2024-2025 Advisory Opinions
Competition Integrity Committee

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<u>24-25 Opinion 1</u>: Advisory opinions from 2022-23 season and 2023-24 season

Question: This question involves the status of CIC advisory opinions from the 2022-23 and 2023-24 seasons. Are teams deemed to be "on notice" of those opinions for future CIC proceedings under AMTA Rule 7.21(6)?

Answer: No. The opinions from prior seasons do not have any binding force and may not be used to support any future penalty decisions. See AMTA Rule 1.1(2) ("If AMTA publishes any interpretations of its rules, whether related to sanctions, invention of fact, or anything else, such interpretations may not be used by AMTA or any of its committees to justify the discipline of teams or individuals in future seasons. Thus, in future seasons, teams and students are not deemed on notice of such interpretations unless they have been codified in the Rulebook."). The opinions from prior seasons remain available on the AMTA website solely for informational purposes. See *id.* ("[N]othing in this rule is intended to preclude AMTA or its committees from . . . making such interpretations publicly available.").

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24-25 Opinion 2: Four Corners of the Affidavit

Question: May affidavit witnesses testify on direct examination to facts relating to them that are contained in other witnesses' affidavits (but not in their own affidavit)? For example, can Kirby Doolittle testify to Doolittle statements contained in other affidavits but not in Doolittle's?

Answer: No. On direct examination, witnesses are generally limited to the facts in the four corners of their affidavit (plus any inclusive document as defined by Rule 7.21(2)(d) and permissible inferences as defined by Rule 7.21(2)(c). Thus, witnesses are not permitted to testify about material facts not in their affidavits or reports that otherwise appear in the case packet. Even if one witness states a particular material fact in their affidavit, that is not a proper basis for another witness to testify to that same material fact. The omission of certain material facts from a specific affidavit (conversely, the inclusion of a particular material fact in a specific affidavit or report) is often intentional by the case writers to ensure that only certain witnesses are able to testify about certain specific material facts.

Under Rule 7.21(2)(a)(ii), no witness may testify on direct or redirect examination about any "material facts not included in or permissibly inferred from the witness's affidavit." Under Rule 7.21(2)(c), "[a] witness's answer does not qualify as a 'permissible inference' merely because it is consistent with (*i.e.*, does not contradict) statements in the witness's affidavit." Rather, "[a] permissible inference must be a conclusion that a reasonable observer *would draw* from a particular fact or set of facts contained in the affidavit." (emphasis added) Further, Rule 7.21(2)(d) establishes that, for purposes of Improper Invention, a witness's affidavit only includes the "witness's sworn statement, [and] any document in which the witness has state their beliefs, knowledge, opinions or conclusions;" it does not include "affidavits or documents produced by other witnesses, except to the extent that a witness has relied on such affidavits or documents in forming their own conclusions." Finally, Rule 7.21 (2)(b) is specifically limited to "material" facts that "affect the merits of the case."

The only witnesses excluded from the general Improper Invention Rule (AMTA Rule 7.21) are Jordan Nathanson and Taylor Hopson. *See* 24-25 Advisory Op. 4. Because Special Instruction 6 specifically provides that the Nathanson and Hopson depositions "are not affidavits" for purposes of Rule 7.21, Nathanson and Hopson are not bound by that rule. As such, both witnesses may testify on direct and redirect examination to information not contained or permissibly inferred from their respective depositions. For example, where the Hopson deposition is silent on whether Hopson is familiar with a specific exhibit, Hopson is free to testify that they are (or are not) familiar with that exhibit. All other witnesses are subject to the limitations of Rule 7.21 discussed above. That said, all witnesses—including Nathanson and Hopson—are bound by Rule 6.11(3) (No Recantation). Additionally, Special Instruction 6 provides that Nathanson and Hopson "may not deny [giving] the answers given in their respective depositions after having been sworn to tell the truth," and are also bound by Special Instruction 4 (regarding authenticity of documents). Moreover, Nathanson and Hopson are bound by all stipulations, including Stipulations 15-17.

24-25 Opinion 3: **Doos Interrogation**

Question: Kelly Doos has both an affidavit and an interrogation transcript (Exhibit 14). On direct and redirect examination, may Doos testify to what they said during their interrogation? What if what was said during the interrogation contradicts something in their affidavit?

Answer: As stated in 24-25 Advisory Opinion 2 , witnesses are generally limited to the facts in the four corners of their affidavit (plus any inclusive document as defined by Rule 7.21(2)(d)). Thus, Doos may testify to the contents of Exhibit 14 during direct and redirect examination (either because Exhibit 14 is consistent with Doos's affidavit or because Doos's affidavit is silent on a topic covered in Exhibit 14). However, to the extent an interrogation response captured in Exhibit 14 contradicts content in Doos's affidavit, Doos must testify in accordance with Doos's affidavit. In other words, if Exhibit 14 contradicts the Doos affidavit, Doos must say the affidavit content is true. If the interrogation response does not conflict with the affidavit, Doos may say the interrogation response is true.

This same logic applies to other exhibits referenced in witness affidavits. For example, to the extent content of the text messages in Exhibit 26(a) contradicts content in the Doos affidavit, Doos must say the affidavit is true. If the text message contents do not contradict the Doos affidavit, Doos may say the text message content is true.

24-25 Opinion 4: Deposition Witnesses

Question: Is Jordan Nathanson allowed to testify, "I heard Taylor Hopson say that they knew that Bancroft was going to change the will," or something similar?

Answer: The proposed testimony identified above, on its own, does not violate AMTA's Improper Invention rule. The Improper Invention rule (AMTA Rule 7.21) allows the Case Committee to exclude certain witness documents from the definition of "affidavit" for purposes of Rule 7.21. (AMTA Rule 7.21(2)(d) (defining affidavit "[u]nless otherwise indicated in the case packet[.]")) Under Special Instruction 6, Nathanson's deposition is not an affidavit for purposes of Rule 7.21. Therefore, Nathanson is not bound by Rule 7.21(2)(a) and can build testimony based on invented facts that are not included in Nathanson's deposition, including the fact above.

It is important to note, however, that testimony from Nathanson may be subject to other limitations outside of Rule 7.21. For example, Special Instruction 6 notes that Nathanson's inventions must not contradict stipulations. If Nathanson testified, "I reviewed security footage where, while in the Platinum Section, Taylor Hopson said that they knew that Bancroft was going to change the will," that testimony would contradict Stipulation 21, which states that there are no security cameras within the Platinum Section and that none of the available security footage is relevant.

Importantly, since only Nathanson's and Hopson's depositions are excluded from Rule 7.21, only Nathanson and Hopson may testify to invented facts. If another witness were to give the same testimony above, unless that fact were contained in or permissibly inferred from the witness's affidavit, it would violate the Improper Invention rule (AMTA Rule 7.21).

24-25 Opinion 5: Expert witnesses preempting other testimony

***Question*:** In order to preempt Silva's testimony that Banctoft died from a natural heart attack as opposed to poisoning, may Dr. Edmund testify on direct examination that "poisoning" by potassium in a patient with chronic kidney disease does not present signs of traditional poisoning, such as discoloration, foaming of the mouth, or vomit, or alternatively that potassium overdose in a chronic kidney disease patient does not present like poisoning with a commonly-thought-of agent, like cyanide?

Answer: AMTA Rule 7.21 governs testimony by any witness who has an affidavit. See Special Instruction 5 (defining the Edmund and Haskins reports as "affidavits for purposes of" Rule 7.21). Under Rule 7.21(2)(a)(i), a witness may not "introduce testimony . . . in a way that contradicts the witness's affidavit." Additionally, under Rule 7.21(2)(a)(ii), no such witness may testify on direct or redirect examination to any "material facts not included in or permissibly inferred from the witness's affidavit." Under Rule 7.21(2)(c), "[a] witness's answer does not qualify as a 'permissible inference' merely because it is consistent with (*i.e.*, does not contradict) statements in the witness's affidavit." Rather, a "permissible inference must be a conclusion that a reasonable observer *would draw* from the particular fact or set facts contained in the affidavit." Rule 7.21(2)(c) (emphasis added).

Dr. Edmund is prohibited from preemptively testifying that a potassium overdose in a chronic kidney disease patient would not present as a traditional poisoning for at least two reasons. First, as to discoloration, testimony that Mr. Bancroft was not discolored would contradict the report. On lines 136-137 of the report, Dr. Edmund states: Mr. Bancroft's "skin was pale and cool to the touch, indicating reduced blood flow and poor perfusion, all signs of severe circulatory distress." Second, as to vomiting, the chart on page 4 of Dr. Edmund's report lists vomiting as a symptom of hyperkalemia. It would therefore contradict Dr. Edmund's report, and violate Rule 7.21(2)(a)(i), for Dr. Edmund to testify discoloration and vomiting would not be present in a potassium overdose for a chronic kidney disease patient.

Furthermore, while Dr. Edmund can certainly state the conclusion from the Edmund report that Bancroft died from a potassium overdose (as opposed to some other cause of death), Dr. Edmund could not testify on direct examination that a potassium overdose in a chronic kidney disease patient does not **present** like poisoning with a commonly-thought-of agent, like cyanide. Such a conclusion is not included in Dr. Edmund's affidavit or accompanying report, nor is it permissibly inferred therefrom. These documents do not include any discussion about the presentation of poisoning with a commonly-thought-of agent, like cyanide, and Dr. Edmund does not state they reviewed Alex Silva's affidavit. Competitors are reminded of Rule 7.21(1), which states "Mock trial competitors are to advocate as persuasively as possible *based on the facts provided*." While it may seem logical or consistent with Dr. Edmund's affidavit/report that they would have knowledge related to other poisoning agents which would allow the witness to draw such a conclusion, that conclusion is not written into this closed universe case.

24-25 Opinion 6: Testimony of Tony Kissner and the Guilty Portrayal Rule

***Question*:** Tony Kissner is a former employee of Defendant Glenbauer Country Club, and the testimony in his affidavit implicates their former employer. Would it be permissible to have Kissner testify for the plaintiff that their own actions played a part in the death of Skyler Sinclair? If so, what are the bounds of that testimony? For example, may Kissner say they are an alcoholic or carry a flask to the stand?

Answer: AMTA Rule 6.11(2) states "a defense team may not allege, argue, imply, or suggest that a witness called by the defense" committed the wrong, acted wrongfully, or committed a crime. Tony Kissner is a witness called by the plaintiff, and the "guilty portrayal rule" therefore definitionally does not apply to Kissner. It is permissible for Kissner to testify, in accordance with the Kissner affidavit, that Kissner's actions may have played a role in Sinclair's death.

Teams are reminded, however, that Kissner is still bound by Rule 7.21. That is, under Rule 7.21(2)(a)(ii), no witness may testify on direct or redirect examination about any "material facts not included in or permissibly inferred from the witness's affidavit." Nowhere in Kissner's affidavit does it state Kissner is an alcoholic. In fact, to the contrary, Kissner states in lines 32-33, "I'm told it takes quite a lot to get me noticeably drunk, but I don't believe it. I think I just don't get drunk." It is not a permissible inference that Kissner would state Kissner is an alcoholic and/or carry a flask. Further, teams are reminded that Rule 6.11(3) prohibits any attempt to indicate through testimony or portrayal that statements in the witness' affidavit are not true, no longer true, incomplete, etc. Likewise, Rule 7.21(2)(a)(i) prohibits portrayals or characterizations of witnesses that contradict the witness's affidavit.

24-25 Opinion 7: **Testimony by Andi Nieman and/or Dani Kraus as to methods**

Question: Would it be a material invention for Andi Nieman and/or Dani Kraus to testify that they relied on a particular method (like the "P-I-N" method)?

Answer: It is generally permissible for an expert witness use the specific steps or components contained in the witness's affidavit or report as the basis for an invented name of a method not specifically provided in the expert witness's affidavit or report. Standing alone, a method's name is unlikely to be a "material" fact. In contrast, the specific steps or components of a method—and whether witness actually performed or followed them—are almost certainly material facts..

AMTA Rule 7.21 governs testimony by any witness who has an affidavit, which includes expert witnesses. Under Rule 7.21(2)(a)(ii), no such witness may testify on direct or redirect examination to any "material facts not included in or permissibly inferred from the witness's affidavit." Under Rule 7.21(2)(c), "[a] witness's answer does not qualify as a 'permissible inference' merely because it is consistent with (*i.e.*, does not contradict) statements in the witness's affidavit." Rather, a permissible "inference must be a conclusion that a reasonable person would draw from a particular fact or set of facts contained in the affidavit."

At the same time, Rule 7.21(2)(a)(ii) is specifically limited to "material" facts. Rule 7.21(2)(b) provides that facts are not material "if they merely provide background information or develop the character of a witness." The rule further states that "[o]ne test that judges and competitors can use to assess materiality is whether the facts at issue are the type that could reasonably be expected to be included in the party's closing argument." Because the specific name of an expert witness's method will rarely affect the merits of the case, such names generally will not be material. (In contrast, the name of the method might be material if the name itself bolstered the argument in favor of admissibility, such as by using a recognized term such as "peer-reviewed," "gold standard," etc., or if the name of the method is used as support in response to a Lack of Foundation or Improper Opinion objection to the expert's conclusion).