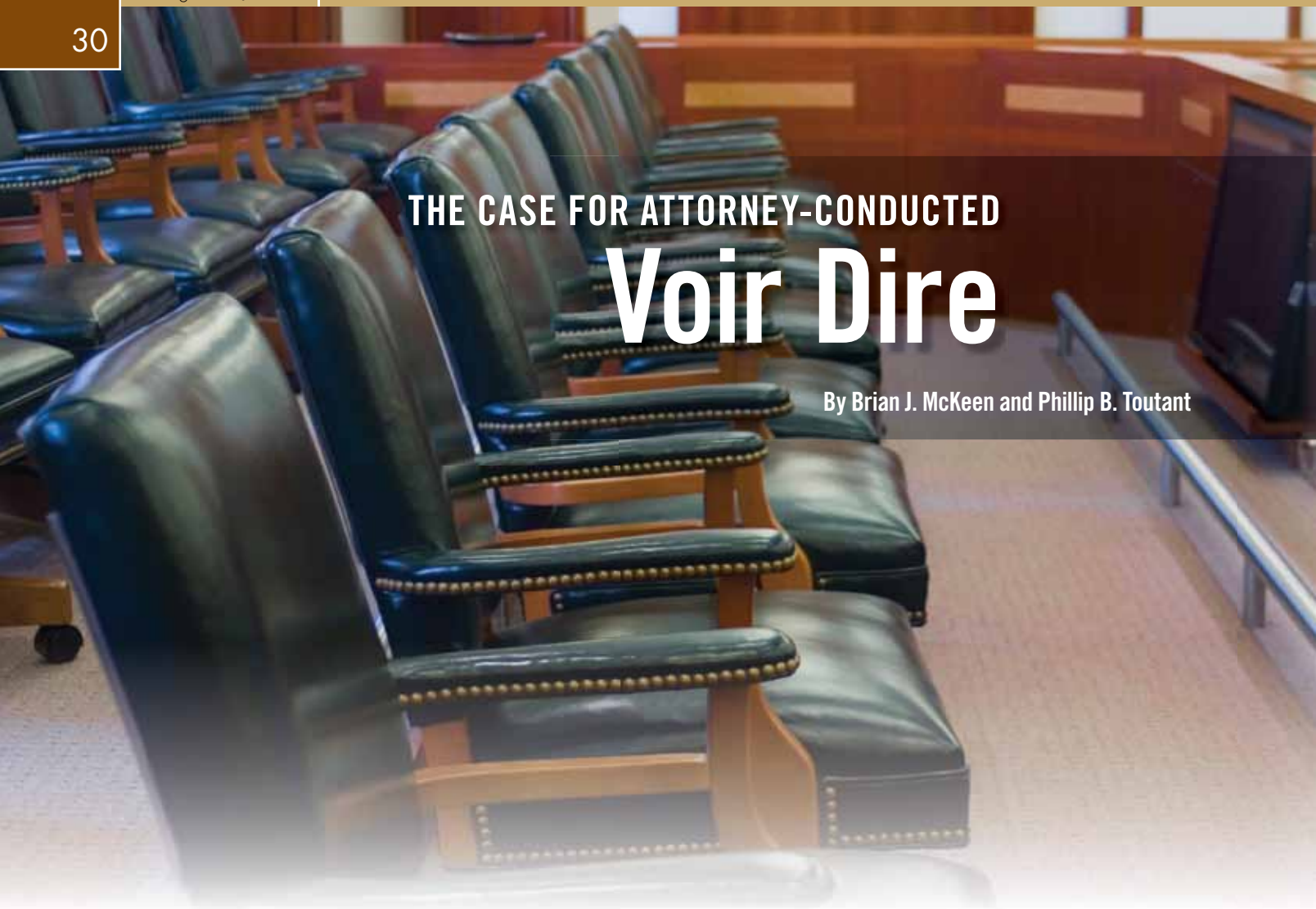


THE CASE FOR ATTORNEY-CONDUCTED Voir Dire

By Brian J. McKeen and Phillip B. Toutant

In Michigan, the ability to have counsel conduct voir dire is a matter of judicial discretion.[1] Without a meaningful voir dire, however, litigants (civil or criminal) can be deprived of their rights to fair trials, while jeopardizing the equal protection rights of both litigants and jurors. Thanks to recent developments in legal scholarship and constitutional law, parties can now come to court flush with arguments to persuade judges to allow reasonable attorney-conducted voir dire.

When judges refuse attorneys' requests for meaningful participation in voir dire, the judicial system is hurt in three ways. First, by denying lawyers and their clients an opportunity to participate in the selection of an impartial jury, both are left feeling helpless and disenfranchised. Second, litigants' expectations of the judicial system are disappointed when verdicts are rendered on the basis of jurors' unprobed biases rather than the facts and law of the actual controversy. Third, judge-only voir dire can conceal violations of litigants' and jurors' equal protection rights when jurors are struck because of their race or gender.

To a trial practitioner, few things are more frustrating than being denied the ability to voir dire prospective jurors. The purpose of voir dire is to elicit the truth and select an impartial jury.[2] The Michigan Court Rules, however, give trial judges complete discretion as to whether attorneys should be allowed to participate.[3] Even a criminal defendant has neither the right to have counsel conduct voir dire nor the right to submit questions for the judge to ask jurors.[4] Under Michigan law, a properly conducted voir dire should enable an attorney to determine the potential jurors' disposition toward counsel and the facts of the case, while at the same time allowing the attorney to make any other inquiry that may flush out potential juror bias.[5] Indeed, it is an abuse of discretion for a trial court to empanel a jury that has not been adequately vetted for potential biases[6] or "to exclude a showing of facts that would constitute ground [sic] for challenging for cause or the reasonable exercise of peremptory challenges."[7] Considering the wealth of evidence indicating the inadequacy of judge-only voir dire, the practice arguably violates a litigant's right to an impartial jury under Michigan law.

As explained more fully below, attorney-conducted voir dire improves the truth-finding function of courts. Thus, until Michigan's rules concerning civil and criminal voir dire are changed, attorneys must protect their clients' interests by arguing for attorney participation in voir dire. This article will provide arguments to buttress attorneys' requests to participate in voir dire.

Attorney Participation in Voir Dire Facilitates Fairer Trials

Compared to judges, attorneys possess superior knowledge of the factual underpinnings of their cases. This makes attorneys

Fast Facts:

Contrary to common belief, attorney-conducted voir dire does not take substantially longer than judge-conducted voir dire.

Denying litigants' requests to directly participate in voir dire can frustrate their rights to a fair trial.

Denial of the ability to participate in voir dire may deprive both litigants and jurors of their equal protection rights.

better positioned to ascertain jurors' potential biases. In-depth knowledge of the divisive issues in a particular case is crucial to an attorney's decisions concerning for-cause and peremptory challenges.[8] The United States Court of Appeals for the Fifth Circuit has frequently emphasized the importance of attorney-conducted voir dire. In *United States v Ledee*,[9] the court observed:

> [W]e must acknowledge that voir dire examination in both civil and criminal cases has little meaning if it is not conducted by counsel for the parties.
>
> A judge cannot have the same grasp of the facts, the complexities and nuances as the trial attorneys entrusted with the preparation of the case. The court does not know the strength and weaknesses of each litigant's case. Justice requires that each lawyer be given an opportunity to ferret out possible bias and prejudice of which the juror himself may be unaware until certain facts are revealed.[10]

The United States Court of Appeals for the Fifth Circuit is not alone in this observation. Research by legal scholars shows that judges are less effective at uncovering juror prejudices, suggesting that attorneys' superior knowledge of their cases enables them to ask jurors questions more revealing of bias.[11]

Judges, as robe-cloaked authority figures, may inadvertently chill jurors' responses to questions during voir dire. Studies have repeatedly shown that when jurors are questioned by judges, they are likely to give responses they perceive will satisfy the judge.[12] Further, jurors, who are often uncomfortable sharing personal details about their beliefs, will be less likely to make such disclosures when asked by a judge.[13] Obviously, when jurors alter their answers to seek a judge's approval, they compromise the truth-seeking purpose of voir dire itself. Moreover, to the extent that judges frequently conduct voir dire through closed-ended questioning,[14] judge-conducted voir dire is even less effective at uncovering the truth.[15]

Attorneys, as opposed to judges, are less apt to stifle jurors' opinions during questioning. This is attributable to attorneys' less imposing social stature and superior knowledge of the facts of the cases, both of which enable them to probe potential juror biases and other factors that influence verdicts. Studies have found that jurors' demographic characteristics (gender, race, age, income, or occupation) are only loosely linked to verdicts,[16] and that jurors' decisions are more influenced by their beliefs about the legal system, particularly their feelings about tort reform, lawsuits, and other "hot button" social issues.[17] Lawyers are in a better position to conduct voir dire because of their knowledge of the case, tendency to probe the relevant bias-influencing factors, and ability to elicit honest responses. Quite simply, the weight of the available evidence establishes that attorney-conducted voir dire is better at revealing juror biases.

Concerns of Judicial Efficiency and Voir Dire Abuse by Attorneys Should Not Result in a Bar on Attorney-Conducted Voir Dire

Claims by detractors that attorney-conducted voir dire harms judicial efficiency are misplaced. Opponents claim that attorney-conducted voir dire decreases judicial efficiency by consuming more time than judge-conducted voir dire.[18] This claim, however, is unpersuasive. Research on voir dire practice in federal courts has shown that attorney-conducted voir dire takes no more time than judge-conducted voir dire.[19]

Research concerning the practice in state courts has provided similar results, showing that attorney-conducted voir dire does not substantially impede judicial efficiency. The National Center for State Courts and the State Justice Institute recently published a comprehensive survey of trial practices, including voir dire.[20] Based on the survey responses, the authors used regression modeling to determine the amount of time taken by different variations of voir dire. The results are revealing: the study found that voir dire conducted primarily by judges with some attorney involvement did not significantly increase the time of voir dire as compared to voir dire divided equally between judges and attorneys.[21] Moreover, the study found that unilateral judge-conducted voir dire would only take approximately 45 minutes less than voir dire with evenly shared responsibilities.[22] Thus, attorney participation in voir dire does not substantially impede judicial efficiency in state courts.

Opponents also claim that attorney-conducted voir dire is associated with attorneys' attempts to improperly curry favor with juries or to "try their cases" during voir dire.[23] A court can eliminate these risks by taking simple steps to ensure that counsel does not attempt to engage in any improprieties during voir dire. For example, Principle 11 of the American Bar Association's (ABA) Principles for Juries and Jury Trials allows attorney-conducted voir dire with "reasonable time limits and avoidance of repetition."[24] By adopting procedures similar to those embodied in the ABA principles, trial courts can ensure that litigants are able to participate in voir dire without stretching judicial resources or prejudicing the case. Moreover, given that severe improprieties during voir dire could result in a mistrial, it is not likely that attorneys will unreasonably abuse their right to participate in the selection of jurors.

Courts should seriously weigh the risks to a litigant's fundamental right to an impartial jury before denying counsel's request for attorney-conducted voir dire on the ground of efficiency. When a litigant's right to a fair trial is jeopardized, judicial efficiency should take a back seat to fundamental principles of justice.

Refusing Attorney-Conducted Voir Dire May Conceal Juror Discrimination, Violating MCR 2.511(F) and the U.S. Constitution

In *Swayne v Alabama,*[25] the United States Supreme Court held that jurors may not be peremptorily challenged because of their race.[26] The Court subsequently held that the use of race or gender in peremptory challenges violates the equal protection rights of civil and criminal litigants, as well as the jurors improperly excluded.[27] Further, the use of race in peremptory challenges undermines the public's confidence in the judicial system and the impartiality of juries.[28] Given this risk, courts should make efforts to prevent race and gender from entering into peremptory challenges. Attorney-conducted voir dire can assist the courts in achieving this end.

Since *Swayne,* the Court has been wrestling with tests to determine whether jurors were improperly subjected to peremptory challenges on the basis of race. In *Batson v Kentucky,*[29] the Court articulated a three-part test to enforce litigants' and jurors' equal protection rights, subsequently tweaking the test to its present form:

(1) the movant must make a prima facie showing that a peremptory challenge was based on race;

(2) in light of that showing, opposing counsel must proffer a race-neutral reason for striking the particular juror(s); and

(3) the court must determine whether the movant has shown purposeful discrimination.[30]

When attorneys are allowed to conduct voir dire, the impermissible use of race or gender in peremptory challenges is more easily uncovered. For example, with respect to the third step of the *Batson* test, the Supreme Court has held that "the best evidence (of discriminatory intent) often will be the demeanor of the attorney who exercises the challenge."[31] Further, the Court has observed that an attorney's disparate questioning of two different racial groups of potential jurors may be instructive in establishing purposeful discrimination.[32] But investigation into prejudiced peremptory challenges is inhibited when a court prohibits attorney voir dire.[33] Often, a peremptory challenge is based on the most discrete of subtleties, and peremptory challenges are sometimes based on nothing but instinct.[34] When a court does not allow attorney-conducted voir dire, it limits the evidentiary record with which the appellate courts can evaluate whether *Batson* has been violated.[35] Further, when a trial court refuses to allow attorney-conducted voir dire, it enables a lawyer to conceal race- or gender-related reasons for striking potential jurors.

Additionally, when attorneys are not allowed to participate in voir dire, they are more likely to strike potential jurors based on stereotypes, in violation of the jurors' equal protection rights. Studies show that when attorneys are denied the opportunity to engage in meaningful voir dire, they fall back on stereotypes, including those related to the race and gender of the venirepersons.[36] In addition to violating the equal protection rights of venirepersons, the use of such stereotypes injects arbitrariness into the jury-selection process, particularly given that demographic stereotypes are not a reliable indicator of a potential juror's disposition on substantive issues in the case.[37] A court's refusal to permit attorney participation in voir dire deprives litigants of an impartial jury *and* denies potential jurors their fundamental right of equal protection under the law.[38] This frustrates litigants' attempts to

obtain a fair trial, and more importantly undermines the public's confidence in the jury system and the American system of justice.[39] By allowing attorneys reasonable participation in voir dire, a court decreases the likelihood that an attorney will get away with the use of race or gender in peremptory challenges.[40]

Conclusion

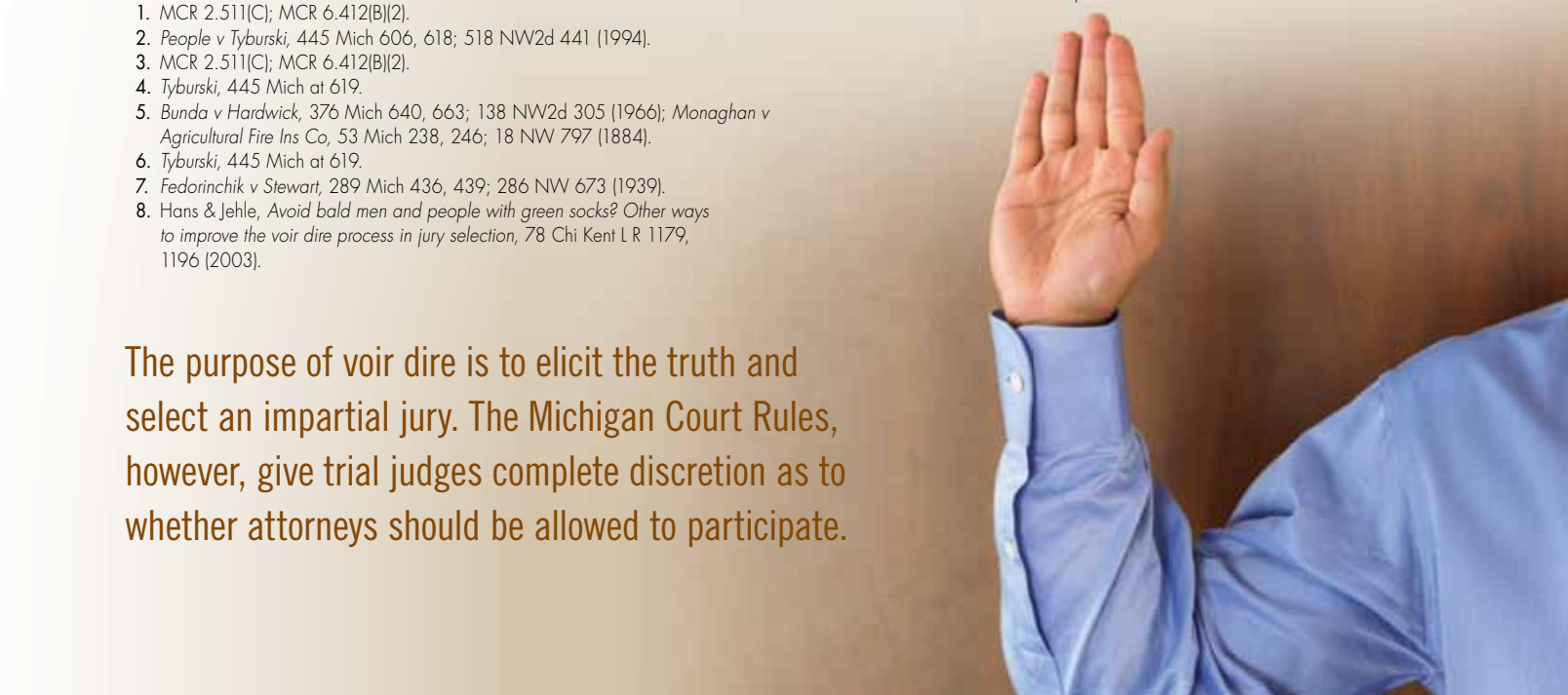
Until the Michigan Court Rules are changed, attorneys do not have the absolute right to participate in voir dire. The above arguments, however, may persuade a resistant judge to allow meaningful participation in voir dire by the attorneys. It is the hope of the authors that greater attorney participation in voir dire will lead to better jury selection and fairer trials in Michigan courts. ■

Brian J. McKeen is the president of McKeen & Associates, P.C. Mr. McKeen represents injured persons in medical and birth injury litigation. He is on the executive boards of the Michigan Association for Justice and the American Association for Justice, and is a member of the SBM Negligence Law Section. Mr. McKeen can be reached at (313) 961-4400, ext. 860 or bjmckeen@mckeenassociates.com.

Phillip B. Toutant is an associate attorney at McKeen & Associates, P.C. His practice includes all aspects of the representation of injured people in medical malpractice and birth injury litigation. He is a member of the Michigan Association for Justice, the American Association for Justice, and the SBM Negligence Law Section, and coaches a Wayne State Law School mock trial national team. Mr. Toutant can be reached at (313) 961-4400, ext. 875 or pbtoutant@mckeenassociates.com.

FOOTNOTES

1. MCR 2.511(C); MCR 6.412(B)(2).
2. *People v Tyburski,* 445 Mich 606, 618; 518 NW2d 441 (1994).
3. MCR 2.511(C); MCR 6.412(B)(2).
4. *Tyburski,* 445 Mich at 619.
5. *Bunda v Hardwick,* 376 Mich 640, 663; 138 NW2d 305 (1966); *Monaghan v Agricultural Fire Ins Co,* 53 Mich 238, 246; 18 NW 797 (1884).
6. *Tyburski,* 445 Mich at 619.
7. *Fedorinchik v Stewart,* 289 Mich 436, 439; 286 NW 673 (1939).
8. Hans & Jehle, *Avoid bald men and people with green socks? Other ways to improve the voir dire process in jury selection,* 78 Chi Kent L R 1179, 1196 (2003).
9. *United States v Ledee,* 549 F2d 990 (CA 5, 1977).
10. *Id.* at 993.
11. Hans & Jehle, pp 1196–1197.
12. *Id.* at 1194; Ream, *Limited voir dire: Why it fails to detect juror bias,* 23 Criminal Justice 4, 8 (2009).
13. See Hans & Jehle, p 1195.
14. Diamond, Ellis & Schmidt, *Realistic responses to the limitations of* Batson v Kentucky, *7* Cornell J L and Pub Pol'y *77,* 94 (1997–1998).
15. Hans & Jehle, pp 1195–1196.
16. Saks, *What do jury experiments tell us about how juries (should) make decisions?,* 6 S Cal Interdisc L J 1, 10–12 (1997).
17. Moran, Cutler & DeLisa, *Attitudes toward tort reform, scientific jury selection, and juror bias: Verdict inclination in criminal and civil trials,* 18 Law & Psychol R 309, 324 (1994); Hans & Lofquist, *Perceptions of civil justice: The litigation crisis attitudes of civil jurors,* 12 Behav Sci & L 181, 182 (1994).
18. Vidmar & Hans, *American Juries: The Verdict* (New York: Prometheus Books, 2007), ch 4, p 89; Mogill & Nixon, *A practical primer on jury selection,* 65 Mich B J 52, 54 (1986).
19. Hans & Jehle, pp 1184–1185.
20. Mize, Hannaford-Agor & Waters, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report,* p 30, available at <http://www.ncsconline.org/D_Research/cjs/pdf/SOSCompendiumFinal.pdf> (accessed October 21, 2011).
21. *Id.*
22. *Id.*
23. Hastie, *Is attorney-conducted voir dire an effective procedure for the selection of impartial juries?,* 40 Am U L R 703, 705 (1991).
24. American Bar Association, *Principles for Juries and Jury Trials,* Principle 11(B)(2) (2005).
25. *Swayne v Alabama,* 380 US 202; 85 S Ct 824; 13 L Ed 2d 759 (1965).
26. *Id.* at 203–204.
27. *Miller-El v Dretke,* 545 US 231, 237–238; 125 S Ct 2317; 162 L Ed 2d 196 (2005); *People v Knight,* 473 Mich 324, 343; 701 NW2d 715 (2005).
28. *Miller-El,* 545 US at 238; *Knight,* 473 Mich at 342.
29. 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).
30. *Snyder v Louisiana,* 552 US 472, 477–478; 128 S Ct 1203; 170 L Ed 2d 175 (2008); see also *Pellegrino v Ampco System Parking,* 486 Mich 330, 338–340; 785 NW2d 45 (2010).
31. *Snyder,* 552 US at 478.
32. See *Miller-El,* 545 US at 255–256, 259–260.
33. See *id.* at 252.
34. See *Batson,* 476 US at 106 (Marshall, J., concurring).
35. See *Snyder,* 552 US at 483.
36. Hans & Jehle, pp 1190–1192.
37. *Id.* at 1180; Ream, p 29.
38. *Batson,* 476 US at 86–88; Diamond, Ellis & Schmidt, pp 93, 95.
39. *Miller-El,* 545 US at 238.
40. Diamond, Ellis & Schmidt, p 95.



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