

ELDER INVESTMENT FRAUD AND FINANCIAL EXPLOITATION (EIFFE):
Ethical Traps For Lawyers And Navigating the Challenges Of Diminished Financial Capacity

Lori A. Stiegel, J.D.
Program Director, EIFFE Prevention Program Legal
Senior Attorney, American Bar Association Commission on Law and Aging


Cheri L. Meyer, Vice President and COO
Investor Protection Trust and Investor Protection Institute



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EIFFE PREVENTION PROGRAM LEGAL


- This CLE program and its materials were developed as part of the Elder Investment Fraud and Financial Exploitation Prevention Program in collaboration between the Investor Protection Trust and the American Bar Association Commission on Law and Aging.
- Other organizations involved in the collaboration include the Investor Protection Institute, State Securities Regulators, and State Bar Associations.



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EIFFE PREVENTION PROGRAM LEGAL


- The Elder Investment Fraud and Financial Exploitation (EIFFE) Prevention Program Legal utilizes CLE courses to educate legal professionals about EIFFE, vulnerability to EIFFE as a result of normal and abnormal aging, recognizing EIFFE in their clients, resources for further assistance, and the reporting of suspected EIFFE.



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LEARNING OBJECTIVES


- Understand the key demographic and physiological factors that increase the likelihood that lawyers will deal with diminished financial capacity and EIFFE in their work and in their families.
- Describe common financial exploitation schemes and practices.
- Recognize indicators of EIFFE and how to screen for diminished capacity and EIFFE in clients.
- Describe when to and where to refer clients for assistance or to report suspected elder abuse.
- Recognize ethical and practical dilemmas that challenge lawyers and ways to address those dilemmas.



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NATIONAL AGING DEMOGRAPHICS

- Leading edge of 77 million U.S. Baby Boomers reached age 65 in 2011
- By 2029, all “boomers” will have attained the age of 65+
- By 2029, 1 in 5 persons will be over 65
- The number and percentage of people aged 85+ will more than double by 2050




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EIFFE CAN HAPPEN TO ANYONE...



“To those seniors and especially elderly veterans like myself, I want to tell you this: You are not alone and you have nothing to be ashamed of. If elder abuse happened to me, it can happen to anyone.”


Mickey Rooney
Testimony to Senate Special Committee on Aging, March 2, 2011



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EXAMPLES OF EIFFE


- Committed by family, caregivers, friends, fiduciaries, trusted financial advisors, strangers
 - Abuse of legal authority (e.g., by agents, conservators, guardians)
 - Fraud and misrepresentation
 - Identity theft
 - Scams
 - Selling inappropriate or unsuitable financial products
 - Theft of money and property
 - Using undue influence to gain control of assets
- Many civil & criminal laws may be relevant



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EXTENT AND COST OF EIFFE


- Estimated annual costs to victims and government of \$2.9 billion (MetLife Mature Market, 2011)
- A 2016 IPT study showed that:
 - 17% of Americans aged 65 or older – more than 6.8 million senior citizens have “been taken advantage of financially in terms of an inappropriate investment, unreasonably high fees for financial services, or outright fraud.”
 - 43% of older Americans exhibit one or more of the warning signs of current financial victimization
- www.investorprotection.org/ipt-activities/?fa=research



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IMPACT OF EIFFE ON VICTIMS

- Financial health affects overall health
 - Wealth Shock: Sudden loss of 75% of one’s assets (median amount = \$101,568) was associated with a 50% increase in all-cause mortality in 2 years!*
 - Same risk level as having a new diagnosis of coronary heart disease
- Financial losses can be devastating for seniors
 - Impacts available food, medication, housing, and other services
 - Over half of individuals 55 and over have less than \$50,000 in savings and investments**
 - Generally, losses cannot be recouped



*Garber, A. Journal of American Medical Association 2016; 319(13):1327-1328; 1327-13
 ** Employee Benefits Research Institute, 2015, available at http://www.ebri.org/files/RCSI5_FS-4_Age2.pdf

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FINANCIAL CAPACITY

- “The ability to make and execute decisions consistent with personal preferences and values regarding finances”



Marson, D et al: Encyclopedia of Psychology and the Law: 2008

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PHYSIOLOGICAL FACTORS

Normal Aging and Diminished Financial Capacity

- Financial decision-making ability begins to decline after age 53*
- Older adults may not realize that their financial decision making is compromised.



Laibson, D et al: The Age of Reason: Financial Decisions over the Life-Cycle with Implications for Regulation

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EVIDENCE-BASED FINDINGS SUPPORTING EIFFE


- 40% of persons 75-84 y.o. have Mild Cognitive Impairment (MCI) or full dementia (Petersen 2018).
- Persons with MCI make four times the financial errors than those without the condition (Marson 2009).
- Damage to the prefrontal cortex makes affected elders less risk averse, i.e., willing to gamble (Denburg 2007)
- If losses are significant, forcing choices between out-of-pocket health care costs & routine living expenses, this can become a clinical issue (Widera 2011).



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RISK FACTORS FOR EIFFE

- Social isolation
- Bereavement
- Dependence on another to provide care
- Financial responsibility for adult child or spouse
- Alcohol or drug abuse
- Depression or mental illness
- Diminished financial capacity




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PREVALENCE OF DEPRESSION AND SUBSTANCE ABUSE IN 65+ POPULATION > RISK OF FINANCIAL EXPLOITATION

- Recent IOM report revealed 5.6 to 8 million older Americans – 14 to 20 % of the elderly population – have one or more mental health conditions or problems stemming from substance misuse or abuse.
- Depressive disorders and dementia-related behavioral and psychiatric symptoms are the most prevalent.

<http://www.iom.edu/Reports/2012/The-Mental-Health-and-Substance-Use-Workforce-for-Older-Adults/Press-Release.aspx>; Accessed 03/08/2013




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CONCEPTUAL SCHEMATIC OF PROGRESSIVE DECLINE IN FINANCIAL CAPACITY IN PERSONS WITH ALZHEIMER DISEASE (AD)#

Disease Progression	Overall Financial Capacity
NORMAL AGING	Minimal changes in financial abilities
MILD COGNITIVE IMPAIRMENT	Emerging difficulty with complex financial skills, including bank statement management, bill payments, and financial judgment ¹⁷
MILD AD	Impairments seen in nearly every financial skill (simple and complex) with rapid decline in a 1-year period and financial incapacity in many cases ¹⁸
MODERATE AD	Global impairment of financial skills with probable financial incapacity in most cases ¹⁹
SEVERE AD	Complete lack of financial capacity

Widera, E. et al. JAMA 2011;305:698-706




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RED FLAGS FROM OBSERVATIONS

- Fearful, emotionally labile, or distressed
- Suspicious, delusional
- Cognitive problems
- Change in ability to perform activities of daily living, including self care, daily finances, medication management
- Accompanied by caregiver who is overly protective; dominates patient/client
- Change in appearance, poor hygiene
- A change in appearance or poor hygiene can indicate neglect; self or by caregiver

Neglect accounts for most reports of elder abuse*


*Naik, A et al. Gerontologist: 2008



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ROLE OF YOUR STATE SECURITIES REGULATOR


- Each State has a Securities Regulator to protect its citizens from investment fraud.
- Securities markets are global, but securities are sold locally by professionals who are licensed in every state where they conduct business. State securities regulators work within your state government to protect investors and help maintain the integrity of the securities industry.
- For contact information for your state securities regulator, visit the North American Securities Administrators Association Web site at www.nasaa.org and click on "Contact Your Regulator."



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WHAT IS INVESTMENT FRAUD?


- Investment fraud, also known as stock and/or securities fraud, violates securities laws when investors are induced to make purchase or sale decisions on the basis of false information, frequently resulting in losses
- Investment fraud can take many forms including:
 - unsuitable investments
 - fraudulent offerings
 - unregistered products
 - unlicensed advisers/ brokers
 - theft or misappropriation of funds



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WARNING SIGNS OF INVESTMENT FRAUD


- Promise no risk with high rewards/returns
- High pressure sales techniques
- Spelling and grammatical errors
- Offer is for you only or a “select group”
- Pressure for an immediate response
- Requires an advance payment
- “Cash only” or checks made out personally
- Promises to provide paperwork “later”
- Often ask for personal information
- Ask you to sign blank forms or documents
- Inability to contact an independent company representative
- Offers that are too good to be true



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**FINANCIAL PROFESSIONALS:
COMMON VIOLATIONS**

- Unsuitable investments and “know your customer”
- Unauthorized transactions (power of attorney abuse)
- Margin trading
- Churning
- Unreasonable expectations
- Complex investments
- High fees and expenses




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KEY DEFINITIONS

- Financial Exploitation – “The fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an older individual for monetary or personal benefit, profit, or gain, or that results in depriving an older individual of rightful access to, or use of, benefits, resources, belongings, or assets.”
- Undue Influence – “When exploiters, whether family, acquaintances, or strangers, use their power to deceptively gain control over the decision making of a victim. Often involves financial exploitation.”


The Older Americans Act of 2006
American Bar Assoc. & American Psychological Assoc. Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists: 2008



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NEED FOR SCREENING CLIENTS

- Victims don't disclose for many reasons
- Makes clients and you more comfortable
- Shows you can help in the future
- Indicates whether preventive and protective actions are needed
- Competent representation requires screening



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HOW TO "BREAK THE ICE"

Begin with questions about general financial concerns

- Answers may indicate vulnerability to EIFFE
- *"We find that some older adults worry about money; may I ask you a few questions about this?"*

Then ask specific questions related to EIFFE


- Answers may indicate past, present, or potential EIFFE
- *"I just read a NY Times article about elders being financially exploited and thought I ought to talk to my mother and my clients, too."*



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QUESTIONS ABOUT GENERAL FINANCIAL CONCERNS

- Who manages your money day to day? How is that going?
- Do you run out of money at the end of the month?
- Do you regret or worry about financial decisions you've recently made? Are you having any of the following common concerns?
- Do you have trouble paying bills? Why?
- Are you making loans or gifts for more than you can afford?
- Do you feel confident making big financial decisions alone?



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QUESTIONS RELATED TO EIFFE

- Have you given power of attorney to another person? How is that going?
- If someone else is making financial decisions for you, do you understand them?
- Do you have a will? Has anyone asked you or pressured you to change it?
- Is anyone contacting you by phone or mail/e-mail and asking you to give them money?
- Is someone accessing your bank accounts?
- Does your money or your legal papers seem to be disappearing?



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IF YOU SUSPECT EIFFE

QUESTIONS RELATED TO EIFFE

- Probe for further details
- Refer client to other sources of help
- Assess your ethical responsibilities
- Report to authorities, if appropriate



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1. Client Identification
2. Competency/Capacity
3. Conflicts of Interest
4. Confidentiality



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CLIENT IDENTIFICATION

Who is the client? The person whose interests are most at stake.

- The client is the only one to whom lawyer owes duties
- Power of attorney and other fiduciary roles
- Derivative duties



Horizontal lines for notes

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COMPETENCY/CAPACITY

- MRPC 1.14
- Special ethical obligations in dealing with those with diminished capacity
- The lawyer shall maintain, as far as reasonably possible, a "normal client-lawyer" relationship
- The lawyer may take protective action if client is at risk
- When taking protective action, lawyer may reveal information necessary to protect client's interests



Horizontal lines for notes

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CONFLICTS OF INTEREST

- MRPC 1.07
- Based on the premise that "loyalty and independent judgment are essential elements in the lawyer's relationship to a client." [comment to the rule]
- A lawyer shall not represent a client if the representation will be directly adverse to another client unless the lawyer can provide diligent representation to each affected client and each affected client gives informed consent in writing.



Horizontal lines for notes

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CONFIDENTIALITY

- MRPC 1.06
- The lawyer shall keep information confidential unless client consents or is impliedly authorized
- The lawyer may disclose to prevent, mitigate or rectify substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer's services



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LAWYERS ASSESS CAPACITY ROUTINELY

1. Does the client have the capacity to contract for my services?
2. Does the client have the capacity to complete the legal transaction?
3. Regardless of the answer to 2, is the client vulnerable to financial exploitation or a current victim?



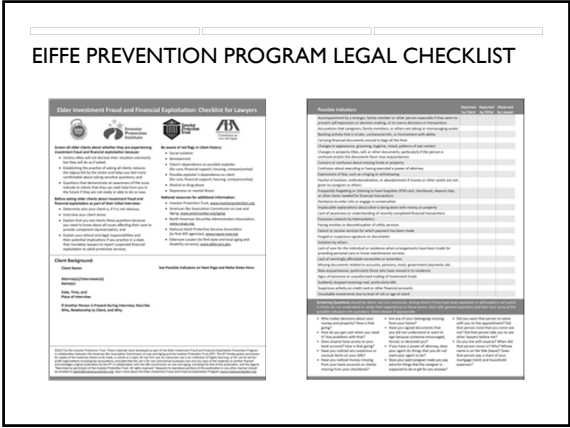
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THE LAWYER'S ASSESSMENT OF CAPACITY IS A "LEGAL" ASSESSMENT, INVOLVING:

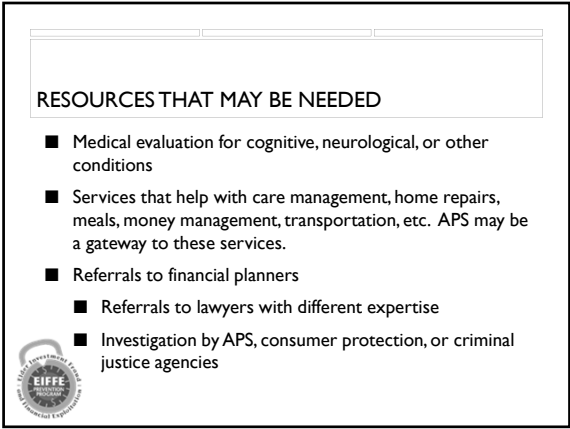
1. An initial assessment component and, *if necessary*,
2. Use of a clinical consultation or formal evaluation by a clinician, and,
3. A final legal judgment about capacity by the lawyer, and
4. Protective action if merited under
5. MRPC 1.14



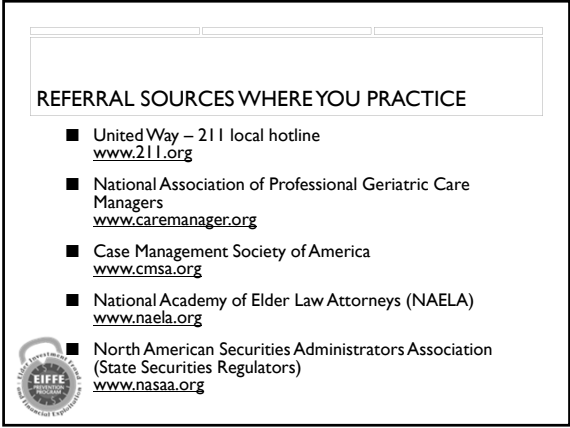
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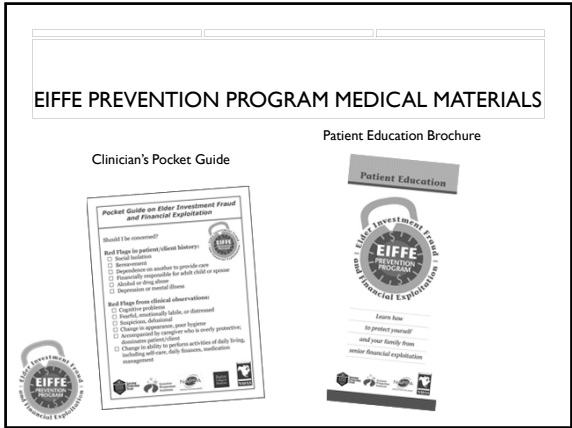
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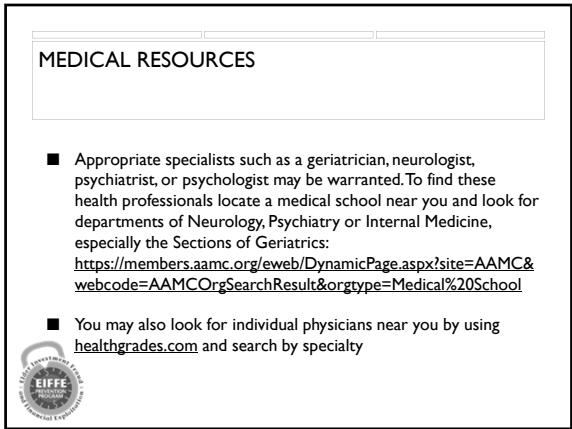
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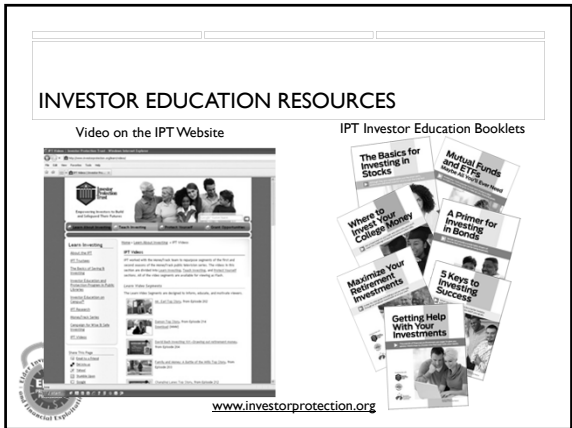
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- When I'm 65 is a national documentary and multi-year engagement program exploring how our financial and lifestyle choices today affect the whole of our lives.
- Documentary
 - The documentary examines how each generational cohort is looking at and planning for retirement. It provides a multi-generational look at the opportunities and obstacles that lie before us.
- Community Engagement Programs
 - Partnerships between public television stations and state and local community groups to bring retirement saving and investment education to communities across the country.
 - Toolkit and outreach materials

**WHEN I'M 65
DOCUMENTARY
AND
ENGAGEMENT
PROGRAM**



WHEN I'M 65

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WI65 BOOKLETS

Starting to Save for Retirement
4-step action guide to help you fund a future "paycheck"



WHEN I'M 65

Ages 25–40

Ramp Up Savings for Your Retirement
5-step action guide to help you boost your future "paycheck"



WHEN I'M 65

Ages 40–55

Getting Closer to Retirement
6-step action guide to help you secure a future "paycheck"



WHEN I'M 65

Ages 55–70

When I'm 65 booklets and complementary facilitator PowerPoint presentations:
www.iinvest.org/programs/when-im-65/

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WHEN I'M 65

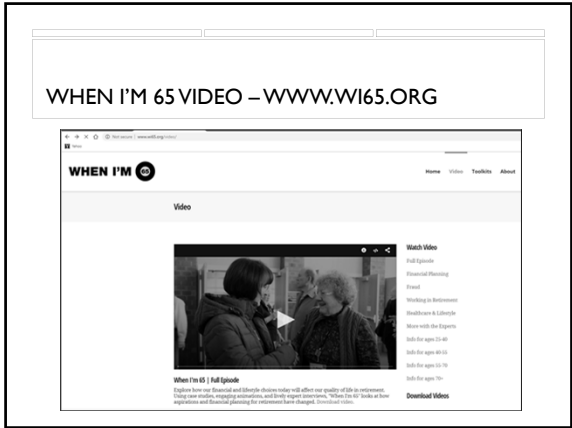
New!

Making Your Money Last in Retirement Action Guide

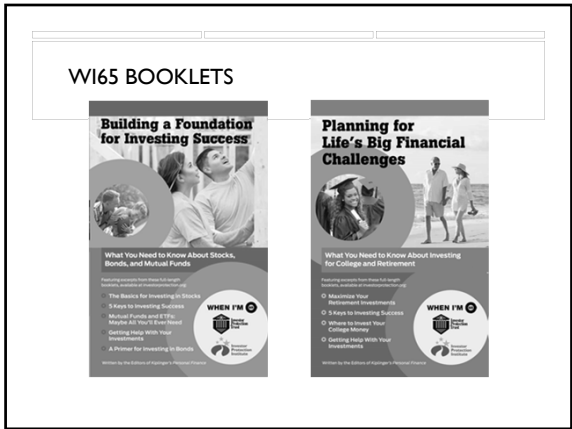
Ages 70+

WHEN I'M 65

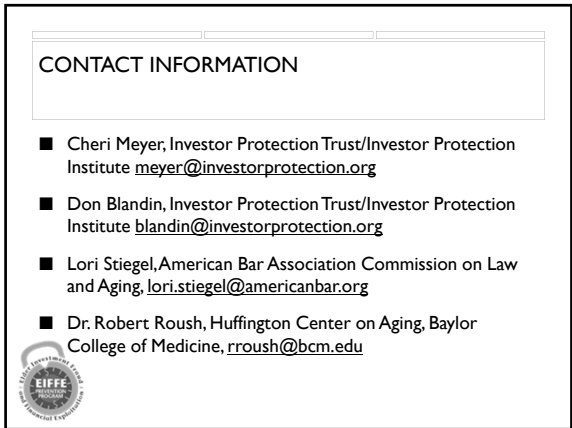
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