2009 -- H 5573

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S T A T E   O F   R H O D E   I S L A N D

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2009

A N A C T

RELATING TO COURTS AND CIVIL PROCEDURE - PROCEDURE GENERALLY - MEDICAL MALPRACTICE

Introduced By: Representative Joseph M. McNamara

Date Introduced: February 25, 2009

Referred To: House Judiciary

It is enacted by the General Assembly as follows:

1 SECTION 1.

2 WHEREAS, Verdicts and settlements in medical malpractice actions exceeding one
3 million dollars have increased steadily over the past twenty years, resulting in losses to many
4 malpractice insurers; and

5 WHEREAS, Medical malpractice claims, unlike many tort actions, often are not filed
6 with insurers or healthcare providers for many years after the treatment was rendered, as a
7 consequence of which substantial prejudgment interest accrues; and

8 WHEREAS, Notwithstanding the fact that total indemnity payments are increasing, many
9 meritless claims continue to be filed, as evidence by the high number of malpractice claims which
10 are closed without any indemnity payment; and

11 WHEREAS, A number of states have experienced or are currently experiencing a crisis
12 in their medical liability insurance markets, with soaring premiums and insurers either failing or
13 leaving the market, causing some physicians and other healthcare providers to either cease
14 practicing or to leave the state; and

15 WHEREAS, The unfavorable civil liability system has led many national insurers to
16 discontinue offering medical liability coverage to healthcare providers;

17 WHEREAS, The Rhode Island market is beginning to experience many of the
18 unfavorable trends which have adversely affected public access to healthcare elsewhere,

including a significant reduction in the number of insurers willing to offer medical liability coverage in the state along with rapidly escalating malpractice premiums; and

WHEREAS, The skyrocketing cost of malpractice insurance, both nationally and locally, has forced some physicians and healthcare providers to limit their practices, or, in some cases, abandon their practices thereby restricting and reducing access to healthcare; and

WHEREAS, The general assembly, acting within the scope of its police power, finds and declares that the statutory remedy herein provided is intended to stabilize the Rhode Island medical liability market, to attract medical liability insurers to Rhode Island, and to assure public access to affordable, high quality healthcare.

SECTION 2. Section 9-1-14.1 of the General Laws in Chapter 9-1 entitled "Causes of Action" is hereby amended to read as follows:

9-1-14.1. Limitation on malpractice actions. – Notwithstanding the provisions of sections 9-1-13 and 9-1-14, an action for medical, veterinarian, accounting, or insurance or real estate agent or broker malpractice shall be commenced within three (3) years from the time of the occurrence of the incident which gave rise to the action; provided, however, that:

(1) One who is under disability by reason of age, mental incompetence, or otherwise, and on whose behalf no action is brought within the period of three (3) years from the time of the occurrence of the incident, shall bring the action within three (3) years from the removal of the disability~~.~~ ,or, in the case of a minor, within three (3) years after the minor's birthday.

(2) In respect to those injuries or damages due to acts of medical, veterinarian, accounting, or insurance or real estate agent or broker malpractice which could not in the exercise of reasonable diligence be discoverable at the time of the occurrence of the incident which gave rise to the action, suit shall be commenced within three (3) years of the time that the act or acts of the malpractice should, in the exercise of reasonable diligence, have been discovered.

SECTION 3. Section 9-19-41 of the General Laws in Chapter 9-19 entitled "Evidence" is hereby amended to read as follows:

9-19-41. Expert witnesses in malpractice cases. – (a) In any legal action based upon a cause of action arising on or after January 1, 1987, for personal injury or wrongful death filed against a licensed physician, hospital, clinic, health maintenance organization, professional service corporation providing health care services, dentists, or dental hygienist based on professional negligence, only those persons who by knowledge, skill, experience, training, or education qualify as experts in the field of the alleged malpractice shall be permitted to give expert testimony as to the alleged malpractice.

(b) The plaintiff shall disclose the identity of such experts and the substance of the

1 proposed expert testimony, as provided in rule 26(b)(4)(A) of the superior court rules of civil
2 procedure, within one year from the date interrogatories were filed requesting such information.
3 In the event the plaintiff does not make the expert disclosure required hereunder, the court may
4 enter an order dismissing the case or precluding the plaintiff from introducing expert testimony at
5 trial. The defendant(s) shall disclose the identity of defense experts and the substance of their
6 testimony within sixty (60) days following plaintiff's disclosure, or within sixty (60) days after
7 interrogatories are propounded to the defendant requesting such information, whichever shall last
8 occur. In the event a defendant does not make the expert disclosure required hereunder the court
9 may enter an order defaulting that defendant or precluding that defendant from introducing expert
10 testimony at trial. defaulting that defendant or precluding that defendant from introducing expert
11 testimony at trial.

12 SECTION 4. Chapter 9-19 of the General Laws entitled "Evidence" is hereby amended
13 by adding thereto the following section:

14 **9-19-45. Admissibility of healthcare providers' reports of medical and healthcare**
15 **errors. –** (a) Preamble. Effective July 1, 2001, the joint commission on accreditation of
16 healthcare organizations ("JCAHO") required as part of its standards for accreditation that
17 healthcare providers report all medical healthcare errors to the overseeing healthcare facility.
18 Providers are further required to provide a clear explanation to the patient, and, when appropriate,
19 their families of the outcome of any treatment or procedure, including unanticipated outcomes.
20 The premise of the standards is that more open communication within a healthcare facility and
21 with patients will lead to a reduction of medical/healthcare errors and other factors which
22 contribute to unintended adverse patient outcomes. In order to create an environment which
23 encourages recognition and acknowledgement of medical/healthcare errors, the standards call for
24 minimization of individual blame or retribution for involvement in a medical/healthcare error.
25 This legislation is intended to create such an environment by excluding from evidence in a civil
26 action any statements made by providers in accordance with the JCAHO standards, as well as any
27 statements of sympathy expressed by the provider to the patient or to the patient's family.
28 Moreover, to the extent such statements are mandated by the JCAHO standards, it would be
29 unfair to introduce such statement into evidence as voluntary admissions of the provider.

30 (b) For purposes of this section:

31 (1) "Benevolent gestures" means actions which convey a sense of compassion or
32 commiseration emanating from humane impulses;

33 (2) "Family" means the spouse, parent, grandparent, step-parent, child, grandchild,
34 brother, sister, half-brother, half-sister, uncle, aunt, adopted children of parent, or spouse's

parents, whether by whole or half-blood, adoption or marriage of a patient;

(3) "Healthcare facility" means any institutional health service provider licensed pursuant to the provisions of chapter 17 of title 23;

(4) "Healthcare provider" or "provider" shall have the same meaning as the meaning contained section 23-17.13-2;

(5) "JCAHO's standards" means the patient safety and medical healthcare error reduction standards of the joint commission on accreditation of healthcare organizations effective July 1, 2001; and

(6) "Medical/healthcare errors" means the events and conditions required to be reported to a healthcare facility's error reporting system under the JCAHO standards.

(c) The following shall be inadmissible as evidence of an admission liability in a civil action against a healthcare provider:

(1) Statements or writings of a healthcare provider made to a patient or to the family of such patient regarding the outcome of such patient's medical care and treatment, including, reports of medical/healthcare errors or unanticipated outcomes as required by or in accordance with the JCAHO's standards or similar standards; and

(2) Statements, writings or benevolent gestures of a healthcare provider made to a patient or to the family of such patient expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of such patient in connection with or relating to the patient's condition or the outcome of such patient's medical care and treatment.

SECTION 5. Section 9-21-10 of the General Laws in Chapter 9-21 entitled "Judgments, Orders, and Decrees" is hereby amended to read as follows:

9-21-10. Interest in civil actions. – (a) In any civil action in which a verdict is rendered or a decision made for pecuniary damages, there shall be added by the clerk of the court to the amount of damages interest ~~at the rate of twelve percent (12%) per annum thereon from the date the cause of action accrued, which shall be included in the judgment entered therein.~~ at a rate equal to the treasury bill index. The treasury bill index shall be the highest rate (auction average on a coupon equivalent rate) for US treasury bills with maturities of one year, as established at auction of such treasury bills for the first week in January, in which such treasury bills are offered, of each year from the date the civil action was filed to the date of judgment. Interest shall be computed per annum. The director of business regulation shall keep a record of the treasury bill rate for the first week of January, in which such treasury bills are offered, for each year and shall distribute notice of that rate to all state judges. Post-judgment interest shall be calculated at the same rate ~~of twelve percent (12%) per annum~~ as prejudgment interest and accrue on both the

principal amount of the judgment and the prejudgment interest entered therein. Whenever a civil action has been assigned for trial to a specific date or week, and a party thereto asserting a claim seeks and obtains a continuance of the trial date, interest shall not accrue on such claim from the assigned trial date to the date when judgment is entered, unless the party opposing such claim consents to the continuance. This section shall not apply until entry of judgment or to any contractual obligation where interest is already provided.

(b) ~~Subsection (a) shall not apply in any action filed on or after January 1, 1987, for~~ In personal injury or wrongful death actions filed against a licensed physician, hospital, clinic, health maintenance organization, professional service corporation providing health care services, dentist, or dental hygienist based on professional negligence~~. In all such medical malpractice actions~~ in which a verdict is rendered or a decision made for pecuniary damages, there shall be added by the clerk of the court to the amount of damages prejudgment interest calculated in the same manner as provided for in subsection (a). Such interest shall be added ~~at the rate of twelve percent (12%) per annum~~ thereon from the date of written notice of the claim by the claimant or his or her representative to the malpractice liability insurer, or to the medical or dental health care provider or the filing of the civil action, whichever first occurs.

SECTION 6. Chapter 9-19 of the General Laws entitled "Evidence" is hereby amended by adding thereto the following section:

9-19-46. Certificate of merit to accompany medical malpractice complaint. – (a) In any civil action asserting a cause of action for personal injury or wrongful death filed against a healthcare provider, the plaintiff or plaintiff's counsel shall be required to file, simultaneous with the filing of the complaint, a certificate of merit which meets the requirements of this section. These requirements are limited to claims where expert testimony is necessary to establish a prima facie case.

(b) The certificate of merit shall attest to the following:

(1) That plaintiff, or plaintiff's counsel, has consulted and reviewed the facts of the case with an expert who the plaintiff or plaintiff's counsel reasonably believes:

(i) Is knowledgeable regarding the relevant issues involved in the particular action;

(ii) Is qualified by knowledge, skill, experience, training or education to testify as an expert in the field of the alleged malpractice in accordance with Rhode Island general laws section 9-19-41; and

(iii) Has no financial or personal interest in the outcome of the case under review; and

(2) That the expert has determined in a written report that there is a reasonable and meritorious cause for the filing of such action.

1 (c) The written report from the expert shall be attached to the certificate of merit and shall
2 contain each of the following:
3 (1) The name and business address of the expert, and sufficient facts to support the
4 conclusion that the expert is qualified by knowledge, skill, experience, training, or education to
5 testify as an expert against the provider in accordance with chapter 19-41.
6 (2) A statement that the expert's determination has been based on an examination of the
7 plaintiff, or an independent and thorough review of all of the applicable medical records;
8 (3) A description of the appropriate standard of care that is expected of a reasonably
9 competent healthcare provider in the same class to which the healthcare providers belongs, acting
10 in the same or similar circumstances;
11 (4) The opinion of the expert, expressed with a reasonable degree of medical certainty,
12 that the appropriate standard of care was breached by the healthcare provider named in the
13 complaint;
14 (5) The factual basis for that opinion;
15 (6) A statement of the actions that the healthcare provider should have taken or omitted to
16 have complied with the standard of care; and
17 (7) A statement of the manner in which the breach of the standard of care was the
18 proximate cause of the injury alleged in the complaint.
19 (d) Where a certificate of merit is required pursuant to this section, a separate certificate
20 and expert report shall be filed as to each defendant who has been named in the complaint and
21 shall be filed as to each defendant named at a later time. In circumstances where the plaintiff files
22 an action against a healthcare facility based on the doctrine of a respondent superior, arising from
23 acts or omissions constituting malpractice by a healthcare provider, a separate certificate and
24 expert report shall be filed as to each such healthcare provider.
25 (e) The contemporaneous filing requirement of subsection (a) of this section shall not
26 apply to any case in which the period of limitation will expire or there is a good faith basis to
27 believe it will expire on any claim stated in the complaint within ten (10) days of the date of filing
28 and the plaintiff or plaintiff's counsel asserts in good faith that, because of such time constraints,
29 compliance with the requirements herein was not possible. In such cases, the plaintiff shall have
30 forty-five (45) days after the filing of the complaint to supplement the pleadings with the
31 certificate of merit and expert report. This section shall not be construed to extend any applicable
32 period of limitation; provided, however, that if the certificate of merit and expert report are filed
33 within the period specified in this section, such filing after the expiration of the statute of
34 limitations shall be considered timely and shall provide no basis for a statute of limitations

1 defense.

2 (f) If a certificate of merit is not filed within the period specified in this section the
3 complaint is subject to dismissal for failure to state a claim upon which relief can be granted.

4 (g) If the plaintiff or plaintiff's counsel files a certificate of merit which does not comply
5 with each of the requirements in subsection (b), or a written report which does not comply with
6 each of the requirements in subsection (c), the defendant to whom such certificate pertains may
7 file a motion to dismiss which shall assert, with specificity, the grounds or basis by which the
8 certificate does not meet the requirements of this section. The court may dismiss the action or, in
9 the alternative, allow the plaintiff a reasonable period of time to cure such defect by amendment.

10 (h) The court may, for good cause shown, order such further discovery as the court may
11 direct to enforce the provisions of this section, including depositions of the expert or other
12 persons. In the event the court finds, upon hearing, that the certificate of merit was not filed in
13 good faith the court may enter such sanctions as the court deems appropriate under the
14 circumstances, including, but not limited to, ordering the plaintiff or plaintiff's counsel to pay all
15 reasonable attorneys' fees and costs incurred in connection with the defense of the action.

16 (i) For the purposes of this section, the term "healthcare provider" shall mean the same as
17 that term is defined in subdivision 5-37.3-3(4).

18 SECTION 7. Section 5-37.3-4 of the General Laws in Chapter 5-37.3 entitled
19 "Confidentiality of Health Care Communications and Information Act" is hereby amended to read
20 as follows:

21 **5-37.3-4. Limitations on and permitted disclosures. --** (a) (1) Except as provided in
22 subsection (b) of this section or as specifically provided by the law, a patient's confidential health
23 care information shall not be released or transferred without the written consent of the patient or
24 his or her authorized representative, on a consent form meeting the requirements of subsection (d)
25 of this section. A copy of any notice used pursuant to subsection (d) of this section, and of any
26 signed consent shall, upon request, be provided to the patient prior to his or her signing a consent
27 form. Any and all managed care entities and managed care contractors writing policies in the state
28 shall be prohibited from providing any information related to enrollees which is personal in
29 nature and could reasonably lead to identification of an individual and is not essential for the
30 compilation of statistical data related to enrollees, to any international, national, regional, or local
31 medical information data base. This provision shall not restrict or prohibit the transfer of
32 information to the department of health to carry out its statutory duties and responsibilities.

33 (2) Any person who violates the provisions of this section may be liable for actual and
34 punitive damages.

1 (3) The court may award a reasonable attorney's fee at its discretion to the prevailing
2 party in any civil action under this section.
3 (4) Any person who knowingly and intentionally violates the provisions of this section
4 shall, upon conviction, be fined not more than five thousand ($5,000) dollars for each violation,
5 or imprisoned not more than six (6) months for each violation, or both.
6 (5) Any contract or agreement which purports to waive the provisions of this section
7 shall be declared null and void as against public policy.
8 (b) No consent for release or transfer of confidential health care information shall be
9 required in the following situations:
10 (1) To a physician, dentist, or other medical personnel who believes, in good faith, that
11 the information is necessary for diagnosis or treatment of that individual in a medical or dental
12 emergency;
13 (2) To medical and dental peer review boards, or the board of medical licensure and
14 discipline, or board of examiners in dentistry;
15 (3) To qualified personnel for the purpose of conducting scientific research, management
16 audits, financial audits, program evaluations, actuarial, insurance underwriting, or similar studies;
17 provided, that personnel shall not identify, directly or indirectly, any individual patient in any
18 report of that research, audit, or evaluation, or otherwise disclose patient identities in any manner;
19 (4) By a health care provider to appropriate law enforcement personnel, or to a person if
20 the health care provider believes that person or his or her family is in danger from a patient; or to
21 appropriate law enforcement personnel if the patient has or is attempting to obtain narcotic drugs
22 from the health care provider illegally; or to appropriate law enforcement personnel or
23 appropriate child protective agencies if the patient is a minor child who the health care provider
24 believes, after providing health care services to the patient, to have been physically or
25 psychologically abused; or to law enforcement personnel in the case of a gunshot wound
26 reportable under section 11-47-48;
27 (5) Between or among qualified personnel and health care providers within the health
28 care system for purposes of coordination of health care services given to the patient and for
29 purposes of education and training within the same health care facility; or
30 (6) To third party health insurers including to utilization review agents as provided by
31 section 23-17.12-9(c)(4), third party administrators licensed pursuant to chapter 20.7 of title 27
32 and other entities that provide operational support to adjudicate health insurance claims or
33 administer health benefits;
34 (7) To a malpractice insurance carrier or lawyer if the health care provider has reason to

anticipate a medical liability action; or

(8) ~~(i)~~ To the health care provider's own lawyer or medical liability insurance carrier if the patient whose information is at issue brings a medical liability action against a health care provider.

~~(ii) Disclosure by a health care provider of a patient's health care information which is relevant to a civil action brought by the patient against any person or persons other than that health care provider may occur only under the discovery methods provided by the applicable rules of civil procedure (federal or state). This disclosure shall not be through ex parte contacts and not through informal ex parte contacts with the provider by persons other than the patient or his or her legal representative. Nothing in this section shall limit the right of a patient or his or her attorney to consult with that patient's own physician and to obtain that patient's own health care information;~~

(9) To public health authorities in order to carry out their functions as described in this title and titles 21 and 23, and rules promulgated under those titles. These functions include, but are not restricted to, investigations into the causes of disease, the control of public health hazards, enforcement of sanitary laws, investigation of reportable diseases, certification and licensure of health professionals and facilities, review of health care such as that required by the federal government and other governmental agencies;

(10) To the state medical examiner in the event of a fatality that comes under his or her jurisdiction;

(11) In relation to information that is directly related to current claim for workers' compensation benefits or to any proceeding before the workers' compensation commission or before any court proceeding relating to workers' compensation;

(12) To the attorneys for a health care provider whenever that provider considers that release of information to be necessary in order to receive adequate legal representation;

(13) By a health care provider to appropriate school authorities of disease, health screening and/or immunization information required by the school; or when a school age child transfers from one school or school district to another school or school district;

(14) To a law enforcement authority to protect the legal interest of an insurance institution, agent, or insurance-support organization in preventing and prosecuting the perpetration of fraud upon them;

(15) To a grand jury or to a court of competent jurisdiction pursuant to a subpoena or subpoena duces tecum when that information is required for the investigation or prosecution of criminal wrongdoing by a health care provider relating to his or her or its provisions of health

1 care services and that information is unavailable from any other source; provided, that any
2 information so obtained is not admissible in any criminal proceeding against the patient to whom
3 that information pertains;
4 (16) To the state board of elections pursuant to a subpoena or subpoena duces tecum
5 when that information is required to determine the eligibility of a person to vote by mail ballot
6 and/or the legitimacy of a certification by a physician attesting to a voter's illness or disability;
7 (17) To certify, pursuant to chapter 20 of title 17, the nature and permanency of a
8 person's illness or disability, the date when that person was last examined and that it would be an
9 undue hardship for the person to vote at the polls so that the person may obtain a mail ballot;
10 (18) To the central cancer registry;
11 (19) To the Medicaid fraud control unit of the attorney general's office for the
12 investigation or prosecution of criminal or civil wrongdoing by a health care provider relating to
13 his or her or its provision of health care services to then Medicaid eligible recipients or patients,
14 residents, or former patients or residents of long term residential care facilities; provided, that any
15 information obtained shall not be admissible in any criminal proceeding against the patient to
16 whom that information pertains;
17 (20) To the state department of children, youth, and families pertaining to the disclosure
18 of health care records of children in the custody of the department;
19 (21) To the foster parent or parents pertaining to the disclosure of health care records of
20 children in the custody of the foster parent or parents; provided, that the foster parent or parents
21 receive appropriate training and have ongoing availability of supervisory assistance in the use of
22 sensitive information that may be the source of distress to these children;
23 (22) A hospital may release the fact of a patient's admission and a general description of
24 a patient's condition to persons representing themselves as relatives or friends of the patient or as
25 a representative of the news media. The access to confidential health care information to persons
26 in accredited educational programs under appropriate provider supervision shall not be deemed
27 subject to release or transfer of that information under subsection (a) of this section; or
28 (23) To the workers' compensation fraud prevention unit for purposes of investigation
29 under sections 42-16.1-12 -- 42-16.1-16. The release or transfer of confidential health care
30 information under any of the above exceptions is not the basis for any legal liability, civil or
31 criminal, nor considered a violation of this chapter; or
32 (24) To a probate court of competent jurisdiction, petitioner, respondent, and/or their
33 attorneys, when the information is contained within a decision-making assessment tool which
34 conforms to the provisions of section 33-15-47.

(c) Third parties receiving and retaining a patient's confidential health care information must establish at least the following security procedures:

(1) Limit authorized access to personally identifiable confidential health care information to persons having a "need to know" that information; additional employees or agents may have access to that information which does not contain information from which an individual can be identified;

(2) Identify an individual or individuals who have responsibility for maintaining security procedures for confidential health care information;

(3) Provide a written statement to each employee or agent as to the necessity of maintaining the security and confidentiality of confidential health care information, and of the penalties provided for in this chapter for the unauthorized release, use, or disclosure of this information. The receipt of that statement shall be acknowledged by the employee or agent, who signs and returns the statement to his or her employer or principal, who retains the signed original. The employee or agent shall be furnished with a copy of the signed statement;

(4) Take no disciplinary or punitive action against any employee or agent solely for bringing evidence of violation of this chapter to the attention of any person.

(d) Consent forms for the release or transfer of confidential health care information shall contain, or in the course of an application or claim for insurance be accompanied by a notice containing, the following information in a clear and conspicuous manner:

(1) A statement of the need for and proposed uses of that information;

(2) A statement that all information is to be released or clearly indicating the extent of the information to be released; and

(3) A statement that the consent for release or transfer of information may be withdrawn at any future time and is subject to revocation, except where an authorization is executed in connection with an application for a life or health insurance policy in which case the authorization expires two (2) years from the issue date of the insurance policy, and when signed in connection with a claim for benefits under any insurance policy the authorization shall be valid during the pendency of that claim. Any revocation shall be transmitted in writing.

(e) Except as specifically provided by law, an individual's confidential health care information shall not be given, sold, transferred, or in any way relayed to any other person not specified in the consent form or notice meeting the requirements of subsection (d) of this section without first obtaining the individual's additional written consent on a form stating the need for the proposed new use of this information or the need for its transfer to another person.

(f) Nothing contained in this chapter shall be construed to limit the permitted disclosure

1 of confidential health care information and communications described in subsection (b) of this
2 section.
3 SECTION 8. Sections 1, 2 and 8 of this act shall take effect upon passage and shall apply
4 to any cause of action which accrues on or after the effective date of this act. Sections 3 and 6 of
5 this act shall take effective upon passage and shall apply to any action filed or commenced on or
6 after the effective date of this act. Sections 4, 5 and 7 of this act shall take effect upon passage
7 and shall apply to all actions pending on or after the effective date of this act.

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EXPLANATION

BY THE LEGISLATIVE COUNCIL

OF

A N A C T

RELATING TO COURTS AND CIVIL PROCEDURE - PROCEDURE GENERALLY - MEDICAL MALPRACTICE

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1 This act would make various changes affecting civil procedure including reduction of
2 periods of limitation, reduction of prejudgment interest and would make statements by healthcare
3 provider inadmissible as evidence.
4 Sections 1, 2 and 8 of this act would take effect upon passage and would apply to any
5 cause of action which accrues on or after the effective date of this act. Sections 3 and 6 of this act
6 would take effective upon passage and would apply to any action filed or commenced on or after
7 the effective date of this act. Sections 4, 5 and 7 of this act would take effect upon passage and
8 would apply to all actions pending on or after the effective date of this act.

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