

## Article 76

### **Addressing “The Best Interest of the Child”: Working in High Conflict Divorce Cases**

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#### **Abstract**

The use of mental health professionals as courtroom experts is controversial at the least, and this controversy increases when examining their use in custody decisions. The debate on using mental health professionals has been complicated by junk science practices used in the courtroom. Too often, mental health professionals enter the courtroom offering a professional opinion when they have not properly assessed a case or when they report on instruments they have not been trained in. However, current research suggests that there is a great need for mental health experts speaking to these cases. Research indicates these ongoing high conflict cases create stress and trauma within children that can negatively affect brain development. There is growing evidenced that children exposed to these types of high conflict cases show long-term negative impacts on their psychological well-being and academic performance. The need for mental health professionals in these cases to help evaluate the psychological needs of the child/ren and speak to the court about the effects of toxic stress on the developing brain is paramount. This information can lead the court to expedite the fact-finding process, lessening the stress the child/ren is exposed to. The guidance mental health professionals can offer in these cases is invaluable.

### **The Need for Mental Health Professionals in the Courtroom**

#### **Current Trends**

The use of mental health professionals as expert witnesses is controversial at the least, with this debate increasing when examining their use in custody decisions. In fact, only about 2% of judges ranked mental health professionals' opinions as falling within the top five factors in their custody decision (Melton, Perila, Poythress, & Slobogin,

2007). The dispute as to whether to use mental health professionals has been complicated both by junk science practices being used in the courtroom and mental health professionals coming in ill-prepared. To further complicate the issue, the truth is that behavioral science cannot specifically answer the legal issues posed by attorneys. Members of the the two disciplines, mental health professionals and attorneys, speak a different language. The court of law and attorneys focus on facts and the goal of the attorney is to come as close to irrefutable factual truth as possible. Mental health professionals focus on theory and best practices with the goal of reaching the best explanation and approach for the behavior in questions; this theoretical approach can appear as if it is pseudo-scientific evidence. It certainly does muddy the waters when mental health professionals find themselves in the courtroom giving testimony ill-prepared and speaking to questions posed that they are not properly qualified or ethically able to answer. Too often, mental health professionals enter the courtroom offering a professional opinion when they have not properly assessed a case or are reporting on instruments used that they have not been trained in. In reality, given the potential for this unprofessional approach to giving expert testimony, it can be easily understood why judges and attorneys are not quick to rely on mental health professionals.

This great divide noted between disciplines often leads to mental health professionals feeling apprehensive and determined to avoid the courtroom. Melton et al. (2007) reported that this discomfort with the courtroom stems from the adversarial nature of the law and the feeling that testimony is constrained by certain legal rulings. Sadly, many find themselves unable to avoid it and hence enter into the courtroom not properly respecting what they can offer; instead they address the process with great anxiety or maybe even in an adversarial manner (Melton et al., 2007). This approach in and of itself leads them to walk in ill-prepared and possibly causes them to walk out feeling validated in wanting to avoid being part of the process (Murphy, 2011). It can be very difficult to discern the language of the court and how to navigate the great divide (Melton et al., 2007). It is common to avoid situations in which one believes the costs well outweigh the benefits. The fact is that many mental health professionals do not truly understand the need for their expertise in the courtroom—the true benefits—so they avoid the risks of being in the courtroom and fail to gain the knowledge of how to survive their day in court (Murphy, 2011). The process can seem very daunting and not worth the energy to properly prepare oneself through study and learning what is acceptable in the courtroom.

In addition, and on the other extreme, there are some mental health professionals who are intrigued with the process and enjoy the legalese and the adversarial feel of the courtroom that renders a win-lose outcome. These professionals can easily find themselves caught in the web of “helping” an attorney win the case. This is made appealing due to the reality that the forensic aspect of the mental health profession can be quite profitable (Murphy, 2011). Edens et al. (2012) reported that after reviewing 160 published civil and criminal cases in which mental health experts testified, 185 judges, attorneys, or other witnesses viewed the expert as one-sided, “for sale,” and representative of “junk science.” Hence earning the term “hired gun” for such individuals. The overall summation by Edens et al. is that the mental health field as a whole may be left being viewed as lacking objectivity and impartiality. Sadly, not only is the term “hired gun” used to identify expert witnesses, but terms like “charlatans” and “voodoo psychobabble” can be found in reference to this field. These mental health

professionals, “hired guns,” are often retained by one side to help win the case. This becomes risky, requiring the professional to manipulate other experts’ testimony, focus on evidence that is favorable, and discount evidence that is problematic for the “winning team.” This type of discipline division renders the court’s perception of the mental health field as junk science; hired guns basically highlight the weak areas of the behavioral science field (Edens et al., 2012). Edens et al. recommended increasing the number of credible, well-prepared, properly trained professionals representing the mental health discipline in the courtroom. Murphy (2011) encouraged mental health professionals not to be fearful of the courtroom but to be well prepared for the dynamics of the judicial system, respecting the culture of the courtroom while properly representing the strengths that the mental health field does offer.

In essence, there is a great void in the courtroom of qualified, skilled professionals who are well-trained to speak to questions posed to the court; in fact, one can argue that there are certain “best interest of the child” standards argued in the courtroom that should be addressed by mental health professionals. Sadly, the current relationship between the two disciplines is riddled with strife and suspicion due to this current approach mental health professionals are taking (Edens et al., 2012). The “best interest of the child” is a standard that is in desperate need for mental health professionals to address. The knowledge and training they have to offer the judge to assist in making well-educated rulings that are truly in the best interest of the child cannot be replaced by a skilled attorney’s attempts to throw up smoke and mirrors to defend a poorly functioning parent’s destructive choices or behaviors. These destructive behaviors of abuse have been seen in research to derail the healthy development of a child. There is a growing body of evidence that these destructive behaviors and this ongoing high conflict between the parents have a serious negative impact on the developing brain (Garner et al., 2011). It can be argued that the mental health discipline is most qualified to speak to this, yet the avoidance approach the discipline is taking renders the courtroom ignorant as to how the ongoing conflict is harming the child both currently and in the future. It is first essential for professionals to understand the need for their skills and training in high conflict divorce cases. Secondly, it is responsibility of these professionals to better prepare themselves to enter into the legal realm while setting the boundaries needed to offer up the information that can best be addressed by them.

### **Current Needs**

Not all divorce cases lead to high conflict. There are three types of post-divorce parenting styles: conflicted, disengaged, and cooperative (Stahl, 2012). Developmental challenges arise for children whose parents are conflicted or disengaged due to the nature of the interaction and the increased level of stress. Developmentally, children need their parents to become cooperative with one another (Garner, 2012); it is the disengagement and conflict that is hurtful to their development. Disengaged parents act completely independent from one another, as if the other parent does not have an influence in the child’s life when away from that child (Stahl, 2012). This level of disregard for the other parent can be interpreted, at the least, as a lack of respect for the child’s love for the other parent. In more extreme cases of disengaged parenting, there can be an underlining or unspoken hostility, but the level of hostility can be and is felt by the child (Stahl, 2012). The child cannot help but to feel the tension between the parents, even if the parents do

not outwardly show it. This can leave the child feeling confused, tense, and unsafe. Conflicted parents, on the other hand, are open about their strong opinion of the other (Stahl, 2012). There is open hostility that quickly can turn to aggressive behaviors, both verbal and physical (Stahl, 2012). This level of engagement is even more threatening to the child and increases the level of ongoing stress the child feels.

Davidson, O'Hara, and Beck (2014) found that recent research supports that this ongoing stress associated with disengaged and conflicted parents has a negative effect on the stress response system in the developing brain. Grossman (2015) reported that the contributing negative developmental factor for children from divorce is the level of conflict; that is, the higher the conflict the more significant the negative impact on the child. The Centers for Disease Control and Prevention (2008) reported strong evidence of a link between childhood stress and adult health and well-being. These health problems include alcoholism, depression, eating disorders, heart disease, cancer, and other chronic diseases. Until recently, little to no attention has been given to the biological factors of high conflict divorce, the focus remaining mainly on the psychological factors. But growing knowledge of how the brain is affected by stress, most specifically the developing brain, has lead researchers to focus even more on the developing brain, stress, trauma, and posttraumatic stress associated with the long-term effects on a child.

What has been determined is that the long-term effects on the developing brain redirect the wiring of the brain, creating a brain hypersensitive to stress and anxiety. Amen (2005) called this an overactive emotional response. In addition, research is indicating the areas most affected by trauma are the areas of the brain that are responsible for connecting to the world around us, processing and retaining information, and the areas responsible for proper emotional regulation (Garner et al., 2012). Chronic stress and trauma can render a developing brain to be prone to challenges with attention, impulsivity, disorganization, poor judgment, and conflict seeking, as well as oppositional behavior, aggression, and learning disabilities (Garner et al., 2012). These new findings make it hard to suggest that there are not long- term devastating effects as a result of high conflict divorce cases on the child. With this growing evidence of life-altering responses to the chronic stress a child experiences when parents cannot resolve their differences in an amicable way (Garner et al., 2012), it becomes increasingly challenging to negate the importance of mental health professionals to intervene and offer their services.

The court system needs the help of the expert to offer treatment options and to begin a forward movement of cooperative parenting rather than disengaged or conflicted parenting. The expert can offer insights as to what can occur to help the parents stop reacting to one another and the past hurts. The conflict resolution skills the expert brings into this can help the parents begin treating each other in a way that is respectful to the child's love for both parents. Not only is the court system naive to the effects of ongoing stress to the developing brain, but so are the parents. A mental health professional can shed light on this for both the courts and the parents as well as begin giving guidance to the parents as to effective conflict resolution and team building.

## **Roles of Mental Health Professionals in the Courtroom**

### **Cooperative Parenting: A Directive Approach**

Cooperative parenting is an intervention that helps parents learn to parent together while building bridges between the parents' homes so that the parenting between homes can be seamless. This provides a consistency in schedules, discipline, and activities that is not present in disengaged or conflicted homes. Cooperative parenting is not counseling but does provide skills that are best delivered by someone trained in the counseling or mental health field. Parents are best suited for cooperative parenting when disengaged. The first step to cooperative parenting is to help guide the parents into parallel parenting; much of what is happening in one home mirrors what happens at the other home. This provides the child with some consistency. During this period between disengaged parenting and cooperative parenting, the mental health expert begins working with the parents on learning to respect the other person as a parent, not an adversary, and bringing to light the common love they have for the child and the love the child has for them. In addition, it is helpful to remind the parents of the child's need for both parents and how parental involvement is important for healthy development. The professional helps the parents stay focused on the child's needs rather than the other parent's faults. As the process continues, the focus becomes more and more on areas of agreement as to wants and desires for the child. The professional helps the parents learn to reach agreed upon approaches to parenting while mediating and establishing fair fighting rules for the parents. Cooperative parenting allows the parents to learn to parent their child together, resolve their conflicts, and find common ground in the parenting process.

For the court system, this can seem to be an unrealistic goal given the parents' inability to resolve marital conflict. Mental health professionals can offer a great deal of hope in the process by offering the education needed for all in order to understand the importance of finding common ground because; not finding this common ground is damaging to the child. The truth is that many parents, once they have a good understanding of the damage their disregard for the other parent is doing to their child, are motivated to work with the process. The mental health professional provides a safe environment to walk through this process with the parents. This environment promotes growth and is free from the adversarial atmosphere that is evident in the courtroom.

Helping parents reach a cooperative relationship in an adversarial atmosphere such as the courtroom is challenging, at the least, and unlikely. Currently, most family courtrooms are naturally set up as an adversarial win-lose environment. There is a need for interventions to occur, but the lack of qualified mental health experts in the courtroom limits the progression from conflicted to cooperative parenting. With judges and attorneys not understanding the long-term effects of this approach on the developing brain, the courtroom process lags at times, which in essence keeps the conflict fueled and ongoing. In addition, experts have suggested that this adversarial nature of the courtroom can become an extension of ongoing abuse of one spouse by another, taxing emotional and financial resources (Huey, Hardesty, & Leon, 2007). This may be due to unidentified pathology of one parent, another reason for the need for a mental health professional to be involved. The quicker the pathology is identified, the quicker it can be addressed.

### **Parenting Coordinator: Parenting Parents**

A parenting coordinator may be needed in highly conflicted situations to first go from conflicted to disengaged parenting, with the goal of cooperative parenting. Many courts are not familiar with the parenting coordinator's role or how it can be useful. In highly conflicted cases, the courtroom becomes the decision maker so that whenever there is a dispute, one or both parents file a motion and then return to the courtroom. Current research suggests that there is an even greater need for experts intervening into these cases. Research indicates these ongoing high conflict cases are creating prolonged exposure to such high levels of stress and trauma within the children that it can lead to toxic stress (Garner et al., 2011). These toxic stress reactions are linked to the ongoing exposure to the fighting related to the litigation and affect brain development. Again, the growing evidence that children exposed to these types of cases are showing long-term negative impacts on their psychological well-being and academic performance due to this toxic stress reaction in the brain indicates the need for quick interventions (Center on the Developing Child, 2015; Child Welfare, 2009). Every time the brain is exposed to high levels of stress, high levels of adrenaline, cortisol, and dopamine are released (Bremner, 2006). These high levels of cortisol have been shown to damage brain cells and have been linked to the breakdown of the hippocampus (Bremner, 2006). In addition, long-term excess of cortisol can interfere with serotonin release (Bremner, 2006). These effects are devastating to the developing brain; in essence, it is the beginning of the development of the anxious brain that Amen (2005) referred to. The anxious brain lacks little internal resources for feeling good. The high levels of cortisol essentially interfere with the release of the "feel good hormones." The cycle of the brain's reaction to the child's stress-filled environment begins the developmental derailment that research is identifying.

The need for mental health professionals in these cases to help evaluate the psychological needs of the child and speak to the court about the effects of toxic stress on the developing brain is paramount. In addition, it is the mental health professional that can offer intervention for the parents to move them past this conflicted adversarial place of interacting. The mental health professional can determine if it is poor coping or pathology that is driving the conflict, offer interventions, and move the parents to a cooperative state. The mental health professional may come in as a parenting coordinator to begin policing the situation outside of the court, while educating the parents on healthier approaches to the conflict. The parenting coordinator offers a quicker intervention that additionally provides parents with growth opportunities while educating them on more effective parenting approaches. This takes the conflict away from an adversarial stance into a growth-provoking prospect. The coordinator stays in contact with the court offering information that can lead the court to expedite the fact-finding process, lessening the stress the child is exposed to. This approach requires a court order and for the mental health professional and the court system to be working together to help equip the parents to better parent together. This is an effective way to more efficiently address the conflict while defusing it more quickly.

The guidance mental health professionals can offer in these cases is invaluable. If judges were exposed to more well-trained mental health professionals, they would be more receptive to hearing the information a professional offers that truly does speak to the best interest of the child. Suitably trained mental health professionals who are

properly and ethically assessing these high conflict cases help minimize the negative developmental effects. Training mental health professionals in high conflict divorce cases is important to enhance their expertise to best facilitate the fact-finding endeavor of the courts and to address pertinent best interest of the child standards.

### **Custody Evaluators: Addressing Best Interest**

Best interest standards that are better addressed by mental health professionals are the standards that look at the emotional fitness of a parent, the developmental needs of the child, and the bonds the child has with either parent. Emotional fitness of the parent can be a complicated factor to determine, one that is influenced by the parents' coping mechanisms as well as their ability to emotionally regulate. In addition, the assessment of insight and ability to adjust and change based on the child's needs is important. These are all areas that a well-trained mental health professional can assess, but are not likely areas that a well-educated attorney can discern. In addition, a child's bond or attachment to a parent is best evaluated by a mental health professional, as they are trained to identify healthy and unhealthy attachment styles that can be directly linked to parenting styles. Finally, mental health professionals would be the experts between the two disciplines on child development, having a better understanding of a child's developmental needs. Without the mental health experts speaking to these issues, the child and parents are left with well-educated attorneys, experts of the laws, speaking to issues of which they may have little to no in-depth understanding.

To address these standards, the mental health professional must be properly trained in assessment and be knowledgeable as to the current assessment standards. Although to date there is not a unified standard in how to approach custody evaluations or parental fitness, there are some agreed upon approaches. First, it is important to have several different means of assessing the parents and child/ren. Testing is advised and it is prudent to use assessments that have good reliability and validity for what is being assessed. In addition, it is very prudent for the evaluator to determine the assessments most accepted in these types of evaluations. Using more than one assessment is also advised. In addition, it is necessary to do a thorough clinical interview and prudent to meet with all parties several time. Interviewing collaterals is important, but who should be included is not always agreed upon. For custody evaluations, a balance must be found in addressing both parents; whatever assessment is used for one should be used for the other unless well documented as to why further assessment is completed for just one. Finally, it is advised to visit with all the children involved and to visit them in both home environments to see their level of comfort and adjustment. There continues to be ongoing debate as to interviewing stepparents, grandparents, or other family members. The most prudent approach is to address all areas that most influence the child. The goal is to obtain the best vantage point from the child's environment as possible. The ability to speak most fluently as to what the child is currently exposed to and the possible effects of that exposure is the goal. If an expert approaches it from that vantage point, the expert then will be best able to address the best interest standards with recommendations and possible interventions needed.

Sadly, due to the adversarial atmosphere in the courtroom, particularly heightened in high conflict divorce cases, many mental health professionals find themselves avoiding getting involved in such cases, going as far as refusing clients that are involved in

divorce-related issues. This hesitancy is understandable due to the fact that there is a great deal of liability in trying to manage such cases; oftentimes someone walks away very displeased with the outcome. Again, the professional does not determine the benefits to outweigh the costs. Therefore, it is understandable that the best interest of the child is underrepresented in the courtroom from a mental health stance. Sadly, this leaves the field represented by the ‘hired guns’ or under qualified experts, further complicating the perception that attorneys and judges have of the mental health field. Given the current state of affairs, there is much truth to the belief by many decision makers that the approach taken by mental health professionals can be perceived as arbitrary and argumentative. The use of inappropriate evaluation procedures, over/under interpretation of testing, and inadequate approaches leads many to decide that the mental health field is junk science. To add insult to injury, when professionals in this field are used to discount each other, basically brought in as hired guns, with testimony that muddies the water comparing instruments that are not comparable and discrediting approaches because another approach does not render the same results, it gives credence to the legislative system’s low opinions of the human science field.

The truth is the mental health field can offer some great approaches to the decision making required in determining the best interest of the child. The legal standards of best interest of the child have several factors that could be best addressed by a mental health expert. One could argue that there is no other profession better prepared to offer this developmentally related information and emotional fitness to the court in reference to best interest of the child than the mental health professional. However, in order to offer some solid data, one must be fully prepared, gathering data in utilizing the best means available, while keeping one’s perspective on the child and not the parent. The question to be addressed is the best interest of the child, not defending a parent. Faulty evaluations are more likely to be completed when the expert is taking the approach that the role is to prove a parent’s fitness rather than the role of establishing best interest of the child. The outcome may be one in the same, but it is most prudent for the mindset of the evaluator to be focused on offering recommendations to the parent and court as to what will best suit the child. One limits their liability by staying neutral, viewing the evaluation on the child’s best interests, and utilizing assessment procedures to render the most information for that question.

To determine best interest, one must keep in mind that research is clear on the importance of the child and parent attachment bond on the child’s development, as well as the link between attachment styles and parent functioning (Feldman, 2014). When one keeps the focus on these truths, then the final recommendation outcomes will be related to getting the parents functioning and actively involved with the child’s life, regardless of the parent’s current functioning. In essence, as mental health professionals, the stance the evaluator takes is assessing the parent’s current functioning and providing essentially a treatment plan for best functioning. Ceci and Bruck (1995) recommended the expert to enter the interview (assessment) process from a neutral stance when discussing the ethical and legal issues associated with accusations of sexual abuse to children. One could argue the importance of this neutral stance when the mental health professional enters into completing a custody evaluation. It is imperative that the evaluator go into the process not trying to prove or disprove parental fitness, but to go in as a fact finder, reporting the facts and offering recommendations associated with best outcome for the child.



Ceci and Bruck(1995) discussed the importance of entering into the role of interviewing children suspected of being sexually abused free from bias and not trying to prove abuse, but rather entering the clinical interview with the goal to obtain factual information to offer the court. In essence, the expert's role is as a fact collector. The expert's testimony becomes questionable when it appears as if they went into the process one sided or biased. This can happen in the process of a custody evaluation if the evaluator believes their job is to prove or disprove fitness. This vantage point is a dangerous vantage point; it indicates the evaluator is going in not from the child's perspective, one of loving both parents and best suited to have active healthy involvement of both in their lives. Although Ceci and Bruck spoke very specifically to assessing sexual abuse of a child, their recommendations can certainly apply to the fact-finding mission of custody evaluations and/or the information a court needs on certain high conflict cases. If the evaluator will take a neutral stance, then if or when the evaluator finds evidence that indicates poor parental emotional fitness, the evaluator is in a position to better determine recommendations that can help the nonfunctioning parent become functioning. The role/outcome is to help the court determine what is needed to get both parents actively involved in the child's life.

### **Conclusion**

Mental health professionals have been educated and trained in child development and effective parenting styles, as well as crisis intervention and treatment planning. These are all skills that can bring tremendous insight into the courtroom with these ongoing conflictual cases. Sadly, as mental health professionals, we are not well educated in the legal process and what to expect in the courtroom. It could be argued if a mental health professional took the stance of utilizing what they are trained in and staying focused on the question at hand, the best interest of the child, bringing into the courtroom the mental health professional's education, there would be little to fear. It is only staying ignorant to the legal process that renders a mental health professional liable. If one stays focused on one's own expertise, respects the legal process and the limitations to what a mental health professional can and cannot do in the courtroom then one's liability is very low. A mental health professional's ethical responsibility is to advocate and to avoid potential harm for one's clients. If the vantage point is clearly defined, that of best interest of child, and the professional uses all their training and skills to focus on advocating for the child's best interest then one's liability lessens even more. It is only when one loses the focus of advocating for the best interest of the child, becomes a hired gun, or enters into the evaluation process lacking proficiency is when ethical standards are compromised.

The outdated myth that urges mental health professionals to avoid the courtroom at all costs is no longer prudent nor is it relevant. There is a growing need for well-trained developmental experts in the courtrooms to help the process along to empower judges with good solid information so they may make better knowledge based rulings. The Association of Family and Conciliation Courts (AFCC), an interdisciplinary international association, helps the different disciplines associated in these cases establish practices that better serve the child in the courtroom. Acceptable standards recognized by the AFCC to date include a minimum of a master's degree in the mental health field, which offers great foundational knowledge for areas in child development, marriage and family

dynamics, multicultural training, and interviewing and assessment skills. The mental health professional must be licensed in the mental health field and be trained in custody-related issues and crisis intervention. In addition, to become qualified and a good representative of the mental health profession, training in advanced interviewing and assessment specific to this area is needed. Thirdly, it is imperative to stay up to date with the best standard of practice utilizing the most widely acceptable testing instruments and interviewing skills to assess the questions posed in these cases. Additionally, good conflict resolution and mediation skills are needed. Finally, ethically, it is imperative to maintain good professional boundaries—establishing the role required (custody evaluator, parenting coordinator, or therapist), understanding the limitations of that role, and maintaining neutrality. For more information and guidelines, look into the Association of Family and Conciliation Courts ([www.afccnet.org](http://www.afccnet.org)).

AFCC is a great resource and establishes helpful guidelines for this unique area of expertise. Although the guidelines given do take into consideration the ethical standards required by mental health professionals, it is also imperative that every professional abide very closely to the standards provided by their specific discipline. The American Counseling Association (ACA) and the American Psychological Association (APA) have very specific guidelines that give further details as to the expectations of a mental health professional's training in evaluation, assessment, and interpretation. These standards can be found in Section E of the *ACA Code of Ethics* (ACA, 2014) or Section 9 of the *APA Ethical Principles of Psychologists and Code of Conduct* (APA, 2010). In general the standards stress the significance of the use of assessments in the evaluation process. It is important that mental health professionals are properly trained before using assessments and that they are using assessment tools within the purpose for which they were designed. In addition, it is important to use a multitude of forms of data collection (e.g., testing, record review, interviews, and collaterals) before rendering a professional opinion. There is special caution to the importance of objectivity, and any professional opinion rendered must be supported by the data collected. These standards all fall within the best practice standard established by AFCC. Filling the courtroom with well-qualified, ethical mental health professionals will go a long way to improve the reputation of the field in the judicial system. Gaining respect by the judicial system renders more informed decision making. This in turn will help parents get the direction they need to become better parents, thus helping the children back onto a healthier developmental path. There is growing research supporting the need for mental health professionals to be speaking to these cases, and there are growing empirically-based practices that are preparing the mental health professional to be even better suited for working in these high-conflict cases.

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