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DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD-2020-OS-0013]

Manual for Courts-Martial; Proposed Amendments

AGENCY: Joint Service Committee on Military Justice (JSC), Department of Defense (DoD).

ACTION: Notice of availability of proposed amendments to the Manual for Courts-Martial, United States (2019 ed.) and notice of public meeting.

SUMMARY: The DoD requests comments on proposed changes to the Manual for Courts-Martial, United States (2019 ed.) (MCM). The proposed changes implement certain provisions of the National Defense Authorization Acts for Fiscal Years 2018, 2019, and 2020 and concern (1) the rules of procedure and evidence applicable in trials by courts-martial; and (2) the punitive articles of the Uniform Code of Military Justice. The approval authority for these changes is the President. These proposed changes have not been coordinated within the DoD under DoD Directive 5500.01, "Preparing, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters, and Testimony," June 15, 2007, and do not constitute the official position of the DoD, the Military Departments, or any other Government agency.

DATES: Comments on the proposed changes must be received no later than [INSERT 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]. A public meeting for comments will be held on February 19, 2020 at 10:00 a.m. in the United States Court of Appeals for the Armed Forces building, 450 E Street, NW, Washington DC 20442-0001.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Department of Defense, Office of the Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Lieutenant Colonel Adam S. Kazin, U.S. Army, Executive Secretary, JSC, (571) 256-8132, adam.s.kazin.mil@mail.mil. The JSC website is located at <http://jsc.defense.gov>.

SUPPLEMENTARY INFORMATION:

The full text of the 2019 MCM is available electronically at <https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/>.

This notice is provided in accordance with DoD Instruction 5500.17, “Role and Responsibilities of the Joint Service Committee on Military Justice (JSC),” February 21, 2018 (available at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/550017_5C.PDF?ver=2018-02-21-074422-370).

The JSC invites members of the public to comment on the proposed changes; such comments should address specific recommended changes and provide supporting rationale.

This notice also sets forth the date, time, and location for a public meeting of the JSC to discuss the proposed changes.

This notice is intended only to improve the internal management of the Federal Government. It is not intended to create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies, its officers, or any person.

Dated: February 6, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

ANNEX

Section 1. Part II of the Manual for Courts-Martial, United States is amended as follows:

(a) R.C.M. 405(h)(3)(B)(iii) is amended as follows:

“(iii) If the Government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. If the preliminary hearing officer determines that the evidence is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) and that the issuance of a pre-referral investigative subpoena would not cause undue delay to the preliminary hearing, the preliminary hearing officer shall direct counsel for the Government to ~~issue~~ seek a pre-referral investigative subpoena for the defense-requested evidence from a military judge in accordance with R.C.M. 309 or authorization from the general court-martial convening authority to issue an investigative subpoena. If counsel for the Government refuses or is unable to obtain an investigative subpoena, the counsel shall set forth the reasons ~~for such refusal~~ why the investigative subpoena was not obtained in a written statement that shall be included in the preliminary hearing report under subsection (1).”

(b) R.C.M. 703(g)(3)(G) is amended as follows:

“*Relief.* If either a person subpoenaed, or a victim named in a specification whose personal and confidential information has been subpoenaed under subparagraph (g)(3)(C)(ii), requests relief on grounds that compliance is unreasonable, oppressive, or prohibited by law, the military judge or, if before referral, a military judge detailed under Article 30a shall review the request and shall—.”

(c) R.C.M. 703(g)(3)(H)(iii) is amended as follows:

“(iii) Form. A warrant of attachment shall be written. All documents in support of the warrant of attachment shall be attached to the warrant, together with ~~the~~any charge sheets and convening orders, if applicable.”

(d) R.C.M. 703A is amended as follows:

“Rule 703A. Warrant or order for wire or electronic communications

(a) *In general.* A military judge detailed in accordance with Article 26 or Article 30a may, upon written application by a federal law enforcement officer, trial counsel, or other authorized counsel for the Government in connection with an ongoing investigation of an offense or offenses under the UCMJ, issue one or more of the following:

(1) A warrant for the disclosure by a provider of electronic communication service of the contents of any wire or electronic communication ~~that is in electronic storage in an electronic communications system for 180 days or less.~~

~~(2) A warrant or order for the disclosure by a provider of electronic communication service of the contents of any wire or electronic communication that is in electronic storage in an electronic communications system for more than 180 days.~~

~~(23) A warrant or order for the disclosure by a provider of remote computing service of the contents of any wire or electronic communication that is held or maintained on that service—~~

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such

communications for purposes of providing any services other than storage or computer processing.

(34) A warrant or order for the disclosure by a provider of electronic communication service or remote computing service of a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications), ~~to include the subscriber or customer's—~~

~~(A) name;~~

~~(B) address;~~

~~(C) local and long distance telephone connection records, or records of session times and durations;~~

~~(D) length of service (including start date) and types of service utilized;~~

~~(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and~~

~~(F) means and source of payment for such service (including any credit card or bank account number).~~

(b) *Warrant procedures.*

(1) Probable cause required. A military judge shall issue a warrant authorizing the search for and seizure of information specified in subsection (a) if—

(A) The federal law enforcement officer, trial counsel, or other authorized counsel for the Government applying for the warrant presents an affidavit or sworn testimony, subject to examination by the military judge, in support of the application; and

(B) Based on the affidavit or sworn testimony, the military judge determines that there is probable cause to believe that the information sought contains evidence of a crime.

(2) Issuing the warrant. The military judge shall issue the warrant to the federal law enforcement officer, trial counsel, or other authorized Government counsel who applied for the warrant.

(3) Contents of the warrant. The warrant shall identify the property to be searched, identify any property or other information to be seized, and designate the military judge to whom the warrant must be returned.

(4) Executing the warrant. The presence of the federal law enforcement officer, trial counsel, or other authorized Government counsel identified in the warrant shall not be required for service or execution of a search warrant issued in accordance with this rule requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service.

(c) Order procedures.

~~(1) A military judge shall issue an order authorizing the disclosure of information specified in paragraph (a)(2), (3), or (34) if the federal law enforcement officer, trial counsel, or other authorized counsel for the Government applying for the order—~~

~~—(A) Offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation; and~~

~~——(B) Except in the case of information specified in paragraph (a)(4), has provided prior notice to the subscriber or customer of the application for the order, unless the military judge approves a request for delayed notice under subsection (d).~~

(1) A military judge shall issue an order authorizing the disclosure of information specified in paragraph (a)(3) if the federal law enforcement officer, trial counsel, or other authorized counsel for the Government applying for the order offers specific and articulable facts showing that there are reasonable grounds to believe that the records or other information sought are relevant and material to an ongoing criminal investigation.

(2) Quashing or modifying order. A military judge issuing an order under paragraph (c)(1), on a motion made promptly by the service provider, may quash or modify such order, if the order is determined to be unreasonable, oppressive, or prohibited by law.

(d) *Delayed notice of order. Non-disclosure orders.*

~~(1) A federal law enforcement officer, trial counsel, or other authorized counsel for the Government applying for an order to obtain information specified in paragraph (a)(2) or (3) may include in the application a request for an order delaying the notification required under subparagraph (c)(1)(B) for a period not to exceed 90 days. The military judge reviewing the application and the request shall grant the request and issue the order for delayed notification if the military judge determines that there is reason to believe that notification of the existence of the order may have an adverse result described in paragraph (4). Extensions of the delay of notification required under subparagraph (c)(1)(B) of up to 90 days each may be granted by the military judge upon application, but only in accordance with paragraph (2).~~

~~(12)~~ A federal law enforcement officer, trial counsel, or other authorized counsel for the Government acting under this rule, ~~when not required to notify the subscriber or customer under subparagraph (c)(1)(B), or to the extent that delayed notification has been ordered under paragraph (1),~~ may apply to a military judge for an order commanding a provider of electronic communications service or remote computing service to whom a warrant or order under this rule is directed, for such period as the military judge deems appropriate, not to notify any other person of the existence of the warrant or order. The military judge shall issue the order ~~for delayed notification~~ if the military judge determines that there is reason to believe that notification of the existence of the warrant or order will result in an adverse result described in paragraph ~~(24)~~.

~~(3) Upon expiration of the applicable period of delay of notification under paragraph (2), the federal law enforcement officer, trial counsel, or other authorized Government counsel shall serve upon, or deliver by registered first class mail to, the customer or subscriber a copy of the process or request together with notice that —~~

~~(A) states with reasonable specificity the nature of the law enforcement inquiry; and~~

~~(B) informs such customer or subscriber —~~

~~(i) that information maintained for such customer or subscriber by the service provider named in such process or request was supplied to or requested by that governmental authority and the date on which the supplying or request took place;~~

~~(ii) that notification of such customer or subscriber was delayed;~~

~~(iii) which military judge made the determination pursuant to which that delay was made; and (iv) which provision of this rule allowed such delay.~~

~~(24)~~ An adverse result for the purposes of paragraph ~~(1) and (2)~~ is—

- (A) endangering the life or physical safety of an individual;
- (B) flight from prosecution;
- (C) destruction of or tampering with evidence;
- (D) intimidation of potential witnesses; or
- (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(e) *No cause of action against a provider disclosing information under this rule.* As provided under 18 U.S.C. § 2703(e), no cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a warrant or order under this rule.

(f) *Requirement to preserve evidence.* To the same extent as provided in 18 U.S.C. § 2703(f)—

(1) A provider of wire or electronic communication services or a remote computing service, upon the request of a federal law enforcement officer, trial counsel, or other authorized Government counsel, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of an order or other process; and

(2) Shall retain such records and other evidence for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

(g) *Definition.* As used in this rule, the term “federal law enforcement officer” includes an employee of the Army Criminal Investigation Command, the Naval Criminal Investigative Service, the Air Force Office of Special Investigations, or the Coast Guard Investigative Service, who has authority to request a search warrant.”

(e) R.C.M. 706(c)(3)(A) is amended as follows:

“(A) That upon completion of the board’s investigation, a statement consisting only of the board’s ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused’s commanding officer, the preliminary hearing officer, if any, appointed pursuant to Article 32 and to all trial and defense counsel in the case, the convening authority, and, after referral, to the military judge.”

(f) R.C.M. 707(e) is amended as follows:

“(e) ~~Forfeiture.~~ Waiver. Except as provide in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty ~~forfeits~~ waives any speedy trial issue under this rule, as to that offense, ~~unless affirmatively waived.~~

(g) R.C.M. 910(j) is amended as follows:

“(j) Waiver. Except as provided in paragraph (a)(2) of this rule, a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, ~~insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made and any non-jurisdictional defect that occurred prior to the plea.~~”

(h) R.C.M. 914(e) is amended as follows:

“(e) *Remedy for failure to produce statement.*

(1) Party refusal to comply. If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice.

(2) Failure to comply in good faith. In the event that the other party cannot comply with this rule because the statement is lost, and can prove, by a preponderance of evidence, that the

loss of the witness statement under subsections (a), (b), and (c) of this rule was not attributable to bad faith or gross negligence, the military judge may exercise the sanctions set forth in subsection(e)(1) of this rule if—

(A) evidence is of such central importance to an issue that it is essential to a fair trial,
and

(B) there is no adequate substitute for such evidence.

(i) R.C.M. 1003(b)(2) is amended as follows:

“(2) In the case of an accused who is not confined, forfeitures of pay may not exceed two-thirds of pay per month. Forfeitures of greater than two-thirds’ pay per month may only be imposed during periods of confinement.”

(j) R.C.M. 1003(c)(2) is amended as follows:

(2) Based on rank of accused.

(A) Commissioned or warrant officers, cadets, and midshipmen.

(i) A commissioned or warrant officer or a cadet, or midshipman may not be reduced in grade by any court-martial. However, in time of war or national emergency the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned, may commute a sentence of dismissal to reduction to any enlisted grade.

~~(ii) Only a general court-martial may sentence a commissioned or warrant officer or a cadet, or midshipman to confinement.~~

(iii) A commissioned or warrant officer or a cadet or midshipman may not be sentenced to hard labor without confinement.

~~(iviii) Only a general court-martial, upon conviction of any offense in violation of the UCMJ, may sentence a commissioned or warrant officer or a cadet or midshipman to be~~

separated from the service with a punitive separation. In the case of commissioned officers, cadets, midshipmen, and commissioned warrant officers, the separation shall be by dismissal. In the case of all other warrant officers, the separation shall be by dishonorable discharge.”

(k) R.C.M. 1101(e) is new and reads as follows:

“(e) Modification. The Statement of Trial Results may be modified as follows:

(1) The military judge may modify the Statement of Trial Results to correct any errors, prior to certification of the record of trial under R.C.M. 1112.

(2) The Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and the Judge Advocate General or his or her designee may modify the Statement of Trial Results in the performance of their duties and responsibilities.

(3) If a case is remanded to a military judge, the military judge may modify the Statement of Trial Results consistent with the purposes of the remand.

(4) Any modification to the Statement of Trial Results must be included in the record of trial.”

(l) R.C.M. 1111(c) is amended as follows:

(c) Modification of judgment. The judgment may be modified as follows—

(1) The military judge who entered a judgment may ~~modify the judgment~~ issue a modified judgment to correct ~~computational~~ any errors, ~~within 14 days after judgment was initially entered~~ prior to certification of the record of trial under R.C.M. 1112.

(2) ~~The Judge Advocate General~~ Court of Criminal Appeals, and the Court of Appeals for the Armed Forces, and the Judge Advocate General or his or her designee may modify a judgment in the performance of ~~their~~ official duties and responsibilities.

(3) If a case is remanded to a military judge, the military judge may modify the judgment consistent with the purposes of the remand.

(4) Any modification to the judgment of a court-martial must be included in the record of trial.”

Section 2. Part III of the Manual for Courts-Martial, United States is amended as follows:

(a) Mil. R. Evid. 311(c)(3) is amended as follows:

“(3) *Good Faith Exception of a Warrant or Search Authorization:* Evidence that was obtained as a result of an unlawful search or seizure may be used if:

(A) the search or seizure resulted from an authorization to search, seize, or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority, or the officials seeking and executing the authorization or warrant reasonably and with good faith believed the individual was competent to issue the authorization or warrant;

(B) the officials seeking and executing the authorization or warrant reasonably and with good faith believed that the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

(C) the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard.

(b) Mil. R. Evid. 902 is amended as follows:

“(12) Reserved.”

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Mil. R. Evid. 902(11). The proponent also must meet the notice requirements of Mil. R. Evid. Rule 902(11).

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Mil. R. Evid. 902(11). The proponent also must meet the notice requirements of Mil. R. Evid. 902(11).”

Section 3. Part IV of the Manual for Courts-Martial, United States as amended by EO 13825 is further amended as follows:

(a) Para. 19(c)(2) is amended as follows:

(2) *Nature of act.* The cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense, if the conduct meets the elements of this offense. Sexual harassment under this paragraph includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature. The imposition of necessary or proper duties and the exaction of their performance does not constitute this offense even though the duties are arduous or hazardous or both.

(b) Paragraph 63 is amended as follows:

“b. *Elements.*

(1) *Indecent viewing.*

(a) That the accused, without legal justification or lawful authorization, knowingly and wrongfully viewed the private area of another person;

(b) That said viewing was without the other person's consent; and

(c) That said viewing took place under circumstances in which the other person had a reasonable expectation of privacy.

(2) Indecent recording.

(a) That the accused, without legal justification or lawful authorization, knowingly recorded (photographed, videotaped, filmed, or recorded by any means) the private area of another person;

(b) That said recording was without the other person's consent; and

(c) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(3) Broadcasting of an indecent recording

(a) That the accused, without legal justification or lawful authorization, knowingly broadcast a certain recording of another person's private area;

(b) That said recording was made without the other person's consent;

(c) that the accused knew or reasonably should have known that the recording was made without the other person's consent;

(d) that said recording was made under circumstances in which the other person had a reasonable expectation of privacy; and

(e) That the accused knew or reasonable should have known that said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(4) Distribution of an indecent recording

(a) That the accused, without legal justification or lawful authorization, knowingly distributed a certain recording of another person's private area;

(b) That said recording was made without the other person's consent;

(c) That the accused knew or reasonably should have known that said recording was made without the other person's consent;

(d) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy; and

(e) That the accused knew or reasonably should have known that said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

e. Sample specifications.

(1) *Indecent viewing, recording, or broadcasting.*

(a) *Indecent viewing.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, without legal justification or lawful authorization, knowingly and wrongfully view the private area of _____, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(b) *Indecent recording.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, without legal justification or lawful authorization, knowingly (photograph) (videotape) (film) (make a recording of) the private area of _____, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(c) *Broadcasting or distributing an indecent recording.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, without legal justification or lawful authorization, knowingly (broadcast) (distribute) a recording of the private area of _____, when the said accused knew or reasonably should have known that the said recording was made without the consent of _____ and under circumstances in which (he) (she) had a reasonable expectation of privacy.”

(c) Paragraph 108 is new and reads as follows:

“108. Article 134 – Sexual Harassment

a. *Text of statute.* See paragraph 91.

b. *Elements.*

(1) That the accused knowingly made sexual advances, demands or requests for sexual favors, or engaged in other conduct of a sexual nature;

(2) That such conduct was unwelcome;

(3) That under the circumstances, such conduct:

(a) Would cause a reasonable person to believe, and a certain person does believe, that submission to such conduct would be made, either explicitly or implicitly, a term or condition of a person’s job, pay, career, benefits or entitlements;

(b) Would cause a reasonable person to believe, and a certain person does believe, that submission to, or rejection of, such conduct would be used as a basis for career or employment decisions affecting that person; or

(c) Was so severe, repetitive, or pervasive that a reasonable person would perceive, and a certain person does perceive, an intimidating, hostile, or offensive working environment.

and

(4) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) Whether “other conduct” is “of a sexual nature” is dependent upon the circumstances of the act or acts alleged and may include conduct that, without context, would not appear to be sexual in nature.

(2) Nature of victim. “A certain person” extends to any person, regardless of gender, seniority, or whether subject to the UCMJ, who by some duty or military-related reason may work or associate with the accused.

(3) Timing and location of act. The act constituting sexual harassment can occur at any location, regardless of whether the victim or accused are on or off duty at the time of the alleged act or acts. Physical proximity is not required, and the acts may be committed through online or other electronic means.

(4) Mens Rea. The accused must have actual knowledge that the accused is making sexual advances, demands or requests for sexual favors, or engaging in other conduct of a sexual nature. Actual knowledge is not required for the other elements of the offense.

d. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

e. Sample specification.

In that _____ (personal jurisdiction data), did, (at/on board – location) (subject-matter jurisdiction data, if required), on or about _____ 20____, knowingly (make sexual advances) (demand or request sexual favors) (engage in conduct of a sexual nature) , to wit (by saying to (him)(her), “ _____, ” or words to that effect) (by _____); that such conduct was unwelcome; and under the circumstances (would cause a reasonable person to believe, and _____ did believe, that submission to such conduct would be made, either explicitly or implicitly, a term or condition of a person’s job, pay, career, benefits or entitlements) (would cause a reasonable person to believe, and _____ did believe, that submission to, or rejection of, such conduct would be used as a basis for career or employment decisions affecting _____) (was so severe, repetitive, or pervasive that a reasonable person would perceive, and _____ did perceive, an intimidating, hostile, or offensive working environment); and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).”

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