Florida Healthcare: Laws and Rules

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Continuing Education for Biennial Renewal

- Rule 64B15-13.001, Florida Administrative Code
  - (1)(a) "Every person licensed pursuant to Chapter 459, F.S. [Osteopathic Medicine], except those licensed as physician assistants…, shall be required to complete forty (40) hours of continuing medical education courses approved by the Board in the twenty-four (24) months preceding each biennial period…. Five of the continuing medical education hours for renewal shall include… one hour of Florida Laws and Rules."
  - (3)(c) "For purposes of this rule, Florida laws and rules means Chapters 456 and 459, F.S., and Rule Chapter 64B15, F.A.C."

Florida Law Governing D.O.s

- Osteopathic physicians in Florida are governed primarily under two bodies of statutes and one group of regulations:
  - Chapter 456 of the Florida Statutes (Regulation of Health Professions and Occupations)
  - Chapter 459 of the Florida Statutes (Osteopathic Medicine)
  - Rule Chapter 64B15 of the Florida Administrative Code (Board of Osteopathic Medicine)

Outline

- Healthcare Fraud and Abuse
- Mandatory Disclosures
- Prescribing Drugs
- Advertising
- Insurance Fraud

Fraud & Abuse

Florida Fraud and Abuse Statutes

- Patient Self-Referral Act of 1992
  - Compare with federal Ethics in Patient Referrals Act (the "Stark Law")
- Florida Anti-Kickback Statute
  - Compare with federal Anti-kickback Statute
- Patient Brokering Act
- Florida False Claims Act
  - Compare with federal False Claims Act

- Federal fraud and abuse statutes do not apply to private payors.
- Florida fraud and abuse statutes do.

Patient Self-Referral Act of 1992

Fla. Stat. § 456.053(5)(a)

"A health care provider may not refer a patient for the provision of designated health services to an entity in which the health care provider [or a family member] is an investor or has an investment interest."

Patient Self-Referral Act of 1992

- Similar to Stark Law
  - Courts and Florida agencies look to Stark interpretations for guidance
- Differences

STARK LAW	SELF-REFERRAL LAW
Limited to claims submitted to Medicare and Medicaid	Applies to claims submitted to all payors
Pertains to referrals to entities with which a physician has a "financial relationship" through ownership or "compensation arrangements"	Pertains to referrals to entities in which a physician only has an ownership interest

Patient Self-Referral Act of 1992

STARK LAW	SELF-REFERRAL LAW
Prohibited referrals are only for "designated health services"	All referrals for health care services are covered
Generally referrals are prohibited to non-public commercial entities in which the physician has any ownership interest.	A referring physician may own up to 50% of the non-public entity that gets the referral, if he is the only one in his practice who can make referrals.
"In-office ancillary services" exception permits services provided by the referring physician, another physician in the same group practice, or someone supervised by either.	Direct, on-site supervision is required for "Group Practice" exception (with the physician in the office suite and "immediately available").
- Yet Medicare/Medicaid rules usually require direct on-site supervision, even if Stark does not.	

Patient Self-Referral Act of 1992

STARK LAW	SELF-REFERRAL LAW
If a self-referral is permitted, the physician's financial relationship need not be disclosed to the pt.	If a self-referral is permitted, the physician's investment interest in the service provider must be disclosed to the pt.
Referrals of pts suffering from end-stage renal disease for clinical laboratory services is allowed.	Such referrals are prohibited.
	Providers may seek a declaratory statement from the Agency of Health Care Administration regarding compliance.

Patient Self-Referral Act of 1992

- Generally prohibits healthcare providers (including osteopathic physicians) from referring pts to entities for "designated health services" if the provider or an immediate family member has an investment interest in the entity providing:
  - Clinical laboratory services
  - Diagnostic-imaging services
  - Radiation therapy services
  - Physical therapy
  - Rehabilitation

Patient Self-Referral Act of 1992

- ASC Exception – Physicians may refer pts to an ambulatory surgery center. (Fla. Stat. § 456.053(3)(o)3.g.)
- Group Practice Exception
  - Referrals do not include recommendations by a health care provider who is the only provider or who is a member of a "group practice" for services performed by, or under the direct supervision of, the provider or group practice if the services are only for the practice's pts.
  - A group practice may own a separate entity providing diagnostic imaging to the group practice and its pts.
    - In Re: Petition for Declaratory Judgment, Tallahassee Neurological Clinic, P.A. (Aug. 17, 2004).

Patient Self-Referral Act of 1992

- Similar referrals for non-designated health services are prohibited, unless (1) the entity does not loan or guarantee the loan of an investor who can make referrals to the entity if any part of the loan goes toward paying for the investment, (2) returns on investment are distributed in proportion to invested capital, and (3) the provider's investment is:
  - In a publicly held corporation that has at least $50 million in assets; or
  - In a non-public entity (e.g., a small business) if:
    - Investors are not required to make referrals or are not in a position to make referrals as a condition of investing;
    - No more than ½ the value of the investment interests are held by those in a position to make referrals to that entity; and
    - The investment is offered to someone who is in the position to make referrals on the same terms as someone who is not.

- Example: Physicians invest in a public pharmacy. They may not refer pts to the pharmacy unless at least 50% of the investment interests is owned by non-referring physicians and the other conditions are satisfied.

Patient Self-Referral Act of 1992

- If a provider may refer a pt to an entity in which the provider is an investor – e.g., because of the Group Practice exception or because the entity is a public company – the provider must give the pt:
  - Prior written notice of the investment interest
  - Acknowledgement of the pt's right to go to another supplier or provider
  - The name and address of each such place where provider is an investor; and
  - The names and addresses of at least two other providers or suppliers
    + (Fla. Stat. § 456.052.)
- Receiving entities must also disclose such information.

Patient Self-Referral Act of 1992

- "No claim for payment may be presented by an entity to any individual, third-party payor, or other entity for a service furnished pursuant to a referral prohibited under this section." (Fla. Stat. § 456.053 (5)(c))
  - So you can't bill for services provided due to a prohibited referral.
- Any amount paid in violation must be refunded "timely."
- Any amount not refunded may subject the provider to a civil penalty of up to $15,000 "for each such service."
- Cross-referral or other arrangements to ensure referrals may subject the provider to a civil penalty of up to $100,000 per scheme.
- Violations may also subject the provider to professional disciplinary action.
- Payors (health insurers) may sue providers to recover money paid in violation of this Act. State Farm Mut. Auto. Ins. Co. v. Physicians Group of Sarasota, LLC, No. 8-13-CV-1932-17-TGW (M.D. Fla. Mar. 25, 2014).

Healthcare Fraud and Abuse

- Federal Kickback Law relates to federal healthcare programs
- Florida has its own counterparts
  - Florida Anti-Kickback Statute
  - Patient Brokering Act
- **These statutes deal with differing aspects of the same prohibition on making payments in order to get pt referrals.**

Florida Anti-Kickback Statute
Fla. Stat. Section 456.054

- Healthcare providers may not offer, pay, solicit, or get a kickback (remuneration or payment that serves as an incentive or inducement) for referring or soliciting pts for services or items.
- Violations are prosecuted as criminal offenses under the Florida Patient Brokering Act. (Fla. Stat. § 817.505).
  - Violations constitute 3rd degree felony
  - Up to 5 years imprisonment
  - Up to $5,000 fine
- Practitioners of osteopathic medicine may be disciplined for getting or paying a bonus, commission, kickback, or rebate, or engaging in a split-fee arrangement with a physician, organization, etc. for pts referred to hospitals, pharmacies, clinical labs, ambulatory surgery centers, etc.
- Bottom Line – Don't pay or give something of value to a website or anyone else in return for a referral.

Florida Anti-Kickback Statute

Example

- An ophthalmologist proposed a marketing program through which he would donate $10 to the pt's charity of choice if either:
  - The pt gave out information about the pt's Lasik surgery performed by the ophthalmologist; or
  - The pt referred another person to the ophthalmologist and that other person had the ophthalmologist perform Lasik surgery.
- The ophthalmologist submitted the marketing plan to the Board of Medicine for review.
- The Board determined that the plan would constitute a kickback or rebate, in violation of the Florida Anti-Kickback Statute.
  - In re: Petition for Declaratory Statement, Paul J. Befanis, M.D. (August 27, 2007)

Florida Anti-Kickback Statute

- Examples
  - An out-of state lab offers you (a Florida D.O.) $25 per case referred to them. You may not accept the $25 under the Florida Anti-Kickback Statute.
  - A D.O. leases space from another medical practice to induce referrals from the practice. The lease would be considered a kickback.
  - A practice offers to sublease space to an independent M.D. for below market value. (The practice pays $1,000 a month, but charges the M.D. $500.) If the M.D. could refer pts to the practice, then the sublease agreement is an illegal kickback.

Florida Anti-Kickback Statute

- A New York lawyer created a company to make nutritional supplements. A Florida M.D. agreed to refer all of his pts who needed supplements to the company in return for ½ the company's profits. The M.D. terminated the agreement and began referring his pts to a different supplement manufacturer. The lawyer sued, and the suit was thrown out on the grounds that the contract was contrary to public policy and was unenforceable. The contract was seen as offering a kickback. Harris v. Gonzalez, 789 So.2d 406 (Fla. Dist. Ct. App. 2001).
- M.D. sent out solicitation letter to other physicians offering $100 to $150 for "every client of yours that you consult with and who schedules a procedure that is performed in our office."
  - The arrangement was deemed an offer for a kickback for referring pts.
  - M.D. was fined $9,500 plus $2,152 in costs, reprimanded, and ordered to perform 50 hours of community service and to give a one hour lecture on "appropriate consultation services."
    - ➢ Dep't of Health v. Stein, DOH Case No. 2004-37339 (Feb. 6, 2007).

Patient Brokering Act
Fla. Stat. § 817.505

- Patient brokering is like paying a finder's fee.

  (1)"It is unlawful for any person, including any health care provider or health care facility, to:

  (a) Offer or pay [or receive] any commission, bonus, rebate, kickback, or bribe … or engage in any split-fee arrangement, in any form whatsoever, to induce the referral of patients or patronage from a health care provider or health care facility"….
- All exceptions to the Florida Anti-Kickback Statute are in the Patient Brokering Act.
- Exceptions: If an arrangement fits within a safe harbor of the federal Anti-Kickback Statute, or referrals are made in a group practice, the Patient Brokering Act is satisfied. (Fla. Stat. §§ 817.505(3)(a) and (b))

Patient Brokering Act

Example

- A diagnostic business that conducted evaluations of pts offered doctors the opportunity to bill the professional component of an evaluation while the company would bill the technical component.

- This billing practice was held to be illegal pt brokering because it was a way to solicit referrals.

  - Wise Diagnostic Solutions v. Progressive Express Ins. Co., 12 Fla. L. Weekly Supp. 663a (Fla. Leon County Ct. Aug. 20, 2004).

Patient Brokering Act

- **Fee splitting** is referring a pt to a healthcare facility and getting paid part of the fee for the facility's provision of healthcare services when the person who made the referral did not provide the services.

Examples

- A practice pays a D.O. as an independent contractor based on a percentage of collections the contractor brings in. The practice's assigning the pt to the D.O. is considered a referral, and any revenue going from the D.O. to the practice may be considered paying the practice for the referral
  - Therefore, the fee the practice retains from the D.O. must reflect the practice's cost of services and items it provides to the D.O. and the D.O.'s pts (including overhead).
- Marketing consultants should be paid an hourly rate, not based on the growth of the practice or a percentage of revenue because that sounds like payments for generating referrals.

Patient Brokering Act

- Examples of Fee Splitting
  - Management services agreement provided that payment was made in form of:
    - Annual fee
    - 12% of net clinic revenues
    - 25% of additional managed care payments
    - The court held the 12% figure to be fee-splitting.
    - The 25% figure was held to be an indirect fee for pt referrals.
  - ➢ Gold, Vann & White, P.A. v. Friedenstab (Fla. Dist. Ct. App. 2002).

Patient Brokering Act

- A physician entered into a contract with a nutritional supplement company.
  - The contract gave the physician ½ of the company's net profit in return for his referring pts to the company "as an option for their fulfillment of their supply needs and make referrals to no other source."
  - The court held the contract void.
  - Exclusive pt referrals in return for a share of profits were seen as a kickback.
  - Harris v. Gonzales (Fla. Dist. Ct. App. 2001).

Patient Brokering Act

- Insurers sometimes use the Patient Brokering Act to deny paying claims.
  - Main case: A company hired an MRI provider and billed an insurer 3.5x for MRIs ordered by an insurer on behalf of a pt. The insurer refused to pay.
  - The court said that the arrangement between the company and the MRI provider was fee splitting and amounted to the MRI provider's paying a referral fee to the company "for brokering this patient." According to the court, the company was merely a middleman that had done nothing for the pt other than make the appointment.
  - Because the fee splitting arrangement was illegal, the contract was unenforceable and the insurer did not have to pay for the MRIs.
    - NuWave Diagnostics, Inc. v. State Farm Mut. Auto. Ins. Co., 6 Fla. L. Weekly Supp. 522 (Fla. Broward County Ct. May 7, 1999).
  - Also insurers can sue for insurance fraud under this statute or the Florida Anti-Kickback Act. (Fla. Stat. § 627.736(12))

Patient Brokering Act

- A diagnostic company had a lease with an MRI center. The company paid the MRI center a flat fee per month.
  - A person was injured in a care accident, and Allstate referred the insured to the company for an MRI.
  - Allstate refused to pay the bill.
  - The court agreed with Allstate and decided that the agreement between the company and the MRI center was void because of pt brokering and fee splitting. Also, the company had not rendered any technical or professional services pertaining to the MRI
    - ➢ Prosper Diagnostic Centers, Inc. v Allstate Ins. Co., No. 4D07-12 (Fla. Dist. Ct. App. 2007).
- Radiology company did MRIs, paid an M.D. $50 to read them, and billed the insurance company $250 per scan for the professional component the doctor had performed.
  - The court considered the $200 net to be "a referral fee… for brokering" the pt to the M.D.
    - ➢ Radiology B – Services, Inc. v. Progressive Express Ins. Co., 11 Fla. L. Weekly Supp. 251c (Fla. Broward County Ct. 2003).

Patient Brokering Act

- A management company that did not provide medical services leased services, equipment, and space from a diagnostic imaging center.
  - The company paid $350 to the center and sent the insurer a $1,400 bill.
  - The arrangement was fee splitting.
    - Medical Management Group of Orlando, Inc. v. State Farm Mut. Auto. Ins. Co., 811 So.2d 705 (Fla. Dist. Ct. App. 2002)

Florida False Claims Act
Fla. Stat. Sections 68.081 – 68.092

- Intended to counteract fraud in state contracting.
- False claims often relate to Medicaid payments and overbilling.
- Prohibits knowingly presenting (or causing to be presented) a false or fraudulent claim for payment to the State of Florida (or a state subdivision (county) or instrumentally (city)or a state contractor) or using a false statement or record in support of such a claim, or conspiring to submit a false claim or get it approved, or by concealment or omission avoids repaying the government
  - "Knowingly" includes deliberate ignorance or reckless disregard of truth or falsehood
  - Damages
    - Civil penalty of $5,500 - $11,000 per claim
    - Treble damages

Florida False Claims Act

- Florida's Departments of Legal Affairs or Financial Services may sue, but so may an individual suing in the name of the State of Florida.
- “Relators” are private citizens who bring whistleblower suits ("qui tam actions") which are filed under seal and are not served immediately on the defendant.
  - A copy of the complaint and of the written evidence is also sent to the Florida Attorney General and to the Chief Financial Officer of the Department of Financial Services.
  - The Dept. of Legal Affairs or the Dept. of Financial Services may decide to take over the litigation. If they decline, the person who filed suit may assume responsibility for prosecuting the suit.

Florida False Claims Act

- Whistleblowers are often former disgruntled employees, who get 15% - 30% of the recovery.
- Three differences between the federal and Florida False Claims Act:
  1. Florida allows "innocent mistake" as an affirmative defense.
  2. If the defendant cooperates with the state by disclosing the overpayment, treble damages may be reduced to double damages.
  3. If the defendant wins and the claim is deemed frivolous, the defendant recovers costs and attorney's fees.

Mandatory Disclosures

Mandatory Disclosures

Reports on Professional Liability Claims

Practitioners of osteopathic medicine must report within 15d to the Florida Office of Insurance Regulation any claim or suit for damages for personal injury allegedly due to error, omission, or negligence while the licensee was rendering professional services.

- Fla. Stat. § 456.049

Mandatory Disclosures

Reports on Professional Liability Claims

- The Office of Insurance Regulation forwards the information to the Department of Health.
- The information becomes public except for the name of the complaining party (usually the injured pt).
  - Dep't of Health vs. Ammar, DOH Case No. 2010-23335 (Feb. 8, 2012) (fining M.D. $3,000 and reprimanding him for failing to update his profile to disclose a malpractice settlement).
  - Dep't of Health v. Nazario-Vidal, DOH Case No. 2008-13490 (same, $1,000 fine plus $2,128 in costs).

Mandatory Disclosures

Reports on Professional Liability Claims

- For first offense, a maximum $2,000 fine if the physician complies within 6 months. If not, the fine can reach $5,000 with a reprimand.
- For a second offense, a reprimand and a fine from $5,000 to $10,000 if the physician complies within 6 months. If not, then a $10,000 fine plus suspension followed by probation.
- If a physician submits three reports within 5 years, the Dept. of Health will conduct an emergency investigation to determine whether the physician should be disciplined. (Fla. Stat. § 458.3311)
- Florida requires professional liability insurance carriers also to report payments for such claims. The Office of Insurance Regulation forwards the information to the DOH, which usually then conducts an investigation.

Mandatory Disclosures

Duty to Notify Patients

"Every licensed health care practitioner shall inform each patient… in person about adverse incidents [or outcomes] that result in serious harm to the patient. Notification of outcomes of care that result in harm to the patient under this section shall not constitute an acknowledgment of admission of liability, nor can such notifications be introduced as evidence."

- Fla. Stat. § 456.0575 (known as Amendment 7 to Florida Constitution)

Mandatory Disclosures

- Duty to Notify Patients (continued)
  - Thus, the physician must disclose negative outcomes – even if not the result of medical negligence – to the pt or the pt's legal representative (often a parent or other family member).
  - Disclosure should be as soon as reasonably possible in order to tell the pt of potential results and options for tx.
  - This disclosure should be documented, although it need not be in the medical record.
  - The disclosure will not be used against you.

Mandatory Disclosures

– Example:

- A dentist put a child under anesthesia to do a procedure. The child stopped breathing and had to be resuscitated, but the dentist did not tell the parents.
- For this incident and other failings the dentist was suspended from practice.
- In re: The Emergency Suspension of the License of Michael Addair Tarver, D.M.D., DOH Case Nos. 2013-12498 and 2013-09493 (Sept. 4, 2013).

So plan in advance how to handle these situations.

Prescriptions

Written Prescriptions for Medicinal Drugs

- Fla. Stat. § 456.42, "Legible Prescription Law"
  - A written Rx "must be legibly printed or typed so as to be capable of being understood by the pharmacist filling the prescription."
  - The prescribing healthcare practitioner must sign the Rx on the day issued.
  - The Rx has to contain this information:
    - The name of the prescribing healthcare practitioner;
    - The name and strength of the drug prescribed;
    - The quantity of the drug ("in both textual and numerical formats" for controlled substances [for example, “ten (10)”]);
    - Directions for use; and
    - For controlled substances, the dates “in numerical, month/day/year format, or with the abbreviated month written out, or the month written out in whole” written either “on a standardized counterfeit-proof prescription pad produced by a vendor approved by the [Department of Health] or electronically prescribed.”

Written Prescriptions for Medicinal Drugs

- The law was passed to reduce Rx errors.
- Applies to a written Rx, not to an Rx the physician delivers by phone.
- Written orders for administering a drug are not covered.
- The pt does not need to understand the Rx; only the pharmacist does.
- Standard abbreviations on a Rx are fine.
- Physicians are not required to report an Rx that does not comply with the law.

Written Prescriptions for Medicinal Drugs

- DOH conducted a dispensing practitioner inspection on an M.D.
- The M.D. failed the inspection in several ways, including:
  - Not using counterfeit-resistant Rx pads for controlled substances.
  - Not writing the quantity of drug prescribed in text and numerically on the Rx.
  - Not dating the Rxs properly.
- Result: M.D.'s license was revoked.
  - Dep't of Health v. Dees, DOH Case No. 2013-07837 (Apr. 17, 2014)

Written Prescriptions for Medicinal Drugs

Disciplinary Action may take place for:

- "Promoting or advertising on any prescription form of a community pharmacy, unless the form shall also state "This prescription may be filled at any pharmacy of your choice." “
  - Fla. Stat. § 459.015(1)(r)

Advertising

Advertising

"Any advertisement or advertising shall be deemed … false, deceptive, or misleading if it:

(b) Makes only a partial disclosure of relevant facts; or

….

(i) Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional services that do not disclose all variables affecting the fees that will, in fact, be charged; or

(j) Conveys the impression that the osteopathic physician disseminating the advertising or referred to therein possess qualifications, skills or other attributes, which are superior to other osteopathic physicians, other than a simple listing of earned professional, post-doctoral or other professional achievements recognized by the Board [of Osteopathic Medicine] ….“

- Fla. Admin. Code Ann. r. 64B15 – 14.001(2)

Advertising

- In 2002, DOH filed an administrative complaint against Sheryl Lavender, D.O., who owned pain relief centers. Newspaper ads did not include the D.O.'s name. The pain relief centers had two sets of business cards. One set gave her name, but did not mention that she was a D.O. The other set did not have her name. These were alleged to violate the advertising statute. The Board of Osteopathic Medicine in Florida found her guilty of false/deceptive advertising and fined her $1,000.
- Another D.O. (Robert Smith) filed a consent decree for violating this statute by advertising in the Yellow Pages without identifying himself as a D.O. He agreed to correct his advertising. (2005)
- A sign before the office building of a chiropractor indicated that he was an M.D. He was held to have engaged in false, deceptive or misleading advertising and fined $500. (2007 Fla. Div. Adm. Hear. LEXIS 425)

Advertising of Fees and Discounted Services
Fla. Admin. Code Ann. r. 64B5-4.003

- Subsection (2): "Any advertisement containing fee information shall contain a disclaimer that the fee is a minimum fee only."
- Subsection (5): "Any advertisement for free or discounted services must comply with the requirements of Section 456.062, F.S., and must also clearly identify the dates that free, discounted or reduced fee services will be available." In other words, how long the discount will be in effect.

Advertising of Fees and Discounted Services

- Fla. Stat. § 456.062 requires the following disclaimer, all in caps, in advertising free or discounted services, exams, or treatments:

  THE PATIENT AND ANY OTHER PERSON RESPONSIBLE FOR PAYMENT HAS A RIGHT TO REFUSE TO PAY, CANCEL PAYMENT, OR BE REIMBURSED FOR PAYMENT FOR ANY OTHER SERVICE, EXAMINATION, OR TREATMENT THAT IS PERFORMED AS A RESULT OF AND WITHIN 72 HOURS OF RESPONDING TO THE ADVERTISEMENT FOR THE FREE, DISCOUNTED FEE, OR REDUCED FEE SERVICE, EXAMINATION, OR TREATMENT.

- This language would be required even in a TV ad.

Advertising of Fees and Discounted Services

- So people have a cooling off period after responding to an advertise.
- Example
  - A chiropractor advertised on the internet a free consultation and a free report about a method of pain relief.
  - The disclaimer was not capitalized.
  - For this infraction and others, the chiropractor was fined $2,500 and ordered to pay costs of $1,400.
    - Dep't of Health v. Blumfeld, DOH Case No. 2008-01474 (Sept. 29, 2008)

Advertising of Fees and Discounted Services

Example

- A doctor's business stationery indicated that he was board certified in two areas he was not, and certified in two other areas for which there is no board recognized by the American Board of Medical Specialties.
- In addition, the M.D. placed an ad in the Tampa Tribune offering a free initial consultation but didn't give his name and did not have the statutory disclaimer language. For these and other violations, he was placed on probation for three years and fined $20,000. (1999 Fla. Div. Adm. Hear. LEXIS 5013.)

INSURANCE FRAUD

Insurance Fraud

It is considered a false claim to an insurer for a healthcare provider to submit a bill or claim form for services rendered and not disclose that the provider and the pt agreed in advance of the provision of services to waive all or part of the pt's co-pay/deductible or "to give the patient a discount for the immediate payment for services rendered."

- Fla. Admin. Code r 69O-153.001(5), 69B-153.003 (also 69O-153.003), and 69O-153.004.

Conclusion

- Questions?

Thanks for coming.

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