

The Changing Role of a Judge and Its Implications

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There is a lot of talk these days about the role of a judge, especially among trial court judges. Frequently the discussion is framed in terms of whether the judiciary should be expected to behave in one of two polar-opposite ways. Should they be primarily almost aloof finders of fact, impartial and nearly devoid of intimate contact with and knowledge of litigants and their circumstances? Or should they be one of many possible partners to a diagnostic, therapeutic oriented response process to ameliorate underlying and messy problems of litigants? These choices confront judges with the creation and development of drug courts, domestic abuse courts, gun courts, mental health courts, community courts, and other courts revolving around social maladies.

These are not negligible choices with few consequences. The contention of this article is that changes in judicial roles have profound implications, even though the advocates of particular role changes might see them as improvements in the manner in which judges make decisions and carry out their responsibilities. To support this argument, the article tries to sort out some of the implications of what has happened to the judicial role in past several years. Certainly there are few judges who would claim that judging today is just like it was 30 years ago, or like they think it was 30 years ago. For this reason, I think that there is a need for a deliberative and purposive discussion on the judicial role—past, present, and future. The intended contribution of this article is to encourage that dialogue by synthesizing scholarly observations on the importance of the judicial role, to suggest what have been implications of past role changes, and to recommend what should be on the future agenda of action and research.

I. INTRODUCTION

The notion that individuals play particular roles in society is a persuasive and pervasive proposition in the study of human behavior. *Role orientations* are defined as an individual's expectations on what he or she should do. And *role behavior* is defined as what an individual actually does in terms of identifying problems, searching for alternative responses to those problems, weighing the pros and cons of the alternatives

to the current condition, selecting the most promising response, and then implementing that response. Cast in that light, it is understandable that the notion of roles has been applied to the study of decision makers. In fact, one of the first applications of this concept was to legislators, at both the national and the state levels.

Studies of judges have incorporated the notion of judicial roles to describe and to explain judicial decision-making behavior. Court reformers have embraced into their vocabulary the notion of roles and urged that judges adopt new ones to fit emerging needs and circumstances. Both scholarly researchers and visionaries of court improvement have accepted the fundamental premise that if judicial expectations or role orientations are changed, a judge's role behavior will be altered in meaningful and substantial ways. And those ways might, in turn, affect a litigant's behavior in a socially desirable manner.

The most recent chapter in the unfolding story of judicial roles is the current discussion surrounding problem-solving courts and problem-solving judges.¹ As we will see below, however, the analysis of roles has a history. This history allows us to talk about the implications of role changes more deeply than if the discussion just began with the contemporary issue of problem-solving courts. Hence, it is both possible and worthwhile to try to sort out the implications of past changes in judicial role orientations and judicial role behavior to enlighten the current condition.

The basic objective of this article, then, is to explore whether there are some common patterns to what happens with the introduction of new and different judicial expectations. To assess whether there are discernable patterns, I believe that it is fruitful to engage in a dual exercise of reflecting on what the scholarly literature on the subject of judicial roles has contributed and by considering essential aspects of court reforms that have occurred during the past 35 years.

Bringing past reforms into the discussion is useful in two ways. First, it provides well-known examples of how judges have changed their behavior and court policies. These illustrations establish the practical significance of thinking about the judicial expectations that underlie these important phenom-

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Footnotes

1. See Greg Berman, *What Is a Traditional Judge Anyway? Problem-Solving in the State Courts*, 84 JUDICATURE 78 (2000); John Feinblatt & Dereck Denckla, *Prosecutors, Defenders and Problem-Solving Courts*, 84 JUDICATURE 206 (2001).

ena. Second, reforms are a useful epistemological platform on which to sort out the implications of changing judicial expectations without first having to define *the* proper expectations and *the* proper behavior of a judge. Universal agreement has not been achieved in either area, but that situation need not inhibit the discussion of the implications of changes in judicial expectations. Implications of changing expectations can be seen, at least indirectly, from major court reforms.

The benefits of discussing the implications of changing judicial expectations are threefold: First, it is essential to know the whether the conscious decision by judges to change their expectations has recognizable implications. Persistent and consistent implications of changing judicial expectations permit the opportunity for reflection and deliberation by judges on whether to continue modifying their expectations or role orientations. Second, an understanding of the path that implications generally take will enable us to monitor role changes in progress. It is helpful to be able to know where role changes are headed to anticipate their eventual consequences. Third, knowledge of the pattern of implications wrought by changes in judicial expectations is vital because an all too common reaction to changes in judicial role behavior and corresponding policies is near hysteria. Because the American legal system is oriented favorably to maintaining both substantive and procedural precedents, change itself is greeted with skepticism by some observers. Before dismissing changes in judicial role behavior out of hand as inappropriate, the implications should first be understood as carefully as possible.

II. LEADING OBSERVATIONS AND POSSIBLE LESSONS FROM THE LITERATURE

Previous research has documented several important characteristics of judicial roles that serve as a useful analytical framework. The literature tries to clarify the general nature and significance of judicial roles. In contrast, visionaries and practitioners of court reform frequently assert the benefits to be derived from particular role changes and focus primarily on how to put corresponding court reforms into place. Hence, the scholarly literature provides a needed perspective on judicial roles.

Basically, I believe that there are five leading propositions extant in the literature, although readers might find it enlightening to examine referenced sources for more specific details of substance and methodology. Because the literature concerns both trial and appellate courts, some of the propositions might seem to be drawn from settings that are not relevant to the contemporary discussion ongoing in many trial courts. Yet, discussion of what is the most proper role of an appellate court judge parallels aspects of the trial court discussions. Hence, I think that they have relevance and I have tried to state them in the most relevant manner possible. The five propositions are as follows:

First, there is no single judicial role based on one distinct

set of expectations or role orientation. There are multiple role orientations that any given judge can adopt. This now seemingly obvious statement is startling when set along the history of debate over the proper role of a judge.

As everyone knows, there has been a long-standing debate in the legal academy and among the participants engaged in the selection of judges, especially federal judges. Some participants contend that a judge's role behavior is to interpret the plain meaning of the law and apply it strictly to the facts in an instant case. Other observers contend that a judge's role behavior is to adapt the law to changing circumstances and technologies and to consider socially desired consequences in resolving specific disputes. As fascinating, intriguing, and compelling as the give and take among the participants to this debate may be, the discussions seem somewhat abstract and elevated in light of what judges have claimed are their jobs. Moreover, the less abstract judicial role orientations are seen in studies of both appellate judge and trial judges.

One of the initial efforts to study judicial roles raised the prospect that there are at least five distinct sets of judicial expectations or role orientations.² The following five names are given to role orientations believed to be held by justices of supreme courts in Louisiana, Massachusetts, New Jersey, and Pennsylvania:

- The Task Performer—emphasizes processing litigation and maintaining smooth court operations.
- The Adjudicator—emphasizes deciding cases.
- The Law Maker—emphasizes interpreting the law to fit changing circumstances and technologies.
- The Administrator—emphasizes the supervision of the bar and the lower courts.
- The Constitutional Defender—emphasizes strict adherence to the Constitution and the avoidance of basing decisions on socially desired outcomes. (This role presumably is a counter to the Law Maker.)

Of course, these categories reflect the context and setting in which the study was conducted—four state supreme courts in approximately 1970. Perhaps, more importantly, the construction and classification of judicial expectations is based on a

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2. HENRY ROBERT GLICK, SUPREME COURTS IN STATE POLITICS: AN INVESTIGATION OF THE JUDICIAL ROLE 30-34 (1971).

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classification of responses by individual justices to a single, open-ended question. That question was, "How would you describe the job of a supreme court judge?" Nevertheless, the multiple categories illustrate the elemental proposition that the role orientation of a judge is not a single task or responsibility that might be carried out in different

ways. On the contrary, judges have distinctively different sets of expectations on what they should do.

This same research made a related observation concerning the dominance of particular role orientations. Justices from different states tend to emphasize one role over another, although justices cluster together more with justices from some states than from others. These differences are attributed to differences in tradition and position of the courts in their respective state governmental systems. For example, more of New Jersey Supreme Court justices emphasized the expectations associated with the Law Maker's role orientation than did the justices in the other states. The views of the New Jersey justices were interpreted as a result of the successful efforts of former New Jersey Chief Justice Arthur T. Vanderbilt to gain acceptance of the New Jersey Supreme Court's role in legal policy making by the other branches of government in New Jersey.³

A second theme in the literature is the proposition that expectations do in fact affect a judge's behavior. This proposition is one of the overarching premises on which the study of judicial roles is based. Because of the time and cost of just mapping a judge's expectations, most scholarly investigations of judicial roles have foregone the business of linking measured role orientations to independently measured role behavior. Fortunately, some scholars have made the linkage. Two studies are worth mentioning.

One study piggybacked an inquiry on roles and trial court timeliness onto a previous investigation. The previous investigation had conducted a study of trial court judges in Ohio and produced five categories of role orientations.⁴ The categories were constructed through a quantitative analysis of responses to multiple, closed-ended questions about their agreement or disagreement that particular factors influence their decision making.⁵ The names of the role orientations were as follows:

- The Law Interpreter—emphasizes adherence to judicial restraint.

- The Adjudicator—emphasizes concern for social consequences of decisions.
- The Administrator—emphasizes procedural goals and precedent only if they expedite case resolution.
- The Trial Judge—emphasizes a concern for timeliness, justice in individual cases, and precedent.
- The PeaceKeeper—emphasizes a balancing of contending principles and does not consider stare decisis to be the working rule of law.

The questions that made up the role orientation of the judge as an administrator were then asked of judges by another researcher in a subsequent study of trial court judges in three anonymous metropolitan courts in 1978.⁶ Each judge was classified to the extent he or she emphasizes the role orientation of the administrator. The research question then became, "Do the judges that adhere to the administrator's role more closely than other judges resolve their cases more expeditiously?"

The answer was yes. Moreover, not only was timeliness related to the administrator's role at the individual judge level, but it also held true at the court level. The greater the extent to which the judiciary of each court emphasized the administrator's role orientation, the shorter the average amount of time that each court took to resolve cases.

Additionally, this research made several sage suggestions that went beyond the immediate conclusions. One observation was that judges are likely to adhere to different combinations of role orientations. No one orientation is likely to be all-inclusive for many individual judges. Another observation was that expectations can and likely will change over time. Expectations held by judges reflect their circumstances to some degree, especially perceived challenges. In a sense, to say that there have been changes in judicial priorities is another way of saying that expectations have changed.

Another study that connected judicial role orientations to behavior concerned trial judges in California and Iowa and their sentencing decisions in 1976.⁷ Here, the expectations of judges were measured to determine if there was a single dimension underlying their views. The research advanced the hypothesis that the essential nature of the judicial role orientation is whether a judge believes that it is proper for extra-legal stimuli (e.g., their own views and behavior) to influence his or her decisions more than legal stimuli (e.g., recommen-

3. *Id.* at 36-37.

4. Thomas D. Unga & Larry R. Bass, *Judicial Role Perceptions: A Q-Technique Study of Ohio Judges*, 6 LAW & SOC. REV. 343 (1972).

5. Basically, the names of the different roles were labels given to sets of questions whose answers clustered together statistically. That is, responses to some questions highly correlated with responses to other particular questions and were unrelated to the responses to still other questions. Each set of questions whose answers were inter-correlated were considered to be a particular role. By looking at the substantive nature of the inter-correlated questions,

researchers gave them a name that they thought served a meaningful interpretation.

6. Keith Boyum, *A Perspective on Civil Delay in Trial Courts*, 5 JUSTICE SYS. J. 170 (1979). Boyum piggybacked his study onto the previous work of Unga and Bass.

7. James C. Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AMER. POLITICAL SCI. REV. 911 (1978); James C. Gibson, *Discriminate Functions, Role Orientations and Judicial Behavior: Theoretical and Methodological Linkages*, 39 J. POLITICS 984 (1977).

dation of a district attorney). The findings suggest that judges who do give legitimacy to extralegal factors sentence defendants more leniently than those who do not. However, the judges who emphasized legal factors were not a closely knit group. Some of them imposed severe sentences, but others imposed more lenient ones.

A third proposition is that judicial role orientations exist beyond the borders of the American common-law adversary system. Following in the research tradition used in the previous studies of American judges, researchers in 1974 sought to see if judges in Switzerland and Austria exhibited expectations concerning their work. All German-speaking appellate judges were asked to respond to a battery of questions concerning the weight they gave to a series of factors in making their decisions.⁸

The investigators concluded that the judges under study did have definite expectations concerning two key dimensions: (1) the weight given to precedent and (2) the weight given to the litigants in individual cases versus the public.

Dividing each dimension into halves produced a fourfold typology of role orientations. They were:

- The Law Applier—emphasizes precedent and individual litigants.
- The Law Extender—emphasizes precedent and the public.
- The Mediator—emphasizes the individual and deemphasizes the importance of precedent.
- The Policy Maker—emphasizes the public and deemphasizes the importance of precedent.

In addition to suggesting the generality of the concept of judicial role, the research suggests a judge's expectations include more than what he or she thinks a judge is supposed to do in making decisions. Judges are cognizant of the role of previous courts in society and of other participants in the justice system.

A fourth proposition is that judicial roles are critical intervening factors between case management policies and the degree of the policies' successes. Researchers have asked the question, "Why do courts with the same case management policies and procedures governing the resolution of cases vary substantially in the time taken to resolve cases?" The answer is that there are some judicial role orientations that inhibit the effectiveness of case management policies and others that enhance policy effectiveness.

Based on interviews and observations of federal district court judges in Los Angeles, Miami, and New Orleans in

1977,⁹ three sets of expectations seemed to be associated with the pace of litigation: the degree of a judge's perceived need to control attorneys, the perceived need to encourage settlement, and the perceived quality of justice shaped to a judge's willingness to use available policies and procedures of case management. Judges who believe that their job calls for them to control litigation and encourage settlement, and who do not see case management as sacrificing quality, tend to resolve cases faster than those judges with opposite expectations of what their jobs entail.

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A fifth and final proposition is that judicial expectations are manifestly discernable in how judges make decisions. The connection between judicial expectations and decisions is not a "black box." This idea is clearly a new addition to the study of judicial roles because the previous research mentioned above in the discussion of the first four propositions had examined only the nature of either judicial expectations or judicial decisions. How the expectations are translated into decisions has not been a topic until a recent study of prisoner litigation in the federal court system.

That study argues that federal court judges followed a particular role in crafting decisions beginning in the 1960s toward the conditions of state prisons.¹⁰ The thesis of the study is that judges took a policy-making role and developed a body of legal doctrine that was the basis for their intervention and the setting of prison standards, such as the maximum number of prisoners, access to the courts, medical care, recreational opportunities, and so forth. Furthermore, judicial policy making was similar but not identical to legislative and executive policy making. Judges followed the basic steps that legislators and executives follow in responding to problems. The researchers claim that the basic decision-making steps of problem definition, goal identification, search for alternatives, selection of the most promising alternative, and implementation were observable in how the federal judiciary responded to challenges to prison conditions. The steps were not exactly the same as in legislative and executive decision making because the judges were creating doctrine. Their decision-making process was just as discernable, however, as in the case of legislative and executive decision making.

8. Victor Eugene Flango, Lettie McSpadden Wenner & Manfred W. Wenner, *The Concept of Judicial Role: A Methodological Note*, 19 AMER. J. POLITICAL SCI. 277 (1975).

9. David Neubauer, *Judicial Role and Case Management*, 4 JUSTICE SYS. J. 223 (1978).

10. MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998).

Even if "outsiders" were present at creation, these reforms quickly were grafted onto existing court procedures.

Summing up, the research literature affirms the correctness of the cynosure of contemporary court reformers.¹¹ If changes in judicial decisions and the use of new procedures are desired, then efforts rightly are focused on changing judicial role orientations. New expectations coupled with new policies will trump the effects of new policies alone every time.

There are two limitations to the literature reviewed here. One of them arises because research on judicial roles has not continued into the present. Thus, there is no available catalog of expectations that connects specific subsets of expectations to particular goals of contemporary court reform, such as access to justice, expedition and timeliness, fairness and integrity, clarity of decisions, and so forth. As a result, there is no guide currently available that charts the extent to which a combination of judicial expectations in a court leads to particular combinations of court performance.¹²

A second limitation is that there is no prescriptive package that contains the mechanisms for changing expectations. Researchers recognize this limitation and fall back on the traditional ingredient of education and training. Researchers have left those "details" to others. Nevertheless, despite these limitations, it is worthwhile to begin sketching out the implications of changing expectations as a way to understand more fully the meaning and significance of changing judicial roles.

III. IMPLICATIONS OF CHANGING JUDICIAL EXPECTATIONS

A. A Short History of Contemporary Court Reform

During the past 25 years, there have been multiple court reforms that have gained national attention and varying applications of particular reforms. The enduring significance of these reforms is a matter of judgment, so the following reforms are offered as illustrations, not as a definitive list. The reforms include the following:

- The development of pretrial release and diversion policies under the general topic of "bail reform" in the 1960s.

- The development of case management in the 1970s.
- The development of alternative dispute resolution efforts in the 1970s.
- The development of drug courts in the 1980s.
- The broader development of specialized courts (e.g., community, gun, and mental health) under the general topic of "problem-solving courts" in the 1990s.

Certainly all of these court reforms had precursors before they attracted widespread attention. However, despite their particular historical lineages, these reforms share some important and interesting attributes. They tended to be created by individuals either within or close to the courts themselves rather than being inspired by legislative or executive action (as contrasted with tort reform and sentencing reform, which generally were inspired by legislative action). Even if "outsiders" were present at creation, these reforms quickly were grafted onto existing court procedures. To a considerable extent, the integration of new policies and procedures into ongoing trial court systems boosted the stock of those court administrators who were especially competent at making the new and the old work smoothly and effectively. And all of these reforms led to the formation of professional associations that fostered or offered education and training programs for judges to attend for inspiration and knowledge building. For all these reasons, it seems reasonable to assume that changing judicial expectations were part of these reforms.

B. The Implications

Court reforms not only have their immediate, direct consequences. Because the reforms involve changing role orientations and role behavior, they have implications for the institution of the judiciary and its place in society and government. These implications are important to understand because they illuminate the profundity of changing judicial roles. The following five implications are offered as among the most substantial:

There is a change in the nature and source of information deemed essential to support judicial decision making. Judges not only make different decisions when they shift their role orientations, but the bases for their decisions shift. For example, recommendations for bail based on measures of a defen-

11. Previous research on the role of a judge has focused primarily on the expectations held by the judges themselves. There has been little effort to measure the expectations of others outside the courts (e.g., litigants, attorneys, policy makers, and the attentive public). Hence, when considering changes in expectations, there is some ambiguity. Whose expectations are we talking about exactly? Looking at recent literature, which focuses on the rise of problem solving courts and judges as problem solvers, the expectations calling for change seem to include both judges and court reformers. I mention this ambiguity because I offer my thoughts

on implications based on the assumption that the changing expectations involve both judges and others.

12. The idea that courts and individual judges within courts hold multiple combinations of distinct expectations is related to research now being conducted at the National Center for State Courts. That project focuses on court culture and performance. It is pursuing the hypothesis that those distinctive combinations of judicial and court staff expectations make up distinctive cultures among courts and that different court cultures lead to different performance outcomes.

dant's likelihood of making court appearances are a qualitative change from previous practices in most courts.

There is a change in the nature and range of viable alternatives for judges to consider in decision making. As an illustration, case management is less about telling a judge that he or she must meet a particular deadline in a particular way than suggesting there are alternative ways to screening and calendaring cases (e.g., case differentiation is an alternative to the practice of "first in, first out").

Experts emerge who are knowledgeable in gathering and analyzing new information and who are knowledgeable in fashioning ways of integrating new procedures into court procedures. This implication signals the rise of court management in the broadest sense. Contrary to the idea that case management represents the rise of managerial judges, all of these reforms represent the rise of managerial nonjudges. As an illustration, one reason for the success of mediation in the thorny area of workers' compensation is that mediation has acquired a managerial aspect that it never had before.¹³ Hence, judges may become less managerial than before if they change their expectations and permit others to manage.

Taken together, the first three implications suggest a fourth implication. Changing expectations can cost a lot of money. Information, experts, and management all call for resources. As a result, visionaries, court reformers, and judges need to think through thoroughly the priority and timing of court reforms and corresponding changes in judicial expectations.

The final implication builds on the fourth implication and concerns the source of the money connected to the social reforms. To a very great extent, resources made available by the United States Department of Justice have fueled all of the reforms mentioned above. Without automatically asserting that this situation is a benign bestowing of federal largesse or a corruption of the state judiciary, it is important to think about this relationship. It seems fair to ask: Are state judges changing their expectations and their behavior to secure resources?

If we assume that the third branch of state government is in a position of limited and dwindling resources, the possibility of being able to secure an extra judicial position through the acquisition of federal resources might seem attractive. As a result, is the role of the judge changing because of conscious policy choices that the change is warranted because it is the right thing to do? Or is the role changed merely because the carrot of additional resources is available if such changes are made?

IV. CONCLUSION

The literature on judicial roles, recent reforms of court policies, and the implications of past changes in judicial role orientations and role behavior have convergent conclusions. The expectations that judges have on how they should act in making decisions have profound consequences. The behavior of judges is altered. This in turn means that litigants are treated

differently. In addition to these consequences, there are implications that arise from changes in judicial role orientations and role behavior. These implications concern the essential elements of judicial decision-making, including what is defined as relevant information, appropriate and viable decision making alternatives, the input and advice of experts, the prominence and role of court administrators, and the source of resources available for the judiciary to seek.

Appealing to the future, there are three fundamental recommendations that arise from these conclusions and implications. First, it is essential to know much more than we currently know about the expectations of judges. The last studies of judicial role orientations and role behavior occurred several years ago. They likely have more value at a general level than at the street level where contemporary discussions are taking place. Yet it remains absolutely important to know the expectations that judges have, including their views on alternative ways of making decisions.

Judges need to be asked whether that they agree or disagree that they should make decisions in an impartial, fact-finding, and independent manner. Or should they make them in more of a partner's role along with many other partners in ameliorating problems vexing litigants? Obviously, the exact wording of questions and their measurement require care and attention, but the history of past scholarship provides a firm foundation.

Additionally, judges need to be asked about how they spend their time. Here the possible categories should parallel the alternative ways of making judicial decisions. Finally, judges should be asked how they would like to spend their time and how they would like to make decisions. These three clusters of questions should be asked in national, regional, and state surveys of judges. The information would give everyone a much more accurate sense of what today's judicial roles are and what judges think of prospective changes in role orientations.

Second, judges need to begin more formal and structured dialogues on the desirability and direction of changes in role orientations and corresponding court reforms. Policy changes do not happen naturally. And role changes do not happen because of some inexorable set of forces. A judge's role is the product of conscious choices. Because those choices have important and substantial consequences and implications, the judiciary has a responsibility to talk through the advantages

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13. Roger Hanson, *Courts Have Surprising Success Mediating Workers' Comp Cases*, *DISPUTE RESOLUTION* 25-8 (Winter 2001).

and disadvantages of role changes. The allure of federal dollars underscores the importance of this dialogue. Certainly, the judiciary does not want to be or appear unconscious of the connection between court reforms and federal monies and act as if they stumbled into federally supported reforms. The judiciary should decide what shifts in their expectations are most warranted in serving the ends of justice and ones that they feel comfortable in adopting. Dialogue on this topic has begun, but far more extensive discussion is needed.

Third, research is needed on the relationship between current judicial role orientations and role behavior. Is there a connection between judicial expectations and court performance? Previous studies have demonstrated an association between a judge's expectations and the timeliness of his docket. But is there any association with judicial expectations and court-level outcomes in the areas of access, fairness, public trust and confidence, and so forth? Do judges who embrace particular role

orientations achieve particular levels of performance, as that notion is currently used? This information would provide the necessary grounding for the proposition that role orientations do make a difference and thereby serve as a foundation for the first two recommendations. Thus, there is a comprehensible set of ways to clear the path toward more coherent court policies in the future.



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