BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	No. 04-0503
MARK HYATT TYNAN, Bar No. 006212	**HEARING OFFICER'S REPORT AND RECOMMENDATION**
RESPONDENT.	

I. PROCEDURAL HISTORY

On August 16, 2004, State Bar of Arizona ("State Bar") Probable Cause Panelist Alan P. Bayham, Jr., filed a Probable Cause Order, finding probable cause existed to issue a Complaint against Respondent Mark Hyatt Tynan ("Respondent") for violations of Rule 42, Ariz. R. S. Ct., including but not limited to violations of ERs 5.5 and 8.4(a), (c) and (d). Approximately four months later, on December 22, 2004, the State Bar filed a Complaint against Respondent alleging one count of violating those ethics rules. The State Bar served the Complaint on Respondent by mail on December 23, 2004. When Respondent failed to answer the Complaint by January 12, 2004, the Disciplinary Clerk filed a Notice of Default on January 20, 2005.

On February 11, 2005, Respondent belatedly moved for an extension of time to file his answer, citing on-going medical and counseling treatment and the need to secure reports from his treating professionals. The State Bar filed its Response on February 15, 2005, objecting to enlarging Respondent's time to file an answer. The Hearing Officer considered the Motion and Response without hearing, and on February 17, 2005, granted the Motion, allowing Respondent until February 22, 2005 to file his Answer, noting that

further extensions would not be granted. On February 22, 2005, Respondent, *pro se*, filed an Answer admitting the allegations of the Complaint, but offering in addition an explanation of medical problems, including sleep apnea and persistent asthma, which were impairing his ability to think and remember matters.

An initial case management conference was held on March 1, 2005, where standard scheduling orders were entered. In particular, Respondent was ordered to serve his initial disclosure on the State Bar by March 24, 2005, with all discovery to be complete by April 1, 2005. The State Bar complied with the scheduling orders timely, but Respondent failed to serve timely his disclosure.

The matter was assigned to Randall M. Howe for settlement conference. A settlement conference was held on March 31, 2005, but the parties were unable to reach an agreeable resolution of the case.

On April 4, 2004, Respondent retained his present Counsel. Counsel promptly filed a Motion seeking to extend Respondent's time for disclosure. In that motion, Respondent sought to minimize his lack of formal disclosure by pointing out that disclosure had been given informally. He noted that he had admitted the substantive allegations in the Complaint, so there was no factual dispute; moreover in the motion, he provided limited notice that he would call three witnesses (his two treating professionals and an employee), and would address mitigation only. Additionally, he noted that his on-going medical and counseling treatment had already been disclosed to the State Bar in its investigation of a prior matter, No. 04-0010.[1] Finally, Respondent contended he had

[1]In this matter, Respondent received an Informal Reprimand and Probation (LOMAP) effective November 19, 2004 for violating ERs 1.3, 1.4, 5.3, and 1.16(d) and SCR 53(f).

disclosed to the State Bar two documents that had been filed as attachments to Respondent's Answer. On April 11, 2005, the State Bar filed its Response, again objecting to the request for extension of time and seeking sanctions and oral argument.

A telephonic hearing was held on April 18, 2005. This Hearing Officer also granted the State Bar's Motion for Sanctions in part, *i.e.*, ordering Respondent to provide disclosure by April 19, 2005, and the State Bar withdrew its other demands for sanctions. This Hearing Officer thus also granted Respondent's Motion for additional time to serve formal disclosure on the State Bar, but only until 5:00 p.m. the following day, March 19, 2005 (the day originally scheduled for disclosure of the final witness and exhibit lists). In order to accommodate hearing motions timely, this Hearing Officer further granted the State Bar's request to raise motions orally shortly before or at the Hearing. The existing hearing date of May 4, 2005, therefore, was preserved. Both parties subsequently timely served their final disclosure.

As permitted by that Order, instead of filing motions *in limine*, the parties cited factual and legal points of dispute in their Joint Pre-Hearing Statement filed on April 25, 2005. They utilized the Pre-Hearing Conference on April 26, 2005 to argue those issues (as well as several other evidentiary motions) orally, and this Hearing Officer ruled on all those motions at the hearing. *See* Order filed April 28, 2005.

The hearing was held on May 4, 2005. Respondent continued to admit all allegations in the Complaint, including all facts, but he contested whether his admitted conduct constituted a violation of ER 8.4(c). The State Bar did not object to this clarification of Respondent's Answer, and this Hearing Officer took evidence as to the violation of ER 8.4(c) as well as mitigating and aggravating factors. By stipulation, the

parties allowed Dr. Ziltzer, Respondent's treating internist, to testify out of order. Having already secured stipulations to its evidence as well as all factual allegations of the Complaint, the State Bar called Respondent to the stand, then rested. Respondent then finished his case by recalling Mr. Tynan for some additional inquiries.[2] At the request of the parties, this Hearing Officer allowed oral argument as to both violation of the ethics rules and the appropriate sanction.

A Protective Order was filed on May 26, 2005 sealing Respondent's Hearing Exhibits A and B and hearing transcript dated May 4, 2005, pp. 21-57.

II. FINDINGS OF FACT

1. By stipulation, I find that at all times relevant to this proceeding, Respondent was an attorney licensed to practice in Arizona, having been admitted to practice on May 20, 1980.

2. By stipulation, I find that on February 20, 2004, the Board of Governors of the State Bar of Arizona authorized summary suspension of Respondent from the practice of law, pursuant to Rule 45(h), Ariz. R. S. Ct., due to his failure to comply with mandatory continuing legal education ("CLE") requirements for the reporting period of 2002-03.

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[2]One evidentiary matter was not resolved at the Hearing. At the Pre-Hearing Conference, Respondent had sought a decision *in limine* admitting at the Hearing letters evidencing his attempts to settle with the State Bar; in accordance with 17A Ariz. R. Evid., 408, AZ ST REV Rule 408, this Hearing Officer had denied the settlement letters' admission. Nonetheless, Respondent urged that he should be permitted to introduce those letters to contest any costs that might be assessed pursuant to Rule 60(b), Ariz. R. S. Ct.; he argued that the letters would reflect that the State Bar was unreasonable in rebuffing his attempts to settle the matter pre-Hearing, so it should bear the costs of the Hearing (or in any event, Respondent should not be burdened with them). At the close of the Hearing, Respondent again asked to admit those letters. This Hearing Officer continued to refuse that evidence, but assured Respondent that he would be permitted to challenge the costs in a meaningful way that satisfied Due Process at a later time. Indeed, presuming that costs will be ordered here, Respondent will have an opportunity to object to costs and seek an evidentiary hearing pursuant to Rule 60(b).

3. As a matter of undisputed fact, I find that Respondent lacked 2.75 hours of CLE hours during that reporting period.

4. By stipulation, I find that on March 1, 2004, notice of this summary suspension from the practice of law was mailed to Respondent at his address of record with the State Bar.

5. Per Respondent's concession at the Hearing, I find that he did in fact receive that notice, placing it in his CLE file.

6. Based on Respondent's testimony (which the State Bar did not dispute), I find that once Respondent sought to correct his continuing legal education deficiency, he completed it within two weeks, and I find that to be a relatively brief period of time.

7. By stipulation, I find that on May 27, 2004, the Executive Director of the State Bar notified Respondent that he had been reinstated to the practice of law effective that date. I therefore find that Respondent had been suspended from practice for the period of March 1, 2004 through May 27, 2004.

8. By stipulation, I find that on April 16, 2004 (while Respondent was suspended from practice), he filed a Notice of Appeal in *Fowler v. Stoneman-Ehrlich*, in East Phoenix #2 Justice Court.

9. By stipulation, I find that, having been informed of the State Bar initiating a screening investigation pursuant to Rule 54(b), Ariz. R. S. Ct. concerning his representation in *Fowler v. Stoneman-Ehrlich* as a possible violation of ERs 5.5 & 8.4(c) and (d), on June 30, 2004, Respondent reviewed his calendar; as a matter of undisputed facts, I also find that Respondent then voluntarily disclosed to Bar Counsel that during that period of suspension, he had also engaged in the following law practice activities:

- In March of 2004, he represented defendant Harold Palmquist, appearing in a forcible detainer action, *Jackson v. Palmquist*, in Chandler Justice Court;
- On April 16, 2004, he represented defendant Buscaglio, appearing in a forcible detainer case, *Orr v. Buscaglio*, in North Mesa Justice Court;
- On May 3, 2004, he represented defendant Hinkle, appearing at a pre-trial conference, in the matter of *Roberson v. Chick and Hinkle*.

10. Based on unrebutted expert testimony and medical records in evidence, I find that Respondent suffered from asthma and sleep apnea during all times relevant to the Complaint. I further find, from credible expert testimony that he had suffered from sleep apnea continuously since at least June 12, 2003.

11. Based on credible medical testimony and evidence (supported by medical studies referenced by the testifying expert), I find that persons suffering from sleep apnea often experience memory loss and cognitive impairment. In particular, based upon medical testimony and his symptoms, I find that Respondent suffered from memory loss and cognitive impairment caused by his untreated sleep apnea at the time he received the notice from the State Bar suspending him from practice.

12. I further credit and adopt the medical opinion of the expert, Dr. Ziltzer, as a finding of fact that that memory loss and cognitive impairment can be so severe as to interfere with an apnea patient's memory of receiving a letter, including one as professionally significant to a lawyer as notice of suspension from the practice of law. Specifically, I thus find that Respondent's untreated sleep apnea caused him to not remember (or to not record a memory of) receiving the notice of suspension.

13. Independent of Dr. Ziltzer's opinion, I find Respondent's report to be credible and persuasive that he did not remember receiving that letter, based on: (a) the undisputed facts that he never reported that he had been suspended from practice to either Dr. Ziltzer or Dr. Hopper shortly after being served with the notice of suspension – even though that would represent an important symptom reflecting the severity of his medical problems, so would be something I would expect him to share with his treating and diagnosing physicians; (b) the fact that once he saw the letter in his CLE file, it failed to "refresh his recollection;" and (c) the fact that once he later realized he had not fulfilled his CLE requirements, (1) it took him very little time to correct the deficiency, and (2) he acted promptly to redress the shortfall. Hence, Respondent's argument that he would have corrected it immediately if he had remembered and been aware of it is reasonable and consistent with his subsequent actions.

14. Based on uncontested facts supported by medical records, I find that Respondent was first diagnosed with sleep apnea on April 21, 2004. I find that diagnosis highly credible and well-documented with objective, scientific criteria; in addition to consistent expert medical opinions of Dr. Ziltzer as well as Dr. Hopper, I note that that diagnosis is supported by objective evidence documented preceding the offense: a history of snoring, worsening and pharmacologically uncontrolled asthma, reported memory impairment, elevated blood pressure, exhaustion and day sleepiness (also supported by the occurrence of a bizarre motor vehicle accident caused by Respondent on April 20, 2004), experience of stress, and (most significantly) the sleep study that was conducted documenting the number of times Respondent stopped breathing and so awoke during

sleep and the corresponding depletion of oxygen available in his bloodstream as a result of those cessations.

15. I am not persuaded by the State Bar's line of impeachment (seeking to challenge whether Respondent actually suffered from memory loss) as reflected by Respondent's success on a dementia test on February 24, 2004. Instead I find credible the medical expert's testimony that the degree of memory and cognitive impairment an untreated sleep apnea patient suffers varies, and the test has limited utility to establish whether the patient is afflicted by memory impairment caused by sleep apnea (*vis á vis* caused by dementia). I further credit the doctor's opinion that memory impairment is a consistent and reliable symptom occurring routinely with untreated sleep apnea; so that memory impairment *should* be present when the sleep study verifies that the patient suffers from sleep apnea.

16. Based on uncontested evidence supported by medical records, I find that Respondent was started on treatment with a CPAP machine on or soon after the April 21, 2004 diagnosis. Therefore, I find that he was not receiving treatment for sleep apnea at the time he received the letter from the State Bar notifying him of his summary suspension from the practice of law.

17. Based on undisputed medical expert testimony supported by medical records of Dr. Hopper and Dr. Ziltzer, I find that Respondent improved significantly and rapidly, including rebound of his memory and cognitive functioning, upon receiving treatment for his sleep apnea. I further find that that improvement has been maintained since then by continued resort to treatment. Consistent with the opinion of Dr. Ziltzer, I

therefore find that sleep apnea was the sole cause of Respondent's failure to attend to or remember receiving the notice of suspension from practice.

18. In so finding, this Hearing Officer is mindful that Respondent demonstrated twice during the pendency of this case a failure to attend to disciplinary proceeding requirements timely (*i.e.*, he neither timely filed his Answer nor served his Disclosure). There is no allegation in the Complaint of unresponsiveness to Bar proceedings, and the State Bar had not moved to amend its charges with that violation; indeed, it may be questioned whether Respondent's tardy litigation conduct would even rise to the level of an ethics violation. Nonetheless, this Hearing Officer is deeply troubled by repeated disregard of Bar or disciplinary obligations since Respondent's suspension. The review of Respondent's prior disciplinary record only compounds this Hearing Officer's concern, because in *both* prior Bar Complaints, Respondent failed to respond to the State Bar investigation inquiries timely.

19. I find from the testimony of Respondent and supporting opinion by Dr. Ziltzer that it is very likely that Respondent will continue to treat his sleep apnea successfully in the future.

CONCLUSIONS OF LAW

1. The State Bar bears the burden to prove by clear and convincing evidence a violation of ERs 5.5 and 8.4(a), (c), and (d). It therefore must prove that it is highly probable that its allegations in the Complaint are true.

2. Respondent was not authorized to practice law in Arizona from March 1, 2004 through May 27, 2003; nonetheless, he continued to practice law in at least four cases: *Fowler v. Stoneman-Ehrlich*, *Jackson v. Palmquist*, *Orr v. Buscaglio*, and *Roberson*

v. Chick and Hinkle. I therefore conclude that the State Bar has proven by clear and convincing evidence that Respondent violated ERs 5.5 and 8.4(a) and (d).

3. However, I conclude that Respondent did not knowingly misrepresent that he was authorized to practice law in those respective cases, due to his lack of remembering that he had received an Order of Suspension from the State Bar. Hence, the State Bar has failed to meet the burden of proving by clear and convincing evidence that Respondent violated ER 8.4(c).

IV. RECOMMENDATION

A. ABA *Standards*

ABA *Standard* 7.0 notes that the Violations of Duties Owed as a Professional (including unauthorized practice of law, referenced in ER 5.5, and violating the Ethical Rules, referenced in ER 8.4(a)) usually do not result in actual injuries to clients or participants in the justice system. *Standard* 7.4 recommends Admonition (informal reprimand in Arizona), the least severe sanction, when a lawyer: engages in an isolated instance of negligence in determining if his conduct violated a duty owed to the profession causing little or no injury to a client, the public, or the legal system.

Standard 6.1 notes that lawyers, as officers of the court, must always operate within the bounds of the law, and cannot misrepresent matters in court or to parties or clients. *Standard* 6.14 recommends admonition (informal reprimand in Arizona), the least onerous sanction, when a lawyer: engages in an isolated instance of neglect in failing to disclose material information upon learning of its falsity, causing little or no injury to a party or adverse effect on the legal proceeding. Here, I find there was little injury to the justice system.

B. Aggravating and Mitigating Factors

This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant to *Standards* 9.22 and 9.32, respectively. This Hearing Officer finds the following two factors are present in aggravation:

1. *Standard* 9.22(a), prior disciplinary offenses. Respondent had been informally reprimanded and placed on one year of probation (LOMAP) on March 19, 2004 in File No. 03-0577 for failing to communicate with his client and failing to respond to the Bar during its disciplinary screening process, thus violating ERs 1.4, 8.1, 8.4, and SCR 51(f) and (d). In addition, Respondent was informally reprimanded and placed on probation (consistent with File No. 03-0577) on November 17, 2004 in File No. 04-0010 for failing to communicate with his client, supervise his secretary, and maintain control over clients' documents, and failing promptly to provide relevant information requested by the State Bar in its investigation in violation of ERs 1.3, 1.4, 5.3, 1.16(d). Restitution was also ordered.

2. *Standard* 9.22(i), substantial experience in the practice of law. Respondent has been continuously engaged in the practice of law since 1980.

This Hearing Officer finds the following five factors are present in mitigation:

1. *Standard* 9.32(b), absence of a dishonest or selfish motive. Respondent adduced credible evidence that he was not aware of the suspension when he violated it, thus establishing reasonable evidence that he did not continue representation based on a dishonest or selfish motive.

2. *Standard* 9.32(e), full and free disclosure to disciplinary board or cooperative attitude toward proceedings. Respondent introduced reasonable and

uncontroverted evidence that he cooperated with the State Bar's investigation of the matter. This Hearing Officer finds that Respondent voluntarily reporting additional clients that he had represented during his period of suspension (that the State Bar had been unaware of) to be especially weighty evidence in mitigation.

3. *Standard* 9.32(l), remorse. Respondent has consistently displayed what appears to this Hearing Officer to be genuine remorse.

4. *Standard* 9.32(d), timely good faith effort to make restitution or to rectify consequences of misconduct. Respondent took steps to correct the underlying problem that led to his unauthorized practice of law – by treating his sleep apnea – even before the State Bar intervened, and corrected the underlying CLE deficit well before disciplinary proceedings were instituted.

5. *Standard* 9.32(h), physical disability. Respondent's sleep apnea is solely responsible for the misconduct in this matter. Therefore, the greatest weight is given to this mitigating factor. *See* Mitigation, Commentary to 9.32 in 1992 amendments.

C. Proportionality Analysis

The Supreme Court has held that in order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983); *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).

As noted in *Matter of Edmund D. Kahn*, SB-04-0154 (2005), assessing proportionality in cases of unauthorized practice of law is difficult, given the wide range of sanctions imposed in these cases, predominantly based upon other facts. Hence, cases in which substantially harsh sanctions were imposed for the unauthorized practice of law

consistently include numerous more serious ethical violations. For example, in *In re MacAskill*, 163 Ariz. 354, 788 P.2d 87 (1990), MacAskill was disbarred for practicing while suspended (for nonpayment of dues), but he had also engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, committed numerous ethical violations while representing five clients during his suspension, failed to cooperate with the Bar investigation, and moved with no forwarding address during the discipline process. Similarly, in *In re Phelps*, 154 Ariz. 516, 774 P.2D 428 (1987), Phelps was disbarred after practicing while his license had been suspended (again, for failure to pay bar dues), but it was a knowing violation, and he had been suspended from practice only one year earlier for unprofessional conduct.

On the other hand, there are several cases finding far less severe sanctions appropriate under less egregious correlative facts. Most notably, in *Matter of Stevens*, 178 Ariz. 261, 872 P.2d 665 (1994), Stevens was suspended from the practice of law not due to substandard practice, but because he had failed to file his affidavit attesting to compliance with CLE requirements. He had intentionally refused to file it, purportedly in order to mount a challenge to the CLE requirement; nonetheless, he soon rethought that litigation and belatedly complied with CLE. Having satisfied those requirements, although the State Bar had not yet reinstated him, Stevens represented a long-standing client in court. The Disciplinary Commission noted that "the absence of a deceptive motive leads the Commission to conclude that a suspension would be inappropriately harsh under these circumstances." *Id.*, 178 Ariz. at 263, 872 P.2d at 667. Although acknowledging that unauthorized practice of law is a serious ethical violation that usually results in suspension, the Supreme Court took into consideration Stevens's remorse, the fact that his suspension

was on "technical" grounds rather than for malpractice, the brevity of his period of suspension, and that a single aggravating factor was present while "the mitigating factors abound." *Id.* Under those circumstances, the Supreme Court concurred with the Disciplinary Commission that censure was appropriate.

In *Matter of Dennis P. Bayless*, No. SB-04-0053 (May 3, 2004), Bayless was suspended from practice for thirty days for disciplinary (as opposed to technical) violations. During that period of time, he practiced law. The Hearing Officer specifically found that his conduct was negligent rather than knowingly violative. Furthermore, there had been no injury to any clients by his practice during the suspension. By agreement, Bayless received a censure.

In *Matter of Edmund D. Kahn*, SB-04-0154 (March 23, 2005), Kahn was unquestionably aware that his license had been suspended for failure to pay bar dues, as he had challenged the notice of noncompliance and was given numerous actual notifications from a variety of participants in the justice system. Despite receiving notice of suspension, and while he was appealing it, he continued to practice law in a number of cases throughout his approximate eight-month period of suspension. The Hearing Officer found as aggravating factors a pattern of misconduct, refusal to acknowledge the wrongful nature of his acts, and substantial experience in the practice of law; he also found mitigating factors of absence of prior disciplinary record and full and free disclosure to the Bar. Recognizing that Kahn went forward knowingly and intentionally in violation of the suspension, *but in good faith* due to on-going litigation of Bar requirements, a 30-day suspension was ordered.

D. Discussion of Appropriate Sanction

The purpose of attorney discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is also the object of lawyer discipline to protect the public, the profession, and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Another purpose attorney discipline serves is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P,2d 352, 361 (1994).

In selecting the appropriate attorney disciplinary sanction, it is appropriate to consider the facts of the case, the Standards, and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994). I have considered all these factors.

Respondent's conduct in this case was negligent; although he did not intend nor know his act was in violation of the ethical rules at the time he represented those four clients, he *should have known* or realized that he was suspended from practice (having received the suspension letter), and should have taken steps immediately upon receiving notice to ensure that he would not violate the suspension. Indeed, given the evidence that he was aware he was suffering from memory and cognitive impairment (and had already sought medical intervention) before receiving the notice of suspension, he had a duty to take additional steps to ensure that he would remember and promptly attend to such a significant practice impediment.

It is not insignificant that there was little injury to the public or justice system by Respondent's conduct. The fact that he responded promptly to correct his CLE deficit, coupled with the candor and extent of his self-disclosure as well as his efforts undertaken

independent of the Bar investigation to correct his cognition and memory problems occasioned by his medical condition, suggest that removing him from practice is not necessary to protect the community or the legal profession. Consistent with *Stevens*, I therefore reject the State Bar's request for a suspension from practice.

However, Respondent has demonstrated a pattern of lack of diligence in attending to Bar matters in past disciplinary actions and in the present case proceedings. This may not be wholly attributable to untreated sleep apnea since he continued to fail to meet deadlines in the litigation in this case well after he was successfully treated. Had this offense been Respondent's first instance of dereliction of duty to the Bar, this Hearing Officer would have favorably considered Respondent's request for referral to diversion in lieu of sanctions. Consequently, I reject Respondent's request for diversion.

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionally analysis, this Hearing Officer recommends the following:

1. Respondent shall receive an informal reprimand.

2. Respondent shall be placed on probation for a period of two years effective upon the signing of the probation contract. Bar Counsel shall notify the Disciplinary Clerk of the date probation begins. The terms of probation are as follows:

a. Respondent shall meet with the director of the Member Assistance Program (MAP), who will conduct an assessment. Respondent will thereafter enter into a probation contract based upon the recommendations made by the director of MAP.

b. Respondent will provide proof of on-going medical treatment. Respondent will continue to receive what medical treatment is recommended by his

treating physicians and will waive his right to confidentiality of medical records and/or provide evidence of on-going treatment so that his medical treatment can be monitored by the State Bar.

3. Respondent shall pay the costs and expenses incurred in these disciplinary proceedings, pursuant to Rule 60(b), Ariz. R. S. Ct.

Dated this 7th day of July, 2005.

Donna Lee Elm/ps
Donna Lee Elm
Hearing Officer 6N

Original filed with the Disciplinary Clerk
this 7th day of July, 2005.

Copies of the foregoing mailed
this 7th day of July, 2005, to:

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