inspired this article and this is what I believe more folks should be made aware.

You can establish an HSA with a bank and then link that account with a brokerage account setup through an investment firm. This gives way to the enormous value of investing, rather than merely accumulating, your money. Our ever-generous government, at least for the time being, affords us the ability to possess yet another retirement account favorably equipped with tax benefits. Think IRAs, Roth IRAs, SEPs, etc.

And now, the details, the nitty-gritty if you will (reminded of this great burger spot in Madison, Wisconsin <http://www.nittygrittybirthdayplace.com/>):

1. Setup an HSA. I use www.hsabank.com. They have been great, but the primary reason I used them is because of their relationship with #2, next.
2. Setup an account with TD

Ameritrade. By far the best investment brokerage I’ve worked with. Top notch service, just like Stoneman Legal! A

<http://www.hsabank.com/hsabank/Accountholders/Investments.aspx>

If you do set up an account with TDAmeritrade, please let them know I referred you. They give a referral bonus and every dollar counts! I appreciate it.

3. Link the two accounts. HSA Bank will walk you through this simple two form process.

4. Deposit money into your HSA then contact HSA Bank to initiate a transfer from your HSA into your TD account.

5. Most importantly, invest the money now in your TD account into stocks, bonds, mutual funds, etc.

If you invest this money and never wind up applying it towards medical expenses, the funds act entirely as a retirement account. It is not as good as a Roth IRA, but the investments do grow tax-free. Furthermore, when you retire, you

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HEALTH INSURANCE (HIPAA) *(continued from page 3)*

“Healthcare” attorneys having access to PHI.

As attorneys, therefore, we have obligations under HIPAA. When it comes to disclosure of PHI to Business Associates, 45 C.F.R. § 164.502(e)(1) states that “A covered entity may disclose protected health information to a business associate and may allow a business associate to create or receive protected health information on its behalf, if the covered entity obtains satisfactory assurance that the business associate will appropriately safeguard the information.” (Emphasis Added)

Pursuant to 45 C.F.R. § 164.502(e)(2) a covered entity must “document the satisfactory assurances required by paragraph (e)(1) of [45 C.F.R. § 164.502] through a written contract or other written agreement or arrangement with the business associate.” Attorney Business Associates fall under this category and therefore need to have such a written agreement with their clients. These Business Associate Agreements are by no means simple contracts. While there is no set or correct form, there are certain requirements that must be met. 45 C.F.R. § 164.504(e)(2) outlines several of the requirements. These requirements include statements which: establish the permitted and required uses and disclosures of PHI; prohibit further use or disclosure except as permitted by the Covered Entity; require reporting to the Covered Entity of any unautho-

rized use or disclosure; require the Business Associate to enter into similar agreements with anyone to which it provides PHI; make the PHI as well as the Business Associates’ internal practices and records for accounting for the PHI available to the Covered Entity and the Department of Health and Human Services; provide for the return or destruction of all PHI received or created by the Business Associate upon the termination of the Agreement; and authorize termination of the Agreement if the Business Associate violates its terms.

Fortunately, creating the Business Associate Agreement does not have to be a daunting task. The Business Associate Agreement does not need to be an independent and separate agreement. Rather, it can be, and often is, incorporated into the Attorney’s engagement letter with the client. In addition, more specific guidance, as well as sample Business Associate Agreements and language are available from the Department of Health and Human Services as well as organizations such as the American Health Lawyers Association.

In conclusion, the relationship of attorneys as HIPAA Business Associates to their healthcare related clients should not be overlooked. When dealing with a healthcare related professional or entity, attorneys should conduct an analysis of what types of information may come

in to their possession during the course of the relationship. If PHI may come into the Attorney’s possession, then it is best to enter into a Business Associate Agreement with the client.

Philip M. Bluestein is a current Co-Chair of the Boulder County Bar Association’s Business Law Section. He is a Healthcare Practice Attorney, representing Physician’s, Dentists, Chiropractors and other healthcare professionals and practices on a variety of issues in their careers and practices. These areas including practice formation, buy-ins, sales and dissolutions, employment contracts, regulatory matters, professional licensing board matters and matters arising in the operation and management of healthcare practices. Mr. Bluestein speaks on healthcare topics to groups of healthcare professionals as well as attorneys locally and nationally.



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HEALTH INSURANCE *(continued from page10)*

are able to pull withdrawals taxed respective to your income bracket at that time, which will likely be at a lower bracket than the one you are taxed at currently while you are busy busting your tail.

In sum, for those of you leery to buy health insurance, this is in my opinion the best bet going. It is a win-win on many levels. If you wish to speak with me further regarding this article, feel free to contact me. I am thrilled I stumbled upon this investment mechanism and I am happy to share my newly found knowledge with you. Don't worry, I won't even charge you for the advice! Give me a ring!

While you have your health, why not build your retirement? Do it, today.

Todd Stoneman is a solo practitioner in Longmont. He can be reached at 720.340.4017.

MEDIATOR AND ARBITRATOR DIRECTORY

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CLASSIFIED ADS

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Please email resume, references, and writing sample to:
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