

IN THE
SUPREME COURT OF THE STATE OF ARIZONA
BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
1501 W. WASHINGTON, SUITE 102, PHOENIX, AZ 85007-3231

IN THE MATTER OF AN APPLICATION FOR
REINSTATEMENT OF A SUSPENDED MEMBER
OF THE STATE BAR OF ARIZONA,

GARETH C. HYNDMAN, II,
Bar No. 019500,

Applicant.

PDJ-2012-9020

REPORT AND RECOMMENDATION

FILED SEPTEMBER 20, 2013

On June 24, 2013, the Hearing Panel ("Panel") composed of public member, Michael Snitz, attorney member, Harlan J. Crossman, and the Honorable William J. O'Neil, Presiding Disciplinary Judge ("PDJ") held a one day hearing pursuant to Supreme Court Rule 65(b)(1), Ariz.R.Sup.Ct. Stacy L. Shuman appeared on behalf of the State Bar of Arizona ("State Bar") and Kevin W. Holliday appeared on behalf of Mr. Hyndman. The witness exclusionary Rule was invoked. The Panel considered the testimony, the admitted exhibits, the parties' Joint Prehearing Statement, pre-hearing memorandum and evaluated the testimony and credibility of the witnesses including Mr. Hyndman.¹

The State Bar expressed grave concerns regarding Mr. Hyndman's rehabilitation. Despite not opposing reinstatement, the Bar's reinstatement recommendation was on the condition that a term of probation with significant

¹ Consideration was given to the testimony of Hal Nevitt, Courtney Hyndman, and Judy Page.

monitoring be attached. The Panel now issues the following "Report and Recommendation," pursuant to Rule 65(b)(3), Ariz.R.Sup.Ct, recommending that reinstatement be granted with probation and significant monitoring.

Background

1. Mr. Hyndman was admitted to practice law in Arizona on May 19, 2000. On November 17, 2004, an Order of Informal Reprimand and Probation was issued against him in SB No. 03-1331 and 03-2022. Mr. Hyndman was informally reprimanded for violations of ERs 1.3, 1.4, 1.16(d), 3.2, 3.4, 8.4(c) and (d) and Rule 32(c)(3). In that case he failed to appear for a trial date and judgment was issued against his client. He was subject to a two year probationary period requiring monthly written reports, attend the one-day Ethics Enhancement Program within 20 days of the reprimand order, and a LOMAP audit within 20 days of the reprimand order as well as costs associated with both programs and costs and expenses of the disciplinary proceedings. [State Bar Exhibit 11 at Bates 75-79]

He signed a probation contract on March 19, 2005, at which time his two-year term of probation commenced. Mr. Hyndman failed to comply with multiple terms despite being capable of complying.

- He failed to attend a one-day Ethics Enhancement Program.
- He failed to contact that Program Coordinator within 20 days.
- He failed to report, in writing, his compliance with the terms of probation.
- He did not submit his quarterly report.
- He failed to submit a promissory note to the complainant in lieu of restitution.
- He failed to submit proof of payment of that debt. He failed to make payments towards LOMAP as ordered.
- He failed to attend the EEO class and did not pay the enrollment charge for that class.

-He failed to respond to the Notice of Non-Compliance issues against him.

His failure to comply with his terms of probation in File No. 03-1331 led to a complaint, SB 06-0170-D, which was filed against him and later amended. The probation violations were set forth in Count One, File No. 05-1606, which he later admitted under a consent agreement.

In addition, he admitted to Count Two, file no. 05-1606, under that agreement. In that count he admitted that as attorney for record in a bankruptcy litigation in which he failed to file a revised proof of claim as ordered by the court. He informed court staff that he was withdrawing as counsel. He failed to. The court issued an order to show cause directing him to file his motion to withdraw. He failed to. The court ordered him to appear. He did not. The court ordered that he explain these failings. He did not. The court again ordered him to appear. He failed to. The court issued another order to show cause and directed him to appear. He did not. The Court ordered that he pay a \$1,000 sanction by a date certain. He did not. The Court referred the matter to the State Bar. He failed to respond to multiple inquiries of the State Bar. After the filing of the complaint but before its amendment, he appeared before the court and apologized and paid the sanction. He was suspended for 90 days by the Supreme Court of Arizona effective March 11, 2007.

Thereafter, Mr. Hyndman sought reinstatement. However he withdrew that application when the State Bar filed an objection based on a new and still outstanding disciplinary matter, SB 08-0030, file nos. 06-1689 and 06-1808. In Count One, Mr. Hyndman ultimately admitted that in representing a client he failed to file Rule 26 disclosures, failed to respond to a motion to compel, a disclosure

statement, and discovery responses. He also failed to respond to a motion for expenses and attorney fees. These were all granted against his client without objection, resulting in a forced substitution of counsel in a civil matter, a bar referral, and failure to cooperate with a bar investigation.

In Count Two, Mr. Hyndman admitted he failed to appear for oral argument on a motion to vacate judgment, which was then granted against his client. He thereafter failed to respond to a request for admission, interrogatories, and a request for production of documents. He did not timely file a Rule 26.1 Disclosure Statement. A motion for summary judgment was filed against his client. He did not appear for oral argument on these motions. The motion for summary judgment was granted and the court threatened to order fees against Mr. Hyndman and his client, making them jointly and severally liable. These actions led again to a bar referral, and Mr. Hyndman again failed to cooperate with the bar investigation.

Mr. Hyndman was suspended for six months and one day, retroactive to August 7, 2007. The March 18, 2008, Judgment suspending him required that he:

- a) Limit his practice to representation of his father's business firm and no more than five (5) clients with conditions as may be placed by LOMAP and MAP.
- b) Participate in fee arbitration.
- c) Pay restitution to his client, Mr. Trzaska within thirty days.

His current Application for Reinstatement was filed on March 8, 2012. Pursuant to Rule 64(e)(1), Ariz. R. Sup. Ct., because Mr. Hyndman has been suspended for more than six months, he must submit to formal reinstatement proceedings pursuant to Rule 65. Rule 65(b)(2) requires that the lawyer seeking

reinstatement has the burden of demonstrating by clear and convincing evidence the lawyer's rehabilitation, compliance with all disciplinary orders and rules, fitness to practice, and competence.

Mr. Hyndman applied for reinstatement within five years; however, his application came on the eve of the five year time frame requiring the additional requirements of Rule 64(c) that he re-take the bar examination. In addition, Mr. Hyndman immediately sought a waiver of the 150 day requirement of Rule 65(b)(1)(A) because of his deployment to Afghanistan as a civilian working for the Department of Defense. Based on the last minute nature of the application for reinstatement and the prolonging of the time for hearing, Mr. Hyndman agreed to apply for admission and comply fully with the examination requirements of Rule 65(c).

I. FINDINGS OF FACT

2. Mr. Hyndman was first admitted to the practice of law in Arizona on May 19, 2000. [Joint Pre-Hearing Statement]

3. Although Mr. Hyndman failed to meet the application requirement of Rule 65(a)(3)(C), pursuant to the Disciplinary Clerk's inquiry, Karen Weigand verified by email the Client Protection Fund "has neither received nor paid out any claim against Mr. Hyndman, therefore he owes not money to the Fund."

4. Mr. Hyndman had not applied for reinstatement with the State Bar of Arizona regarding his later suspension prior to this matter. [Joint Pre-Hearing Statement]

5. During the period of suspension, Mr. Hyndman worked:

- a) From December 2010 to present as a warranted contracting officer for the U.S. Department of Defense, Department of Army, at the Aberdeen Proving Ground, Maryland (current) and at the regional Contracting Center at Kandahar Airfield, Afghanistan.
- b) From September 2009 to December 2010 as an unwarranted contracting specialist for the U.S. Department of Defense, Department of Army, at the Aberdeen Proving Ground, Maryland.
- c) From March 2009 to November 2010 as a consultant for Judy Page, RN and Associates, 127 Saltillo Court, Solano Beach, California doing research and writing for his mother's start-up company.
- d) From April 2007 to February 2009 as a billing and collections manager for his father's privately held commercial management company, Hanover Management, 2605 W. Van Buren, #OFC, Phoenix, Arizona.

[Joint Pre-Hearing Statement; Application for Reinstatement]

6. Mr. Hyndman has maintained five (5) residences during the period of suspension. Mr. Hyndman currently resides in Maryland with his wife. [Joint Prehearing Statement]

7. Mr. Hyndman has not been a party to any criminal actions during the period of suspension. [Joint Prehearing Statement]

8. Mr. Hyndman has been a party to six (6) civil matters during the period of suspension. All matters were resolved. [Joint Prehearing Statement; Application for Reinstatement]

- a) Maricopa Superior Court, CV2010-090166. Action initiated January 2010. Action ended via arbitration.
- b) Maricopa Superior Court, CV2008-093588. Action initiated December 2008. Action terminated by settlement.
- c) Maricopa Superior Court, CV2007-004194. Action initiated March 2007. Action terminated by settlement.
- d) Maricopa Superior Court, CV2007-002568. Action initiated February 2007. This is the only matter involving an allegation of fraud against Mr. Hyndman. Mr. Hyndman was dismissed from the matter in 2009.
- e) Maricopa Superior Court, CV2006-002417. This action was consolidated with the matter listed immediately above. Mr. Hyndman was dismissed from the action in 2009.
- f) Arizona Precinct Justice Court, Maricopa County, CV2006-055185. Action initiated April 2006. This matter was initiated prior to suspension but resolved after suspension. The matter was resolved by Judgment of the court.
- g) Mr. Hyndman testified he was convicted of Driving Under the Influence in the state of Arizona in 2004. He successfully completed the terms of his sentence.

[Joint Prehearing Statement; Application for Reinstatement]

9. The only allegation of fraud against Mr. Hyndman was in relation to the 2007 case listed in paragraph 11(d) above. In that matter, Mr. Hyndman was in-house counsel for a small corporation. The minority shareholders instituted a

takeover action against the majority shareholders and Mr. Hyndman supported the actions of the minority shareholders. The resulting legal action included claims by the majority shareholders against Mr. Hyndman. Mr. Hyndman was dismissed from the action in 2009. [Joint Prehearing Statement]

10. Mr. Hyndman was subject to an IRS audit for tax years 2007 to 2009. He has paid in full all taxes owing for years through 2008. He is currently in an active payment plan with the IRS for taxes owing for year 2009. He filed his 2011 taxes and has filed an extension for his 2012 taxes. [Supplement to Application for Reinstatement; Testimony of Mr. Hyndman June 24, 2013]

11. Mr. Hyndman had a significant amount of debt that negatively impacted his credit. At hearing he testified he has substantially repaired his credit and made progress regarding paying off those debts. [Supplement to Application for Reinstatement; Testimony of Mr. Hyndman June 24, 2013]

12. Pursuant to the suspension in SB 08-0030, Mr. Hyndman was ordered to pay restitution to a former client in the amount of \$813. Mr. Hyndman did not timely pay restitution; however, he finally satisfied the order of restitution months after filing his application for reinstatement. [Joint Prehearing Statement; Testimony of Mr. Hyndman June 24, 2013]

13. Mr. Hyndman took and passed the February 2013 Arizona Bar exam and completed the course on Arizona law. At the time of hearing he had not sat for nor taken the MPRE exam. He was scheduled to take the examination in August, 2013.

[Application for Reinstatement; Hearing Exhibit 13 and Notice of Intent.]

14. Mr. Hyndman completed three (3) credit hours of Continuing Legal Education credit on February 22, 2013. [Joint Prehearing Statement.]

15. Other than sitting for the bar exam and completing three (3) credit hours of CLE Mr. Hyndman has done nothing to remain current in the knowledge and skills necessary to fulfill the professional responsibilities of an attorney.

16. Mr. Hyndman was the subject of a background investigation by the State of California in an effort to obtain a California Realtor's License. He was ultimately issued a provisional/restricted real estate broker license in July 2012.

17. Mr. Hyndman has obtained a Secret Clearance in relation to his position with the Department of Defense.

18. Mr. Hyndman has not sought a professional assessment or obtained counseling regarding the depression he alleges was the cause of the underlying ethical violations resulting in his suspension.

19. Mr. Hyndman testified he completed six to eight sessions of alcohol counseling in 2004 related to his DUI conviction.

20. Mr. Hyndman took two different medications for depression on two separate occasions. Both prescriptions were prescribed by his brother, who was a doctor. Mr. Hyndman took the medications for the minimum time period recommended – 6 months – and did not take the medications in conjunction with any counseling or mental health assessment. Testimony of Mr. Hyndman June 24, 2013.

21. As to rehabilitation, Mr. Hyndman testified he obtained a Bachelor degree in Psychology to understand his depression.

22. Mr. Hyndman could not identify the triggers of his depression other than to state he struggled to tell anyone about his problems. He further could not identify any tools he had in place to prevent falling into a depression again, other than to state he knew he could not practice law in as a solo practitioner or in a small firm and that he now talks to his mother and wife more freely. However, in relation to his current employment, Mr. Hyndman testified he has mentors at work that are aware of his past problems with depression and his problems with the practice of law and that he confers with them regularly to ensure similar lapses into depression do not result from challenges in his current work environment. [Testimony of Mr. Hyndman June 24, 2013.]

23. At the conclusion of the evidentiary hearing the State Bar recommended that Mr. Hyndman be reinstated subject to conditions of probation including significant monitoring.

II. ANALYSIS UNDER RULE 65(B)(2), ARIZ.R.SUP.CT.

A lawyer seeking reinstatement must prove by clear and convincing evidence their rehabilitation, compliance with all applicable discipline orders and rules, fitness to practice, and competence. Rule 65(b)(2).

The Supreme Court of Arizona has also held that the following factors also are considered in matters of reinstatement: 1) the applicant's character and standing prior to disbarment (suspension in this matter), 2) the nature and character of charge for which disciplined, 3) the applicant's conduct subsequent to the imposition of discipline, and 4) the time which has elapsed between the order of suspension and the application for reinstatement. *Matter of Arrotta*, 208 Ariz. 609, 96 P.3d 213 (2004). Additionally, an applicant for reinstatement must show

rehabilitation by clear and convincing evidence as well as having overcome his or her disability. *In re Johnson*, 298 P.3d 904 (2013). While an applicant need not pull back the “multiple layers of causation or psychoanalysis,” the “applicant must clearly and convincingly prove rehabilitation by specifically identifying the causal weakness leading to each count and explaining how the weakness has been overcome.” *In re Johnson supra at 13*.

Rehabilitation

All of Mr. Hyndman’s evidence regarding his rehabilitation from his depression is based upon his own statements and testimony. Mr. Hyndman offered no testimony or documentation from doctors, psychologists, psychiatrists, or counselors. Mr. Hyndman attributed his depression to being incapable of handling the business of a small or solo law practice and failure to tell people when he was struggling or depressed. Mr. Hyndman readily admitted he hid all of the disciplinary matters he faced from his family and his wife. The only assistance he sought for his depression was from his brother who was a doctor.

Mr. Hyndman stated he realized that two things prevent him from harming the public as a practicing attorney should he return to the practice of law: the support of his wife and his awareness that he cannot practice law as a solo practitioner or in a small firm setting. Mr. Hyndman did admit to a lack of integrity and abuse of alcohol as contributing factors to his depression.

He admitted to abusing alcohol in 2004 and testified regarding his efforts to overcome that abuse. He indicated if he were required to not drink alcohol ever again as a condition of reinstatement, he would agree to such terms.

Mr. Hyndman asserted depression was the reason for his repeated violation of ethical rules that led to his 2007 suspension. However, no evidence of tools or protocols to prevent and avoid those triggers and weaknesses was presented during the reinstatement process. The Panel was struck by the fact Mr. Hyndman, having a degree in Psychology, was unable to articulate triggers to his depression or identify tools to aid him in not falling into the same position that led to his failings as a member of the State Bar.

Mr. Hyndman testified he has made changes in his personal relationships with his mother and wife and now seeks their assistance and input when struggling. He indicated he was no longer depressed and that he believed his current job was a significant factor in overcoming his depression.

Further, Mr. Hyndman had an extremely difficult time answering the questions presented to him by his own counsel, State Bar counsel or the Panel. Questions that required a simple yes or no answer resulted in 20 minutes of information not directly related to the question. This caused the Panel concern as to Mr. Hyndman's sincerity and further raised the question of what Mr. Hyndman's true agenda was in seeking reinstatement.

Hal Nevitt, LCSW/LISAC/CEAP

Mr. Nevitt, former director of the State Bar's Member Assistance Program testified that Mr. Hyndman presented to him in June 2007 and again in February 2013 for an evaluation. Mr. Nevitt spent no more than a total of 5 hours during both of these visits with Mr. Hyndman. Mr. Nevitt testified all of the information he knew about Mr. Hyndman's suspension and depression were the result of what Mr. Hyndman told him during these two brief evaluations. Mr. Nevitt indicated that

although he believed Mr. Hyndman was aware of his weaknesses and had made progress in developing a support system, he had not fully committed to tackling the issue of his depression. Mr. Nevitt indicated that it was his professional opinion that Mr. Hyndman should not return to the practice of law unless *significant* monitoring was in place. Testimony of Hal Nevitt June 24, 2013.

Courtney Hyndman

Courtney Hyndman is Mr. Hyndman's wife. She testified that she has a different relationship with her husband today compared to her relationship with him when the disciplinary matters leading to his suspension from the State Bar were going on. She testified that Mr. Hyndman has become more open with her and discusses his struggles with her. She testified they now work through obstacles and problems together and that she is committed to supporting his efforts to remain free from depression. Ms. Hyndman stated she has a high respect for changes her husband has undergone and his effort to maintain his new ways of handling stress, pressure and challenges.

Compliance with Disciplinary Rules and Orders

Mr. Hyndman is, at this time, finally compliant with all past disciplinary orders imposed as a result of his suspension. There were no allegations involving the unauthorized practice of law during the period of suspension. Mr. Hyndman does not owe any funds to the Client Protection Fund. However, the State Bar filed its Statements of Costs and Expenses incurred as a result of the application for reinstatement and Mr. Hyndman owes the State Bar \$456.53. Pursuant to Rule 65(a)(3)(A), Ariz. R. Sup. Ct., the lawyer seeking reinstatement shall be required to cure the monetary deficiency before the application is reviewed by the Court.

Competence

Mr. Hyndman obtained 3 hours of continuing legal education ("CLE") during the 2013 CLE year period. He also successfully passed the February Arizona Bar exam and completed the course on Arizona law. Mr. Hyndman however, had not submitted his Multistate Professional Responsibility Examination ("MPRE") results. Rule 35(b)(6), (7) and (8), Examination Subject; Grading requires proof of a successful passing score of 85 or greater on the MPRE. The PDJ stayed this matter to ascertain if he intended to take that examination. He filed a Notice of Schedule MPRE on July 24, 2013, informing of his intent to take the examination on August 17, 2013. The matter was stayed until those results were submitted.

Fitness to Practice

Mr. Hyndman agreed to meet the additional requirement set forth in Rule 64(c) regarding the passing of the bar examination. Mr. Hyndman has not been involved in the practice of law since his suspension. He presented evidence of awards and promotions as a result of his work in his current employment with the Department of Defense as a warranted contracting officer.

Further, Mr. Hyndman demonstrated that he is current on his tax filings and that he has made significant progress in overcoming significant debt. He testified that he voluntarily took a deployment to Afghanistan in order to obtain extra income to make progress on paying off past debts. Evidence was presented that he was actively in a payment plan to pay off taxes owed from 2009 and that many of the debts he had amassed during the time of his depression were paid in full or were under repayment.

However, multiple debts were ignored by him and were not adequately explained in his application. As became typical in the proceedings, Mr. Hyndman minimized his conduct and glossed over his debts. In his deposition [Exhibit 19] he acknowledged that he had not satisfied his debt with Palo Verde Animal Hospital. Instead he testified it "abandoned their claim, so that's gone off my credit report." [Exhibit 19 page 10]

Regarding another creditor he testified "Compass Bank is gone." We find this equally misleading. Upon further questioning he acknowledged ..."the dispute there was over bounced-check charges, and I responded to the dispute with my list of why I thought that those were excessive and inappropriate, and they eventually abandoned the—claim for \$779." [Exhibit 19 page 11]

Regarding Home America Property Management he acknowledged there was a judgment that was not satisfied and he had paid nothing on it. His testimony was ambivalent, speculative and self-serving. Regarding the judgment he testified, "That's probably still out there as far as I know." He then changed direction and speculated, "I don't believe that has been renewed-that judgment's been renewed." He then expounded, "It's over five years old. It has not been filed with the County Recorder; I don't believe it has."

His basis for this speculation was telling. "I haven't specifically looked for it within the last three to six months. So that would be an outstanding debt that's not satisfied." His attorney's extemporaneous explanation was, "Home America's out of business." This led Mr. Hyndman to rationalize why the judgment was invalid, again minimizing his conduct. He then concluded, "Well the-the judgment

has now lapsed, so my argument from a legal standpoint is that it's not a valid judgment; it's not an enforceable judgment." [Exhibit 19 page 11-13]

Mr. Hyndman owed past due quarterly maintenance fees for a timeshare he and his wife owned. He testified that because they exercised their right to foreclose his mortgage for non-payment that "all of that has gone away," and "we don't owe them."

III. DISCUSSION OF DECISION

The Panel is less than impressed with Mr. Hyndman's efforts regarding rehabilitation and demonstrating a sustained period of recovery and a strong commitment to recovery. Mr. Hyndman presented to the Panel as an opportunist who only minimally complied with the reinstatement requirements and completed the terms and conditions of his 2007 suspension because he had no other choice but to do so in order to have an opportunity at reinstatement and to advance his federal career. Mr. Hyndman ignored the orders issued against him and did not fully comply with the terms of his 2007 suspension until April 17, 2013, thirteen months after he filed his Application for Reinstatement. He put forth the least amount of effort to meet the requirements for reinstatement; however, we agree that he has met the bare minimum requirements for reinstatement.

His testimony and the exhibits consistently call into issue his credibility. We decline to ignore the prior probationary requirements issued in his 2007 suspension. We agree with them. We are more than concerned that he is not rehabilitated. An additional concern is his monitoring. He does not intend to return to Arizona and therefore he is likely not to be supervised at all.

Because Mr. Hyndman had not yet taken but was scheduled to take the Multistate Professional Responsibility Examination (MPRE), the Presiding Disciplinary Judge, with the concurrence of the hearing panel, stayed this matter pending receipt of his MPRE results. Mr. Hyndman shall file with the Office of the PDJ his MPRE results prior to this matter being transmitted to the Supreme Court of Arizona for a final decision on reinstatement. The Office of the PDJ has been informed by the Certification and Licensing Division of the Administration of the Court that Mr. Hyndman has passed the MPRE, and as a result, the stay was lifted and this report and recommendation is now issued. The Panel reluctantly concurs with the State Bar and recommends reinstatement.

IV. CONCLUSION

To be clear, the Panel narrowly concurs with the State Bar and recommends reinstatement under very specific conditions of probation. Mr. Hyndman shall also pay costs of these proceedings pursuant to Rule 65. Probation is effective the date of the Order of Reinstatement and shall conclude two years from that date. The recommended terms and conditions of probation are as follows:

Terms and Conditions of Probation

1. Within 30 days of reinstatement, Mr. Hyndman shall contact the director of MAP at (602) 340-7334 or (800) 681-3057 and submit to a MAP assessment. Mr. Hyndman shall thereafter, enter into a MAP contract based on recommendations made by the MAP Director or designee and shall comply with the recommendations. The terms and conditions of probation shall be incorporated herein by reference. Mr. Hyndman is responsible for any costs associated with MAP.

2. Mr. Hyndman's practice of law shall be restricted in that he may not practice as a solo practitioner.

3. In the event Mr. Hyndman returns to the practice of law in Arizona, he shall immediately notify the State Bar's Law Office Management Assistance Program ("LOMAP") and enter into a LOMAP contract based on recommendations by the director of LOMAP or designee. Specific terms and conditions of a LOMAP contract shall be incorporated herein.

4. In the event Mr. Hyndman fails to comply with any of the foregoing probation terms, and the State Bar receives information thereof, bar counsel shall report material violations to the Presiding Disciplinary Judge, who may hold a hearing within 30 days to determine if the terms of probation have been violated and if an additional sanction should be imposed. The burden of proof shall be on the State Bar to prove non-compliance. Rule 60(a)(5)(C), Ariz.R.Sup.Ct.

DATED this 20th day of September, 2013.

/s/ William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

CONCURRING

/s/ Michael Snitz

Michael Snitz, Volunteer Public Member

/s/ Harlan J. Crossman

Harlan J. Crossman, Volunteer Attorney Member

Original filed with the Disciplinary Clerk
this 20th day of September, 2013.

COPY of the foregoing mailed/emailed this
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