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Physicians Caring for Texans

Fees for Copies of Medical Records

TMA OFFICE OF THE GENERAL COUNSEL

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Copy Fees Under Texas Medical Board Rules

For many years, the Medical Practice Act allowed physicians to charge a “reasonable fee” for release of medical records. However, that law proved unworkable, as no one could agree what particular amount was reasonable nor was there any standard for determining what was an unreasonable fee. The 1995 Texas Legislature directed the then Texas State Board of Medical Examiners to adopt rules interpreting the “reasonable fee” standard in the law and set the maximum charges for release of medical records. The Texas Medical Board (TMB) has since adopted rules setting the maximum cost of copies.

Copy Fees for Medical Records in a Paper Format

Under these rules, physicians may charge no more than \$25 for the first 20 pages and 50 cents for each page thereafter for medical records provided in a paper format.¹ Thus, a physician may charge a maximum of \$2750 for a 25-page chart. These are maximums, and the rules bear out that the fee actually charged must be both “reasonable” and “cost-based.”² Thus, merely following the guideline may not be sufficient to meet the mandate imposed by the regulation.

Copy Fees for Medical Records in an Electronic Format

For medical records provided in an electronic format, the rules provide that physicians may charge no more than \$25 for 500 pages or fewer and \$50 for more than 500 pages.³ Again, these are maximums, and the rules state the fee charged must be reasonable and cost-based.⁴ As with providing copies of medical records in a paper format, simply charging the maximum fee allowed under the rule may not be sufficient to be in compliance with the rule.

Copy Fees for Medical Records in a Hybrid Format

The rules also address the possibility that medical records would be requested partially in electronic format and partially in paper format (“hybrid”). Copy fees charged for medical records provided in a hybrid format also must be reasonable and cost-based.⁵ A reasonable fee for providing the requested records in a hybrid format may be a combination of the fees allowed for providing records in a paper format and in an electronic format.⁶

What Is a “Reasonable” Fee?

A reasonable copy fee may include only the costs associated with copying and labor (including compiling, extracting, scanning, burning onto media, and distributing media);⁷ the cost of supplies for creating the paper copy or electronic media (if the individual requests portable media);⁸ postage (if the individual has requested the copy or summary be mailed);⁹ and preparing a summary of the records (when appropriate).¹⁰ The fee may not include costs associated with searching for and retrieving the requested information.¹¹

1 22 TAC §165.2(e)(1)(B).

2 22 TAC §165.2(e)(1)(A).

3 22 TAC §165.2(e)(2)(B).

4 22 TAC §165.2(e)(2)(A).

5 22 TAC §165.2(e)(3)(A).

6 22 TAC §165.2(e)(3)(B).

7 22 TAC §165.2(e)(5)(A).

8 22 TAC §165.2(e)(5)(B).

9 22 TAC §165.2(e)(5)(C).

10 22 TAC §165.2(e)(5)(D).

11 22 TAC §165.2(e)(5).

What Other Charges Are Permitted?

The regulations provide for a “reasonable fee” cap for supporting “affidavits for medical records custodian,” which often accompany requests for release of medical records in prelitigation situations. The regulations permit a charge of up to \$15 for completing this document.¹²

Pursuant to board rules, physicians are permitted to charge separately for copies of medical and billing records.¹³

Where the request is for films or other static diagnostic imaging studies, the practice is entitled to no more than \$8 per copy of an imaging study.¹⁴

Who Must Pay the Copy Fee?

Texas law and TMB rules govern what physicians may charge but do not address who must pay. This means these rules appear to govern what physicians may charge anyone (e.g., patient, insurance company, another physician practice, patient’s attorney) in most nonsubpoena situations (exceptions are discussed below).

Withholding Copies of Records for Failure to Pay Copy Fee

Generally, the regulations permit physicians to retain records until payment of a copy fee is received (keep in mind there are exceptions, discussed below). However, to appropriately withhold copies for failure to pay the copy fee, a physician is required to send the requesting party written correspondence of the need for payment within 10 calendar days of receiving the request. Failure to send the letter impairs the practice’s ability to withhold the records. TMB further requires that the “10-day” letter be made part of the patient’s medical and/or billing record.¹⁵ **It is important to note that if the records are requested by a physician licensed in the United States or Canada for the purposes of providing emergency or acute medical care to the patient, the records cannot be withheld.**¹⁶

Although a practice is permitted to withhold copies for lack of payment of the copy fee, TMB has prohibited practices from using requests for copies as a method of collecting on overdue accounts. Therefore, where a patient has a past due account for treatment previously rendered to the patient and that patient pays for the copies, the records must be provided to the patient.¹⁷ TMB does enforce this particular provision. Consider the following summary (with the physician’s name omitted), which appeared in a TMB newsletter.

P, M.D., Texas

On August 26, 2005, the Board and Dr. P entered into an Agreed Order assessing an administrative penalty of \$500. The action was based on allegations that Dr. P failed to timely provide to **one patient** properly requested medical records while under the misunderstanding that records can be withheld because of an outstanding bill.¹⁸

It is possible that, in addition to the TMB penalty, the physician paid defense costs associated with hiring legal counsel. Also, the physician must now report on credentialing forms that he has been the subject of a complaint and penalty by the Texas Medical Board.

The law permits a patient to name a recipient of the copies other than himself or herself.¹⁹ No exception in the law would permit a physician to refuse disclosure based solely on the objection of who is the named recipient (even if that recipient is an attorney).

¹² 22 TAC §165.2(e)(4)(A).

¹³ 22 TAC §165.2(e)(4)(B).

¹⁴ 22 TAC §165.3(e).

¹⁵ 22 TAC §165.2(g).

¹⁶ 22 TAC §165.2(f).

¹⁷ 22 TAC §165.2(h).

¹⁸ *Texas Medical Board Bulletin*, Vol. 3, No. 1 (Fall 2005) (emphasis added).

¹⁹ Tex. Occ. Code §159.005(b)(3).

When a Practice Cannot Charge for Copies: Exceptions to the Regulations

A physician is entitled to receive copy fees for records before releasing the records, except where the records are requested:

1. By a licensed Texas health care provider or any American or Canadian licensed physician for emergency or acute medical care;²⁰ or
2. To support an application (or an appeal) for disability or other benefits or assistance under:
 - a. Aid to Families with Dependent Children;
 - b. Medicaid;
 - c. Medicare;
 - d. Supplemental Security Income;
 - e. Federal Old-Age and Survivors Insurance; and
 - f. Veterans' benefits.²¹

Where the requestor attempts to avoid fees under No. 2, above, the law states:

A person ... that requests a record under this section **shall include with the request a statement or document from the department or agency** that administers the issuance of the assistance or benefits that confirms the application or appeal.²²

The fee is waived only when the patient or his or her attorney requests the records and includes a statement or document from the agency; it does not apply when a state or federal agency requests the records.

A physician may charge a fee for the medical or mental health record of a patient requested by a state or federal agency in relation to the patient's application for benefits or assistance under No. 2 above or an appeal relating to denial of those benefits or assistance.²³

A physician is not required to provide more than one complete record requested for veterans' benefits without charge. If additional material is added to the patient or former patient's record, on request of the patient, the physician shall supplement the record provided for veterans' benefits without charge. The law does not appear to permit charging for copies of supplemental records to support applications under the other mentioned programs.²⁴

How Do HIPAA Privacy Regulations Affect the Amount the Practice Can Charge?

State regulations also contain provisions relating to HIPAA privacy standards. Physicians who must comply with HIPAA (and not all physicians must do so, as there are exceptions) must adhere to the federal requirement. Under federal regulations, the fee must be cost-based and include only the cost of supplies and labor of copying along with any postage necessary to mail the records. The federal regulations – just as in the state regulations – prohibit physicians from charging fees for retrieving the records, handling the records, or processing the request for access.²⁵ The federal government does not impose a different standard in fees for copies. When adopting the HIPAA regulations, the federal government stated, "Fees for copying and postage provided under state law, but not for other costs excluded under this rule, **are presumed reasonable.**"²⁶ The TMB medical record copy fee rules are adopted by command of state law.²⁷

The HIPAA privacy regulations do not, by their own terms, expressly permit withholding of records for failure to pay the copy fee. However, the regulation and the government comments implicitly permit this practice. Consider the following government discussion:

²⁰ 22 TAC §165.2(f).

²¹ Texas Health and Safety Code §161.202(a).

²² Texas Health and Safety Code §161.202(c) (emphasis added).

²³ Texas Health and Safety Code §161.202(b).

²⁴ Texas Health and Safety Code §161.202(d).

²⁵ 45 CFR §164.524(c)(4).

²⁶ 65 *Fed. Reg.* 82,557 (emphasis added).

²⁷ Tex. Occ. Code §159.008.

The inclusion of a fee for copying is not intended to impede the ability of individuals to copy their records. Rather, it is intended to reduce the burden on covered entities. **If the cost is excessively high, some individuals will not be able to obtain a copy.** We encourage covered entities to limit the fee for copying so that it is within reach of all individuals.²⁸

One would not expect that the agency adopting the regulations would be concerned about high fees preventing access to records unless covered entities are permitted to withhold for failure to pay.

Is \$6.50 the Maximum Fee HIPAA Allows for a Copy of Electronic Medical Records?

No. In early 2016, the U.S. Department of Health and Human Services (HHS) Office of Civil Rights (OCR) published a fact sheet on individuals' right under HIPAA to access protected health information (PHI). There was confusion over some text within the fact sheet, which stated a flat fee not to exceed \$6.50 is a permissible option for covered entities when charging individuals requesting electronic copies of medical records. Some interpreted this to mean that \$6.50 was the maximum amount that could be charged for providing copies of electronic medical records. In response, OCR issued a clarification that "\$6.50 is **not** the maximum amount that can be charged for all individual requests for a copy of PHI under the right of access. Rather, charging a flat fee not to exceed \$6.50 is an **option** available to those entities that do not want to go through the process of calculating the actual or average costs for requests for electronic copies of PHI maintained electronically as permitted by the Privacy Rule."²⁹

While OCR permits the option of a \$6.50 flat fee for electronic medical records for physicians who do not want to calculate actual or average costs, TMB rules still require copy fees to be "cost-based."³⁰

Copy Fees Under the Information Blocking Provision of the 21st Century Cures Act

The 21st Century Cures Act prohibits information blocking of electronic health information (EHI).³¹ For a physician, information blocking means a practice that is likely to interfere with the access, exchange, or use of EHI where the physician knows such practice is unreasonable and is likely to interfere with the access, exchange, or use of EHI.³² It does not include a practice required by law or covered by an exception under the Cures Act.³³

To avoid implicating the information blocking provision when charging a fee to access, exchange, or use EHI, a physician would generally need to satisfy the conditions of the fees exception under the Cures Act.³⁴ However, if the physician fulfills the request for EHI in the manner requested, any fees charged do not have to satisfy this exception.³⁵

To rely on the fees exception,³⁶ the following conditions must be satisfied:

1. Basis for fees condition.
 - a. The fees the physician charges must be:
 - i. Based on objective and verifiable criteria that are uniformly applied for all similarly situated classes of persons or entities and requests;
 - ii. Reasonably related to the physician's costs of providing the type of access, exchange, or use of EHI to, or at the request of, the person or entity to whom the fee is charged (e.g., for copy fees, the lesser of the amount permitted by state law or HIPAA);

²⁸ 65 *Fed. Reg.* 82,557 (emphasis added).

²⁹ U.S. Department of Health and Human Services (emphasis in original). [Clarification of Permissible Fees for HIPAA Right of Access – Flat Rate Option of Up to \\$6.50 is Not a Cap on All Fees for Copies of PHI](#). May 23, 2016.

³⁰ 22 TAC §§165.2(e)(1)(A), (e)(2)(A), and (e)(3)(A).

³¹ 42 USC §300jj-52(b)(2)(B) (penalty referrals for health care providers who commit information blocking).

³² 45 CFR §171.103.

³³ *Id.*

³⁴ 85 *Fed. Reg.* 25,879: "[W]e interpret the broad definition of information blocking ... to encompass *any* fee that is likely to interfere with the access, exchange, or use of EHI (84 FR 7521). Fees that do not meet this exception may implicate the information blocking provision and will have to be assessed on a case-by-case basis to determine, for example, the actor's intent and whether the practice rises to the level of an interference." (Emphasis in original.)

³⁵ 45 CFR §171.301(b)(1)(ii)(A).

³⁶ 45 CFR §171.302(a)-(b).

- iii. Reasonably allocated among all similarly situated persons or entities to whom the technology or service is supplied, or for whom the technology is supported; and
 - iv. Based on costs not otherwise recovered for the same instance of service to a provider and third party.
- b. The fees the physician charges must not be based on:
- i. Whether the requestor or other person is a competitor or potential competitor, or will be using the EHI in a way that facilitates competition with the physician;
 - ii. Sales, profit, revenue, or other value the requestor or other persons derive or may derive from the access, exchange, or use of the EHI;
 - iii. Costs the physician incurred due to the health IT being designed or implemented in a nonstandard way, unless the requestor agreed to the fee associated with the nonstandard design or implementation to access, exchange, or use the EHI;
 - iv. Costs associated with intangible assets other than the actual development or acquisition costs of such assets;
 - v. Opportunity costs unrelated to the access, exchange, or use of EHI; or
 - vi. Any costs that led to the creation of intellectual property, if the physician charged a royalty for that intellectual property pursuant to the licensing exception and that royalty included the development costs for the creation of the intellectual property.
2. Excluded fees condition. The fees exception does not apply to:
- a. A copy fee prohibited by HIPAA;
 - b. A fee based in any part on the electronic access (defined below) of a patient's EHI by the patient or the patient's representative or designee;
 - c. A fee to perform an export of EHI via the capability of health IT certified to the 2015 Edition health IT certification criteria for the purposes of switching health IT or to provide patients their EHI; and
 - d. A fee to export or convert data from an EHR technology that was not agreed to in writing at the time the technology was acquired.

“Electronic access” means an internet-based method that makes EHI available at the time the EHI is requested and where no manual effort is required to fulfill the request.³⁷

Notably, a fee to access EHI through some form of physical media, such as paper copies (where the EHI is printed out), or where EHI is copied onto a CD or flash drive, does not implicate the information blocking provision – and therefore not need to satisfy the fees exception – provided the fee complies with HIPAA.³⁸

Copy Fees for Specific Records

Copy Fees for Hospitals

Hospitals may charge for copies; however, the hospital fee schedule for copies is governed by a different law. Texas Health and Safety Code §241.151 et seq. creates special medical records release provisions for licensed hospitals – and only licensed hospitals. They do not apply to physician offices. The fee is to be adjusted accordingly based on certain changes to the consumer price index, effective Sept. 1, 1996, and annually thereafter.

The fee schedule **FOR HOSPITALS ONLY** as of Sept. 1, 2021, is as follows:³⁹

1. A basic retrieval or processing fee, which must include the fee for providing the first 10 pages of copies and which may not exceed \$52.12; and

³⁷ 45 CFR §171.302(d). Fees based on electronic access are distinguished from the cost-based fees that a physician may charge for copies of electronic protected health information under HIPAA and state law, which would *not* be excluded under the fees exception. 85 *Fed. Reg.* 25,886.

³⁸ 85 *Fed. Reg.* 25,886.

³⁹ [Texas Health and Human Services. Maximum Fees Allowed for Providing Health Care Information Effective September 1, 2021.](#)

- a. A charge for each page of:
 - i. \$1.76 for the 11th through the 60th page of provided copies;
 - ii. 86 cents for the 61st through the 400th page of provided copies;
 - iii. 47 cents for any remaining pages of the provided copies; and
 - b. The actual cost of mailing, shipping, or otherwise delivering the provided copies;
2. If the requested records are stored on microform, a retrieval or processing fee, which must include the fee for providing the first 10 pages of the copies and which may not exceed \$79.39; and
- a. \$1.81 per page thereafter; and
 - b. The actual cost of mailing, shipping, or otherwise delivering the provided copies; or
3. If the requested records are provided on a digital or other electronic medium and the requesting party requests delivery in a digital or electronic medium, including electronic mail:
- a. A retrieval or processing fee, which may not exceed \$94.42; and
 - b. The actual cost of mailing, shipping, or otherwise delivering the provided copies.

In addition, Texas Health and Safety Code §241.154 prohibits a hospital from charging a fee for providing health care information where the fee is prohibited under Texas Health and Safety Code §161.202 (regarding support for applications for disability).

Copy Fees for Mental Health Records

Under the Texas Mental Health Code, if the patient requests a summary or narrative of “mental health records,” the mental health “professional” (which includes physicians) must respond or give the patient a written reason for a refusal to disclose.⁴⁰ A professional or other entity who has possession or control of a mental health record shall grant access to any portion of the record to which access is not specifically denied, within a reasonable time and may charge a reasonable fee.⁴¹

It is unclear whether the TMB rules regarding fees for medical records generally apply to fees for copies of mental health records, specifically. The regulations do not mention this portion of the health and safety code. Nonetheless, it may be prudent for physicians who are mental health “professionals” to follow the TMB rules in this area.

Copy Fees for Workers’ Compensation

Physicians who examine or treat workers’ compensation patients must send copies of certain medical and narrative reports to the Texas Department of Insurance (TDI) Division of Workers’ Compensation (DWC), the workers’ compensation carrier, the injured worker, and the worker’s representative.⁴² No written consent to release medical records is required in this situation, and the HIPAA privacy regulation contains an exception for workers’ compensation.⁴³

A physician must provide the injured worker and/or the worker’s representative with an initial copy of the medical documentation without charge.⁴⁴ Additionally, a workers’ compensation carrier is not required to pay a physician for initial medical documentation provided by a physician to support payment of a medical bill submitted by the physician.⁴⁵ However, in both instances, the requestor shall pay the physician for any subsequent requests of the same medical documentation.⁴⁶ If the injured worker and/or the worker’s representative requests creation of medical

⁴⁰ Texas Health and Safety Code §§611.001 and 611.0045.

⁴¹ Texas Health and Safety Code §611.0045 (emphasis added).

⁴² 28 TAC §§127.10(e)-(f) and 130.1(d).

⁴³ 45 CFR §164.512(l).

⁴⁴ 28 TAC §134.120(c).

⁴⁵ 28 TAC §134.120(a).

⁴⁶ 28 TAC §134.120(b)-(c).

documentation, such as a medical narrative, the requestor shall pay the physician for this additional information.⁴⁷
A physician may not charge TWI DWC for any documents it requests or requires.⁴⁸

Where payment is permitted, a physician may charge for reports and copies of records of workers' compensation patients only according to a fee schedule adopted by TDI DWC⁴⁹:

Copies of medical documentation	50 cents per page
Copies of hospital records	Initial fee of \$5 plus 50 cents per page for the first 20 pages, then 30 cents per page for records over 20 pages
Microfilm	50 cents per page
Copies of x-rays	\$8 per film
Narrative reports	\$100 for one to two pages, then \$40 per page after two pages

Copy Fees and Subpoenas

When You Receive a Subpoena Duces Tecum for Medical Records, Are You Entitled to Be Paid for Your Trouble?

While it is customary to pay professionals for their time in responding to a subpoena (primarily out of a desire to avoid an uncooperative witness who feels he or she has been “stiffed” out of the copying fee), the Texas Rules of Civil Procedure do not absolutely require parties to lawsuits to pay the persons upon whom they serve subpoenas for either the documents requested or the time necessary to attend a deposition or court hearing (unless the person subpoenaed is called to testify as an expert witness). This is often an unpleasant surprise to many people; however, it is consistent with established legal precedent. The U.S. Supreme Court put it this way: “There is a public obligation to provide evidence, and this obligation persists no matter how financially burdensome it may be.” *Hurtado v. U.S.*, 410 U.S. 578 (1973).

The Texas Rules of Civil Procedure generally state that “a person served with a subpoena must comply with the command stated therein unless discharged by a court or by the party summoning such witness.”⁵⁰ Note that the language of the rule does not allow someone to refuse to produce any object or writing unless he or she is first paid a set fee for the records sought. In other words, a party receiving a subpoena duces tecum may send a bill for his or her overhead costs, or handling or preparation fees, but there is no absolute requirement that the attorney issuing the subpoena has to pay that bill.

However, if the opposing party files a motion to quash or modify a subpoena, the court must provide a person served with a subpoena “protection from undue burden or expense.”⁵¹

The attitude of attorneys varies greatly in this area: Some are willing to pay any reasonable amount while others “play hard ball” and refuse to pay any amount on grounds that the rules of procedure do not mandate that they do so. As Texas Rules of Civil Procedure Rule 176 refers to undue expense and TMB has set “reasonable fees,” a court might recognize what the TMB rules allow as the maximum reasonable cost in subpoena situations where a motion to quash has been filed, but there is no assurance this would be the case.

This insight is bolstered by another action taken by the 1995 Texas Legislature: The enactment of section 22.004 of the Texas Civil Practice and Remedies Code, which limits compensation paid to a custodian of records (any records) who produces records under compulsion of a tribunal (that likely means a subpoena) to **one dollar** (\$1).⁵² This is because of the “rule of statutory construction” that states that when two laws purport to govern a subject, the specific law is given preference over the general law. In this case, the bill enacting the section of the Civil Practice and Remedies Code is specific, as it governs production of documents under subpoena – and the Medical Practice Act does not mention

⁴⁷ 28 TAC §134.120(d).

⁴⁸ 28 TAC §134.120(e) (emphasis added).

⁴⁹ 28 TAC §134.120(f).

⁵⁰ Texas Rules of Civil Procedure 176.6(a).

⁵¹ Texas Rules of Civil Procedure 176.7.

⁵² See Texas Civil Practice & Remedies Code §22.004(a).

subpoenas. In addition, no professional licensing board is empowered to make rules governing civil procedure or evidence in lawsuits. That is a task left to the judicial branch of government, not the executive branch.

TMA has a separate white paper on "[Subpoenas for Medical Records](#)."⁵³

Copy Fees and Utilization Review Agents

Utilization review agents shall pay health care professionals for the reasonable costs of providing medical information in writing, including copying and transmitting any requested patient records or other documents, unless precluded or modified by contract.⁵⁴ The charges shall not exceed the cost of copying for workers' compensation records.⁵⁵

A contract provision that arguably could modify the right to be paid under this chapter of the insurance code may read as follows:

The medical records maintained by Physician shall remain the property of the Physician and shall not be transferred or removed from Physician. Physician shall permit MCO with access to medical records for three years following termination of the agreement. Physician agrees to provide any copies of medical records as may be requested by enrollees or MCO.

The health plan would argue that agreement to provide records as requested means to provide those records without charge.

Exceptions

These utilization review provisions do not apply to certain defined types of reviews, including: (1) Medicare,⁵⁶ (2) Medicaid,⁵⁷ (3) claims under an automobile insurance policy,⁵⁸ and (4) benefits of employee welfare benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA).⁵⁹

Copying Fees in Other Situations

Several governmental entities have rights to audit records of various sorts in a physician's office. Most of these agencies require that physicians make them copies at no charge when they are conducting an investigation. The Texas Medicaid and Healthcare Partnership (TMHP) September 2021 Texas Medicaid Provider Procedures Manual provision is fairly representative: "The provider is required to submit original documents, records, and accompanying business records affidavits to representatives of the organizations listed in this section. ... Requested records must be provided promptly and at no cost to the state or federal agency" (in this case, the Texas Health and Human Services Commission or its Office of Inspector General, the Texas Department of State Health Services, TMHP, the Attorney General's Medicaid Fraud Control Unit or Antitrust and Civil Medicaid Fraud Section, the Texas Department of Family and Protective Services, the Texas Workforce Commission, or the U.S. Department of Health and Human Services).

If you are subject to a governmental audit, be very clear what your rights and responsibilities are. Also, the Texas Medical Board may request medical records without charge pursuant to an investigation.

Conclusion

Physicians are often permitted to charge for copies of medical records. Practices should not confuse the rules that affect physicians with the fee schedule that affects hospitals. However, the general rule has a number of exceptions, and policies should be put into place within the practice to prevent improper charges.

⁵³ TMA log-in required; available at: www.texmed.org/Template.aspx?id=2101.

⁵⁴ Texas Insurance Code §4201.207(a).

⁵⁵ Texas Insurance Code §4201.207(b)(1).

⁵⁶ Texas Insurance Code §4201.052.

⁵⁷ Texas Insurance Code §4201.053(a)(1).

⁵⁸ Texas Insurance Code §4201.055.

⁵⁹ Texas Insurance Code §4201.056.

NOTICE: Please check the Texas Medical Board website at www.tmb.state.tx.us for current updates on its rules and policies with respect to this issue.

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