# 2023-2024 Advisory Opinions
## 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.").

**23-24 Opinion 2: 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).

**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**

***Question:*** Would it violate Rule 7.21 (Invention of Fact), if the defense elicited testimony during the direct examination of Berkley De la Porta that De la Porta bought the three Berthe Morisot paintings without being totally certain they were the same Berthe Morisot paintings stolen from Miller Tower (as in, was not sure if they were fakes or not)?

***Answer:*** The proposed testimony would violate AMTA Rule 7.21(4)(a).

Under that rule, no witness may testify on direct or re-direct examination to any "material facts not included in or permissibly inferred from the witness's affidavit." Accordingly, three questions must be answered: (1) whether the facts testified to are included in the witness's affidavit; (2) if not, whether the facts are permissible inferences from the witness's affidavit; and, (3) if the answer to both questions is no, whether the facts are material.

*First,* nothing in De la Porta's affidavit states De la Porta believed or suspected that the purchased paintings were fakes or copies.

*Second,* such a statement is not a permissible inference from De la Porta's affidavit. Under Rule 7.21(4)(c)(ii), a witness's answer does not qualify as a permissible inference merely because it does not contradict statements in the witness's affidavit. Instead, a permissible inference is "a conclusion that a reasonable person *would draw* from a particular fact or set of facts contained in the affidavit." Rule 7.21(4)(c)(ii).

Nothing in the text of De la Porta's affidavit suggests De la Porta believed the paintings to be fakes or replicas, or that De la Porta considered that to be a meaningful possibility when purchasing them. To the contrary, the affidavit describes De la Porta's belief that the purchased paintings were "*the* Morisot that I provided for the gala" and "*the* two lent to us by Bancroft Estates," and that they made De la Porta's collection "the most complete collection of Morisot paintings in the world." Lines 257-58, 273. Further, the affidavit describes the paintings as, "those two from Bancroft Estates," and recounts De la Porta considering whether "I should have returned *the* Bancroft Estates Morisot paintings." Lines 270, 274. Given these statements, a reasonable person would not draw the conclusion that De la Porta was unsure whether the paintings were authentic or fake; indeed, a reasonable person would infer the opposite and might even find the proposed testimony to contradict the strong implication that De la Porta believed the paintings were those that had been stolen.

*Finally,* testimony that De la Porta was unsure whether the paintings were authentic is material. Under Rule 7.21(4)(c)(i), "[f]acts are 'material' if they affect the merits of the case." Here, although the prosecution can choose which charge(s) to pursue against De la Porta, the gravamen of the case is that De la Porta worked with others to plan and commit a heist where the Morisot paintings were stolen from the gala. While De la Porta's lack of certainty about the paintings' authenticity may be more probative of some charges than others (for example, the fact seems to attempt to directly negate the 'knowing' element of Count Five: Receiving Stolen Property), it affects the merits of the case regardless of what charges are pursued. As a result, the testimony is material.