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978-1-107-00475-7 - The Lawyer-Judge Bias in the American Legal System

Benjamin H. Barton

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THE LAWYER–JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM

Virtually all American judges are former lawyers. This book argues that these lawyer-judges instinctively favor the legal profession in their decisions and that this bias has far-reaching and deleterious effects on American law. There are many reasons for this bias, some obvious and some subtle. Fundamentally, it occurs because – regardless of political affiliation, race, or gender – all American judges share a single characteristic: a career as a lawyer. This shared background results in the lawyer–judge bias. The book begins with a theoretical explanation of why judges naturally favor the interests of the legal profession and follows with case law examples from diverse areas, including legal ethics, criminal procedure, constitutional law, torts, evidence, and the business of law. The book closes with a case study of the Enron fiasco, an argument that the lawyer–judge bias has contributed to the overweening complexity of American law, and suggestions of some possible solutions.

Benjamin H. Barton is the Director of Clinical Programs and Professor of Law at The University of Tennessee College of Law. His articles have been published in the *Michigan Law Review*, *California Law Review*, and *The Journal of Empirical Legal Studies* and discussed in *Time* magazine, the *New York Times*, and the *Wall Street Journal* law blog, among others. Barton has been twice named the Outstanding Faculty Advisor for UT Pro Bono and has received the Marilyn V. Yarbrough Faculty Award for Writing Excellence. He is the winner of the 2010 LSAC Philip D. Shelton Award for outstanding research in legal education.

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CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA
www.cambridge.org
Information on this title: www.cambridge.org/9781107004757

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First published 2011

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Barton, Benjamin H., 1969–
The lawyer–judge bias in the American legal system / Benjamin H. Barton.
p. cm.

Includes bibliographical references and index.

ISBN 978-1-107-00475-7 (hardback)

1. Judges – Selection and appointment – United States. 2. Lawyers – United States.

I. Title.

KF8776.B37 2011

347.73'14–dc22 2010035957

ISBN 978-1-107-00475-7 Hardback

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Acknowledgments

I could not have finished this book without a great deal of help along the way. The book is dedicated to Indya, my wife, best friend, ardent supporter, and most faithful editor. My daughters Dahlia and Georgia were patient and kind while I worked nights and weekends, and dubbed the book “Judges ♥ Lawyers.” My extended family was also there for me throughout, so thanks to Bill, Mary-Claire, Jake, Jenny, Louis, and Claire.

Special thanks are also due to several friends and colleagues. Charles Wolfram greatly improved the book with his time, wisdom, and encyclopedic knowledge. Brannon Denning read multiple drafts and sharpened its contents immeasurably. Jeff Hirsch and Glenn Reynolds sat through many lunches and chats in which we worked through the ideas found herein. I am also extremely grateful for comments from Dwight Aarons, Doug Blaze, Judy Cornett, Tom Davies, Joan Heminway, Jennifer Hendricks, Joseph King, George Kuney, Alex Long, Carl Pierce, Tom Plank, Mae Quinn, Paula Schaefer, Greg Stein, Maurice Stucke, and Penny White. I am also thankful for the supportive and collegial atmosphere at The University of Tennessee College of Law. Last, but not least, John Berger of Cambridge University Press guided me through this process with kindness and patience.

This book draws on previously published articles: “Do Judges Systematically Favor the Interests of the Legal Profession?” 59 *Alabama Law Review* 1 (2007); “The ABA, the Rules, and Professionalism: The

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Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons,” 83 *North Carolina Law Review* 411 (2005); “An Institutional Analysis of Lawyer Regulation – Who Should Control Lawyer Regulation, Courts, Legislatures, or the Market?” 37 *Georgia Law Review* 1167 (2003); “Why Do We Regulate Lawyers? An Economic Analysis of the Justifications for Entry and Conduct Regulation,” 33 *Arizona State Law Journal* 429 (2001); and “The Lawyer-Judge Hypothesis,” in *The Pursuit of Justice: Law and Economics of Legal Systems* (Edward J. Lopez, ed., 2010).

Thanks to the *American Bar Association Journal* for allowing me to use the photograph on the cover. The original publication of the photo can be found at 11 *A.B.A. J.* 371 (1923). It is a photo of the Executive Committee of the American Bar Association in 1923. That year’s executive committee included a future Chief Justice of the U.S. Supreme Court (Charles Evan Hughes), a co-founder of the American Law Institute (Cordenio Severance), a former Congressman from Michigan (John Corliss), as well as other judges, prominent attorneys, and high-level politicians. The photo well captures the power and prestige of the American Bar Association and suggests the genesis of the lawyer–judge bias.

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1 An Ambient Bias

When I refer to the secret life of judges, I am speaking of an inner turn of mind that favors, empowers, and enables our profession and our brothers and sisters at the bar. It is secret, because it is unobserved and therefore unrestrained – by the judges themselves or by the legal community that so closely surrounds and nurtures us. It is an ambient bias.

- The Honorable Dennis Jacobs, Chief Judge, U.S. Court of Appeals for the Second Circuit¹

THIS QUOTE COMES FROM A SPEECH, “THE SECRET LIFE OF Judges,” that Dennis Jacobs recently gave at the Fordham Law School. Judge Jacobs’s remarks are exceptionally frank for any sitting judge, and are particularly startling from the chief judge of the Second Circuit. It is quite unusual for any judge or lawyer to discuss a bias in favor of the legal profession; it is a criticism that cuts too close to the bone. If and when cases crop up that favor the legal profession, lawyers, judges, and law professors are quick to explain them away as correct decisions that reflect the unique position of lawyers in the American justice system or as anomalies. This may explain why relatively little has been written about what I call the lawyer–judge bias.

The lawyer–judge bias has also stayed largely hidden because of a national blind spot for judges. American lawyers have always been

¹ Dennis Jacobs, “The Secret Life of Judges,” 75 *Fordham L. Rev.* 2855, 2856 (2007).

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relatively unpopular, especially in recent years. In comparison, judges are held in relatively high esteem.² This raises a somewhat puzzling conundrum: Why does the public trust and admire lawyer-judges more than lawyers?

This gap in public perception is part of a much greater gap in our understanding of the American judiciary. The idea that all judges should be lawyers has become so ingrained in our national consciousness that it has become like wallpaper, barely noticed or discussed. In some circles, lawyers are seen as dishonest sharks who will do anything to win a case. Lawyer-judges are seen as measured arbiters of the law and facts.

I do not seek to convince readers that lawyer-judges are as bad as lawyers are perceived to be, nor do I aim to prove that lawyers are particularly maleficent. Instead I seek to demonstrate that lawyer-judges instinctively favor the legal profession in their decisions and actions and that this bias has powerful and far-reaching effects on our country. In this book I gather judicial decisions from diverse areas of the law and boil them down to a simple proposition I call the lawyer–judge bias: when given the chance, judges favor the interests of the legal profession over the public. The lawyer–judge bias hypothesis addresses the interests of the legal profession as a whole, not any particular lawyer representing any particular client, or even a particular subset of lawyers (such as prosecutors or defense lawyers). Those biases may exist, but I am addressing only a broader bias in favor of the interests of the entire profession.³

² Opinion polls show that the public holds the judiciary in much higher esteem than the legal profession. See Gallup, “Honesty/Ethics in Professions,” available at <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx>. In recent years judges have polled ahead of lawyers, senators, governors, and other state and local officeholders, but behind clergy, doctors, and nurses.

³ In this book I use the expressed desires of bar associations as a proxy for what the profession as a whole would prefer. If it strikes you as overreaching to refer to the “interests of the legal profession” or you think those interests are too multiple to be so reduced, please add the modifier “as expressed by bar associations” whenever the interests of the profession as a whole are at issue.

AN AMBIENT BIAS**3**

There are many reasons for this bias, some obvious and some subtle. At bottom, it occurs because regardless of political affiliation, judicial philosophy, race, gender, or religion, every American judge shares a single characteristic: every American judge is a former lawyer.⁴ This shared background has powerful effects on the shape and structure of American law and has created the lawyer–judge bias.

Sahyers v. Prugh, Holliday & Karatinos, P.L.

It is helpful to choose a single emblematic case as an introduction, and we begin with *Sahyers v. Prugh, Holliday & Karatinos, P.L.*,⁵ a 2009 case in the U.S. Court of Appeals for the Eleventh Circuit.⁶ Subsequent chapters cover better-known cases, those with broader implications and others with more famous players. I choose *Sahyers* here, however, because it is narrow in scope but manages to encompass many of the underlying themes of the book. It offers a special benefit to the legal profession, largely on the basis of the judicial sympathy and empathy for fellow lawyers. It does so despite long-standing statutory and case law that suggests the opposite result. It justifies the decision because lawyers are “officers of the court” – that is, because lawyers are special and deserve special treatment. Finally, the court claims that it does all this not to benefit lawyers, but to benefit what the court ironically calls “the public interest.”

One of the reasons *Sahyers* is such a great lawyer–judge bias case is that in most ways it is a very ordinary case. Plaintiff Christene Sahyers

⁴ There are still some justices of the peace and magistrate-level judges who are not lawyers, but the vast majority of trial judges, and all appellate judges, are former lawyers. See Doris Marie Provine, *Judging Credentials: Nonlawyer Judges and the Politics of Professionalism* (Chicago: University of Chicago Press, 1986).

⁵ *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241 (11th Cir. 2009). Unless noted separately, all the facts and law that follow come from this decision.

⁶ Please note that I have been involved with advising plaintiff’s counsel in this case and am helping pro bono on a petition for certiorari to the U.S. Supreme Court.

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worked as a paralegal at the law firm of Prugh, Holliday & Karatinos. She claimed that during her employment she worked unpaid overtime. This fact is not surprising: according to a survey taken by the National Federation of Paralegal Associations, more than 35 percent of paralegals are classified as “exempt” employees and are not subject to overtime rules, despite the fact that very few paralegals fit the legal definition of “exempt.”⁷

After Ms. Sahyers left the law firm’s employ she hired a lawyer and sued the firm in federal court for failure to pay overtime wages for hours she worked in excess of 40 per week, in violation of the Fair Labor Standards Act (FLSA).⁸ Before filing suit, Sahyer’s lawyer did not contact Prugh, Holliday for settlement negotiations or to warn the firm about the lawsuit. There was nothing unusual about this: the FLSA does not require any warning or contact before a lawsuit is filed,⁹ and every day all over America there are defendants who first learn about a lawsuit when they are served with a complaint.

The complaint set forward no particular amount of damages and no specific amount of hours of overtime. This was also quite typical. The American legal system generally allows “notice pleading”: a plaintiff’s complaint must set forth only sufficient details to put the defendant on notice of the claim, not enough details to flesh out every part of the claim.

Prugh, Holliday answered the complaint and denied the allegations. The parties continued on to discovery, the part of a lawsuit in which the parties request information from each other about their claims.

⁷ See National Federation of Paralegal Associations, “Paralegal Compensation & Benefits Survey Report, Sept. 2006,” available at: http://www.paralegals.org/display_common.cfm?an=1&subarticlenbr=926. See 29 CFR §§541.100–541.300 (2009) for the exemptions that might fit paralegals.

⁸ 29 USC §§201–219 (2009).

⁹ *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 738 (1981) held that the FLSA wage provision “permits an aggrieved employee to bring his statutory wage and hour claim ‘in any Federal or State court of competent jurisdiction.’ No exhaustion requirement or other procedural barriers are set up.”

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Prugh, Holliday requested an accounting of the total number of unpaid overtime hours and the evidence supporting that calculation. The plaintiff objected to this request. Discovery disputes are likewise endemic to the American legal system; this case was no different.

After discovery closed, Prugh, Holliday filed an offer of judgment under Federal Rule of Civil Procedure 68 for \$3,500 plus any attorney's fees and costs to which the district court determined the plaintiff was entitled. Rule 68 allows a defendant to make a settlement offer before trial. If the plaintiff rejects the offer and receives less than the amount offered at trial, the plaintiff must pay the defendant's costs from the time of the Rule 68 filing.¹⁰ As is typical, Prugh, Holliday denied all liability in the Rule 68 offer.

Sahyers accepted the Rule 68 offer. The district court entered judgment in favor of Sahyers and, as is customary in an FLSA case, allowed Sahyers and her attorney a chance to file a motion for fees and costs. The FLSA requires judges to award "a reasonable attorney's fee" and costs to successful parties.¹¹ The purpose of awarding attorney's fees is to encourage employees to act as "private attorneys general" and enforce the FLSA when the Department of Labor cannot. It also encourages attorneys to represent employees despite the relatively small amount of damages generally in question.¹² In short, the fees provision is an incentive to draw lawyers into taking these cases, despite the fact that the total damages on fifty hours of lost overtime might be too little to otherwise interest a lawyer. Although many other statutory fee-shifting provisions are left to a judge's discretion, the FLSA is mandatory. If a plaintiff wins, the court must allow a reasonable attorney's fee.¹³

¹⁰ Federal Rule of Civil Procedure 68 (2008).

¹¹ 29 USC §216(b) (2008).

¹² See *Jones v. Central Soya Co., Inc.*, 748 F.2d 586, 592–93 (11th Cir. 1984); *United State, Tile and Composition Roofers, Damp and Waterproof Workers Association, Local 307 v. G & M Roofing & Sheet Metal Co.*, 732 F.2d 495, 501–02 (6th Cir. 1984).

¹³ See *Shelton v. Erwin*, 830 F.2d 182, 184 (11th Cir. 1987).

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Sahyers’s lawyer filed for \$13,800 in attorney’s fees and \$1,840.70 in costs. Up to this point in the story, *Sahyers v. Prugh, Holliday & Karatinos* was a perfectly typical FLSA lawsuit. What comes next was quite unusual.

First, the district court scheduled oral argument on the fee request at its own motion. Usually the issuance of legal fees in an FLSA action is pretty straightforward. A court must award fees to the prevailing party. The court determines a reasonable fee by calculating the “lodestar” – the product of the number of hours reasonably expended and the customary fee charged in the community for similar services. The court may then adjust the lodestar based on a limited number of factors,¹⁴ which deal with the difficulty of the case, awards in similar cases, and other related issues.¹⁵ None of the factors covers civility during the lawsuit or whether the plaintiff contacted the defendant before filing the case.

Nevertheless, at the oral argument, “the district court asked Plaintiff’s lawyer, among other things, to respond to Defendants’ contention that he afforded Defendants no notice of Plaintiff’s claim before filing suit. Plaintiff’s lawyer admitted that the allegation was true.”¹⁶ It is hard to get much of a sense of pique from a written order, but it is clear that the district judge was greatly aggrieved by Sahyers’s lawyer’s failure to call his fellow lawyers before filing suit:

At no time prior to filing this lawsuit did Plaintiff make a written demand to Defendants for payment of the overtime compensation

¹⁴ *Hensley v. Eckerhart*, 461 U.S. 424, 429–30 (1983).

¹⁵ The factors are (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney owing to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship and the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974).

¹⁶ *Sahyers*, 560 F.3d at 1244.

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she now seeks. Furthermore, Plaintiff's attorney did not send Defendants a pre-suit demand letter prior to filing this lawsuit. This Court is not ruling that a pre-suit letter is always required, but in this case, the Plaintiff's lawyer did not even make a phone call to try to resolve the issue before filing suit. The Defendant is a law firm. Prior to filing suit in this local area, it is still reasonable to pick up the phone and call another lawyer so it won't be necessary to file suit. The defense proffered by Plaintiff's lawyer for not doing so is that his client instructed him to file suit first and ask Questions [*sic*] later.

Absent any pre-suit demand, a defendant who unknowingly failed to compensate an employee for overtime would have no opportunity to voluntarily do so outside of litigation. As a result, such a defendant would be subject to additional litigation expenses and attorney's fees despite its good faith desire to properly compensate the employee. Furthermore, additional judicial time and resources would be spent on unnecessary litigation.¹⁷

The judge went on to rule that Sahyers had indeed prevailed on her suit, but that "there are some cases in which a reasonable fee is no fee," and he rewarded Sahyers no attorney's fees or costs whatsoever.¹⁸

There are several striking aspects to this decision. The decision is in clear conflict with the FLSA and prior case law. The FLSA does not require any presuit activities. There is no letter requirement. There is no phone call requirement. This is not an oversight on Congress's part: when Congress wants a presuit procedure, it knows how to require it. Humorously, Congress did create a presuit notice requirement for FLSA suits by employees of Congress.¹⁹ The district court itself recognized this by stating, "This Court is not ruling that a presuit letter is always required."

Moreover, the FLSA requires a court to award a reasonable attorney's fee to a successful plaintiff. There is forty-odd years of case law on how to determine those fees; whether the defendant is a law firm or

¹⁷ District court's written order, quoted in appellant's brief, 2008 WL 2336850.

¹⁸ *Id.*

¹⁹ 42 USCA §2000e-16a et seq. (2008).

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whether it would have been more considerate to contact the employer ahead of time are not on the list of factors that courts must use to calculate fees.

The court also seems much more worried about the poor defendant law firm that “unknowingly” fails to pay overtime than it is about the paralegal who was illegally uncompensated for her overtime. The FLSA, like many other statutes, has no requirement that the failure to pay overtime be intentional. There is a good reason that the statute does not require intent: every employer claims that it “unknowingly” failed to pay overtime. Nevertheless, in this judge’s opinion, it is the plaintiff’s lawyer, who had the temerity to sue another local law firm, who is the villain.

The district court’s palpable sympathy for the law firm is somewhat startling. After all, it is the law firm, not the plaintiff, that violated the law. Of course the reason for this sympathy is not a general worry about unsavvy employers, or even the more reasonable worry about unnecessary litigation. To the contrary, the reason for the concern is that the “Defendant is a law firm. Prior to filing suit in this local area, it is still reasonable to pick up the phone and call another lawyer so it won’t be necessary to file suit.”

For critics of the American legal system, the aforementioned sentences will strike a particular chord. The experience of Prugh, Holliday in the American civil justice system is extremely typical. In comparison with the more high-profile cases of innocent defendants ruined or bankrupted defending themselves, this case seems mild indeed.²⁰ However, it took a case in which a law firm suffered the indignity of a lawsuit and a lengthy discovery and settlement process to really irk this judge.

Unsurprisingly, Sahyers’s lawyer decided to appeal to the U.S. Court of Appeals for the Eleventh Circuit. The argument was pretty straightforward: Sahyers was the successful party, the statute requires an award of fees to a successful party, there is no presuit notice requirement in the

²⁰ Philip Howard’s three books are packed with such examples. See, e.g., Philip K. Howard, *Life Without Lawyers* (New York: W. W. Norton, 2009), 68–92.

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FLSA, and “judicially created exemptions from laws of general applicability only for lawyers are wrong.”²¹ The National Employment Lawyers Association filed an amicus brief in support, basically making the same arguments.²²

The defendants countered that Sahyers was not a successful party in the suit (despite her receipt of a Rule 68 settlement) and that it was allowable to lower attorney’s fees if a case involved a “nuisance settlement” or unnecessary legal fees; they included several references to the “special circumstances” involved in a suit against a law firm.²³ Notably, Prugh, Holliday did not argue that a special rule should apply to law firms, or that a presuit notice requirement was appropriate, nor did Prugh, Holliday argue that the federal courts have special “inherent authority” over the legal profession that allows a court to disregard settled FLSA law when it comes to a suit against a law firm if it does not like the behavior of one of the parties’ lawyers. Nevertheless, the Eleventh Circuit’s decision held exactly that.

First, it is important to note what the Eleventh Circuit did *not* hold. The Eleventh Circuit did not hold that Sahyers was an unsuccessful party in the underlying lawsuit or that Rule 68 settlements are somehow different from other settlements.²⁴ The court also did not hold that despite Sahyers’s status as a successful party, the district court could choose not to award a reasonable attorney’s fee. To the contrary, the very first sentence of the court’s legal discussion conceded, “In general, a prevailing FLSA plaintiff is entitled to an award of some reasonable attorney’s fees and costs.”²⁵

The Eleventh Circuit did not, however, apply the “lodestar” test for determining attorney’s fees, nor did it discuss why the district court should or should not have used that well-established test. Instead, the

²¹ Appellant’s brief, available at 2008 WL 2336850.

²² Brief of amicus curiae, available at 2008 WL 3980717.

²³ Appellee’s brief, available at 2008 WL 3980718.

²⁴ *Sahyers*, 560 F.3d at 1244.

²⁵ *Id.*

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court created a brand-new defense of the district court’s brand-new exception to settled law on FLSA attorney’s fees: “The district court, in substance, based this exception on its inherent powers to supervise the conduct of the lawyers who come before it and to keep in proper condition the legal community of which the courts are a leading part.”²⁶

Before we flesh this argument out, note the phrase “in substance.” In fact, the district court never mentioned inherent authority or supervising the legal profession in its opinion at all. The district court judge was clearly annoyed that one lawyer had failed to show the requisite consideration to another lawyer, but he certainly never said, “As a judge I am in charge of relations between lawyers and under my inherent authority I am going to punish one of my wayward brethren.” Nevertheless, the Eleventh Circuit decided to treat the case as an inherent authority case, despite the fact that neither the district court’s opinion, the briefs of the parties, nor the *amicus curiae* had done so.

We will spend much more time on the “inherent authority” of courts to govern lawyers later, so I offer only a brief explanation here. Federal courts have “inherent powers” that are not granted by rule or statute: “Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.”²⁷ The federal courts’ powers include the right “to control admission to its bar and to discipline attorneys who appear before it.”²⁸ A judge’s ability to hold persons in the courtroom in contempt is also an inherent power. The Supreme Court has noted that these powers are limited and are to be “exercised with restraint and discretion.”²⁹

The Eleventh Circuit noted this traditional statement of a federal court’s “inherent authority” before launching into a much broader statement of these powers. I will spend a little time on what comes next in the

²⁶ *Id.*

²⁷ *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

²⁸ *Chambers*, 501 U.S. at 43.

²⁹ *Id.* at 44.

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