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Competition Integrity Committee
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<u>23-24 Opinion 1</u>: Advisory opinions from 2022-23 season

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

Answer: No. The 2022-23 opinions no longer 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 2022-23 opinions 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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<u>23-24 Opinion 2</u>: Defendants with affidavits referencing events during trial

Question: May De la Porta testify to events that happen during trial despite having an affidavit rather than an interrogation?

Answer: There is no absolute prohibition against De la Porta (or any non-sequestered witness) testifying about – or being asked on direct examination about – events that occurred during trial. In doing so, however, De la Porta may not testify in a way that violates AMTA Rule 6.11(3) (No Recanting) or Rule 7.21 (Invention of Fact).

It would not violate AMTA rules for defense counsel to ask whether De la Porta heard the government's first witness claim a certain fact was true and for De la Porta to confirm that De la Porta heard the witness testify to that fact. For example, defense counsel could permissibly ask De la Porta, "Did you hear Blaise Nova testify that you were holding a red key fob?" and De la Porta could permissibly answer, if true, "Yes." Standing alone, the fact that a non-sequestered witness heard a specific thing being said during trial is not "material" because it does not "affect the *merits of* the case," but instead gives background information for the witness's testimony. Rule 7.21(c)(i).

There is likewise no inherent prohibition against defense counsel asking De la Porta whether a fact testified to by a previous witness is indeed true or for De la Porta to claim that it is not, provided that Del la Porta does not contradict their affidavit or otherwise commit an improper invention. Instead, the question is whether Rules 6.11(3) and 7.21(4) would allow De la Porta to make that claim absent the other witness's in-court testimony. For example, De la Porta may not claim that hearing another witness's in-court testimony made De la Porta realize something in De la Porta's affidavit was wrong, because that would violate Rules 6.11(3) and 7.21(4)(a)(i). Nor may De la Porta assert that another witness's testimony made De la Porta realize that De la Porta left out something relevant from De la Porta's affidavit or caused De la Porta to reach a conclusion De la Porta had not otherwise drawn in De la Porta's affidavit, because that would violate Rule 7.21(4)(a)(ii).

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23-24 Opinion 3: Demonstrative aids

Question: According to the Order on Motions in Limine, "Agent Burke may not testify to the contents of [the lost] financial records as a fact without those documents being present, but rather must clearly state only what Agent Burke recalls about those records. For example, Agent Burke is prohibited from stating, "the financial record showed a transaction occurred" on a date certain. However, Agent Burke may testify, "I believe a transaction occurred" on a date certain. Order at 3. Given this ruling, would it be permissible to list some or all of those transactions on a demonstrative aid during Agent Burke's testimony, such as: "August 9, 2022: $3,000 transfer from Goodspeed Industries to Bern Steel Ltd."? Would it be permissible to list those transactions if the demonstrative aid also included qualifying language (such as "Agent Burke's Recollections of Financial Records")?

Answer: The content of demonstrative aids is governed by AMTA Rule 7.20(2)(b). Under that rule, "no demonstrative aid may state or include *any* case-specific material fact that is not included in the case packet." That standard is more restrictive than the normal Improper Invention standard of Rule 7.21 and does not permit reasonable inferences. In addition, the comment to Rule 7.20(2)(b) provides examples of facts that may not be contained in a demonstrative aid unless they are specifically included in the case packet.

Rule 7.20(2)(b) imposes two relevant limitations here. *First*, because the rule does not permit reasonable inferences, the proposed demonstrative aid may not include any case-specific material information (such as dates, times, or other identifying information) that is not stated in the case packet. See Comment to Rule 7.20(2)(b). *Second*, because demonstrative aids may not be used to introduce material facts to which the witness could not testify, the restrictions that the Order on Motions in Limine impose on Agent Burke's testimony also apply to any demonstrative aid that is created to accompany that testimony.

Accordingly, it would not be permissible for a demonstrative aid to state, alone, "August 9, 2022: $3,000 transfer from Goodspeed Industries to Bern Steel Ltd.," but it would not violate the rules for a demonstrative aid to state, "August 9, 2022: Agent Burke's Recollections of Financial Records," or similar language. Like the witness's testimony, any demonstrative aid must describe the records' contents as recollections, memories, beliefs, or opinions - not as absolute facts.

23-24 Opinion 4: Application of Rule 7.21 (withdrawn January 2024)

****This opinion has been withdrawn in light of the December 12, 2023 case changes****

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<u>23-24 Opinion 5</u>: Permissible answers on cross examination (January 2024)

Question: This question is about the implications of lines 416-421 in the Bahmani report. For example, if Bahmani is asked on cross examination whether they received DNA testing results from the cell jammer, may Bahmani testify that they did in fact receive such results?

Answer: The proposed testimony set forth in the example would not violate AMTA Rule 7.21(4)(b).

Rule 7.21(4)(b) states, in relevant part: "On cross-examination, a witness commits no violation or Improper Invention when they testify to material facts not included in their affidavit so long as the witness's answer is responsive to the question posed and does not contradict the witness's affidavit. An answer is responsive to the question posed if, and only if, it responds directly to the content of the question. However, an answer is not responsive if it volunteers information on the same general subject as the question, but does not respond to the specific content of the question."

Detective Bahmani's report is silent about whether the cell jammer was tested for DNA. If Bahmani is asked on cross-examination: "Did you conduct DNA testing on the cell jammer?", a "yes" answer would be responsive to the question asked and would not contradict lines 418-21 of the report, which state, in relevant part, that: (i) "[s]ome investigative steps are omitted from the report"; (ii) any unmentioned investigative steps yielded "nothing of substance"; and (iii) any unmentioned investigative steps did not yield any "evidence tending to incriminate or exonerate Poe Cameron, Memphis Raynes, or B.F. De la Porta." Thus, a "yes"' answer to that question would not violate Rule 7.21(4)(b).

There are two important qualifications to this answer. First, if Detective Bahmani answered "Yes, <u>and Poe Cameron's DNA was all over it</u>," the underlined portion of the answer would violate Rule 7.21(4)(b) because it is not responsive to the question and contradicts the witness's affidavit. As discussed above, Bahmani's report directly states that the omitted investigative steps yielded nothing of substance and did not incriminate Poe Cameron – facts that the statement "Poe Cameron's DNA was all over it" obviously contradict. In addition, the added statement would not be responsive to the question asked, which called for a yes or no answer. As the Comment to Rule 7.21(4)(b) notes, the purpose of the rule is to "prevent[] witnesses from volunteering invented material facts on cross-examination that exceed the scope of the question." Accordingly, an answer where the witness volunteers invented facts about Poe Cameron's DNA being on one of the devices used to commit a crime clearly violates both the letter and the purpose of this rule.

Second, on direct or re-direct examination, a witness also may not testify to material facts that are "not included in or permissibly inferred from the witness's affidavit as defined by Rule 7.21(4)(c)(ii). See Rule 7.21(4)(a)(ii). Because whether Bahmani received DNA test results from the cell jammer is neither "included in or permissibly inferred from" Bahmani's report, Bahmani may not testify to that fact on direct or re-direct examination.

To be clear, Rule 7.21(4)(b) does not prohibit *all* non-responsive answers during cross examination. Instead, as this opinion explains, Rule 7.21(4)(b) provides that a witness may not invent material facts on cross examination unless they are directly responsive to the question posed and do not contradict the witness's affidavit.

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23-24 Opinion 6: Permissible answers on cross examination (January 2024)

Question: During cross examination, Burke is asked: "Isn't it true you chose not to determine the authenticity of the paintings after taking them from De la Porta's home?" In response, may the witness claim: "That's not true, I authenticated the paintings?"

Answer: The proposed answer would not violate any AMTA rules.

As explained in 23-24 Opinion 5, Rule 7.21 creates substantially different rules for witnesses during direct and cross examination. On cross examination, a witness is allowed to testify to material facts not included in their affidavit, "so long as the witness's answer is responsive to the question posed and does not contradict the witness's affidavit." AMTA Rule 7.21(4)(b). Here, the proposed answer is being given on cross examination, is directly responsive to the content of the question, and does not contradict the witness's affidavit. Accordingly, the proposed answer does not violate Rule 7.21.

As Opinions 5 and 7 emphasize, the CIC cautions this analysis is specific to the cross examination context and the particular question asked.

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<u>23-24 Opinion 7</u>: Invention of fact; non-responsive answers on cross (January 2024)

Question: These questions involve Bahmani's ability to testify about Bahmani's statement to Cameron during the December 5, 2022 interrogation that "Memphis made you do it."

A: On direct examination, may Bahmani testify that statement was a lie – i.e., that Bahmani never believed Memphis made Cameron do it?

B: On cross examination, Bahmani is asked: "Detective Bahmani isn't it true that during your 12/5/22 interrogation of Poe Cameron, you said: 'I think Memphis made you do it'?" May Bahmani respond: "Yes, I did say that, ***and I was lying***"?

C: On cross examination, Bahmani is asked: "Detective Bahmani isn't it true that during your 12/5/22 interrogation of Poe Cameron, you said: 'I think Memphis made you do it'?" May Bahmani respond: "Yes, I did say that, ***before I saw those text messages***"?

Answer: Examples A and B would be impermissible. Example C would be permissible.

Example A is a straightforward violation of AMTA Rule 7.21(4)(a)(ii). That rule states that, on direct or re-direct examination, a team may not offer "material facts not included in or permissibly inferred from the witness's affidavit as defined in Rule 7.21(4)(c)(ii)." Rule 7.21(4)(c)(ii), in turn, states that "[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."

Special Instruction 9 provides that "[u]nless stated herein, all of the witness's affidavits, reports, and interrogations are 'affidavits' pursuant to AMTA Rule 7.21 including Detective Kit Bahmani's interview (Exhibit 22)." Neither Bahmani's report nor Exhibit 22 states Bahmani was lying when they said "I think Memphis made you do it." The fact that it is widely known that police officers sometimes lie to suspects during interrogations does not mean that a reasonable person *would* infer that Bahmani was lying in this particular instance. Finally, whether Bahmani was lying when Bahmani said Memphis made Cameron do it is material because it "affect[s] the merits of the case" as opposed to simply "provid[ing] background information or develop[ing] the character of a witness." AMTA Rule 7.21(4)(c)(i).

Example B would violate AMTA Rule 7.21(4)(b). That rule provides: "[1] On cross-examination, a witness commits no violation or Improper Invention when they testify to [2] material facts [3] not included in their affidavit so long as [4] the witness's answer is responsive to the question posed and [5] does not contradict the witness's affidavit. An answer is responsive to the question posed if, and only if, it responds directly to the content of the question. However, an answer is not responsive if it volunteers information on the same general subject as the question, but does not respond to the specific content of the question." As noted above, the words "***and I was lying***" are not included in Bahmani's "affidavit" (i.e., Bahmani's report and Exhibit 22) and constitute material facts. Although the testimony is being made during cross examination and does not contradict Bahamni's affidavit, the words "***and I was lying***" do not "respond[] directly to the content of the question" but rather "volunteer[] information on the same general subject of the question." For that reason, the answer would violate Rule 7.21(4)(b).

Although Example B would violate Rule 7.21(4)(b), it would not also violate AMTA Rule 6.11(3). Rule 6.11(3) establishes an additional requirement that witness's may not "recant statements in or adopted by their affidavits, depositions, expert reports, or other statements made under oath," "[n]or may they attempt to indicate through their testimony or portrayals that statements in their affidavits are not true, are no longer true, not complete, coerced, etc." But Rule 6.11(3) is not triggered here. Bahmani's statements during the December 5, 2023, interrogation were not made under oath. In addition, Special Instruction 9 provides that the two interrogations (Exhibits 18 and 19) "are not affidavits" either.

Example C, in contrast, would not violate any AMTA rules. The difference involves the language in Rule 7.21(4)(b) restricting its application to non-responsive answers that introduce material facts "not included in [the witness's] affidavit." So even though the words "***before I saw those text messages***" in Example C are still non-responsive to the question, that answer would be permissible because the fact that Bahmani only saw the text messages after the December 5, 2022, interrogation is included in Bahmani's affidavit. See lines 331-36 of Bahmani report.

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<u>23-24 Opinion 8</u>: Invention of fact (April 2024)

Question: J.Z. Simon's affidavit states that they have reviewed the medical files of several of Davis's other patients. May Simon testify on direct examination that, within the files they reviewed of other patients, they saw the signature of D.J. Davis? If so, may Simon testify that those signatures matched or looked similar to or consistent with the signature at the bottom of Derrick Vinson's prescription (Exhibit 8)?

Answer: The proposed testimony would violate AMTA Rule 7.21(4)(a)(ii). That rule states that, on direct or re-direct examination, a team may not offer "material facts not included in or permissibly inferred from the witness's affidavit as defined in Rule 7.21(4)(c)(ii)." Rule 7.21(4)(c)(ii), in turn, states that "[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."

Lines 128-40 of Simon's affidavit describe the review the witness conducted of files from Davis's other patients. Nothing in that paragraph states that the witness recalls seeing Davis's signature on any of those documents, much less that Simon reached any conclusion about how any such signatures compared to the one on Exhibit 8. The paragraph likewise does not contain any information from which a reasonable person *would conclude* that Simon remembers seeing any such signatures or drew any such conclusions. Accordingly, neither part of the proposed testimony satisfies the definition of permissible inference contained in Rule 7.21(4)(c)(iii). In addition, the proposed testimony is material because it relates directly to a central issue in this case – whether the signature on Exhibit 8 is actually that of Dr. Davis. See Rule 7.21(4)(c)(i) (defining material). Accordingly, both parts of the proposed testimony are impermissible.