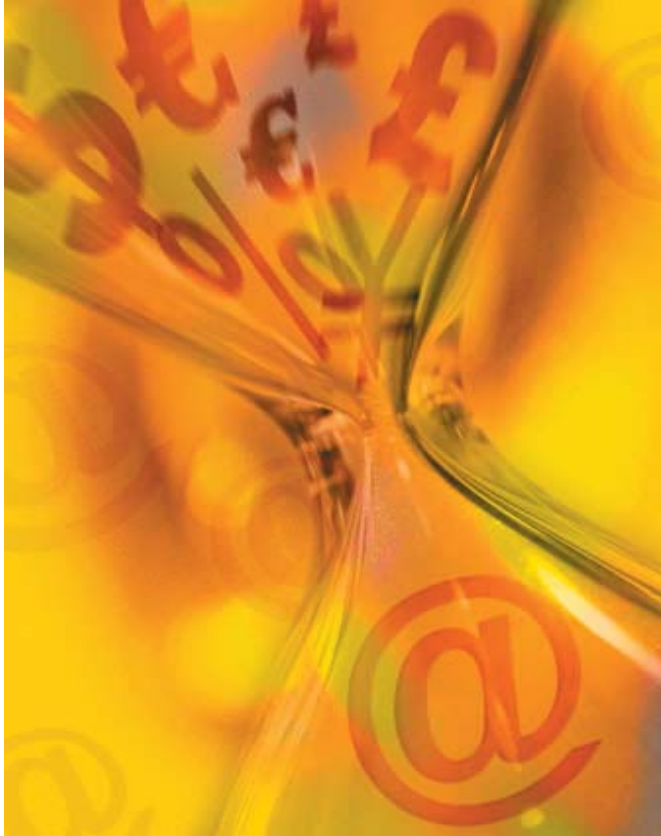


Collecting Documents on an Expedited Basis – Practical Guidelines

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David is a frequent author and lecturer on corporate governance and control issues. David has been a faculty member of the Stanford Director's College and the Duke Director Institute, as well as numerous professional programs, including programs sponsored by the Practicing Law Institute (PLI), the National Investor Relations Institute, the SEC Institute, and the ABA among others. David has also been a guest lecturer at a number of law schools and business schools throughout the country, including teaching classes at Stanford, Harvard, and Duke.

Editor's note: The following transcript is taken from Mr. Berger's presentation at a CGOC Webcast, September 2004.

Key Issues

The topics that I will cover today are four-fold, addressing: legal standards, internal control, knowing your adversary, and practical tips. The majority of my discussion will be focused on electronic discovery, including email, which in “litigative” terminology actually stands for evidence mail and is the biggest revolution in electronic discovery. As you all know, the volume is enormous – BlackBerry has become the way we communicate. The practical difficulty in locating this information can be very, very challenging. People believe that when they send an email, it is gone once they send it. Consequently, they feel comfortable saying anything, including things that they would not ordinarily say if they had to put it in writing on paper or if they were engaged in a discussion with one another. But in fact, emails last forever and we need to be careful about the rules regarding emails and electronic discovery. While becoming clearer, these rules are far from fully developed. In fact, there are new rules and new cases emerging all the time.

Legal Standards

The federal rules around discovery are clear. You should be aware that new rules for dealing with electronic information are coming; there are federal rules that are in the process of being put out for comment. There is a package of proposals aimed at the discovery of electronic information and it includes amendments to federal rules of civil procedure 16, 26, 33, 34, 37 and 45.

You don’t get any special dispensation because you are on an expedited schedule. All you have is an increased burden and a shortened time frame with which to comply with your obligation.

What does it all mean? The key provision is a requirement that parties discuss early on an approach to the production, including privilege issues of electronic documents. I am going to talk more about this when we get into the third section on knowing your adversary, but what is critical is that this discussion occurs in expedited litigation or in regular litigation. As I continue with the presentation, it may sound as if I am referring to regular litigation but it is important to note that expedited litigation turns into regular litigation; it’s also well to note that the rules that apply for expedited litigation are the same as those that apply for regular litigation. You don’t get any special dispensation because you are on an expedited schedule. All you have is an increased burden and a shortened time frame with which to comply with your obligation.

With state law as well as federal law, there are a variety of new statutes that deal with electronic information. In California, we have a new rule that allows the court to enter into an order for the use of technology in the litigation and to enter such an order at the outset of the litigation.

Key Issues

- Legal Standards
- Internal Controls
- Knowing Your Adversary
- Practical Tips

Legal Standards

- Federal Rules
 - FRCP 26 and 31
- State Law Practice
 - Cal CCP 2017(e)(3)
- Local Rules and Trends

Case Law and Recent Developments

- **Zubulake v. UBS Warburg LLC et al.**, 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y. July 20, 2004)
 - Sanctions awarded for discovery abuses
 - Several lessons for companies engaged in discovery, including the following:
 - ◆ Merely notifying employees of document preservation obligations may not be sufficient to meet counsel's or a party's obligations. *Id.* at *35.

Similarly, in the local rules and trends, new rules are coming out in abundance. The Ninth Circuit has issued a proposed new model rule for dealing with electronic information and the key issues include document retention. It's interesting that historically we used to use "document retention" euphemistically as a way to describe document destruction.

In California, we have a new rule that allows the court to enter into an order for the use of technology in the litigation and to enter such an order at the outset of the litigation.

But after the Frank Quattrone and Arthur Anderson situations, I don't think that anybody is going to be in the business of document destruction these days, and that is particularly the case in expedited litigation. We also should be aware that under the new standards that have come out in Delaware, where I do a lot of litigation, it is no longer acceptable for directors or for senior executives to say that they don't have any documents, that they don't remember anything, and that they don't know why they made a particular decision. In today's environment, it is assumed that anything that was destroyed was bad. There is an assumption that a director or officer or senior executive who makes the decision has a basis for that decision and they need the documents to show that basis. As a result, we are spending a lot of time educating our clients on how to create documents, not telling them what to destroy.

Critical Developments

The key case that is one of several recent decisions is the Zubulake case in the Southern District of New York. The most recent decision came down on July 20th and is actually the fifth decision in this long trajectory of decisions. Judge Scheindlin from the Southern District of New York is the judge who has issued the five opinions. For those of you who are involved or working for financial companies, you are aware that she is the same judge who has been involved in the IPO cases. With this fifth opinion, she concludes that this is what she hopes is her last opinion in the issues of document destruction, document retention, and electronic documents. Given some of her earlier decisions, I think there are certainly a number of members from the defense bar who would agree and be hopeful that this

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is her last opinion. Judge Scheindlin sets forth a very exacting standard for requiring companies to retain and produce electronic documents. I will tell you that this case is being closely followed and has been widely viewed and I think that it will set the standard for future litigation over electronic documents.

What is Judge Scheindlin's opinion? The Zubulake case is a fairly simple, straightforward case. The facts are quite simple; it's an employment discrimination case so there was nothing expedited about it, but it applies the rules across the board. She awarded sanctions for discovery abuses finding that literally notifying employees of adopting preservation obligation is generally not sufficient to meet a party's obligation. She sets forth detailed obligations of both in-house and outside counsel, as well as the parties. She reviewed in detail about how the obligations of a party demand to maintain and retain documents.

Zubulake Outcomes

One of Judge Scheindlin's key rulings addresses the question of "when does obligation begin?". She specifies that obligation begins not at the time that litigation begins. It is a very important distinction to understand that once a party reasonably anticipates litigation, it must suspend its routine document retention destruction policy and put in place a litigation hold to ensure the preservation of relevant documents. What does that mean for us? Well, it means that if you are in a situation where you might be considering a litigation, for example in connection with an unsolicited acquisition or perhaps a patent litigation, anytime where you are the potential plaintiff, you may have an obligation to put in place a litigation hold prior to the commencement of that litigation. Similarly, if you think you are likely to be sued, you have an obligation to put in place a litigation hold at the time that you believe there is a possibility or at least a likelihood that you are going to be sued.

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What does a litigation hold mean? Judge Scheindlin specifies that for a litigation hold you have to understand where all of the relevant information is contained and that you have to have this understanding on a continuing basis. She suggests that council immediately begin to speak with folks in the IT department and that they be able to explain system-wide backup procedures and the actual implementation of the firm's recycling policy. It also involves communicating with the key players in the litigation in order to understand how they stored information. What you have to do prior to the time litigation has commenced, or when you have reason to believe that litigation is going to be commenced and certainly once litigation is commenced, is to immediately speak with your IT people as well as the key employees involved in the litigation. And to ensure that you as council, both inside council and outside council, and again these obligations apply whether you are inside council or outside council, have an understanding of how electronic documents are retained. This is going to be a tremendous burden particularly when you are participating in an expedited litigation.

Case Law – Zubulake

- Court detailed obligations of in-house and outside counsel
- "Counsel must oversee compliance with the litigation, monitoring the party's effort to retain and produce the relevant documents." *Id.* at 32.
- Counsel must "fully" familiarize itself with client's document retention policies and data retention architecture.

Case Law – Legal Obligations

- **Compliance Obligations:**
 - Issue a litigation “hold”
 - Regularly repeat instructions to employees to maintain and produce all documents
 - Document efforts taken to ensure that document retention instructions are sent broadly throughout the Company

Legal Obligations

Let me address what the continuing ongoing compliance obligations are. First, the litigation hold: It is not sufficient to just issue a litigation hold and expect that you will be able to get, retain and produce all relevant documents. In fact, in the Zubulake case, the court specifically rejected that act as something that relieves a party’s or council’s burden. Rather, she says, council must take “affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. Council and client must take reasonable steps to make sure that all sources of relevant information are located.” Again, what does this mean in the context of electronic documents? It means that council is going to learn to become very familiar with the company’s electronic document retention polices, where the documents are kept, how back up tapes are kept – and all of this applies to back up of tapes. You have to know (we are becoming technologists in this day and age), you have to understand where and how the companies’ archival efforts and electronic document retention efforts are maintained.

It is not sufficient to just issue a litigation hold and expect that you will be able to get, retain and produce all relevant documents.

One other point to keep in mind is that this litigation hold must be given out repeatedly and frequently. It is not enough to do it just once, and she urges people to continually update the key players in the litigation and that includes the people identified in the party’s initial disclosures as well as supplementations. So, whenever council supplements and finds out that additional people have relevant knowledge, you have to continually update them as to the obligations to retain documents. To this point, one of the questions that has been asked is whether CS First Boston met this obligation in discussing these issues with Frank Quattrone at the time of

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his trial. I think, just from the public record, it is questionable whether Quattrone was informed enough under the standards that are set forth in this case to be under the obligation. From what I’ve seen, it’s not clear to me that a company can meet its obligations by giving a one time phone call or a background summary that there may be a litigation issue. Clearly, what Zubulake is trying to set forth is a continual ongoing obligation on the part of both inside and outside council to make clear that a party and the key players in the party are aware of the real risks of litigation and what exactly it is that they have to hold onto.

Internal Controls

So, how do we implement this new regime? This is not going to be easy. It's going to require some changes to what we do, particularly in expedited context, but also in the context of regular litigation. First, it requires a very close relationship between inside and outside counsel. Discovery is likely to become much more intrusive and you are going to have to work closely together to try to minimize the burdens on the company as a whole while at the same meeting these very difficult obligations.

It's a critical issue to just be able to access your information in a way that is timely, cost effective and less intrusive.

One of the things that we are doing now is trying to meet with our key clients and go over with them, while there is no particular pressure, prior to any litigation, what their IT practices are. We, as outside counsel, must understand what the company's general IT practices are so we will be in a position of, if we face litigation, knowing what we have to do. It is also important to think about outside vendors — PSS offers solutions in this space. It's a critical issue to just be able to access your information in a way that is timely, cost effective and less intrusive. Again, this is going to be a critical issue as you move forward.

When you draft the litigation hold memorandum, it is critical to be over inclusive. You are going to want to maintain a record of who that memorandum was sent to and how frequently you sent it.

The Interview Process

How should you approach the interview process? When I began working as an attorney, it was not uncommon for companies, particularly the large ones, to do the initial document collection process internally led by an experienced paralegal within the company. I frankly think that is no longer sufficient and you are not going to find a court finding that sufficient, particularly in an expedited litigation. Rather, all of these efforts need to be done by attorneys and, frankly, the more significant the litigation, the higher level the attorney needs to be. The consequences of failure here are enormous. In the Zubulake litigation there were sanctions issued

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against the company; there were inferences that were drawn as a result of the destruction of documents. And recently we've seen the Phillips Morris decision out of the District of Columbia in which the company was fined in excess of 2 million dollars and also had significant sanctions issued against it.

Internal Controls – Implementing the New Regime

- **Identify a client contact (preferably General Counsel)**
- **Draft "litigation hold" memorandum**
 - Key: Be over-inclusive
 - Describe broad categories of potentially relevant documents to be preserved
 - Circulate memorandum to all employees with potentially relevant documents
- **Coordinate collection effort with client contact**

Internal Controls – The Interview Process

- **Assemble teams consisting of one attorney and one paralegal**
 - Number of teams depends on size of client
 - Client Interviews
 - Determine paper and electronic storage habits
 - Remind employee of preservation obligations

Internal Controls – The Collection

▪ Paper documents

- Be over-inclusive
- The “Sweep”

▪ Electronic documents

- Coordinate with client IT department
 - ◆ Determine company policy regarding electronic storage and back-up
 - ◆ Identify and preserve potentially relevant back-up tapes
 - ◆ Obtain hard drive snapshots and system-wide network searches

We’re seeing increasing sanctions and with the standards that are being developed, it is no longer going to be the case that somebody can say that they did not understand their obligations. This is the critical issue that’s being discovered, particularly among judges. Any time you go to a judicial conference these days, the issue of electronic discovery is one of the hot topics and it is critical that you come in and be prepared to discuss these issues as soon as you have a litigation. And if you are in an expedited litigation, you are not going to get a break.

Document Collection

I’d like to address document collection and what it means to collect documents on an expedited basis. Typically, in an expedited litigation, the key is time frame in all the different respects. So the time frame for collection is obviously shortened and you have to understand what that is. You have to understand the time frame for production. You have to understand the relevant time frame of what documents you are seeking to collect. Typically, when you are doing an expedited litigation, one way to limit document production, is to say you are going to collect documents for a limited time period. Whether it is three months before the offer or three months before the alleged patent infringement or some reasonable amount of time. But remember, the case is going to continue on and off again after the preliminary injunction hearing, and your obligations to update are even greater. So that notwithstanding, the fact that you are in an expedited litigation, you also have to prepare for the regular litigation as it is going to continue. So, your litigation hold memorandum, for example, probably must include both what you are immediately doing in so far as it’s for the expedited litigation as well as something for the subsequent litigation as something gets continued.

What isn’t understood, particularly by senior executives, is electronic documents: what they are supposed to do with them, how they keep them, where they file them, what happens to them when they are deleted, and what happens when they send something via email.

Finding paper document these days has become rather easy as a result of the use of electronic documents – perhaps that is the one good thing. People are not making notes as much as they used to. Individual’s files, particularly senior executive’s files, are much smaller than they use to be and people, in my experience, have become pretty good on what it is they are asked to keep in terms of paper documents. We all understood over the last ten years what types of paper documents we were supposed to keep and what types we wouldn’t keep.

What isn’t understood — particularly by senior executives — is electronic documents: what they are supposed to do with them, how they keep them, where they file them, what happens to them when they are deleted, and what happens when they send something via email.

The first step when the collection begins is to coordinate closely with the internal teams – and that is both internal legal as well as the internal IT departments. At Wilson Sonsini, we actually have our own internal IT department that meets in an expedited document collection with the IT department from the client so that we can have the technical people

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speaking with technical people trying to work things through as fast as possible. We have found that it is one way in which we are often in a good position to obtain electronic documents quicker than our adversary which can be a tremendous benefit.

Knowing Your Adversary

Knowing your adversary in any litigation is critical. In terms of expedited litigation, the need is highlighted because you are going to have very different production issues depending on whom your adversary is. The new rules are going to require an early discussion with your adversary on issues surrounding electronic production.

What you say, what you want, and what your goals are depends upon whom your adversary is. Let me give you a couple of examples. If your adversary is a regulatory agency, for example the Department of Justice or the FCC, the privilege issues may dominate your discussions. In particular, you have to consider early on whether or not to waive privilege voluntarily: First, because that's what the regulatory agency is going to want you to do and second, because it's often very difficult with electronic documents to determine whether or not a particular document is privileged. Documents that often say in the re: line "attorney client privileged" are not in fact privileged. Even more frequently, you'll see documents sent to attorneys that should be marked privileged but, when they were written, people did not mark them privileged.

It's often very difficult with electronic documents to determine whether or not a particular document is privileged. Documents that often say in the re: line, "attorney client privileged," are not in fact privileged.

Once you produce something to the FCC or the Department of Justice, the likelihood of getting it back on the basis that it was inadvertently produced and you didn't mean to waive the privilege is very, very small. In fact, what is more likely to happen is that the regulatory agency will use that as a basis to say that all of the privilege is waived and more often than not, they are successful in getting the court to agree and require that you produce all the documents being considered a waiver of the privilege.

Knowing Your Adversary

▪ Production Issues

- Consider discussing network search items with opposing counsel to avoid discovery disputes
- Privilege issues
- One-sided or mutual production rules

Knowing Your Adversary

▪ Using Your Own Documents

- Time frame for review and production
- Use of new technology

▪ Using Your Adversary's Documents

- Coordination with team about what to expect
- Provide "open" environment for asking questions
- Goal: finding the "needle in the haystack"

So you need to figure out early on with a regulatory agency what you are going to do with respect to privilege issues and discuss that with them.

In contrast, if you are facing the plaintiff's bar, whether it's a security case or an employment case, perhaps the issue that you are going to be thinking most about is cost-shifting and burden. Because with the plaintiff's bar, typically, you are going to have very limited opportunity to obtain discovery on the plaintiff and they are certainly not going to have the type of electronic discovery that you are going to have.

It is often the case that the plaintiff's bar will want everything that you have and want you to produce all of the potential electronic documents that you can find so that they can increase your burden.

It is often the case that the plaintiff's bar will want everything that you have and want you to produce all of the potential electronic documents that you can find so that they can increase your burden. Whereas you are going to be in a situation where if there are any electronic documents to be produced, particularly archive documents or backup tapes, you are going to want the plaintiff to pay for that and that is one of the first issues that you are going to discuss.

In contrast again, if you are facing a corporate defendant who is of similar size as you are, then the issue is going to come down to speed and scope of production. Particularly in an expedited litigation, you are going to want to make sure that both parties are going to be doing similar searches. You might have a discussion with counsel for the opposing party to go over issues such as what are the key search terms, whose electronic files are going to be searched, whose emails are going to be searched. We all know that in an ongoing litigation (the Oracle situation with Peoplesoft) one of the big issues was that Larry Ellison claimed to have no electronic documents. There are a couple of written opinions about Ellison and his failure to have electronic documents because it was hard for people to believe that Ellison was running Oracle and not creating any electronic documents. But it is one of those issues that you're going to want to make sure that you understand and make sure that you have negotiations (if you have a similar sized adversary) who is going to be searched and what types of searches you are going to have.

You need to learn before the case, what you can easily do and what you can't do. Only if you have that knowledge are you going to be in the position to gain any advantage in the early discussions with your adversary.

So, again, it depends upon who your adversary is as to what are the discussions and rules that you are going to have. And basically the key is knowledge. You need to learn before the case what you can easily do and what you can't do. Only if you have that knowledge are you going to be in the position to gain any advantage in the early discussions with your

adversary. If you know, for example, that you can easily obtain documents from certain executives but you can't from others, you are going to want to use that information as you are entering negotiations. If you have set up a policy for what types of documents are privileged internally and you have instructed your senior executive staff to write in the re: line "attorney client privileged" anytime they send something to an attorney, you are going to want to use that information as you negotiate.

All of these issues are dependent and the time to learn them is before the litigation commences, not when you are in the middle of the negotiations which are typically conducted by outside counsel who is not as familiar with your system as you might be (unless you have taken time before hand to get him or her familiar).

You need to know where your documents are located and what's in them and there is a tremendous amount of new technology that's able to help you understand this information.

When you are engaged in the litigation and you are figuring out who your adversary is there are really two parts of an expedited litigation. One is using your own documents and the other is using your adversary's documents. Again, I've said it a couple of times: Knowledge is key here. You need to know where your documents are located and what's in them and there is a tremendous amount of new technology that's able to help you understand this information. PSS is one of the new vendors that have come out that have the ability to help you locate your own documents and to be able to understand and circulate and maintain control of your own documents; this is a critical tool in any expedited litigation. Similarly, with respect to your adversary's documents, in this day in age, volume is the issue and volume is the key and the same tools that you have been using for locating your own documents can often be used to find your adversary's documents. What you want to do is to coordinate with your team, both internally and with outside counsel, about what to expect.

You want to be able to find the needle in the haystack. Essentially, in an expedited litigation, the increasingly common tactic that is used is to dump a bunch of largely useless electronic documents on a party. It is critical to find within that large collection of documents, the key documents and to see, for example, the communication among board members or the communication among the senior technology people in connection with a path in litigation. You need to know and be able to work with the electronic tools that are available to find that information on an expedited basis.

Practical Tips

- Database and use of electronic vendors
- Issues to watch for:
 - Information subject to confidentiality provisions in third party agreements
 - Privileged communications
 - Trade secrets or other highly confidential information (e.g., customer lists)

Practical Tips

I've mentioned a couple of times the database and the use of electronic vendors. It's amazing to me how much we are turning to the use of new technology in litigation – it can't be overstated. We are seeing it in everything we do and with a lot of firms it's being taken in-house. At our firm, Wilson Sonsini, we have developed a lot of technology that we are using with our clients to facilitate working with our clients' IT department. This way we make sure that we understand what it is that they are doing and to make sure that their technical people can talk with our technical people who can then work with the lawyers to make sure that we are all on the same wavelength. We also try from an attorney's standpoint to better understand the technology issues that our clients are facing so that we can have a quick turnaround on electronic documents.

Trade secrets are more critical than ever. These types of documents show up everywhere; they are easy to pass along and it's very easy to lose control of them.

There are some key issues to watch for when you are engaged in an expedited production. Perhaps the most important one is to understand and identify information that is subject to confidentiality provisions in third party agreements – including trade secrets. In this day and age, trade secrets are more critical than ever. These types of documents show up everywhere; they are easy to pass along and it's very easy to lose control of them in an expedited litigation and then have that result in further litigation. You have to be very careful about that, particularly if you are involved in a case with another corporation. You don't want them to get your trade secrets as you are litigating the case and you don't want them to get trade secrets that you have been given by one of your partners because that would result in additional litigation with your partner, now perhaps former partner, who is now suing you for improper disclosure of trade secrets.

You also have to be very careful about privileged communication. Trying to find whether a particular communication is privileged when going through large quantities of emails is very, very difficult. We urge clients to sit down with inside and outside counsel, again prior to any litigation, and think of a policy to set up so that you can put something in the re: line and inform the key people at the company to exercise this policy when a communication

is privileged. I will tell you that simply adding an attorney to a distribution list and putting on top “privileged and confidential attorney client work product” is not sufficient usually to maintain the privilege. Rather what you need to do is give it some thought and figure out if there is a strategic way that you can use the privilege as necessary, so that it is not a blanket to cover up all communications.

The fact is that electronic information and electronic discovery has given us a tremendous new burden from a litigation standpoint and also a tremendous new opportunity.

In this day and age, don't let the perfect be the enemy of the good. There are going to be mistakes that are going to be made. With the volume of information that we are seeing, it's just impossible to have a continual perfect production, particularly in an expedited litigation. The key is to pick the spots where errors are going to be less critical than others. The only way to do that is to be aware of the risks of failure and be aware where you should focus your resources. The fact is that electronic information and electronic discovery has given us a tremendous new burden from a litigation standpoint and also a tremendous new opportunity. You have to be in the position of taking advantage of that opportunity by accessing the new technology and using the tools that are available to you to gain control. If you do that, you are much further along, frankly, than most of the adversaries that you'll be facing. You will be in a position to succeed in litigations; you will be amazed at what an advantage it can be in litigation.

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