

## **Handling a Wisconsin OWI Case For an Illinois Driver**

By Donald Ramsell, Esq. and Andrew Mishlove, Esq.

Lawyers in Wisconsin are often confronted with the problems faced by Illinois drivers who have been arrested for OWI or PAC in Wisconsin. Although a “Wisconsin only” lawyer normally cannot practice before Secretary of State in Illinois, it is, nevertheless, critical that the Wisconsin lawyer understand the Illinois consequences of an OWI conviction. The Illinois driver’s case often needs to be handled far differently than that of the Wisconsin driver. This is especially true for a first-offense charge. Put bluntly, if an Illinois driver with no prior arrests (anywhere) is convicted of a first Wisconsin OWI, he will receive a revocation of his Illinois driving privileges for a minimum 1 year and a maximum of lifetime!

For example, an Illinois driver comes into your office who was arrested for OWI while vacationing in Wisconsin. In addition to questions about what is likely to happen as a result of the prosecution in Wisconsin, he also asks whether his Illinois driver’s license will be affected. The purpose of this article is to provide you with some ready answers to the questions you likely will field, and suggest some strategies for controlling the damage. Of course, the best strategy is to obtain an acquittal; and the authors strenuously urge you to explore that possibility with some zeal.

For starters, a Wisconsin OWI or PAC conviction will result in the automatic revocation of an Illinois driver’s license.<sup>1</sup> In addition, the refusal to submit to chemical testing, (breath, blood and/or urine) after an arrest for DUI will result in the suspension of an Illinois driver’s license.

In a first-offense case, the OWI revocation in Illinois will be worse than the driver would face if he had a Wisconsin license, and worse than he would face if the offense occurred in Illinois.

In Illinois, our southern colleagues are more often able to negotiate settlements than we are here in Wisconsin. It is more common in Illinois for a drunken driving charge to be reduced to reckless driving.

Also, Wisconsin lawyers should be familiar with the Illinois system of “court-supervision.” This is a formal, statutorily endorsed deferred prosecution program available in Illinois for those charged with first-offense drunken driving. Although a disposition of court-supervision does not result in a conviction under Illinois law, it does count as a prior offense under Wisconsin law. *State v. List*, 2004 WI App 230, 691 N.W.2d 366 (Ct. App. 2004).

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<sup>1</sup> 625 ILCS 5/6-206(a)6.

Thus, in Illinois, a driver's first drunken driving charge does not result in a '**conviction**'. A 'conviction' in Illinois usually only occurs for a second or third drunken driving charge.

Because of this anomaly, the Illinois driver's licensing authority (the Secretary of State) will treat a first Wisconsin conviction just like two Illinois DUI guilty's; the end result is that a first offense conviction in Wisconsin causes the Illinois driver to get a loss of driving privileges in Illinois which is usually reserved to second-offenders: bizarre, but true.

An Illinois driver charged with first-offense OWI in Wisconsin is most definitely NOT eligible for Illinois court-supervision.<sup>2</sup> These items will be discussed separately.

### **LICENSE REVOCATIONS**

#### **A) Effective Date and Duration:**

The Illinois Secretary of State will automatically revoke the driver's license of a resident upon receipt of a report of any conviction for drunken driving, OWI, DUI or a similar offense where the cause of action is the same or substantially similar to the offense of DUI<sup>3</sup> as defined in the Illinois Motor Vehicle Code.<sup>4</sup> Some State's have statutory schemes that provide for different impairment levels of DUI. A reduction or amendment of the pending charges to a lower impairment level will still result in a revocation in Illinois, as Illinois does not have any graduated scheme. Therefore, to avoid a license revocation, any amendment or reduction must be to an offense that will be recognized separately (i.e. Reckless Driving) under the Illinois Motor Vehicle Code. Assuming that the case will result in a conviction, it usually takes several weeks for the report of the conviction to reach the Illinois Secretary of State. However, upon receipt, the Secretary of State immediately serves a Notice of Revocation upon the affected driver by mailing it to the address listed with the Secretary of State's office.<sup>5</sup> The revocation's effective date is normally within a few days of mailing. On this note, you should ask the client whether they still live at the address listed on their Illinois driver's license. If not, they should be advised to change their address directly with the Secretary of State's Drivers Services Department forthwith as official notices from the Secretary are not

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<sup>2</sup> 625 ILCS 5/6-203.1.

<sup>3</sup> In Wisconsin, we generally use the common acronyms OWI and PAC. In Illinois and elsewhere, DUI is in more common use. Therefore, we will use OWI or PAC when referring to Wisconsin law, and DUI in reference to Illinois law.

<sup>4</sup> 625 ILCS 5/11-501, et. seq.

<sup>5</sup> 625 ILCS 5/6-211(c)

forwarded and the failure of the driver to actually receive the notice does not affect the validity or effective date of the revocation.

In Illinois, license revocations are for a minimum of 1 year if the driver has never been previously convicted of DUI.<sup>6</sup> Two DUI convictions within a 20-year period will result in a minimum revocation of 5 years,<sup>7</sup> and three convictions within twenty years results in a minimum revocation of 10 years.<sup>8</sup> A fourth conviction for DUI renders the driver permanently ineligible from applying for an unrestricted license in Illinois.<sup>9</sup> It is the policy of the Secretary of State's office not to fully reinstate an otherwise eligible driver until they have first been issued a Restricted Driving Permit (RDP) and drove on it without incident for at least 9 months.

**B) Restricted Driving Permit (RDP)-Eligibility and Conditions:**

Illinois, like all states, has a work permit program. In Wisconsin, we call it an occupational permit. In Illinois, they call it a restricted driving permit or RDP.

Once a revocation is effective, the next issue is when, and under what conditions, one becomes eligible to apply for an RDP. In Illinois, an RDP may be issued for: a) driving to and from work as well as within the scope of the petitioner's employment related duties; b) to allow transportation of the petitioner or a family member for necessary medical care; c) to and from certain alcohol rehabilitative activities; (i.e. AA meetings), and d) for the petitioner to travel to and from classes at an accredited educational institution.<sup>10</sup> The Secretary of State also will not issue permits for more than 12 hours a day or 6 days a week.<sup>11</sup> Petitioners who have traffic tickets pending in any court (other than a DUI with a pending suspension) or who are also suspended or revoked for other reasons are ineligible to apply for an RDP until the other matters are resolved.<sup>12</sup>

Before one is eligible to apply for an RDP, a petitioner must obtain an alcohol evaluation from an agency licensed by the Illinois Office of Alcohol and Substance Abuse (OASA), and complete the treatment recommended therein at a treatment service provider licensed by OASA.<sup>13</sup> Depending on the treatment level at which a petitioner is classified by the evaluation, other requirements may also apply. The various treatment levels and other requirements are set forth as follows:

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<sup>6</sup> 625 ILCS 5/6-208(b)1.

<sup>7</sup> 625 ILCS 5/6-208(b)2.

<sup>8</sup> 625 ILCS 5/6-208(b)3.

<sup>9</sup> 625 ILCS 5/6-208(b)4.

<sup>10</sup> 625 ILCS 5/6-206(c)3.

<sup>11</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.420 (c)1.

<sup>12</sup> See, e.g., 92 Ill. Admin. Code Ch II, Sec. 1001.420(f) & (j)

<sup>13</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.420(a) 1.

Level 1/Minimal Risk - Completion of an Alcohol/Drug Risk Education course (usually 10 hours). Note-Level 1 can only be recommended for petitioners who, at a minimum: a) have no prior DUI dispositions or suspensions; b) submitted to chemical testing with a resulting blood alcohol level of less than .15; and c) were not diagnosed with any other recognized symptoms of substance abuse or dependence.

Level 2M/Moderate Risk - Completion of an Alcohol/Drug Risk Education course (usually 10 hours) and an Early Intervention Counseling Program (Minimum of 12 hours). Note-Level 2M can only be recommended for petitioners who, at a minimum: a) have no prior DUI dispositions or suspensions; b) submitted to chemical testing with a resulting blood alcohol level of .15 to .19; and c) were not diagnosed with any other recognized symptoms of substance abuse or dependence.

Level 2S/Significant Risk - Completion of an Alcohol/Drug Risk Education course (usually 10 hours), Substance Abuse Treatment, (Minimum of 20 hours) and enrollment in and at least partial completion of Aftercare a/k/a Continuing Care (usually 2-3 hours a month for 6 consecutive months). Note-Level 2S will, at a minimum, be recommended for petitioners who: a) have at least 1 prior DUI disposition or suspension; and/or b) submitted to chemical testing with a resulting blood alcohol level of at least .20; and/or c) were diagnosed with other recognized symptoms of substance abuse.

Level 3 High Risk/Dependent - Completion of a minimum of 75 hours of substance abuse treatment and enrollment in and at least partial completion of Aftercare a/k/a Continuing Care (usually 2-3 hours a month for 6 consecutive months). In addition, at the hearing the Petitioner will have to submit proof of establishment of an ongoing support/recovery program (i.e. regular attendance at AA meetings for at least 6 months and having obtained an AA sponsor). Petitioner will also have to document at least 12 consecutive months of abstinence from alcohol and drugs.

Level 3 High Risk/Non-Dependent - Completion of a minimum of 75 hours of substance abuse treatment and enrollment in and at least partial completion of Aftercare a/k/a Continuing Care (usually 2-3 hours a month for 6 consecutive months). In addition, at the hearing the Petitioner will have to submit proof of at least 12 consecutive months of non-problematic use of alcohol (or abstinence if it had been recommended by an evaluator or treatment service provider) as well as abstinence from drugs.

Once the conditions applicable to the petitioner have been met, they will need to obtain an updated alcohol evaluation from either the original evaluator or the treatment

service provider.<sup>14</sup> If the petitioner has never previously been revoked for a DUI conviction, they are eligible for the appropriate type of administrative reinstatement hearing at this point. However, if the petitioner had previously been revoked for another DUI conviction, they are ineligible for a hearing until the revocation has been in effect for at least one year.<sup>15</sup>

**C) Informal vs. Formal Reinstatement Hearings:**

The next step is to determine the type of reinstatement hearing applicable. An informal hearing is available for petitioners who are seeking an RDP and/or full reinstatement and have neither been previously convicted of DUI nor had a statutory summary suspension from a previous DUI.<sup>16</sup> All other petitioners must apply for relief through a formal hearing.<sup>17</sup>

Informal hearings are conducted at many Secretary of State Drivers Service facilities throughout the State. There is no requirement that an informal hearing be requested in writing. A petitioner may retain an attorney to represent them at the hearing.

Of course, we recommend that petitioners retain counsel for an informal hearing and for the advice regarding the client's arduous preparation for the informal hearing. Thus, it is important for a Wisconsin lawyer to work with a qualified Illinois lawyer to coordinate the proceedings.

Informal hearings are normally conducted on a "first come-first served" basis. Petitioners must submit, at a minimum: the original alcohol evaluation and, if necessary an updated evaluation; appropriate documentation verifying completion of the recommended level of counseling; a letter verifying employment schedules and any scope of employment driving that may be required and/or a current school schedule, and, if applicable, appropriate letters documenting abstinence and/or ongoing support group (i.e. AA) involvement.<sup>18</sup> At the hearing, it is the petitioner's burden to establish by clear and convincing evidence that; 1) the alcohol and/or drug problem has been resolved;<sup>19</sup> 2) that the petitioner will be a safe and responsible driver and the issuance

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<sup>14</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.440(a)6. This requirement does not apply if the original evaluation (Uniform Report) was prepared less than six (6) months from the date of the initial reinstatement hearing.

<sup>15</sup> 625 ILCS 5/6-205(i)

<sup>16</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.300

<sup>17</sup> Id.

<sup>18</sup> All such letters must be dated within 30 days of the date of the hearing.

<sup>19</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.440(b).

on an RDP will not endanger the general public;<sup>20</sup> and 3), that an undue hardship is currently being suffered as a result of the inability to legally operate a motor vehicle.<sup>21</sup>

The decision from the informal hearing is usually mailed to the petitioner within 3 to 4 weeks after the hearing. If the petitioner was approved for an RDP, the letter will be accompanied by a set of instructions on additional steps that may be necessary, such as filing insurance proof, taking a driving test, etc. Once the petitioner receives the permit, they must drive on it for at least 9 months without incident before they will be considered eligible for full reinstatement. This requires another informal hearing for which the petitioner will have to obtain an updated evaluation.

If the petitioner was denied at the informal hearing, the letter will explain the reason(s) for the denial, i.e., inconsistencies between the petitioner's testimony and the documents submitted, improper documentation, etc. Once the problem has been corrected, the petitioner may have another informal hearing, provided it has been at least 30 days since the last hearing.<sup>22</sup> The testimony at an informal hearing is not recorded or transcribed in any way. The only "record" is a form filled out by the hearing officer and submitted to a review board along with the documentation submitted by the petitioner. Finally, there are no appeal procedures following an informal hearing.<sup>23</sup> Petitioners who are ineligible for informal hearings must proceed with a formal hearing.

Formal hearings differ from informal hearings in a variety of ways. Initially, formal hearings are only available in Chicago, Joliet, Springfield or Mount Vernon. The petitioner or their attorney makes a request for a formal hearing in writing. The Secretary of State's office then mails a Notice of Hearing to the petitioner (and their attorney if applicable). The Notice sets forth the date, time and place of the hearing and is accompanied by a list of the documentation required to be submitted at the hearing.<sup>24</sup> Once the hearing date has been assigned, it can only be continued for good cause shown.<sup>25</sup>

A formal hearing is conducted by an appointed hearing officer who administers an oath to the petitioner (and any witnesses), takes testimony, issues subpoenas upon request, and rules on objections made during the hearing. An appointee who acts as a prosecutor during the hearing represents the Secretary of State. The petitioner's burden of proof (resolution of alcohol/drug problem, safe driver and undue hardship) is the

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<sup>20</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.430(f).

<sup>21</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.420(c).

<sup>22</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.360(b).

<sup>23</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.360(a).

<sup>24</sup> The documentation requirements are the same as for informal hearings.

<sup>25</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.100(n).

same as described above for informal hearings. Official notice may be taken of the decisions of any prior hearings as well as any documents (i.e., evaluations, treatment documents, Notices of Summary Suspensions) previously submitted.<sup>26</sup> The hearing is recorded either by an electronic recording system or a court reporter. If requested, a transcript (or copy of the cassette tape of the hearing) can later be ordered by the petitioner at their own expense. After the conclusion of the hearing, the hearing officer reviews the entire record, makes findings of fact and conclusions of law, and prepares a recommendation. This is then sent to a review board, which either adopts or rejects the recommendation and a written Order is prepared and mailed to the petitioner and their attorney, usually within 6 to 8 weeks.<sup>27</sup> If the petitioner was approved for an RDP, the Order will be accompanied by a set of instructions on additional steps that may be necessary, such as filing insurance proof, taking a driving test, etc. Once the petitioner receives the permit, they must drive on it for at least 9 months without incident before they will be considered eligible for full reinstatement. This requires another formal hearing for which the petitioner will have to obtain an updated evaluation and any applicable letters regarding abstinence, employment and support group attendance. If the petitioner was denied relief at the formal hearing, the Order will set forth in detail the reason(s) for the denial, i.e., inconsistencies between the petitioner's testimony and the documents submitted, improper documentation, etc. If a petitioner is denied relief, they must wait 4 months before they are eligible for a subsequent hearing. The Order constitutes a final administrative decision, which is subject to review under the Illinois Administrative review Law.<sup>28</sup>

**D) Breath Alcohol Ignition Interlock Devices (BAIID):**

In addition to the foregoing requirements, many petitioners will also be required to have a Breath Alcohol Ignition Interlock Device (BAIID) installed on their car as a further condition of the issuance of an RDP. Simply stated, a BAIID is a breathalyzer wired into the ignition system of an automobile. Before a BAIID-equipped car can be started, the driver must provide a breath sample into the device. If the sample registers above the alcohol setpoint (currently 0.025 breath alcohol concentration<sup>29</sup>), the car is rendered incapable of starting, or "locked out". Petitioners who meet any of the following criteria are designated "BAIID Eligible Petitioners," must have formal hearings and must have a BAIID device installed within 14 days of the issuance of any RDP.

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<sup>26</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.100(e).

<sup>27</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.110.

<sup>28</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.120(b)

<sup>29</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.410.

- 1) Any petitioner who had a DUI arrest on or after January 1<sup>st</sup>, 1982 which resulted in the loss of driving privileges who then received driving relief after a formal or informal hearing and thereafter received another DUI resulting in another loss of driving privileges;
- 2) Any Petitioner who received a Judicial Driving Permit (JDP) and within 3 years after the date the JDP was issued, received another DUI and had to seek driving relief at an administrative hearing;
- 3) Any petitioner classified as Level 3 Dependent with at least 6 but less than 12 months of abstinence from alcohol and/or drugs at the time of the hearing;
- 4) Any petitioner with 3 DUI dispositions<sup>30</sup> if:
  - a) The last DUI arrest occurred within 3 years of the date of the hearing; or
  - b) Any of the DUI dispositions involved a breath or blood concentration of 0.20 or more.
- 5) Any petitioner with 4 or more DUI dispositions.<sup>31</sup>

When the RDP is mailed to a BAIID Eligible Petitioner, it is accompanied by a list of approved installers where the device can be obtained. The petitioner has 14 days to have the device installed and can only operate the vehicle for the purpose of obtaining the BAIID device until it has been installed. Any violation of this requirement will result in the immediate cancellation of the RDP.<sup>32</sup>

### **STATUTORY SUMMARY (IMPLIED CONSENT) SUSPENSIONS**

An Illinois driver arrested in Wisconsin for OWI who subsequently refused to submit to chemical testing will have his or her license suspended by the Illinois Secretary of State upon receipt of a report from the Wisconsin Department of Motor Vehicles.<sup>33</sup>

The Illinois Vehicle Code does not specify the length of the suspension as it is classified as "discretionary".<sup>34</sup> However, the Secretary of State's office typically will issue a 6-month suspension, the same duration applicable to a statutory summary

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<sup>30</sup> DUI disposition for BAIID purposes is defined as any conviction or supervision for DUI, or any conviction of reckless driving reduced from DUI, any statutory summary suspension or implied consent suspension and any conviction for reckless homicide. 92 Ill. Admin. Code Ch. II, Sec. 1001.410

<sup>31</sup> Id.

<sup>32</sup> 92 Ill. Admin. Code Ch. II, Sec. 1001.441(g). The various rules and regulations governing the operation and maintenance of a BAIID device are beyond the scope of this article. However, the complete set of BAIID regulations can be found at 92 Ill. Admin. Code Ch. II, Sec. 1001.441. According to information received from hearing officers and clients, the cost of obtaining a BAIID device is approximately \$1,000.00.

<sup>33</sup> 625 ILCS 5/6-203.1, 5/6-206(a)6.

<sup>34</sup> 625 ILCS 5/6-206.

suspension for a first time offender who refuses chemical testing in Illinois after being arrested for a DUI.

It is important for the Wisconsin lawyer to know that the Illinois authorities will treat a Wisconsin implied consent conviction less seriously than they will treat a first-offense OWI conviction. This means that in a plea-negotiation situation, an Illinois driver is often better off accepting a Wisconsin refusal rather than a Wisconsin OWI.

The Illinois driver can contest the suspension at a formal hearing,<sup>35</sup> and request the issuance of an RDP. Many Illinois drivers will contest the refusal suspension and seek an RDP, simultaneously. If the driver is only seeking an RDP, that can be done at a formal hearing. If the driver is subsequently convicted of the DUI charge, then the length of the implied consent suspension served will automatically be credited against the minimum period of revocation imposed once the Notice of Revocation is issued by the Secretary of State.<sup>36</sup>

### **DISPOSITION STRATEGIES FOR ILLINOIS CLIENTS**

A Wisconsin lawyer should not represent an Illinois driver in an OWI-PAC first offense case unless the lawyer is prepared for not only the different negotiation strategies, but also prepared to fight the case. The consequences of a Wisconsin OWI to an Illinois driver are different and potentially more serious than for a Wisconsin driver; so, the case must often be handled differently. First and foremost, serious consideration must be given to a thorough and zealous defense, including a jury trial. For the Illinois driver who must drive for a living, there may be no other choice. Therefore, counsel must be thoroughly familiar with all of the issues related to the stop, the detention, the arrest, implied consent, field sobriety testing, breath testing, blood testing, etc. If, for example, counsel is not familiar with the process of direct injection gas chromatography, then counsel should decline to accept a blood test case. Additionally, counsel should take care to charge a fee reasonably adequate to cover the arduous and zealous defense that may be required.

Short of an acquittal, extra effort should be taken to explain to the prosecution the inequities faced by an Illinois driver. Some particularly fair-minded prosecutors, given proof of defendant's voluntary alcohol treatment, may see fit to amend the OWI charge to reckless driving.

Wisconsin practitioners should not blithely accept the standard disposition of a guilty plea to the OWI or PAC in return for a dismissal of the refusal allegation. While this may be advantageous for a Wisconsin driver, it is definitively wrong for an Illinois

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<sup>35</sup> 625 ILCS 5/2-118.

<sup>36</sup> 625 ILCS 5/6-203.1(b).

driver. An Illinois driver is better off with a six-month refusal suspension than a potential lifetime revocation for an OWI first offense.

In fact, counsel should consider proposing a disposition involving the legal fiction of an implied consent violation under 343.30 Wis. Stats., even where the client actually consented to the chemical test.

The most controversial strategy used in resolution of OWI cases for an Illinois is the practice of having the client attain a Wisconsin license and then change the Wisconsin pleadings to reflect the Wisconsin license information. There are a number of important warnings regarding this strategy:

1. If the Wisconsin residence is not legitimate, counsel is committing not only an unethical, but also a potentially fraudulent practice with all the unpleasant implications.
2. It often does not work. A retroactive residence and driver's license change provides only bureaucratic, but not legal protection to the Illinois driver. Illinois will, act upon notice of the Wisconsin case. While the residence and license change may shield the client from notice to Illinois, it also may not. Stipulated amendment of the pleadings is generally ineffective to prevent notice to Illinois.
3. The change of residence from Illinois to Wisconsin entails complications often overlooked. For example, the client will have to re-register his vehicles, change his voting venue, gain or lose public assistance or benefits, and there may be serious tax consequences.

### **CONCLUSION**

Illinois drivers have special requirements for the handling of a Wisconsin OWI or PAC case. Only attorneys experienced in contested litigation should involve themselves in these cases, as such litigation is more often required.

Typical Wisconsin plea resolutions may not be appropriate for an Illinois driver.

The "gray" practice of backdating driver license and residency change is not, *per se*, unethical or unlawful. However, this practice is fraught with the risk of impropriety. Further, it is often ineffective.

Put simply, the only sure resolution for an Illinois driver to avoid an Illinois Revocation of one-year-to-life for an OWI conviction is an acquittal, a dismissal, or a reduction of the OWI to a lesser charge. And, the only sure way to avoid an Illinois Summary Suspension of six-months-to-three-years for refusing chemical testing is to win the implied consent hearing. With that in mind, the fee charged by counsel ought to

be adequate to allow counsel to deal with the complications of an OWI case with an Illinois driver.

### **Author Biographies**

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