



The American Mock Trial Association

www.collegemocktrial.org
amta@collegemocktrial.org

Mail: c/o Tammy Doss
American Mock Trial Association
Webster Hall, Suite 212
3950 E. Newman Road
Joplin, MO 64801

Tel: (515) 259-6625
Fax: (417) 659-5427

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AMTA Invention of Fact Guidance Memorandum

*Prepared by the Competition Response Committee,
on behalf of the AMTA Board of Directors*

Following a commitment from AMTA President, William Warihay and before the start of the 2020 AMTA tournament season, AMTA is issuing this memorandum to consolidate prior instructions and to further guide AMTA teams regarding the invention of fact rule and its enforcement. This memorandum does not modify the existing invention of fact rule (Rule 8.9). Rather, teams often have questions about the invention of fact rule and its enforcement, and we want to make sure that the AMTA community has a common understanding.

In preparation for drafting this document, this Fall, AMTA provided a public survey of our member schools and students about invention of fact, and we received over 120 responses. Every member of the CRC reviewed all of the responses. In so doing, it was clear that the majority of respondents have the same understanding of the invention of fact rules as AMTA. That's a good thing. The problems seem to arise when teams seek to find the "gray area" between what is acceptable and what is not. It is for that reason impossible for AMTA to construct a completely black and white test for what always will and never will constitute an improper invention.

All inventions of material fact are improper, and all inventions of material fact are cheating. We do not think that AMTA's member schools want to cheat. Quite the opposite, our experience is that teams want to play by the rules and compete on a level playing field.

We also want to stress that we are not discouraging creativity within the bounds of AMTA's Rulebook. Creativity is a cherished aspect of AMTA competition. We want to foster the development of critical thinking skills, and we want trials to be exciting. AMTA's case committees work hard to build cases that accomplish these goals. But we do not think there is anything creative or exciting about teams that try to avoid the facts provided by creating altogether new and material ones.

The memorandum contains four parts. First, we describe the invention-of-fact rule. Second, we discuss the procedure by which teams may seek remedies for invention of fact. Third, we detail how AMTA assesses alleged violations of the invention-of-fact rule. Finally, we conclude by addressing a number of frequently asked questions, including many of the questions from AMTA's recent survey on this issue.

I. The Invention-of-Fact-Rule

The AMTA rule regarding invention of fact is Rule 8.9. Importantly, the rule begins by explaining that AMTA provides “closed universe” cases, which means that “[m]ock trial competitors are to advocate as persuasively as possible *based on the facts provided.*” (emphasis added). Consequently, “teams must rely on the facts stated in the Case Problem rather than creating new facts or denying existing facts in order to advantage their parties.”¹

Under Rule 8.9, there are precisely two kinds of improper inventions. First, “[a]ny instance,” regardless of which party is questioning the witness, in “which a witness introduces testimony that contradicts the witness’s affidavit” is an improper invention. Second, “[a]ny instances on direct or re-direct examination in which an attorney offers, via the testimony of a witness, material facts not included in or reasonably inferred from the witness’s affidavit,” also is an improper invention. For purposes of these restrictions, Rule (8.9(4)(c)(iii)) defines “affidavit” to be any document in which the witness has set forth the witness’ “beliefs, knowledge, opinions or conclusions.” For example, a police report, expert report, CV, or even a map or drawing created by a witness all constitute an “affidavit” for the purpose of this rule.

However, on cross-examination, it is not improper for a witness to testify to material facts not included in the witness’s affidavit “*as long as the witness’s answer is responsive to the question posed.*” (emphasis added).

Let us focus on two concepts in Rule 8.9 that students often focus on when responding to allegations regarding Rule 8.9: “material facts” and “reasonable inferences.”

1. A fact is “material” if it “affect[s] the merits of the case.” One easy litmus test for determining whether a fact unquestionably is material is whether that fact “that could reasonably be expected to be included in [a] party’s closing argument.” Just because a party does not use a fact in its closing argument does not mean it is immaterial, though. A team cannot “make” a fact immaterial by omitting it from closing argument. To simplify things further, another guiding principle for whether a fact is “material” is whether an attorney’s response to a “relevance” objection *could* be anything other than, “it’s just background.” If so, then the fact is “material.” Another guiding principle is whether the testimony would help the team offering the testimony actually win the substance of the trial. If the answer is yes, it is material. These litmus tests are not exhaustive. But if a fact is material under any of these litmus tests, then it is a material fact.

¹ It is worth noting that Rule 8.9 is not the only section of the rulebook that guides how a team may present its case. For example, Rule 7.6 prohibits student attorneys from “attempt[ing] to circumvent any rule” or “engage in any conduct that is unfair or prejudicial to the administration of justice.” Consider testimony that blatantly contradicts a stipulation or special instruction. Even if that testimony does not violate Rule 8.9 (perhaps it was offered by a witness who does not have an affidavit), it still could violate AMTA’s Rules and subject a team to sanctions.

By its nature, the “materiality” of an individual fact is dependent on context and not easily evaluated in isolation. Over the years, AMTA has encouraged witnesses to create their own rich background stories, built from immaterial facts. We think that this path promotes diversity and inclusion, makes the activity more interesting, and helps allow students to shine in witness roles. However, context matters. A seemingly otherwise immaterial “background fact,” when combined with other facts, may be a material invention.

2. A “reasonable inference” is a “conclusion that a reasonable AMTA competitor *would* draw from a particular fact or set of facts contained in the affidavit.” (emphasis added). As the CRC has explained before, an inference is not reasonable under AMTA’s Rules “merely because it is consistent with (*i.e.* does not contradict) statements in the witness’s affidavit.” Rather, the specific conclusion must be drawn from the facts. Furthermore, as AMTA has explained before, the question is not what inferences would be drawn by the reasonable mock trial witness, but rather, what inferences a reasonable AMTA competitor would draw from the case materials.

For example, let’s say, hypothetically, that Armani Rodriguez’s affidavit in this year’s case stated, “I did not like Parker from the moment I laid eyes on her.” It would be a reasonable inference from this statement that Rodriguez saw Parker. It would *not* be a reasonable inference that Rodriguez undertook any actions toward Parker that are not otherwise specifically described in Rodriguez’s affidavit because of Rodriguez’s vague sentiment of “dislike.” Nor would it be a reasonable inference that Rodriguez disliked Parker for any particular reason – for example, because Parker was wearing a specific color t-shirt (that Rodriguez knew would be particularly offensive to other campers, like Kelly Doos).

This last example is where teams most often run into trouble in evaluating what is “reasonably inferred.” Consider the following analysis:

- In the above hypothetical, is it a reasonable inference that Rodriguez disliked Parker for *some* reason? Arguably, yes (although sometimes a person dislikes someone for no reason at all).
- Can the *specific* reason why Rodriguez disliked Parker be reasonably inferred? No. Even though it is *consistent* with the affidavit that there was a reason why Rodriguez disliked Parker, the specific reason *cannot* be reasonably inferred.
- Would Rodriguez inventing a *specific* reason why Rodriguez disliked Parker violate Rule 8.9? Possibly; the answer turns on whether the invention of a specific reason why Rodriguez disliked Parker was “material.” As mentioned above, this depends on context.
 - If Rodriguez testified to a humorous, immaterial fact—perhaps that Rodriguez irrationally dislikes people who wear a specific color t-shirt—that’s not necessarily an invention of a “material fact” in its own right.
 - However, if a team built its theory around another camper (Doos, for example), having a strong—and perhaps homicidal—reaction to a specific color t-shirt, that turns the aforementioned Rodriguez testimony into a material invention that violates Rule 8.9.

In providing this example, we note that it is important to err on the side of caution when eliciting testimony that is supposed to be an “immaterial” invention. When in doubt, you do not want to be litigating “materiality.” For instance, if your team runs two “case theories” and you think that a fact is material to one theory, but not another, then you should not be eliciting the fact in support of either theory. Put another way, it is absolutely not a permissible strategy to “bait” the opposing team into impeaching witnesses on facts that may or may not be material.

Sticking with the Rodriguez hypothetical for a moment, let us point out one other important facet of Rule 8.9; it does not allow a witness to reach beyond the witness’s own sworn statement (or incorporated exhibits) as a basis for the witness’s testimony. Rodriguez does not mention Kelly Doos anywhere in Rodriguez’s affidavit (or any incorporated exhibits). Rodriguez is not permitted under Rule 8.9 to provide any testimony whatsoever regarding Doos that advances a team’s case. This is true even though Detective Chesney’s report suggests that Doos and Rodriguez were together at the scene.

In thinking about whether testimony that you plan to elicit will violate Rule 8.9, it is helpful to think about the purpose underlying the Rule. At its core, the goal of Rule 8.9 is to create a level playing field: a closed universe case in which teams get to prepare fictitious witnesses who have no knowledge of any material facts beyond the ones contained in the Case Problem. Teams are not permitted to “fill in the gaps” of a witness’s knowledge to help their case. Instead, they must follow the rules, which set forth that those “gaps” cannot be used to create material facts.

II. Procedures for Remediating Material Inventions of Fact

The only in-tournament remedy for improper invention of fact is impeachment. Judges are instructed on the prohibition against improper inventions, as you can see from the Judges’ PowerPoint, which is publicly available. If you think that you can effectively impeach an improper invention of fact, then you should. Indeed, most post-trial requests for remedies relating to improper invention of fact are denied because post-trial relief is only available for *egregious* inventions. The factors considered in determining whether an invention is egregious are considered in the next section of this memorandum. Along those lines, AMTA Representatives *cannot* levy tournament penalties for improper inventions during the tournament (although they can, but are not required to, report alleged improper inventions to the Competition Response Committee, should they desire).

A team may seek post-tournament review of an alleged improper invention by the Competition Response Committee (“CRC”), as set forth in Rule 8.9(6). Members of the CRC include its Chair, the Tabulation Director, the Rules Committee Chair, the Civil Case Committee Chair, the Ombudsperson, The Tournament Administration Committee Chair, the President, and in the event of recusal, the National Championship Tournament Case Committee Chair. A team must bring allegations of an *egregious* Improper Invention to the CRC (not the AMTA Representatives on site), by submitting the allegation via the CRC form on the AMTA website, by Noon Central time on the Tuesday after the relevant tournament, except for the final weekends of Regionals and ORCS, when the deadline is 4 pm Central time on the Monday after the last tournament. After an allegation is submitted, the CRC may request a response through an online form and, in some cases, the CRC will seek supplemental

materials. If the CRC concludes that the allegation, even if true, does not constitute a violation, the CRC will dismiss the complaint without seeking a response. If the CRC feels that an allegation states a potential violation, the CRC will always allow a response from the alleged violating team.

AMTA wants all of its processes to be fair. For that reason, members of the CRC recuse themselves from all discussions regarding allegations about or brought by their own teams.

If the CRC determines that an *egregious* improper invention occurred, the CRC reports its findings to the Executive Committee. The Executive Committee then determines whether to adopt the CRC's findings and what sanctions, if any, are appropriate. The penalties for an egregious improper invention may take the form of "any sanctions permitted under [the] AMTA Rulebook." Under Rule 9.6, sanctions issued by the Executive Committee may be appealed to the full Board of Directors.

III. AMTA's Assessment of Alleged Violations of Rule 8.9

AMTA only issues post-tournament sanctions when it determines that an improper invention was "egregious." In response to our recent survey regarding improper invention, respondents asked a lot of questions about the circumstances in which AMTA believes sanctions are appropriate for improper invention. We understand the curiosity. However, let us underscore that teams should work hard to avoid being in that position in the first place. When AMTA is considering whether an improper invention was egregious, it already has decided that the offending team cheated by finding that an improper invention occurred in the first place.

That said, we wanted to provide some information on factors that AMTA often discusses when deciding whether sanctions are appropriate. These factors also shed light on the underlying policy goals behind Rule 8.9's existence.

A non-exhaustive list of factors that may be considered when determining whether an invention was egregious include:

- The significance of the invented facts to the case;
- The use of the invented facts in argument;
- Repeated use of the same invented facts across trials or throughout a single trial;
- Evidence of prior planning or premeditation; and
- Use of material facts to gain an unfair advantage at trial.

In addition to the above, when AMTA issues guidance regarding certain types of improper inventions, it is more likely to find them egregious in the future. Please take careful note of the guidance we have issued here.

We do not apply any of these factors mechanically; we look at them as a whole, and each case is unique. However, a few observations may be instructive. In general, AMTA is likely to sanction improper

inventions that are designed to get around and/or eliminate the effectiveness of impeachment as a remedy. These types of inventions can take multiple forms:

1. First, improper inventions that take advantage of the inherent limitations of AMTA cases are likely to be considered egregious. For instance, AMTA cases necessarily must be written so that callable witnesses can vary drastically in physical appearance from trial to trial. Introducing a material invention to craft a “gotcha” eyewitness narrative would almost certainly constitute an improper invention.
2. Second, a witness recanting the witness’s affidavit will almost certainly be considered egregious. As with the first example, this tactic takes advantage of the “fiction” of AMTA. In real life, a witness would be subject to criminal liability for contradicting a sworn affidavit. In AMTA, the cross-examining team is left with no effective remedy, and judges are likely to be left terribly confused by the whole ordeal.
3. Third, seemingly innocuous inventions that are combined across witnesses to build a case theory are likely to be considered egregious improper inventions. The improper strategy of using a trail of minor, improper inventions to build a case is not new to AMTA, but it seems to have seen an uptick in popularity as teams have tried to corroborate the otherwise unsubstantiated stories of “no affidavit” defendants. For example, using seemingly innocuous characterizations of witnesses during trial to be latter corroborated by testimony from the “no affidavit” defendant are likely to be considered egregious improper inventions.

In addition, AMTA is likely to sanction improper inventions that are designed to “break the case,” which can also take multiple forms:

1. It is well-known that judges often “score down” cross-examiners for seemingly trivial impeachments by omission, especially when attempting to impeach fact witnesses already prepared to minimize the impact of impeachment. This reality puts the cross-examining team in a nearly impossible position when deciding whether to impeach invented testimony. This is exactly the kind of gamesmanship that lends itself to post-tournament penalties.
2. A case theory, or argument, cannot be a violation of Rule 8.9 standing alone. AMTA does not issue sanctions because it finds a violation in a team’s case theory. However, a team’s theory as evidenced by the arguments it makes in Opening, Closing, or through crosses are often considered by AMTA and highly relevant to the materiality and egregiousness of an improper invention in witness testimony. If AMTA finds that an attorney argument in statements, objections, and overall theory created an “alternate reality” in the trial that was designed to reduce and/or eliminate the effectiveness of impeaching a witness’ invention of material fact, AMTA will consider this as evidence in determining whether the inventions were egregious under Rule 8.9(6)(b). Additionally, all participants have independent ethical obligations under AMTA rules with respect to case theories and arguments. *See generally* Rules 1.4-1.9, 7.6.

IV. Frequently Asked Questions

1. *Can the CRC, or someone else affiliated with AMTA, advise us on whether certain testimony we intend to elicit violates the rules?*

Generally speaking, no. The CRC and Rules Committees do not render advisory opinions and only rarely issue clarifications. However, the CRC and Rules may report concerns to the Case Committee to ensure that the Case Committee has intentionally included (or removed) certain potential arguments. As discussed above, whether an invention of fact is “material” is highly dependent on context. If you think that eliciting certain testimony might violate the rules, in our experience, it probably does.

2. *I saw an egregious invention of a material fact at an invitational tournament. What can I do to remedy it?*

AMTA does not govern invitational tournaments. It is up to the tournament host to determine how, if at all, the host wants to enforce rules from the AMTA rulebook. Prior to the start of AMTA-sanctioned tournaments, the CRC does not have jurisdiction to address any issues.

3. *What penalties can the AMTA Representatives assess for inventions of fact?*

AMTA Representatives are not allowed to assess penalties for inventions of material fact. Nor may they intervene during a trial to remedy or investigate an invention of fact. Impeachment is the only in-tournament remedy for invention of fact.

4. *Can a witness who is not bound by an affidavit contradict the sworn statements of other witnesses?*

Yes. In AMTA cases, witness statements often intentionally include different versions of the facts. A witness without an affidavit, who is not bound by Rule 8.9, cannot violate Rule 8.9 by definition. Just because one witness’s affidavit states that the light was red does not mean a defendant—without an affidavit—cannot say that the light was green. That said, witnesses without affidavits are still bound by the AMTA rules, and certain testimony could violate other AMTA rules.

5. *Can a witness who is not bound by an affidavit contradict special instructions or stipulations?*

No. By eliciting testimony that contradicts a special instruction or stipulation, an attorney violates Rule 7.6. Similarly, to comply with Rule 7.6, the prosecution must prosecute the offenses set forth in the relevant indictment—and do so in the manner in which the offense has been alleged.

6. *Is a witness bound by an affidavit allowed to invent material facts through an accent or costuming?*

No. Trying to get around the invention-of-fact rules by using accents, costuming, or other character development is not allowed. Participants cannot use any visual or physical attributes (actual or portrayed age, infirmity, accent, or physical abilities) to advance the merits of their case, unless those

facts are set forth in the appropriate witness's affidavit. Put simply, this restriction means that you cannot take advantage of the limitations of the mock trial competition. For example, you cannot elicit testimony that an eye witness said that the perpetrator either did or did not have an accent to argue that the Defendant did not commit the crime. As one illustration of this impermissible strategy, a defense team cannot cross examine an alleged eye witness called by the prosecution on whether the Defendant had an accent. This puts the prosecution witness in a “no win” position, as no matter the answer they give, the Defendant can testify in the opposite manner to contradict the prosecution witness testimony.

7. *Does AMTA consider the result of the trial when evaluating invention of fact issues?*

No, the result of a round is rarely—if ever—a consideration in determining whether an improper invention was egregious. “We would have won without the invention” and “we won by large margins” are not defenses to egregiousness. Alternatively, “We lost anyway,” does not negate the fact that rule(s) were broken.

8. *Why don't you publish more details about previous allegations of improper invention?*

There are a couple of reasons. First, AMTA receives very few allegations of improper inventions in the first place. The overwhelming majority of tournaments conclude with no teams raising this issue with AMTA. Second, we issue guidance when the circumstances of an alleged invention are illustrative and/or instructive, such that AMTA believes guidance to the community is necessary. Put another way, once guidance has been issued, AMTA does not as a matter of course issue repeated guidance on the same points. We think it is in the long-term interest of our members—and the many competitors who aspire to be lawyers—to stick with our current policy on how much information we publish.

9. *If a team was not sanctioned for an invention, does that mean that they were “innocent?” Does it set precedent?*

The answer to both of these questions is “no.” The CRC often finds that a team invented a material fact, but then determines that the invention was not “egregious.” However, an invention of material fact always constitutes cheating. AMTA has never established any precedent that cheating is acceptable.

10. *Is it a defense that I did not intend to invent a material fact?*

Knowledge and premeditation are factors that we consider when determining whether an invention of material fact was egregious. However, they are not the only factors we consider. Teams are responsible for ensuring that they do not introduce inventions of material fact as part of their case.

11. *The other team did not try to impeach us. Did they waive their right to file a complaint?*

No. A team does not have to attempt to impeach a witness to preserve the right to file a complaint for an improper invention.

The American Mock Trial Association