

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE,
AT NASHVILLE

TERRY R. CLAYTON,

Petitioner,

vs.

BOARD OF PROFESSIONAL
RESPONSIBILITY OF THE
TENNESSEE SUPREME COURT,

Respondent.

No. 09-1801-II

FILED
2010 JUL 23 PM 1:29
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JUDGMENT

This case is before the court on a Petition for Certiorari filed by the petitioner, Terry R. Clayton. The petition seeks a reversal of the judgment of the hearing panel filed July 21, 2009, in a lawyer disciplinary proceeding against Mr. Clayton. After careful review of the record in this case, for the reasons set for in a Memorandum filed simultaneously with this Judgment which is incorporated herein by reference, the court of the opinion the petition to reverse the findings and conclusions of the hearing panel should be denied and the judgment of the hearing panel should be affirmed in all respects.

It is, therefore, ORDERED, ADJUDGED AND DECREED that the petition seeking reversal of the findings and conclusions of the hearing panel filed July 21, 2009, is denied and that the judgment of the hearing panel be affirmed in all respects. The costs of this cause shall be assessed against the petitioner, Terry R. Clayton, and his surety, for which execution may issue, if necessary.

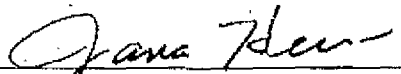
This 22nd day of July 2010.

Donald P. Harris

Donald P. Harris, Senior Judge
sitting by designation of the
Tennessee Supreme Court

CERTIFICATE

The undersigned hereby certifies that a copy of the forgoing Final Decree has been forwarded to Randall J. Spivey, 1101 Kermit Drive, Nashville, TN 37217; and to Terry R. Clayton, 1402 5th Avenue, North, Nashville, TN 37217, this the 23 day of July, 2010.


Clerk and Master

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE,
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TERRY R. CLAYTON,

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BOARD OF PROFESSIONAL
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TENNESSEE SUPREME COURT,

Respondent.

No. 09-1801-II

MEMORANDUM

This case is before the court on a Petition for Certiorari filed by the petitioner, Terry R. Clayton.¹ The petition seeks a review of the Judgment of the Hearing Panel filed July 21, 2009, in a lawyer disciplinary proceeding against Mr. Clayton.

The hearing panel found violations of certain Rules of Professional Conduct. The panel also found various aggravating factors. As a result, the hearing panel entered its judgment recommending Mr. Clayton be suspended from the practice of law in Tennessee for a period of seven months. The panel further recommended he serve one month of that period on active suspension with the remaining six months to be served on probation conditioned on his attending additional continuing legal education and retaining a law office monitor to insure he was meeting his professional obligations to his clients.

Standard of Review

In reviewing the findings and conclusions of the hearing panel in a disciplinary proceeding, the court must be guided by Rule 9, section 1.3, of the Rules of the Supreme Court which provides in pertinent part as follows:

¹Because Mr. Clayton is the petitioner in the proceeding before the court and was the respondent in the proceeding before the hearing panel, he will be referred to in this memorandum as "Mr. Clayton." The Board of Professional Responsibility will be referred to as the "Board."

The Respondent-attorney (hereinafter "Respondent") or the Board may have a review of the judgment of a hearing panel in the manner provided by [Tennessee Code Annotated section] 27-9-101 et seq., except as otherwise provided herein. The review shall be on the transcript of the evidence before the hearing panel and its findings and judgment. If allegations of irregularities in the procedure before the panel are made, the trial court is authorized to take such additional proof as may be necessary to resolve such allegations. The court may affirm the decision of the panel or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the panel's findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the panel's jurisdiction; (3) made upon unlawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact.

Tenn. Sup. Ct. R. 9, §1.3 (2007).

With that standard in mind, the court has carefully reviewed the entire record. The court's findings with regard to the allegations made by Mr. Clayton in his Petition for Certiorari are set forth below.

Findings

On August 1, 2008, the Board filed a Petition for Discipline pursuant to Rule 9 of the Rules of the Supreme Court. This petition was based upon two complaints that had been filed with the Board, one related to Ms. Miriam Dirie and the other to Ms. Nekia Smith. With respect to the Dirie complaint, the petition alleged violations of the Rules of Professional Conduct 1.1, requiring lawyers to provide competent representation; 1.3, requiring reasonable diligence and promptness in representing clients; 1.5, relating to fees, 5.1, relating to the responsibilities of an attorney sharing fees with another; 8.4(a), prohibiting the violation of the Rules of Professional Conduct; and 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice. As a result of the Smith complaint, Mr. Clayton was charged with violations of the Rules of

Professional Conduct 1.1; 1.3; 1.4, requiring that an attorney to keep clients reasonably informed; 8.4(a); and 8.4(d).

An evidentiary hearing was conducted by the a hearing panel on May 19, 2009. The evidence presented during that hearing was well summarized in the findings of fact included in the judgment of the hearing panel as follows:

6. In August of 2006, [Mr. Clayton] was contacted by a member of a local and purportedly informal Somalian group of citizens in the community, through Ms. Manamina Sufi, a former client of [Mr. Clayton], who apparently was an informal leader or respected person within the local Somalian community, with a request for representation of Miriam Dirie in a criminal case.

7. [Mr. Clayton] informed Ms. Dirie and the member of the Somalian community that there was an attorney working from and in his office that could handle the criminal matter.

8. Ms. Audrey Armstead, an employee of [Mr. Clayton], testified that she scheduled the appointment about the criminal matter with O'DeNeal on August 23, 2006. On that date, O'DeNeal met with Ms. Sufi and others to discuss the terms and conditions of his representation. [Mr. Clayton] was not present for any of the consultation. O'DeNeal's involvement is further discussed below.

10.(sic) Ms. Dirie's file and matter was at all times directed to O'DeNeal, the attorney with whom [Mr. Clayton] shared space in [Mr. Clayton's] office.

11. Ms. Dirie completed an "intake" form which appeared on the letterhead of [Mr. Clayton].

9.(sic) [Mr. Clayton's] office was paid \$5,000 for this representation.

12. [Mr. Clayton] retained the \$5,000 payment.

13. O'DeNeal was not an employee of [Mr. Clayton's] law firm, but rather, an "associate" or "independent contractor." The arrangement between them was memorialized in a later "Attorney Associate Agreement"

executed by [Mr. Clayton] and O'DeNeal.

14. [Mr. Clayton] testified: that he allowed O'DeNeal, a personal acquaintance, to practice law out of his office; that O'DeNeal told [Mr. Clayton] that he had been practicing criminal law in another part of the state; and that [Mr. Clayton] told O'DeNeal that he did not practice criminal law and that he typically referred criminal cases to other lawyers. In an effort to assist O'DeNeal to build a clientele, [Mr. Clayton] agreed to refer all of "his" criminal cases to O'DeNeal once he started to practice law in Davidson County. To do so, [Mr. Clayton], without then entering into a written agreement, told O'DeNeal that a good time for him to start "renting space" from him in his office would be the first of August, 2006, as he would then be out of town attending the National Bar Association Convention.

15. O'DeNeal continued to represent clients from [Mr. Clayton]'s office in Davidson County and also in West Tennessee. While working from [Mr. Clayton]'s office, and using his office space, he did not make any other payments to [Mr. Clayton] except as related to the \$5,000 payment mentioned above.

16. On November 30, 2006, [Mr. Clayton] and O'DeNeal entered into a written agreement setting forth terms and conditions of their association. This document is the "Attorney Associate Agreement" that ostensibly formalized the agreement already in place between [Mr. Clayton] and O'DeNeal.

17. The Agreement provided that [Mr. Clayton] would receive all fees generated by O'DeNeal, and return to him a set percentage or dollar amount of those fees dependent upon the type of matter. It does not refer to "rent" or "overhead."

18. Their agreement provides "clients that associate represents by virtue of Firm referral are considered clients of the Firm and not clients of any particular member of the Firm." The agreement also provided for [Mr. Clayton] and O'DeNeal to have periodic meetings to determine if O'DeNeal would be brought into [Mr. Clayton's] law firm on a more permanent basis.

19. [Mr. Clayton] did not have any further direct communications

with O'DeNeal, Ms. Dirie, or anyone else in the Somali community regarding representation of Ms. Dirie other than at the outset. Neither Ms. Dirie nor Ms. Sufi informed [Mr. Clayton] that there was a problem with O'DeNeal's representation of Ms. Dirie. [Mr. Clayton] was not directly informed that O'DeNeal had apparently abandoned Ms. Dirie as a client.

20. Neither [Mr. Clayton] nor O'DeNeal responded to pretrial motions in the Dirie matter, and failed to attend the trial set for January 22, 2007.

21. The trial was reset for July 23, 2007 and a pre-trial hearing was scheduled for July 19, 2007. Neither [Mr. Clayton] nor O'DeNeal appeared at the pre-trial hearing and the trial. The trial was continued and new counsel was appointed to represent Ms. Dirie.

24. (sic) [Mr. Clayton] refunded the \$5,000 fee after this disciplinary petition was filed.

25. [Mr. Clayton] took no action to ensure that Ms. Dirie was receiving competent and diligent representation after directing the representation to O'DeNeal.

26. Even when [Mr. Clayton] became aware that O'DeNeal had apparently abandoned the representation of Ms. Dirie, he took no effective action to ensure — or even seek or suggest — that she receive competent and diligent representation.

27. [Mr. Clayton] and his office staff were aware of unacceptable and inexcusable office habits of O'DeNeal during this period of time relevant to Ms. Dirie's representation. He was in a position easily to end the Attorney Associate Agreement and any other association well before he did so.

28. O'DeNeal was suspended from the practice of law for one (1) year for his failure to represent Ms. Dirie competently and diligently.

29. [Mr. Clayton] was aware of other clients who complained about O'DeNeal's services during the period of time that he was associated with [Mr. Clayton].

30. [Mr. Clayton's] Agreement with O'DeNeal provided that [Mr. Clayton] would receive the fees generated by O'DeNeal, and return to him a percentage or set amount of those fees. Regardless of how it is subsequently described by [Mr. Clayton] — rent, office expense or whatever, the result and calculation of their financial arrangement remains clear.

31. On or about September 7, 2007, a complaint was entered as to [Mr. Clayton] by Nekia Smith and designated as File No.: 30567-5-SG.

32. Ms. Smith, a paralegal, was a former client of [Mr. Clayton] whom sought his services for a bankruptcy petition. Ms. Smith testified that she had previously utilized [Mr. Clayton] to file a Chapter 13 bankruptcy in 2000, and then had converted her case to Chapter 7 or complete liquidation in 2002.

32. (sic) On or about May 17, 2007, Ms. Smith called [Mr. Clayton's] office requesting assistance with filing the bankruptcy petition. [Mr. Clayton's] office staff apparently determined that it should be filed as a Chapter 13 pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) Regulating Debt Relief Agencies, 11 U.S.C.A. §101, esq.

33. After an initial meeting in his office, Ms. Smith believed [Mr. Clayton] to be her attorney. While the level of [Mr. Clayton's] direct actions is not clear, his office staff very clearly was assisting her in pursuit of her legal matter.

34. At this initial meeting, Ms. Smith expressed her concern that her home was at risk of foreclosure as Ms. Smith was significantly behind on her mortgage payments.

36. (sic) [Mr. Clayton's] staff pursuant to what was described at the Hearing as standard operations procedures instructed Ms. Smith to come to the law office to pick up a blank 17 page bankruptcy questionnaire that contained a cover sheet instructing her to bring all of the documents purportedly needed or relevant to the proceeding for which she was being represented. The cover sheet sought from Ms. Smith proof of income for the last 6 months; tax returns for the last three years; mortgage closing documents, copy of all bills; and credit report and proof of having attended

consumer counseling class.

37. Ms. Smith dropped off at [Mr. Clayton's] office what was described by [Mr. Clayton] as her partially completed bankruptcy questionnaire on or about May 25, 2007, without making an appointment.

38. Ms. Smith had faxed to [Mr. Clayton] a letter on May 22, 2007, from her employer stating her income for February 2007 and a letter setting forth allegedly what her income was for six (6) months. [Mr. Clayton's] paralegal testified that he called Ms. Smith and told her that these documents did not qualify as "pay advices" and could not be used as verification of her income. On June 4, 2007, Ms. Smith faxed a February "pay advice" and a Notice of Foreclosure dated January 29, 2007, that reflected the description of the property and an early but obviously then inaccurate home foreclosure date of February 28, 2007. [Mr. Clayton's] paralegal testified that he repeatedly called Ms. Smith requesting her to bring in additional pay advices and tax returns, as they were required by the BAPCPA.

39. Ms. Smith testified she provided [Mr. Clayton] with all of the relevant information she had in her possession. Ms. Smith testified she believed she had provided [Mr. Clayton] with all documents necessary to file a petition for bankruptcy.

40. [Mr. Clayton's] office personnel informed Ms. Smith that they would file the bankruptcy petition.

41. Between May 17, 2007 and July 24, 2007, Ms. Smith testified [Mr. Clayton] would not return her several telephone calls and that he did not otherwise speak to Ms. Smith.

42. Ms. Smith did, however, communicate several times with [Mr. Clayton's] office, providing it again with copies of documentation she had already provided, and providing it with additional correspondence from debt collectors.

43. Ms. Smith testified she continued to express to [Mr. Clayton's] staff concerns about her home being foreclosed, and again received assurances from [Mr. Clayton's] staff that he would file the bankruptcy petition.

44. On July 24, 2007, [Mr. Clayton's] paralegal called Ms. Smith to let her know that her bankruptcy petition "was complete" and that she could come in to sign it so it could be filed. Ms. Smith had not provided any additional information after June 4, 2007, 44 days earlier.

45. [Mr. Clayton] was running for Metro Council during this period of time and while still regularly involved in it did not have full attention to his law practice.

46. Ms. Smith's home was foreclosed upon on July 18, 2007. [Mr. Clayton] failed to file the bankruptcy petition prior to the foreclosure of Ms. Smith's home.

Based upon these facts, the hearing panel found that, with respect to Ms. Dirie, Mr. Clayton violated Rule 1.1 of the Rules of Professional Conduct that requires an attorney to provide competent representation and Rule 1.3 that requires a lawyer to "act with reasonable promptness when representing a client." The panel also found Mr. Clayton in violation of Rule 1.5 which prohibits the division of fees between lawyers who are not members of the same firm unless "the division is in proportion to the services performed by each lawyer or, by written consent of the client, each lawyer assumes joint responsibility for the representation; . . ." Mr. Clayton was found to be in violation of Rule 5.1 that makes a lawyer responsible for another lawyer's violation of the Rules of Professional Conduct if that lawyer "is sharing fees from the matter with the other lawyer" and "knows of the conduct at the time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action." Finally, Mr. Clayton was found to be in violation of Rule 8.4(a) that provides it is professional misconduct to violate the Rules of Professional Conduct and Rule 8.4(d) that provides it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

Regarding Ms. Smith's case, the panel found Mr. Clayton to have violated Rule 1.1, 1.3, 1.4 that requires an attorney to "keep a client reasonably informed about the status of a matter and comply with reasonable requests for information within a reasonable time." The panel also found violations of Rule 8.4(a) and Rule 8.4(d).

Mr. Clayton takes the position that he could not have violated the Rules of Professional conduct with regard to Ms. Dirie because there was no attorney-client relationship between he and Ms. Dirie. His argument is that the contractual arrangement was between Ms. Dirie and Mr. O'DeNeal and he assumed no obligation under that circumstance. The problem with Mr. Clayton's argument is that the check for the fee was made payable to him and he retained it in its entirety. Mr. Clayton asserts he was to retain

half the fees of cases referred to Mr. O'DeNeal to cover rent and overhead. He testified Mr. O'DeNeal allowed him to keep the entire fee because he needed the \$5,000 to pay a client as damages for his missing a statute of limitations. Mr. Clayton's assertion is, in the opinion of the court, an admission that he violated Rule 1.5 of the Rules of Professional Conduct by dividing a fee for which he was to perform no "services" or assume any responsibility for the representation. The court agrees with the hearing panel that characterizing the division of fees as overhead or rent does not change the fact that it was formula based fee splitting and does not remove it from the requirements of Rule 1.5.

Rule 5.1 of the Rules of Professional Responsibility imposes upon lawyers who share fees responsibility for the misconduct of the other lawyer if they become aware of the misconduct at a time when its consequences can be avoided or mitigated and the lawyer fails to take reasonable remedial action. Mr. Clayton first learned of Mr. O'DeNeal's having abandoned the case in June 2007 when his office was called requesting Ms. Dirie's file and informing him the case was set for trial and that Mr. O'DeNeal had missed some motion hearings. Mr. Clayton testified that he did not handle criminal matters but acknowledged that he could have gone before the court and informed the judge that he had received \$5,000 for Ms. Dirie's representation which he could make available for hiring another attorney. Instead he did nothing.² The hearing panel's finding that he was responsible for Mr. O'DeNeal's misconduct and thus failed to provide Ms. Dirie with adequate representation, as required by Rule 1.1, and to act with reasonable promptness in representing the client, as required by Rule 1.2, was based upon his violation of Rule 5.1 and is, in the opinion of the court, supported by evidence which is both substantial and material in the light of the entire record. It follows that the panel's findings Mr. Clayton violated Rules 8.4(a) (committing a violation of the Rules of Professional Conduct) and Rule 8.4(d) (engaging in conduct that is prejudicial to the administration of justice) is also supported by substantial and material evidence.

Mr. Clayton takes a similar position with respect to Ms. Smith's complaint. He asserts that no attorney-client relationship was created until Ms. Smith filed her bankruptcy petition and, according to his testimony, was presented with a contract of employment that was never signed. He relies upon 11 U.S.C. §528 which provides:

§ 528. Requirements for debt relief agencies

(a) A debt relief agency shall--

(1) not later than 5 business days after the first date on which such agency

² Mr. Clayton did refund the \$5,000, but only in 2008 after the complaint for discipline was filed.

provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously--

(A) the services such agency will provide to such assisted person; and

(B) the fees or charges for such services, and the terms of payment;

This statute is obviously a requirement imposed on debt relief agencies and not the assisted person. There is substantial and material evidence that Mr. Clayton's office began providing bankruptcy assistance to Ms. Smith on May 17, 2007, as found by the hearing panel. The fact that his office, as a debt relief agency, did not obtain a written contract as required by this statute is further evidence of his not providing competent representation. Ms. Smith obviously thought Mr. Clayton's office was handling her bankruptcy. There is no evidence she was aware of the requirement of a written contract.

Ms. Smith, at the initial meeting, was given a questionnaire and a checklist of documents she was to provide. She testified before the hearing panel that she provided all those documents within a few days, but during the month of May 2007. She further testified that thereafter she repeatedly phoned or visited Mr. Clayton's office seeking information on the filing of her bankruptcy. Mr. Clayton testified that Ms. Smith did not bring in all the necessary documents until July 20, 2007. The hearing panel found Ms. Smith provided Mr. Clayton's office with the last document on June 4, 2007.³ The hearing panel obviously believed Ms. Smith's testimony that she provided the necessary documents early on during the process and the court finds there was substantial and material evidence in the record to support that conclusion.

There also appears to be some question in the court's mind as to what documents were required prior to filing the bankruptcy petition. It appears to the court that 11 U.S.C. §521(a)(1)(B)(iv) requires "copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor" be filed with the bankruptcy petition. Clearly, within a few days of May 17, 2007, Mr. Clayton's office had a letter from Ms. Smith's employer as to the payment she had received during this period. While Mr. Clayton and his paralegal testified payment advices were required, it is unclear to the court why the statement from the employer would

³ The court is unsure how the hearing panel arrived at that date. There was no testimony with regard to that date during the hearing. The only reference to June 4 the court has been able to locate was included in Mr. Clayton's response to the initial complaint which contains a statement that Ms. Smith brought in some documents on June 4, 2007.

not be considered "other evidence of payment." It also seems to the court that by July 24, 2007, the period to be covered by the payment advices would have been for the months of May, June and July, rather than for March, April and May as would have been required for a petition filed in late May 2007. Perhaps this is the additional documentation that was received by Mr. Clayton's office on July 20. Additionally, Mr. Clayton testified that it was necessary to have the income tax returns prior to filing the bankruptcy petition. According to 11 U.S.C. §521(e)(2)(A)(i), copies of the prior year's income tax return is not required to be provided until 7 days prior to the first meeting of creditors.

The hearing panel found the documents necessary to filing Ms. Smith's bankruptcy petition were provided Mr. Clayton's office at least 44 days prior to the actual filing of the petition. As previously stated, in the opinion of the court that finding is supported by substantial and material evidence. Based upon that finding, in view of the impending foreclosure, the court agrees with the hearing panel that failure to promptly file the bankruptcy petition violated Rule 1.1 of the Rules of Professional Conduct that requires an attorney to provide competent representation and Rule 1.3 that requires a lawyer to act with reasonable promptness when representing a client. Ms. Smith's testimony that she repeatedly contacted Mr. Clayton's office seeking information about the status of her bankruptcy petition is substantial and material evidence that Mr. Clayton also violated Rule 1.4 of the Rules of Professional Conduct that requires an attorney to "keep a client reasonably informed about the status of his or her matter and comply with reasonable requests for information within a reasonable time." These violations would constitute violations of Rules 8.4(a) and (d).

Finally, Mr. Clayton alleges that suspension for the foregoing violations of the Rules of Professional conduct is not supported by substantial and material evidence. The record reveals that on January 13, 1995, Mr. Clayton received an informal admonition from the Board for failing reasonably to communicate with a client and delaying her matter unnecessarily. On July 26, 2007, he was publicly censured by the Board for neglect of two clients and failure to communicate with those clients. On September 24, 2007, Mr. Clayton received a private informal admonition from the Board for failing promptly to move a client's case forward and failing to keep the client informed of the status of her case. During his testimony, Mr. Clayton volunteered that he had missed a statute of limitations for a client and had agreed to pay damages.

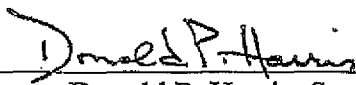
The ABA Standards for Imposing Lawyer Sanctions (Aba Standards), in the section dealing with lack of diligence, provides that suspension is generally appropriate if a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. ABA Standards, Section 4.42. In the section dealing with prior discipline, the Standards provide that "[s]uspension is generally appropriate when a lawyer has been reprimanded for the

same or similar misconduct and engages in further similar acts of misconduct that cause injury to a client, the public, the legal system, or the profession.” The hearing panel found the Standards referred to above applicable to Mr. Clayton. The court is of the opinion there is substantial and material evidence to support that conclusion and that the suspension of Mr. Clayton was not arbitrary, capricious, or an unwarranted exercise of discretion.

Conclusion

For the foregoing reasons, the court is of the opinion the petition filed by Mr. Clayton seeking to overturn the action of the hearing panel should be denied and that the judgment of the hearing panel should be affirmed in all respects. A decree will be filed simultaneously with this Memorandum denying the relief requested by Mr. Clayton, affirming the judgment of the hearing panel, and assessing costs to Mr. Clayton.

This the 21st day of July, 2010.



Donald P. Harris, Senior Judge

c: Randall J. Spivey
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