The NC Bar Association year runs from July 1 through June 30, which means that this is the final comments article I am writing for The Will and The Way. It has been my pleasure to serve as chair of the Section this year, and I think we have had a successful year.

We are preparing for our 40th annual meeting. The annual meeting will be at Kiawah Island this year. The dates are July 25-27. I suggest calling the resort to book accommodations immediately! If there is no room at the resort, there are several accommodation opportunities in Freshfields Village, close to the gate for Kiawah Island. The NCBA has issued the program announcement, agenda, and registration information. Please note that our tuition rate did not rise from the prior year's rate. Our CLE Committee and Ad Hoc Fundraising Committee have been hard at work planning to make sure that our 40th annual meeting is one to remember.

As we approach a new bar year, there are many changes afoot. The biggest change is a change in the NCBA's membership dues. The NCBA engaged in an extensive study about the value of NCBA membership and has made changes to the membership structure to give members more benefit.

The main change is the addition of up to 12 hours of on-demand CLE. These 12 hours will be provided through the Expert Series CLE, which is a series of one-hour CLE web presentations, released each month. When each new program is released, members can download it and have unlimited viewing access for up to 90 days. The Expert Series will

The North Carolina Uniform Power of Attorney Act became effective Jan. 1, 2018. With over a year of experience after its effective date, it is time to review the past, discuss the present, and take a glimpse into the future of the North Carolina Uniform Power of Attorney Act.

The Past

A look back on the past year or more highlights a problem in the present. Also, it highlights changes attorneys should consider in their draft powers of attorney.


Session Law 2017-153 repealed Articles 1, 2, 2A, 2B, and 5 of Chapter 32A. For a Statutory Short Form Power of Attorney created in accordance with N.C.G.S. Section 32A-1 before Jan. 1, 2018, N.C.G.S. Section 32C-4-403(d) provides that the powers conferred by former N.C.G.S. Section 32A-2 shall apply to a Statutory Short Form Power of Attorney created in accordance with N.C.G.S. Section 32A-1 before Jan. 1, 2018. Therefore, the powers so conferred by N.C.G.S. Section 32A-2 survive repeal for application to and for a Statutory Short Form Power of Attorney created in accordance with N.C.G.S. Section 32A-1 before Jan. 1, 2018. N.C.G.S. Section 32C-4-403(d) does not expressly
provide that the powers conferred by former N.C.G.S. Section 32A-2 apply to a Statutory Short Form Power of Attorney created in accordance with N.C.G.S. Section 32A-1 on or after Jan. 1, 2018.

Over the past year, there has been a common question about the validity of a former Statutory Short Form Power of Attorney created in accordance with N.C.G.S. Section 32A-1 executed on or after Jan. 1, 2018. A new statutory form power of attorney is in N.C.G.S. Section 32C-3-301, but it is not the exclusive power of attorney form allowable under Chapter 32C. As provided in N.C.G.S. Section 32C-1-106(a), a power of attorney executed in this state on or after Jan. 1, 2018, is valid if its execution complies with N.C.G.S. Section 32C-1-105. And, N.C.G.S. Section 32C-1-105 requires a power of attorney to be “(i) signed by the principal or in the principal’s conscious presence by another individual directed by the principal to sign the principal’s name on the power of attorney and (ii) acknowledged.” Therefore, if a former Statutory Short Form Power of Attorney is executed as provided in N.C.G.S. Section 32C-1-105, the answer to this common question is a former Statutory Short Form Power of Attorney created in accordance with N.C.G.S. Section 32A-1 executed on or after Jan. 1, 2018, is valid.

Assuming for the moment that a former Statutory Short Form Power of Attorney created in accordance with N.C.G.S. Section 32A-1 executed on or after Jan. 1, 2018, is valid, the more troublesome question arises in determining the meaning to the matters described therein when the definitions in former N.C.G.S. Section 32A-2 are repealed. In the most unfortunate circumstances, a court may give no meaning to the matter described therein and, therefore, no power is conferred to the agent under this former Statutory Short Form Power of Attorney because there are no definitions for the matters described therein under the repealed N.C.G.S. Section 32A-2. Alternatively, a court may give effect to the matter described therein, such as “Real Estate Transactions” or “Banking Transactions,” by an authority implied in the actual term used to describe the matter or by looking to N.C.G.S. Section 32C-4-403.

Section 32C-4-403 outlines the effect of Chapter 32C on existing powers of attorney. Based on the circumstances, a court may look to the provisions of N.C.G.S. Section 32C-4-403 for a definition or meaning to the matters described in a former Statutory Short Form Power of Attorney executed on or after Jan. 1, 2018. N.C.G.S. Section 32C-4-403(c) states that “references to prior statutes and powers of attorney, whether executed on or after the adoption of this Chapter shall be deemed to refer to the corresponding provisions in this Chapter unless application of the rule of construction would substantially impair substantial rights of a party.” In addition, N.C.G.S. Section 32C-4-403(d) states, “notwithstanding the provisions of this Chapter, the powers conferred by former G.S. 32A-2 shall apply to a Statutory Short Form Power of Attorney that was created in accordance with former G.S. 32A-1 prior to January 1, 2018.”

An example illustrates the possible application of N.C.G.S. Section 32C-4-403 and a possible result. If the principal initiated the line opposite “Real property transactions” in a former Statutory Short Form Power of Attorney executed on or after Jan. 1, 2018, a court may determine that the matter described as “Real property transactions” gives rise to the subject described in N.C.G.S. Section 32C-2-204 as “Real Property.” The power and authority for real property is the best example because it is the matter that is the most similar to the actual term used to describe the matter in former N.C.G.S. Section 32A-2(1) and existing N.C.G.S. Section 32C-2-204.

When a form similar to a former Statutory Short Form Power of Attorney is presented by an agent, the terms of the power of attorney must be carefully reviewed. In at least one instance, this author has seen a form similar to a former Statutory Short Form Power of Attorney, but it included a provision that is not in the former Statutory Short Form Power of Attorney. In this similar form, the principal also grants the agent the authority to do “any lawful act that I could perform for myself.” N.C.G.S. Section 32C-2-201(d) provides that “[s]ubject to subsections (a), (b), (c), (e), and (f) of this section, if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in N.C.G.S. Section 32C-2-204 through N.C.G.S. Section 32C-2-216.” Therefore, in this instance, the grant of authority for the agent to do “any lawful act that I could perform for myself” was sufficient to grant the general authorities described in Chapter 32C to the agent under this power of attorney.

On Jan. 1, 2018, the North Carolina Uniform Power of Attorney Act was new to all of us. With the passage of time after its effective date, the Act is not new to us now. If an attorney comes across a former Statutory Short Form Power of Attorney created in accordance with former N.C.G.S. Section 32A-1 on or after Jan. 1, 2018, it may be helpful to determine its origin. And, if it was created by an attorney, please consider reaching out to that attorney in the hopes that the principal may execute a power of attorney under Chapter 32C.

**Technical Corrections.** Now, fast forward to Dec. 14, 2018, when technical corrections for the North Carolina Uniform Power of Attorney Act became law. These technical corrections are found in Part II of Session Law 2018-142. The technical corrections struck references to the nonexistent N.C.G.S. Section 32C-2-220 and changed the cross reference for the definition of incapacity to N.C.G.S. Section 32C-1-102(6) (rather than N.C.G.S. Section 32C-1-102(5) which defines good faith).

With a review of these technical corrections to Chapter 32C, an attorney should consider any changes necessary or desirable in his or her draft power of attorney document. For instance, the draft power of attorney document may refer to Section 32C-1-114(b)(7) or more specifically, the draft document may state "In addition, the duty to account in Section 32C-1-114(b)(7) of the North Carolina General Statutes shall not apply to my Agent under this Power of Attorney." In the technical corrections, the default duty to account to the principal or a person designated by the principal in the power of attorney in N.C.G.S. Section 32C-1-114(b)(7) was deleted so this section must be deleted in the draft document. Also, “a person designated by the principal” was added to N.C.G.S. Section 32C-1-114(h) so that, except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a person designated by the principal in the power of attorney, a guardian of the estate, general guardian, or, upon the death of the principal, by the personal representative or successor in interest of the principal’s estate.

N.C.G.S. Section 32C-1-112, related to reimbursement and compensation of an agent, now provides that, unless the power of attorney provides otherwise, an agent is entitled upon request to the clerk of superior court pursuant to N.C.G.S. Section 32-59 to be
reimbursed for expenses properly incurred on behalf of the principal. The terms "upon request to the clerk of superior court pursuant to G.S. 32-59" were added to Section 32C-1-112(c). With this change, attorneys may wish to review their draft power of attorney document as it relates to reimbursement should the principal wish to provide for an agent's reimbursement in the power of attorney.

Based on this change to N.C.G.S. Section 32C-1-112(c) and at the time of submission of this article, there is a bill before the North Carolina General Assembly, House Bill 226, in the 2019-2020 Session for another technical correction to Chapter 32C. Section 23(b) of this bill, referred to as the 2019 AOC Legislative Changes, provides for a clarification in N.C.G.S. Section 32C-1-116(a)(3) to provide original jurisdiction for the Clerks to determine expenses as well as compensation for an agent under N.C.G.S. Section 32C-1-112(b) and N.C.G.S. Section 32C-1-112(c).

The Present

In the present, attorneys, principals and agents alike need to be aware of possible pitfalls for agents or co-agents when exercising their authorities under the power of attorney. This article discusses some pitfalls or problems and reviews possible solutions to them. Examples or illustrations are the best way to demonstrate the pitfalls.

Power of Attorney Lacks Certain Specific Authorities. An agent moves or transfers a securities account owned in the sole name of principal and an individual retirement account of the principal to a new securities firm. At the former securities firm, there was a transfer on death beneficiary on the securities account and a beneficiary on the individual retirement account. When the agent wants to add the same transfer on death beneficiary on the new securities account and the same beneficiary on the new individual retirement account, the new securities firm through its legal department informs the agent that the agent lacks the authority to designate beneficiaries on the accounts. Further, the legal department informs the agent that the agent does not have the necessary delegation authorities for the accounts to be managed accounts with new securities firm. And, because the new securities firm only offers managed accounts, the agent is prohibited from or unable to place any trades on the accounts except those trades necessary to make the required minimum distribution to the principal from the new individual retirement account.

The agent has multiple problems if the principal no longer has capacity for financial matters. If the agent is not able to create or change the beneficiaries designated on the accounts at the former securities firm, the concern for the agent is a possible breach of some of the agent's fiduciary duties under N.C.G.S. Section 32C-1-114(a) and (b) and, specifically, the agent's duty under N.C.G.S. Section 32C-1-114(b)(6) to attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors. Also, there is no designated beneficiary on the individual retirement account and, therefore, the concern for the agent is a significant federal and state income tax liability at the principal's death. Simply moving or transferring these accounts back to the former securities firm will not resolve the agent's lack of authorities in the power of attorney because the former securities firm will not allow the agent to create or change a beneficiary on these accounts upon the move or transfer of these accounts back to the former securities firm.

As for the authority needed by the agent to invest with a managed account, the legal department of the new securities firm recognizes that the agent has the authority to engage, compensate, and discharge a discretionary investment manager in accordance with N.C.G.S. Section 32C-2-203(6). But, the new securities firm requires an agent to have authority to delegate the agent's authority under the power of attorney and to exercise fiduciary powers that the principal has under N.C.G.S. Sections 32C-2-201(a)(1)d and f. Also, there is another opportunity for the agent to address the delegation authority for the new securities account by and through a specific authority in the power of attorney provided for in N.C.G.S. Section 32C-2-201(a)(2)a, which is the authority for the agent to exercise the powers of the principal as settlor of a revocable trust in accordance with N.C.G.S. Section 36C-6-602.1. As for the need to add the same beneficiaries on the accounts, the agent needs the specific authority to create or change a beneficiary designation by the agent available to the agent in N.C.G.S. Section 32C-2-201(a)(1)c.

Chapter 32C offers a solution to this agent. Pursuant to N.C.G.S. Section 32C-2-219, an agent under a power of attorney that does not expressly grant an agent the authority to do an act described in N.C.G.S. Section 32C-2-201(a) may petition the Clerk of Superior Court for authority to do the acts described in N.C.G.S. Section 32C-2-201(a) that are reasonable under the circumstances. The Clerk has jurisdiction over the petitioner, as agent for the principal, and over the principal in the proceeding, which may be uncontested and have no adverse parties, brought under N.C.G.S. Section 32C-1-116(a) as prescribed for in uncontested estate proceeding under N.C.G.S. Section 28A-2-6(b), including pursuant to N.C.G.S. Sections 32C-1-116(c)(1) and (2), and the Clerk may decide without hearing on the petition summarily. The Clerk has subject matter jurisdiction pursuant to N.C.G.S. Section 32C-1-116(a)(4)d because it relates to authorization of an agent under a power of attorney to do acts described in N.C.G.S. Section 32C-2-201(a), other than to make a gift, under N.C.G.S. Section 32C-2-219. Venue is proper in a county described in N.C.G.S. Section 32C-1-116(d).

In the circumstances of this illustration, the petitioner agent will pray for the specific authority to delegate the agent's authority under the power of attorney, to exercise fiduciary powers that the principal has authority to delegate, to create or change a beneficiary designation, and to exercise the powers of the principal as settlor of a revocable trust in accordance with N.C.G.S. Section 36C-6-602.1. The prayer for the specific authorities to create or change a beneficiary designation and to exercise the powers of the principal as settlor of a revocable trust in accordance with N.C.G.S. Section 36C-6-602.1 should include that the beneficiaries to be created or changed will be consistent with the principal's estate plan. The prayer for these authorities is reasonable under the circumstances so the agent may maintain managed accounts at the new securities firm and the agent may create or change the beneficiaries on the accounts to conform with the designations in place at the former securities firm, which is necessary for the agent to make the beneficiaries consistent with the principal's estate plan.

The delegation authorities are needed for the new individual retirement account to be a managed account. As for the new securities account, the agent may wish to establish a revocable trust.
that is consistent with the principal's estate plan. In this case, the beneficiary of the revocable trust at the principal's death would be the transfer on death beneficiary and, if that beneficiary predeceases the principal, then to the beneficiaries consistent with the principal's estate plan and, if none, the principal's intestate heirs. In preparing the revocable trust for this purpose, the attorney for the agent must exercise great care when considering the other terms of the revocable trust.

Estate Planning with Revocable Trust. Mother engages attorney for her estate planning. Mother's assets include her residence and other real property in her sole name, a checking account owned jointly with rights of survivorship with her sole surviving son, and certificates of deposit in her sole name. All the certificates of deposit have a payable on death beneficiary, some of them to her son, while others are to one or more of her five grandchildren. At death, Mother wants to give specific parcels of real property to her son and to one or more of her grandchildren with the balance of her property to her son and grandchildren similar to or as provided by the payable on death beneficiaries.

With such a plan, Mother must understand that her use of these will substitutes or payable on death beneficiaries on all of these accounts may become problematic for her agent under her durable power of attorney. The agent must not breach the agent's duty under N.C.G.S. Section 32C-1-114(b)(6) to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors. Mother looks at her planning, and specifically her incapacity planning, as if her agent will not need monies from any certificate of deposit because there will be sufficient monies from her monthly income in the checking account to pay her bills. If Mother will not establish a revocable trust, Mother and her attorney should consider, at a minimum, granting her agent the specific authority in the power of attorney provided for in N.C.G.S. Section 32C-2-201(a)(2)a, which is the authority for the agent to exercise the powers of the principal as settlor of a revocable trust in accordance with N.C.G.S. Section 36C-6-602.1. Later, if the agent is in the very difficult position of spending some portion of each of the certificates of deposit (in the relevant proportion) so that the agent does not change the principal's estate plan, the agent has the authority to create a revocable trust with dispositive provisions consistent with the principal's estate plan, including the payable on death beneficiaries on the certificates of deposit. And, the agent would fund the revocable trust with the certificates of deposit. Having said that and in this situation, this author prefers Mother execute a revocable trust as part of her estate planning and fund the revocable trust with the certificates of deposit so that it is clear that the agent is to spend monies from the revocable trust if there are insufficient monies available in the checking account during her incapacity. Mother should recognize that a simple estate plan is not measured by the number of pages to a document or by not creating a revocable trust. A simple estate plan is an estate plan that makes it as simple as possible for those fiduciaries who must administer her financial matters during her incapacity and at her death and for those beneficiaries that Mother leaves behind.

Breach or Imminent Breach by a Co-Agent. Uncle Principal is a widower and designates Nephew and Nephew's Wife, jointly or separately, as co-agents under the Durable Power of Attorney. On or about the same time as Uncle designates Nephew and Nephew's Wife as his co-agents, Uncle establishes a joint account with rights of survivorship with Nephew with approximately $500,000 in the account. Uncle and Nephew add Nephew's Wife as agent to the joint account with rights of survivorship. The other assets of Uncle are cash and securities for $1,000,000 in a securities account in Uncle's sole name, which is the account from which Wife pays Uncle Principal's bills as one of the two co-agents under the Power of Attorney, and approximately $2,000,000 in an individual retirement account with charities as beneficiaries. The last will and testament of Uncle gives all of his assets to charities at his death. The original Will is being held by Wife so she has actual knowledge of its terms. Uncle Principal becomes incapacitated. Over the years, Nephew allows his Wife to work with the financial advisors and pay the bills for Uncle Principal. Wife files for divorce from Nephew. Thereafter, Wife sells almost all of the securities in Uncle's securities account and transfers $900,000 of the $1,000,000 securities account to the joint with rights of survivorship account of Uncle and Nephew. With other implications and representations by Wife, it is clear to Nephew that Wife has changed the estate plan of Uncle Principal known to Wife, and Nephew is expected to use Uncle Principal's money for Nephew's benefit, not for Uncle Principal. Finally, even though there is authority in the Durable Power of Attorney for the agents to make gifts, any gifts must be consistent with the Uncle's estate plan.

An agent's duties under the North Carolina Uniform Power of Attorney Act provides, in pertinent part, that an agent that has accepted appointment, when exercising a power under the power of attorney, shall do all of the following: (i) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest; (ii) act in good faith, and (iii) act only within the scope of authority granted in the power of attorney. In addition to these mandatory duties for an agent under N.C.G.S. Section 32C-1-114(a), there are the following duties in N.C.G.S. Section 32C-1-114(b) relevant to these facts: (1) act loyally for the principal's benefit; (2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest; and (3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances. Further, in N.C.G.S. Section 32C-1-114(b)(6), the agent must “[a]ttempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including the following:

a. The value and nature of the principal's property.
b. The principal's foreseeable obligations and need for maintenance.
c. Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes.
d. Eligibility for a benefit, a program, or assistance under a statute or regulation.”

Nephew believes that Wife has breached her fiduciary duty by her representations to Nephew and by changing Uncle Principal's estate plan. Here, if Uncle Principal dies with the additional $900,000 transferred by Wife as co-agent under the power of attorney to the joint with rights of survivorship account of Uncle
Principal and Nephew, Nephew would inherit an additional $900,000 that Uncle Principal planned to pass to charities in his Will.

Section 32C-1-111(d) provides “[a]n agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal’s best interest. An agent that fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.”

Nephew as co-agent has actual knowledge of a breach or imminent breach of fiduciary duty by his Wife co-agent. Wife co-agent does not choose to recognize or admit her breach or imminent breach despite Nephew’s efforts. Nephew co-agent believes that Wife co-agent may continue to breach her fiduciary duties for her best interest, not the best interest of Uncle Principal. Uncle Principal is incapacitated so notification to Uncle Principal does not avoid liability for Nephew co-agent under N.C.G.S. Section 32C-1-111(d). Nephew as co-agent must take action reasonably appropriate under the circumstances to safeguard the principal’s best interest and, of course, with the scope of his authority as co-agent under the Durable Power of Attorney for Uncle Principal.

Here are some of the actions that Nephew believes are in the best interest of Uncle Principal and necessary to avoid liability for Nephew as co-agent under N.C.G.S. Section 32C-1-111(d). Nephew transfers almost all of the money in the joint account with rights of survivorship with Uncle Principal to a joint account with rights of survivorship with new securities firm, whereby alleviating some of the concern that Wife’s further actions as co-agent will be in her best interest, not in the best interest of Uncle Principal. Simultaneously, Nephew opens a new account in Uncle Principal’s sole name at new securities firm and transfers $900,000 from the new joint account to the new sole account, thereby restoring the accounts as they were before the breach with $500,000 in the new joint account and $900,000 in the new sole account.

As for the $900,000 that is again in Uncle Principal’s sole name, Nephew as co-agent is very concerned that Wife co-agent will continue to breach her fiduciary duties if the $900,000 remains subject to Wife co-agency under the Durable Power of Attorney. Nephew understands his duties to act in the best interest of Uncle Principal and believes that monitoring the account alone is less than reasonable under these circumstances. Further, Nephew understands that he as a co-agent may act without the joinder of his Wife co-agent. With his authority under the Durable Power of Attorney, his duties under North Carolina law, and his need to avoid liability to him by his Wife co-agent’s ability to continue to breach or imminently breach her duties, Nephew as co-agent establishes and funds a revocable trust with the $900,000, the terms of which are consistent with Uncle Principal’s estate plan. Also, by its terms, Nephew as co-agent alleviates the concern that Wife as co-agent will continue to breach or imminently breach her fiduciary duties to Uncle Principal and to act in her best interest, rather than the best interest of Uncle Principal with respect to the $900,000. In preparing the revocable trust for this purpose, the attorney for Nephew co-agent must carefully consider all of the terms of the revocable trust.

The Future

When the power of attorney law was very new to attorneys, this author was asked when attorneys may wish to correspond with clients regarding the new power of attorney law in an effort to have those clients revise or update their powers of attorney. At that time, this author suggested that attorneys may wish to wait for a short time, until the current power of attorney law does not seem so new or when attorneys have gained some experience with the new power of attorney law (except when it was clear that time may become an issue for clients).

With regard to experience under the current power of attorney law and during the first six months to a year under the new power of attorney law, this author was concerned that the reference to a “form” expressed or implied the power of attorney “form” is used in and for any and all clients’ circumstances. Over time, this author has determined that attorneys are more familiar with the current power of attorney law and recognize that their draft power of attorney document is not a “one size fits all” draft document.

While powers of attorney that were valid and effective under former North Carolina law remain valid and effective, it appears that the powers of attorney created under former law may lack advantages available under the new power of attorney law. Also, with the passage of time, it may become increasingly difficult to use a power of attorney created under the former power of attorney law.

While some attorneys communicate with their clients by and through updates and articles, others do not. If and when attorneys may wish to reach out to clients regarding the preparation of a new power of attorney for them under the current power of attorney law is clearly a decision for attorneys as it may apply to their practice. In some instances, attorneys routinely recommend to their clients to review their estate plans at the earlier of a change in the clients’ circumstances and a change in the law, but at least every few years. Assuming the clients follow this recommendation, those attorneys should have the opportunity to update the power of attorney in the near future. If and when, however, attorneys have clients who have not updated their estate plans for some time, attorneys may have two reasons to encourage clients to review their estate plans: the power of attorney law and the digital asset law.

A review of the past along with some of the pitfalls incurred by agents in the present sets the stage for a glimpse into the future for the North Carolina Uniform Power of Attorney Act. Members of the subcommittee for our Section’s Legislative Committee on the power of attorney will reconvene to discuss and review Chapter 32C, taking into consideration the experiences over the past year or so. Attorneys with a concern regarding Chapter 32C that may be addressed by a legislative change should submit that concern (and the possible legislative change to address the concern) to this author as Chair of that subcommittee on the North Carolina Uniform Power of Attorney Act.

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