What midwives need to know about NMC Fitness to Practise hearings

Less than 1% of the 687,000 nurses and midwives on the NMC register are considered under their fitness to practise procedures. Fewer still find their case progresses to a hearing. But what does it mean for you if you do find yourself before a panel? Former panellist Jo Hathaway tries to demystify and humanise the processes, to encourage more registrants to engage positively to defend their pin.

For most nurses and midwives, the thought of being referred to their regulator is an unlikely nightmare scenario. Registrants are not overpaid; many make the choice not to pay to register with a union such as the RCM or RCN that would provide advice and free representation were they to be referred. Many do not engage, finding the whole process too stressful and intimidating from the outset, and imagining only one outcome: striking off.

As an independent panellist of the Conduct and Competence Committee and Health Committee for eight years, I experienced two recurring frustrations: the way in which the NMC communicated with those who had been referred, and the lack of engagement from nurses and midwives whose cases were being heard.

In the context of extraordinary pressures on practice, the NMC has seen a 33% increase in referrals in the last year. In this article, I aim to demystify the referral, investigation and hearings process, as well as the role of the panellists on the reviewing Committees, in an attempt to encourage a more positive engagement between the NMC and any registrants referred to them.

What is a hearing for?

I was taken on by the NMC to sit as an independent panellist of the Conduct and Competence Committee and Health Committee (shortly to be merged).

Jo Hathaway
Former lay panellist of the NMC's Conduct and Competence Committee and Health Committee

As an independent panellist, my three duties were defined by the NMC as being:

- To protect the public
- To declare and uphold proper standards of conduct and performance
- To maintain public confidence in the professions and the NMC

The NMC does not use the word 'tribunal' as other professional regulators do. It refers to a hearing. The terminology is instructive: the best way to fulfil the three duties of the regulator is to bring together all parties, quite literally, in hearing—i.e. a process that enables and encourages a full airing of the evidence and allows all parties to take part and speak about the context and characters involved in the case.

There are very few professions which equate with the responsibilities of nursing and midwifery, providing frontline clinical and pastoral support to members of the public. As human beings we are all vulnerable, never more nakedly than when we present for nursing or midwifery care. It is vital such vulnerability is recognised and protected by the profession, and that when it is perceived to have been abused in some way, that the public or other professionals can refer individuals for investigation.

To protect the public

This is the duty of care and protection. Patently, there are some individuals whose practice is so impaired—for reasons of competence or conduct—as to be considered dangerous to the health and wellbeing of patients and their families, and requiring further monitoring, support, or removal (temporary or otherwise) from the register.

To declare and uphold proper standards of conduct and performance

It might be said that this duty refers to the message being sent to the profession. The NMC is the biggest regulator in the UK, to which 687,000 practitioners are registered. Messages about what conduct and level of competence are and are not acceptable need to be clearly communicated and understood. The Code is critical here, and is referred to in detail when a panel considers misconduct and impairment. The Code is not a wish list; it is a baseline expression of what a registrant must adhere to on a day-to-day basis. It is revised every four or five years and a new copy sent out to all registrants. During my time as a panellist, I heard a worrying number of registrants refer to 'having read/been aware of The Code when I was studying', but who were vague about its relevance to their ongoing practice, or the charges facing them. It is vital that, as a registrant, you know the items of The Code and reflect on their meaning in your practice. Simply put, The Code declares proper standards, the NMC Fitness to Practise directorate upholds them. A panel's written decision will do just this.

To maintain public confidence in the professions and the NMC

This duty can be considered as the message being sent to the public. This is a sometimes subtler, but equally important duty for any panellist. Decisions based on this duty

were often the most difficult or upsetting to make, as the construct of the profession was placed above the practice, career, remediation, and insight of the individual practitioner. There are times when a nurse or midwife may have done something in her private life, for example, that did not have a direct or immediate bearing on her clinical practice. She may have had full insight, be remorseful and unlikely to ever repeat that conduct again, and may even be regarded as more likely to be a reflective practitioner as a result of the experience. Her references might be excellent and you feel that from a public protection and public interest perspective you have no concerns about returning the nurse to unrestricted practice. But you know that to do so would be to undermine or damage the public's confidence in nursing as a profession, and the NMC as regulator. This may be the case when there has been significant harm done to a patient or client, particularly where it has not been possible to alleviate this. It might be the case when a midwife has had a criminal conviction, or admitted to some form of domestic violence, or been dishonest, or any of a hundred other acts or omissions. You may feel that this behaviour amounts to conduct that would make people less confident about the care they should expect or are likely to receive—thus making them less likely to comply with treatment, or accept medical opinion.

What is the public interest?

As a lay panellist I felt that I had a specific role to represent the 'public interest'; I was 'the informed person on the top of the omnibus'. It was I who was hearing the oral and documentary evidence and applying my own instincts, judgement, life experience and analytical and personal skills to form an opinion then work with others to reach a decision on what to do to fulfil the duties set out for us. In many cases, the public interest is best met by keeping good nurses on the register and supporting them to return to safe practice.

The process

What happens when a nurse or midwife is referred to the NMC?

At the time of writing, the NMC website states that fewer than 1% of nurses and midwives 'get complained about', a statistic dated 2014-2015. It is not clear whether these 5183 complaints equate to referrals to the NMC, but it is fair to assume that the number of these complaints that are progressed further is lower than this. Historically, there were a great deal fewer midwifery cases than nursing—this is partly because of the far greater number of nurses; it was also believed that the supervision structures that existed in midwifery (before the Kirkup report) addressed concerns locally before/if ever being referred to the NMC (though no evidence has been found to support this):

- Any referrals that are progressed are passed initially to the Investigating Committee, an independent committee that reviews evidence from all parties
- The cases are also reviewed by independent Case Examiners (some of whom are former Committee panellists), who decide whether or not there is a case to answer, and the likelihood of the charges being found proved
- These cases will be reviewed by a three-person independent panel of the Conduct and Competence Committee. Currently, some of those are then forwarded onto a similar panel of the Health Committee (though these Committees are shortly, and controversially, to be merged)
- A Case Officer is assigned to each case, and that person becomes the point of contact for the nurse/midwife concerned

The options for the registrant

At some stage during the process of investigation, the nurse or midwife concerned may be offered various options for 'disposal' of their case:

- Some registrants will be offered/apply for Voluntary Removal, which offers the opportunity, in some circumstances, for the individual's removal from the register without further investigation or review.
- Some registrants will be offered/apply for the opportunity for a Consensual Panel Determination (CPD) in which the individual comes to an agreement with the NMC about what happened leading to the referral, accepts their misconduct and that their fitness to practise is impaired, and agrees to an appropriate sanction. This CPD is then reviewed by an independent panel that can confirm the determination; find no misconduct or impairment; or amend the sanction.
- If it is felt that there is not a keen public interest in the case, it may be referred to a Meeting. A nurse/midwife can request this, and give their reasons for that request. This meeting is held in private and is common for less complex cases.
- If the panel considers there is a strong public interest in the case, it will be referred to a public hearing.

What does a hearing look like?

Hearings are usually held in one of the NMC's hearing venues—in Belfast, Cardiff, London, or Edinburgh. Hearings may also take place in other places under certain specific circumstances.

Hearings are almost always held 'in public', which means that rooms are usually spacious to allow for any observers. Most hearings are not attended by observers.

Hearings are formal and conducted in a structured way. The set up of the hearing room is detailed in *Figure 1*.

Who is at a hearing?

The panel

Every panel of the Conduct and Competence Committee and Health Committee is made up of three people: the Chair and two panellists. At least one of the panel will be a registered nurse or midwife. The others are 'lay', which is to say they are not registered with the NMC. They come from a variety of backgrounds but will have relevant experience, and will have been through a rigorous selection process to ensure they have the appropriate skills and approach to make balanced, fair decisions —such as health and social care providers, people working in human resources, training providers, lecturers, teachers, former police officers, lawyers, accountants, social workers etc. My own background was as an editor and writer in health and social care—mainly training materials. I had also been a Healthcare Support Worker and had previously written and edited learning

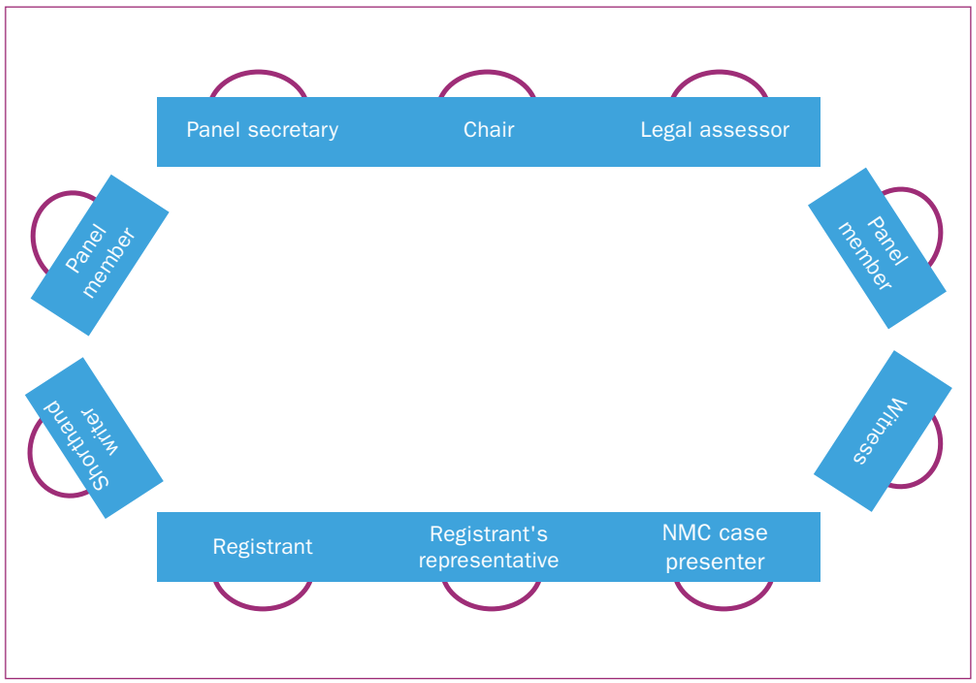

Figure 1. The hearing room layout

materials for the RCN. My mother has recently retired after 50 years a registered nurse; I have had two children of my own in the NHS—I am invested in the professions.

Though the Chair guides the progress of the hearing, all three panellists have an equal say in the decision making.

Legal assessor

The legal assessor sits next to the Chair and advises on legal matters that arise during the hearing, giving guidance to the panel at each stage as to the approach they should take to proceedings, general and specific. The legal assessor is also present in any discussions between the registrant and NMC case presenter that take place during but outside the hearing. If a registrant is present but not represented, the legal assessor also has a duty to make sure that the registrant is clear about matters of law and the process.

The legal assessor does not take part in the decision making, and s/he does not write the reasons.

Panel secretary

The panel secretary is an NMC employee. Their role is to support the panel in administrative matters. They are highly skilled and experienced, and fully aware of the Code, the laws, the rules and legislation affecting the hearings. They write drafts of the panel's discussions and decisions between each stage.

Shorthand writer

The hearing will be recorded digitally or by a shorthand writer, who will be present but will not take part in the hearing.

NMC case presenter

The NMC's case is presented by a lawyer, called the 'case presenter'. They will speak with the registrant before and during the hearing, possibly also outside the hearing. They will agree the evidence to be presented with the registrant, who must be made aware, in advance, of everything that is to be put forward.

Registrant and representative

The registrant sits opposite the Chair and next to their representative if they have one.

Many nurses are represented by their Union or another professional they have taken on for that purpose.

A panel will find out about whether or not a registrant is attending and/or is represented on the morning of the hearing. It was always a cause of relief to hear that a registrant was attending and represented, because it meant you could be confident of a fairer hearing and appropriate sanction. Panels are very much aware of, and sympathetic to, how intimidating and stressful the process and hearing is to someone who is the subject of it, and the Chair should recognise this when the registrant arrives. They are treated with courtesy and respect.

There are no available figures for how often registrants do not attend their hearings. Anecdotally, I would say that in my experience it was about 50%. Of those not attending and not represented, perhaps a quarter send in submissions in the form of a letter and some references.

It is not essential to be represented. If they are not members of a union, registrants may have to find up to £5000 or more (depending on the complexity of the case) to hire representation for their case. Some registrants come alone and represent themselves. Those who do are very much supported in the process by the NMC's case presenter and the legal assessor. The Chair and panel, too, will do what they can to ensure the registrant understands what is happening at each stage, and what they need to present at what stage.

When registrants do not attend and are not represented

There is an often-quoted phrase used at the hearings that 'no adverse inference' or conclusions are made by the panel about the absence of a registrant. However, it cannot be stressed too strongly that engagement, attendance and representation at a hearing are immeasurably helpful to reassure a panel that they might meet their duties without striking off the registrant. If you are called to attend a substantive hearing, come!

Witness

A 'witness box' is referred to, where a witness gives their evidence. However, in reality, this is just a chair at a small table, with a microphone. Witnesses submit or read their sworn statement about the events detailed in the referral, and are

then asked questions by the case presenter, the registrant's representative, and also, possibly the panel members. A registrant can choose whether or not they wish:

- To give evidence (give sworn testimony and accept questions from the lawyers and columnists)
- Make submissions (statements that can be made without being sworn in—sometimes are given less 'weight' as the information you give isn't open to questions/clarifications)

The stages

At each stage the panel will produce written reasons for reaching their decisions. This can take a long time, and sometimes this can be worrying for the registrant. Discussions between the panel members are structured and all the evidence is reviewed in full, and every panel member's opinion explored during those discussions. This must be reflected in the reasons. The panel secretary writes a draft of that discussion and its conclusions, but the panel must edit and review the draft to make sure it accurately and fully reflects their view. The legal assessor also reads the reasons to ensure they are properly expressed from a legal point of view. Sometimes this whole process can take several hours. It is not an indication of the severity or otherwise of the panel's findings.

What does 'current' fitness to practise mean?

Registrants are often confused by the distinction between misconduct and impaired fitness to practise, and what is meant by 'current' fitness to practise.

You may be able to accept—and should do so—that what you did/didn't do that lead to the charges was, objectively speaking, misconduct. You may recognise that at the time you behaved in that way, you were therefore impaired (in whatever context, be it your health, circumstances, judgment etc). It will speak well of your insight if you can recognise and admit that.

The panel will then consider whether your fitness to practise is still currently impaired (i.e. what have you done/reflected on to remediate since the misconduct? How likely would you be to make the

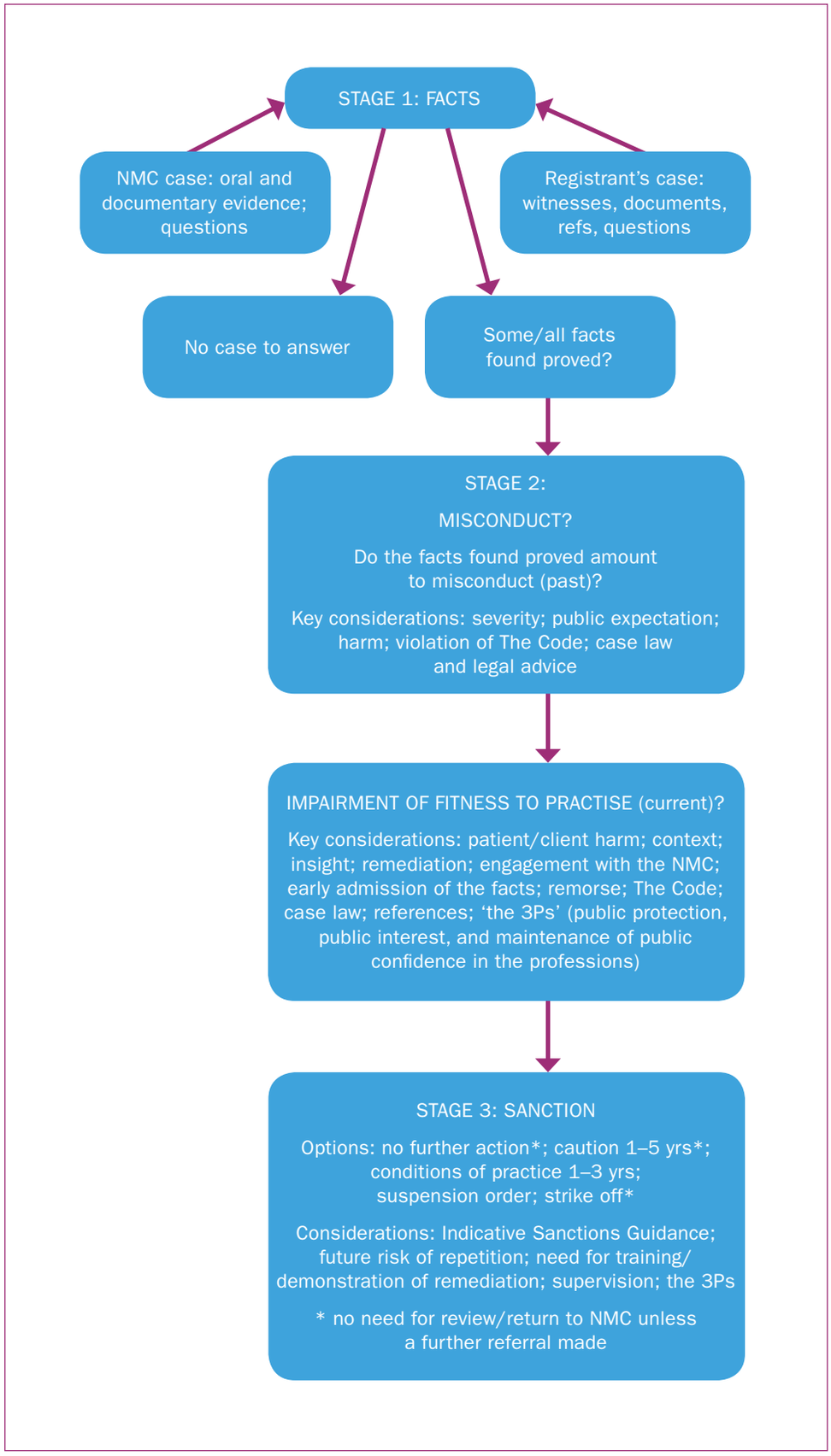

Figure 2. The hearing stages

same mistake today? What protections are in place to prevent it?). The panel may find serious misconduct—often defined as actions or inactions that other registrants would find 'deplorable'—but decide you aren't currently impaired.

How to engage—all the Rs

The distance from a finding of misconduct to impairment, and then possibly to a sanction can be said to be insight. This is a complex thing to achieve and demonstrate, as insight requires both a subjective and objective awareness of a situation:

Reassurance of the panel that a registrant is ready to return to safe practice is often directly proportional to their level of insight. One useful way to think about your own insight is to structure it around all the Rs!:

- **R**epresentation: possibly the single best thing you can do for yourself is to be represented. Join a union and keep up your subscriptions. Apart from all the ongoing ways they can support your training and career, if the worst happens then having a professional body who can support and guide you will take so much of the sting out of what's happening, meaning you don't have to deal with stressful and sometimes opaque or weighty correspondence, which will help you present your case properly.
- **R**eflection: in order to make its determinations, a panel needs to see how much and how constructively a registrant has reflected on the situation that took place, and on their own actions. They will be looking to have your understanding of why the misconduct happened, and how you would approach and handle things differently under similar circumstances in future. They will be looking for an honest and open appraisal of what went on. It may be useful to use a recognised framework. Presenting as full a reflection as possible may also help the individual to move on personally, and professionally, beyond the hearing.
- **R**esponsibility: The Code states that every practitioner is 'responsible for their own practice'. This does not mean that your reflection must necessarily lead you to take all the blame, but rather that you have assessed your own share of responsibility and are able to articulate what that is. This is often indicated by evidence of remorse, remediation and reflection on what happened.
- **R**emediation and remorse: every case differs to such a degree that it is impossible to say what this means for any particular individual or case. But whether it's training, counselling, professional supervision, apologising to colleagues or patients or clients, it all builds a picture of an individual's level of insight into their actions.
- **R**eferences: submit as many relevant, dated references as you can. These should indicate that the person writing is aware of the charges against you.

What does the panel consider in their decision-making?

A panel will be conducting a risk assessment. The NMC's own Indicative Sanctions Guidance is instructive, and points to some of the things which panels are advised to consider. Future risk is informed and determined by a range of factors, including:

- The charges found proved
- The context in which incidents happened
- Harm to patients/clients
- Honesty—has the nurse acted with integrity and openness? If not, why not and for how long?
- Early admissions
- Engagement with any local disciplinary and with the NMC as regulator
- Insight, reflection, remorse and references (see above)
- Career of the nurse and any previous issues over conduct
- Any other factors

The panel will discuss and debate decisions at length and in detail, incorporating discussions of their own experience of nursing, midwifery, healthcare, and lay experience. The panel is there to represent the public and the profession in its review. They take their responsibility seriously. They are entirely independent and there to take a fresh view of all the evidence.

The different kinds of hearings

Interim Order hearing (IO) and Interim Order Review Hearing (IOR)

An Interim Order Hearing is a review of the charges before an independent panel that takes place while the referral is being fully investigated, and a hearing scheduled.

The panel is being asked to undertake a risk assessment and to make any order they think necessary to remove the risk as far as possible. The panel is not presented with all the evidence and sometimes charges evolve during the investigation process. For this reason, any interim order is reviewed regularly. An interim order is not, therefore, an indicator of the likelihood of any final finding. It is decided upon on the basis of public protection. However, a nurse/midwife's involvement and even attendance at the IO hearing is very helpful to a panel in determining just how cautious they need to be in restricting practice at this stage. It may also be considered positively later on as a sign of 'engagement' with the NMC.

It is also potentially very helpful for the nurse concerned, as it can reduce their stress, familiarising them with the formality and functions of a hearing, which may make them feel less objectified/victimised by the process and may help them approach their case in a constructive way.

Substantive hearing (SH)

This is the name for the hearing at which all charges are finalised, evidence presented, parties questioned and documents produced. For all the reasons above, it is incredibly valuable for the panel making their decision if the nurse is present.

Substantive order review (SOR)

If a nurse is given a caution order, they do not have to return for a review. The order will lapse after the allocated period of time and the caution order will be removed from the register. (A further referral during the period of a caution will result in a further review.)

However, if a nurse is given a suspension or conditions of practice order, they mustreturn to the NMC regularly to update them on their progress and show how they are meeting any identified concerns with training or supervision.

A note on formality

The nature of referral and hearings are very formal. Many registrants have to travel a long way geographically, professionally and personally to get through the process. The formality of it is meant to recognise the gravity of the charges and the experience of all parties, including the registrant.

However, the panel recognises that the formality can be intimidating. Registrants can take comfort in the fact that despite the legal language and formal stages of the process, plain English is welcome and does not count against you! Be prepared to speak up and speak out. It is your hearing. The best outcome is one that recognises and addresses the reality of the what has brought everyone to the hearing. It is a chance finally to expose and examine and resolve the difficult experience of every party involved.

Conclusion

In the context of current cuts to services, insufficient resources and exhausted systems and management, it can be hard to remember that your registration is precious and valued deeply by the public.

The best outcome for many hearings is to find a way through what has happened and retain the experience, qualifications and commitment of the registrant involved. Positive engagement with the NMC and others in the process can be intimidating, frustrating, distressing and disheartening.

The nursing and midwifery professions and professionals are worth fighting for, and so are its nurses and midwives. **BJM**

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