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Combining Forces: The Joint Defense Agreement in Civil Litigation

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Part I: Introduction

Within seconds of receiving a new case, every attorney evaluates the key components of who, what, where, and when. The legal issues in your new case promise a refreshing break from the otherwise monotonous work dominating your schedule, but the case also comes with a price – co-defendants. If you share a common interest with these parties, it may be beneficial to work together. Through a joint defense agreement, parties have the opportunity to pool resources, exchange information, marshal legal talent and advice, and maintain a unified front against a common litigation foe. Nonetheless, sharing work product and inside information with third parties could be a disastrous choice leaving your client exposed and vulnerable.

The carefully drafted joint defense agreement is a powerful tool capable of transforming the defense of your multi-defendant case. Understanding when, why, and how joint defense agreements should be entered is an essential skill for every practitioner. With this understanding joint defense agreements will become an essential part of any defense lawyer's defense tactics toolbox.

This article will serve as a primer for the uninitiated defense lawyer to decide – early on – whether a joint defense agreement should be pursued. Examining the benefits, detriments, and origins of this strategy, this article will give you the information you need to make an informed decision and explain this effective, yet underused, tactic.

Part II: History and Purpose

Despite the strong policy behind protecting confidential attorney-client communications and attorney work product, such communications and information generally shed their privilege when revealed to third persons in the absence of a reasonable expectation of privacy.ⁱ In the simplest terms, the joint defense privilege was created to serve as a method by which co-defendants sharing a common interest could share information and coordinate a strategy without losing the attorney-client privilege.ⁱⁱ

The joint-defense privilege is said “to have flowed from the attorney-client privilege.”ⁱⁱⁱ There is not an independent protection created by the joint defense privilege, but rather allows parties facing a common litigation opponent to extend *existing* attorney-client and work product privileges across the entire defense camp to be shared among all participating defendants. Under the protective cloak of the joint defense privilege, co-defendants and their respective attorneys may exchange

information freely among themselves without fear that by their exchange they will forfeit the protection of the attorney-client or work product privileges.^{iv}

Confidentiality of communications between co-parties was first recognized over one hundred and forty years ago in *Chahoon v. Virginia*.^v The doctrine was extended to the civil arena in 1942,^{vi} and first recognized by the federal courts 1967 when the Ninth Circuit Court of Appeals held that witness interview memoranda shared among co-defendants remained privileged because the defendants were engaged in a common defense.^{vii}

Florida recognizes the important public policy benefits of extending attorney-client and work product privileges to a group. In *Visual Scene, Inc. v. Pilkington Bros* Florida's Third District Court of Appeal explained that "since persons with common litigation interests are likely to have an equally strong interest in keeping confidential this exchanged information, the common interests exception to waiver is entirely consistent with the policy underlying the privilege, that is, to allow clients to communicate freely and in confidence when seeking legal advice."^{viii}

When acting within a joint defense agreement, one member of the agreement's statements to the attorney for another member will be treated as though it were an ordinary attorney-client exchange, so long as the communications are for the limited purpose of pooled information in the joint defense.^{ix} Thus, the confidentiality enjoyed by a client with his own attorney is extended to communications with any attorney representing another in the group.^x

Litigation has only grown more complex since the days of *Chahoon v. Virginia*. With the increased likelihood of costly, multiparty litigation, the use of joint defense

agreements can be expected to stay on the rise. Joint defense agreements have been recognized in Florida state and federal courts and they continue to develop through increasingly detailed judicial opinions.

Part III: The Fundamentals

Determining whether a Joint Defense Agreement is right for you begins with an analysis of whether you *can* enter such an agreement and, if so, what information will be protected. Although the existence of multiple parties and multiple attorneys is “axiomatic” to the joint defense doctrine,^{xi} there are a number of additional factors which must be evaluated. In order for the joint defense privilege to apply, members to the agreement must generally satisfy five requirements:

i. The members must be involved in actual or threatened litigation.

“A primary requirement of a joint defense agreement is that there be something against which to defend.”^{xii} In *Fojtasek v. NCL (Bahamas) Ltd*, the Southern District of Florida framed the issue in terms of whether members were “potential or actual parties” parties in “ongoing or contemplated” litigation.^{xiii} In this regard, the joint defense privilege is an extension of the requirement that work product be “prepared in anticipation of litigation.” Fla. R. Civ. Pro. 1.280(b)(3) (2011). Parties are not allowed to have standing or continuing agreements but rather must wait until actual or threatened litigation arises before shared information will be deemed protected under a joint defense agreement.^{xiv}

ii. The members must share a common litigation-related interest.

More than being involved in actual or threatened litigation, parties to a joint defense agreement must share a common defense interest. In *Infinite Energy, Inc. v.*

Econnergy Energy Co, the Eleventh Circuit cautioned that the common interest privilege applies when persons share a common “legal interest,” and not when the primary common interest is a joint business strategy that happens to include a concern about litigation.^{xv} While co-defendants often naturally share a common defense interest by virtue of being accused of the same or similar misconduct, members must be careful to exclude non-parties who are either not potential targets of the litigation or are likely to have interests substantially adverse to the existing members. Remember that regardless of the intentions of the parties, or even the provisions of an express agreement, the privilege ends when the common interest ends.

iii. There must be an objective agreement among the members to maintain confidentiality.

As with any compact, “a misunderstanding cannot result in agreement or to a ‘meeting of the minds’ required to form a contract.”^{xvi} Accordingly, be sure that every party understands and agrees to the basic tenant of confidentiality before exposing your well thought out strategy or facts detrimental to your case.

Florida cases imply that a written agreement is not an absolute requirement for enforcing a joint defense agreement.^{xvii} Nonetheless, reducing the parties’ understanding to writing is certainly the best practice. Written agreements strengthen the argument that communications are shared a part of a common defense effort and ensure that all parties understand and agree to the same specific terms. They are also the best evidence for a later reviewing court to determine the agreement’s existence, scope, effective date, and the precise duties of the parties. Remember that the burden of establishing that a valid joint defense agreement exists is on the party invoking the privilege.^{xviii} In the absence of a written agreement, courts have been hesitant to find

that an implied joint defense agreement exists. *United States v. Weissman*, 195 F.3d 96, 99–100 (2d Cir. 1999).

iv. Shared information must further the joint defense effort and be related to common issues of strategy and defense.

Once potential members have determined that they share a common litigation interest and have agreed to maintain confidentiality, they must carefully screen what information is shared with the group. Remember that just as the attorney-client privilege does not apply to all communications between parties, the joint defense privilege applies “to only those communications made for the limited purpose of common defense.”^{xix} Florida’s courts have held that in determining whether the common interest privilege applies, the “most important” issue is whether the information was exchanged for the limited purpose of assisting in the parties “common, litigation-related cause.”^{xx} Information which is shared in the “ordinary course of business” is not protected.^{xxi}

v. Shared information must not be communicated to non-team members.

As with all privileged information, the privilege can be lost if shared with third parties. Remember that the joint defense doctrine provides no independent protection but rather merely extends existing attorney-client and work product protections to a limited and select group. Any action which would destroy the underlying privilege also destroys the common interest privilege. In this regard, communications between co-defendants, in the absence of any lawyer, may not be protected.^{xxii}

Part IV: Weighing the Pros and Cons

The benefits of joint defense agreements are vast, and much more obvious than the detriments. Without joint defense agreements codefendants run the risk of not

positively obtaining discovery from other co-defendants. In many circumstances this may lead to co-defendants presenting inconsistent defenses to the detriment of the entire defense camp. Aside from the ability of joint defense agreement attorneys to pool knowledge and expertise, the greatest benefit of a joint defense agreement is typically financial. By banding together, the members of the joint defense agreement are able to each contribute to a common war chest which, in most situations will considerably cut the costs of discovery and expert witness fees.

While focused on these positive aspects, the thoughtful defense counsel must consider the following common looming dangers that may arise through the use of joint defense agreements.

Conflicts of Interest

Joint defense agreements invariably increase the risk of conflict on behalf of the attorneys involved. One present danger that should always be avoided is the possibility that one attorney in the group shares privileged communications with other members of the group and later is determined have a conflict of interest. An extreme case of this was illustrated by the court in *Essex Chemical Corp. v. Hartford Accident and Indemnity Co.*^{xxiii} In *Essex*, the trial court disqualified all defense attorneys involved in the joint defense agreement based on the fact that one of the law firms had represented the plaintiff in prior litigation. Although this case was later reversed and the disqualification of all the other defense firms in the joint defense agreement was overturned, this case illustrates the inherent risk associated with conflicts of interest that must be considered in any joint defense agreement.^{xxiv} This argument has not yet appeared in Florida courts, but it is not unreasonable to expect that a court would disqualify all counsel that

participates in a joint defense agreement if the court believes that one attorney has shared information with the group that was obtained through that attorney's prior representation of the plaintiff.

Joint defense agreements also increase the likelihood that an attorney will be conflicted out of future representations. By increasing the number of individuals with whom an attorney is participating in privileged communications with in a particular subject matter the attorney may be limiting his future opportunities to litigate that particular subject matter. One of the most egregious (and costly) examples of this was illustrated by *In re: Gabapentin Patent Litig.*^{xxv} In that case the court disqualified an attorney from representing Pfizer as a plaintiff in a large, and potentially lucrative, multidistrict patent infringement case. The court held that other attorneys in the same firm as the disqualified attorney had previously entered into a joint defense agreement where the current defendants had disclosed confidential information. Because the joint defense agreement gave rise to an implied attorney-client relationship *with all other co-defendants*, the defendant in the current case involving Pfizer was an "affected former client" and accordingly, disqualification of the attorney was proper.^{xxvi}

When Friends become Adversaries

Similar to conflicts of interest are situations where codefendants develop causes of action against each other at some point after the agreement has been entered. As any prudent businessman knows, a joint venture of any kind is grossly incomplete without a contingency plan for winding up in the event the partners decide to go their separate ways. Entering into an agreement with a party who is not trustworthy or who has different motives than your client can be a potential disaster. Because of the gravity

of such a risk, the parties must discuss strategy as much as possible prior to entering a joint defense agreement. The greater danger lies in the possibility that somewhere late in the game, after significant information has been exchanged, one of the parties becomes untrustworthy or acquires a conflicting motive.

The joint defense privilege bars all participants in the agreement from disclosing the pooled information and strategies developed by the team. *United States v. McPartlin*, 595 F.2d 1321, 1336-37 (7th Cir. 1979). In effect, each attorney who is a member of the team becomes counsel for each co-defendant. *United States v. Henke*, 222 at 637-38 (“[a] joint defense agreement establishes an implied attorney-client relationship with the co-defendant”). One Louisiana case examined, in detail, the situation where an attorney’s former membership in a joint defense agreement has bestowed upon him privileged information, that court stated:

We hold that when information is exchanged between various co-defendants and their attorneys that this exchange is not made for the purpose of allowing unlimited publication and use, but rather, the exchange is made for the limited purpose of assisting in their common cause. In such a situation, an attorney who is the recipient of such information breaches his fiduciary duty if he later, in his representation of another client, is able to use the information to the detriment of one of the co-defendants. Just as an attorney would not be allowed to proceed against his former client in a cause of action substantially related to the matters in which he previously represented that client, an attorney should not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various co-defendants in preparation of a joint defense.^{xxvii}

The situation above is contrasted with the distinctly different scenario in which future litigation is between two parties that were both members of the prior joint defense agreement. When the members of the joint defense agreement later become actual

adversaries an attorney may use information obtained about the opposition through the joint defense agreement.^{xxviii} Section 90.502(4)(e), Fla. Stat. provides that if a lawyer acts as an attorney for two or more persons who have a common interest, neither of those clients may assert the privilege relating to communications with the lawyer in a subsequent action in which the clients are adverse parties. However, in an action between one of the clients and a third person the privilege attaches. Since the individuals jointly employed a lawyer to represent their common interests, they had no intention to keep secrets from each other. This exception is applicable even though both clients are not present at the time of the communication so long as the professional relationship is present between the lawyer and the clients at the time of the communication.

As a result, although a joint defense agreement allows its members to speak freely, one should exercise great caution when determining whether to enter such an agreement if future litigation is likely to occur against any other member of the joint defense.

When one Member Waives the Privilege

As with nearly all recognized privileges, a waiver may occur. Many lawyers have engrained the importance of the attorney client privilege into them throughout law school that they often forget how delicate the privilege is. Some may recall that Martha Stewart waived the attorney-client privilege covering an e-mail to her lawyer by simply sharing the e-mail with her own daughter.^{xxix}

Under Florida law, "[a] client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when

such person learned of the communications because they were made in the rendition of legal services to the client."^{xxx} "A communication between lawyer and client is 'confidential' if it is not intended to be disclosed to third persons other than...[t]hose to whom disclosure is in furtherance of the rendition of legal services to the client...[and] [t]hose reasonably necessary for the transmission of the communication."^{xxxi}

Generally, a party to joint defense team communications may not waive the privilege without consent of the other participants. This limitation is necessary to assure joint defense efforts are not inhibited by the fear that a party to a joint defense communication may subsequently unilaterally waive the privilege for the entire group, either purposefully in an effort to exonerate himself, or inadvertently.^{xxxii} Each attorney who is a member of the team must give each co-defendant the same duty of confidentiality as they would their own client.^{xxxiii} Without a written joint defense agreement, setting forth the requirements for waiver, a court may find that a waiver has occurred if the members generally have treated certain information as though it were not confidential.^{xxxiv}

Even in cases where the attorney client privilege is waived, a waiver of the work product privilege designed "to protect the legal craftsman in the product of his labors will not automatically occur."^{xxxv} This does not mean that the work product privilege is immune from waiver in situations involving joint defense agreements; "[c]ourts ... have looked to whether the transferor and transferee share 'common interests' in litigation and to whether the disclosure is consistent with 'maintaining secrecy against opponents.'"^{xxxvi} Parties with common interests against a common adversary are not at all likely to disclose the work product material to their shared adversary. When the

transfer to a party with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger.^{xxxvii} As explained further in the next section, reducing a joint defense agreement to writing will largely avoid the need to prove whether there was a guarantee and, accordingly, whether a waiver of privilege occurs.

Part V: Drafting a Successful Joint Defense Agreement

After checking the fundamental requirements and weighing the relative benefits and detriments, you have decided to enter a joint defense agreement. A successful agreement must be drafted with a cognizant mind taking in to account the inevitable risks that banding together with others always involves. The sophistication of the agreement will depend on the numbers of parties and the complexity of the subject matter. Nonetheless, many potential problems in every case can be avoided through careful drafting. The following is a non-exhaustive list of provisions that should be given consideration. A well drafted joint defense agreement should minimally provide that:

1. It covers all participating attorneys, their clients and litigation support staff.
2. Members of the agreement are actual or potential defendants in litigation with common defense related interests.
3. Members have performed thorough conflict checks and that no conflict of interest exists with regards to any other member or their clients.
4. Each member has explained the agreement to his or her client and that client has agreed to be bound by its terms.
5. That in furtherance of a common defense strategy, the members have decided to pool information and resources and that:
 - a. By entering into the agreement, members intend to permit the exchange and disclosure of defense materials while preserving and protecting the confidentiality of such materials under the attorney-client or work product doctrines

- b. Team members will maintain pooled information in confidence and protect such information from disclosure to third parties;
 - c. Team members will not use exchanged information except in connection with the current litigation effort; and
 - d. That the agreement applies to all information, whether written, oral, electronic, or otherwise, shared in furtherance of common defense.
 - 6. A description of the parameters by which joint-defense materials may be used by the group members and their counsel
 - 7. The agreement remains operative as to all information exchanged pursuant to the agreement if adversity arises between the parties irrespective of any claim that the joint defense privilege may become inoperative by virtue of such adversity.
 - 8. No member is required to share information in its possession and that failure to provide information will neither affect the validity of the agreement nor the application of its terms.
 - 9. The agreement does not limit a party from disclosing or using information for any purpose which (a) originated with that party; (b) was obtained or obtainable outside of the parties' joint defense relationship; or (c) are not otherwise protected under any other recognized privilege.
 - 10. Members remain free to negotiate with adverse parties. The agreement may also provide that members who settle any part of a claim with an adverse party must disclose the fact of settlement with other members.
 - 11. Members are prohibited from using any shared information in a manner adverse to any other team member.
 - 12. Communications between members related to the common defense effort which occurred prior to the date of the agreement are also subject to the common interest privilege.
 - 13. Members may withdraw from the agreement only upon written notice to all other members. In the event of withdrawal, the agreement should provide that:
 - a. All previously shared information will remain protected by the agreement.
 - b. A statement as to whether previously shared information must be returned or destroyed by either the withdrawing or remaining members;
 - 14. The parties acknowledge that any client may become a witness and that no member will seek to disqualify any other member/former member based on their participation in the group or receipt of shared information.
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15. That the agreement does not create a duty of loyalty (as opposed to a duty of confidentiality) to any other team member.
16. That (a) the parties understand and agree that the agreement does not create an actual attorney-client relationship between an attorney and client which was not already in existence at the time of execution and (b) that no such relationship will be deemed to arise by implication.
17. Modifications to the agreement must be in writing and signed by all parties.
18. Members must notify the attorney supplying information in the event that any person or entity requests access to information supplied by the attorney under the agreement.
19. That nothing is intended to interfere with the lawyer's obligations to his client.
20. The agreement does not create any costs sharing responsibility.
21. Waiver of common defense privilege cannot occur with the consent of all parties.

Part VI: Conclusion

When properly managed, the benefits to forming a joint defense group typically outweigh the possible dangers. The best way to avoid problems is to anticipate them and address them upfront within a thoughtfully drafted written agreement. The open dialog you will be granted with similarly situated defendants has the potential to positively reshape even your most confident defense strategies. By taking precautions from the inception of the case your defense team will be relieved of concerns over conflicts and waivers and you can focus solely on what your client hired you to do, win their case.

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ⁱ § 90.507, *Fla. Stat.* (2011).

ⁱⁱ *Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So. 2d 437, 440 (Fla. 3d DCA 1987) (noting that the joint defense exception “enables litigants who share unified interests to exchange this privileged information to adequately prepare their cases without losing the protection afforded by the privilege.”).

ⁱⁱⁱ See *Developers Surety and Indem. Co.*, 2007 WL 2021939 at *1.

^{iv} *Visual Scene* at 442.

^v 62 Va. 822, 842 (1871) (allowing communications between criminal co-defendants and their respective counsel to fall under the protection of the attorney-client privilege).

^{vi} *Schmitt v. Emery*, 211 Minn. 547, 555-556 (1942).

^{vii} *Continental Oil Co. v. United States* 355 F.2d 183, 185 (9th Cir. 1965).

^{viii} *Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So. 2d 437, 440 (Fla. 3d DCA 1987).

^{ix} *United States v. McPartlin*, 595 F.2d 1321 (7th Cir.1979).

^x *Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So. 2d 437, 440 n.3 (Fla. 3d DCA 1987).

^{xi} *Id.*

^{xii} *In re Grand Jury Subpoena*, 274 F.3d 563, 575 (1st Cir. 2001).

^{xiii} 262 F.R.D. 650, 656 (S.D. Fla. 2009).

^{xiv} See e.g. *In re Grand Jury Subpoena* at 575 (noting that “[t]he law will not countenance a ‘rolling’ joint defense agreement”).

^{xv} *Infinite Energy, Inc. v. Econnergy Energy Co.*, No. 1:06CV124-SPM/AK, 2008 WL 2856719, at *2 (N.D. Fla. July 23, 2008)

^{xvi} *Seawell v. Hargarten*, 28 So.3d 152, 155 (Fla. 1st DCA 2010).

^{xvii} *Old Tampa Bay Enters., Inc. v. Gen. Elec. Co.*, 745 So. 2d 517, 518 (Fla. 3d DCA 1999) (noting that . . .)

^{xviii} See *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 94 (3d Cir. 1992).

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- ^{xix} *Developers Sur. & Indem. Co. v. Harding Vill., Ltd.*, No. 06-21267-CIV, 2007 WL 2021939, at *3 (S.D. Fla. July 11, 2007) (citing *Visual Scene*, 508 So.2d at 441).
- ^{xx} *Infinite Energy, Inc. v. Econnergy Energy Co.*, No. 1:06CV124-SPM/AK, 2008 WL 2856719, at *1 (N.D. Fla. July 23, 2008) (citing *Visual Scene*, 508 So. 2d at 441).
- ^{xxi} *Id.* at 3.
- ^{xxii} *United States v. Gotti*, 771 F. Sup. 535, 545 (E.D. N.Y. 1991).
- ^{xxiii} *Essex Chemical Corp. v. Hartford Accident and Indemnity Co.*, 975 F. Supp. 650 (D.C.N.J. 1997) reversed by *Essex Chemical Corp. v. Hartford Accident and Indemnity Co.*, 993 F. Supp. 241 (D.C.N.J. 1998).
- ^{xxiv} *Id.*
- ^{xxv} *In re: Gabapentin Patent Litig.*, 407 F. Supp. 2d 607, 615 (D.N.J. 2005).
- ^{xxvi} *In re: Gabapentin Patent Litig.*, 407 F. Supp. 2d 607, 615 (D.N.J. 2005).
- ^{xxvii} *Wilson P. Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977). (citations omitted); see also Fla.R.Prof.Conduct 4-1.9 (prohibiting a lawyer from (a) representing another person in a matter substantially related to a matter in which he represented another client whose interest would be adverse; (b) using information relating to the representation to the disadvantage of the former client; and (c) disclosing information relating to the former representation).
- ^{xxviii} *In re Grand Jury Subpoena*, 406 F. Supp. 381, 392 (S.D.N.Y. 1975) (joint defense privilege cannot be waived without the consent of all parties to the defense, except when one of the joint defendants becomes an adverse party in the litigation); see also *IBJ Whitehall Bank and Trust Co. v. Corey & Associates, Inc.*, 1999 WL 617842, at *3 (M.D. Ill. Aug. 12, 1999); see also *In re Ginn-LA St. Lucie Ltd., LLLP*, 439 B.R. 801, 805-806 (Bankr. S.D. Fla. 2010).
- ^{xxix} *United States v. Stewart*, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).
- ^{xxx} *Trianon Condo. Apartments Ass'n v. QBE Ins. Corp.*, No. 10-80812-Civ, 2010 WL 3446885, at *1 (S.D. Fla. Sept. 1, 2010).
- ^{xxxi} Fla. Stat. § 90.502(1)(c).
- ^{xxxii} *Interfaith Hous. Del., Inc. v. Town of Georgetown*, 841 F. Supp. 1393 (D. Del. 1994) quoting *Western Fuels Ass'n Inc. v. Burlington Northern R.R. Co.*, 102 F.R.D. 201, 203 (D.Wyo.1984).
- ^{xxxiii} *Id.*; see also *United States v. Henke*, 222 at 637-38 (“[a] joint defense agreement establishes an implied attorney-client relationship with the co-defendant”).
- ^{xxxiv} See Fla. Stat. § 90.502(1)(c).
- ^{xxxv} *Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So. 2d 437, 442 (Fla. 3d DCA 1987) quoting *Transmirra Products Corp. v. Monsanto Chemical Co.*, 26 F.R.D. at 578.
- ^{xxxvi} *United Technologies Corp. v. National Labor Relations Board*, 632 F.Supp. 776, 784 (D.Conn.1985) (quoting *United States v. American Telephone & Telegraph Co.*, 642 F.2d at 1299).
- ^{xxxvii} *Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So. 2d 437, 442–43 (Fla. 3d DCA 1987).
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