2022-2023 Advisory Opinions
Competition Integrity Committee

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Opinion 1: Affidavit-less witnesses (December 12, 2022)

Question: May Felder or Koller invent facts not reasonably inferred from their depositions or any other portion of the case packet? For example, suppose Koller testified that Koller had a conversation with some teenagers who said they were planning to set off fireworks on Basin Beach at 8:43 p.m. on July 4.

May Felder or Koller testify to events that took place after their depositions that are highly material but would not have been responsive to any question in the deposition?

May Felder or Koller testify they asked their lawyers to subpoena one of the non-testifying witnesses and saw a subpoena for that witness issued by the court in support of an argument that the witness is suspicious because they violated the subpoena?

Answer: The proposed testimony identified above does not appear to violate any AMTA rules or special instructions. The general Improper Invention rule (AMTA Rule 7.21) is limited to witnesses with "affidavits." See Rule 7.21(4)(a) (definition of Improper Invention); see Special Instruction 4 (defining the expert reports of Drew Hubbard, Jamie Savchenko, Kennedy Heisman, and R. Moore as "affidavits for purposes of" Rule 7.21). Because Felder and Koller do not have affidavits—and because Special Instruction 5 specifically provides the Felder and Koller depositions "are not affidavits" for purposes of Rule 7.21—Felder and Koller are not bound by that rule. All witnesses—including Felder and Koller—are bound by Rule 6.11(2) (No "Guilty Portrayals"). In addition, Special Instruction 5 provides that Felder and Koller "may not deny [giving] the answers given in their respective depositions after having sworn to tell the truth," and are also bound by Special Instruction 3 (regarding authenticity of documents). Moreover, per Stipulation 19: "From the end of their respective depositions to the beginning of trial, neither Ari Felder nor Casey Koller has seen, heard, or otherwise learned anything that would cause either of them to change the answers they provided to the questions asked during their respective depositions."

Opinion 2: Reasonable Inference (December 12, 2022)

Question: May Gelfand testify on direct examination that a pilot needs to complete at least 40 hours of flying, of which at least 20 must be done with a flight instructor, to get a Private Pilot License? Although not specifically in Gelfand's affidavit, Gelfand has a Private Pilot License, and Roy explains in their affidavit the requirements needed to earn a Private Pilot License.

Answer: The proposed testimony above would violate the Improper Invention rule (AMTA Rule 7.21).

Under Rule 7.21(4)(a)(ii), no witness may testify on direct or redirect examination about any "material facts not included in or reasonably inferred from the witness's affidavit". Under Rule 7.21(4)(c)(ii), "[a] witness's answer does not qualify as a 'reasonable inference' merely because it is consistent with (*i.e.*, does not contradict) statements in the witness's affidavit. Rather, a reasonable inference must be a conclusion that a reasonable observer *would draw* from the particular fact or set of facts contained in the affidavit." And under Rule 7.21(4)(c)(iii), for purposes of Improper Invention, a witness's affidavit only includes the "witness's sworn statement, [and] any document in which the witness has stated their beliefs, knowledge, opinions or conclusion;" 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."

Applying these rules to the question at hand, since the proposed testimony is not contained in either Gelfand's affidavit or any of the exhibits Gelfand is familiar with, it is clearly not "included in . . . the witness's affidavit." Nor would this qualify as a reasonable inference. Although this fact is stated in the Roy affidavit, the inquiry for reasonable inference is whether it is a conclusion a reasonable observer would draw from the facts contained within Gelfand's affidavit (and any exhibits Gelfand is familiar with). Put another way, is this a conclusion that a reasonable observer would draw when reading only the four corners of the Gelfand affidavit (plus the exhibits Gelfand is familiar with)? It is not, and therefore it is not a reasonable inference.

Rule 7.21(4)(ii) is specifically limited to "material" facts. Because this year's case involves assigning responsibility for an airplane crash, the requirements for obtaining a Private Pilot License "affect the merits of the case." Accordingly, since this fact is neither contained in Gelfand's affidavit nor can it be reasonably inferred from Gelfand's affidavit, stating this fact on direct examination would constitute an Improper Invention.

In short, just because 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. Witnesses are limited to the facts in the four corners of their affidavits (plus any exhibits that the witness states they are familiar with) and reasonable inferences from those facts. Witnesses are <u>not</u> permitted to testify about material facts not in their affidavits or reports that otherwise appear in the case packet, even if it would make sense for the witness to be familiar with those facts. The omission of certain material facts from a specific affidavit or report (or conversely, the inclusion of a particular material fact in a specific affidavit or report) is often intentional by the case writers to ensure that <u>only</u> certain witnesses are able to testify about certain specific material facts.

Opinion 3: Demonstrative aids—diagrams (December 12, 2022)

Question: May our team use a diagram of a single piston engine that is not included in the case packet? The diagram includes specific part labels and is available on Google.

Answer: The proposed demonstrative aid may or may not be permissible depending on its specific characteristics and how a team intends to use it.

The diagram is clearly a "demonstrative aid" within the meaning of AMTA Rule 7.20. The diagram is not included in the case packet and is a "tangible physical object" that a team "intends to show to the jury during trial." Rule 7.20(1)(c).

The permissible content of demonstrative aids is governed by Rule 7.20(2)(b). Under that rule—which was amended during the Summer 2022 Board meeting—"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.

Here, the proposed demonstrative aid would be impermissible if a team intends to argue that it accurately depicts the specific engine involved in this case (either directly or by testifying that all single piston engines look the same). The proposed demonstrative aid also would be impermissible if the team intends to rely on any specific portion of the drawing (or label on the drawing) that is not identified in the case packet as support for an argument about why the crash occurred or did not occur. Such testimony would constitute using the demonstrative aid to introduce a "case-specific material fact that is not included in the case packet." Rule 7.20(2)(b); see Rule 7.21(4)(c)(i) (definition of "material").

By contrast, the proposed demonstrative aid is likely permissible if it would be used to explain how a piston engine works generally, as opposed to supporting or illustrating a case-specific argument about why the failure occurred in this case. The proposed demonstrative aid is also more likely to be permissible if the information contained on any labels is contained within the affidavit or report of the witness who is testifying when the demonstrative aid is used.

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Opinion 4: Names of expert's method—oral testimony and demonstrative aids (December 12, 2022)
Question: Do AMTA Rules prohibit expert witnesses from providing—or a demonstrative aid from giving—the name of a method if the name of that method is not directly stated in the expert's report?

Answer: It generally will be permissible for an expert witness to give—and for a demonstrative aid to include—the name of a method not specifically provided in the witness's report. Standing alone, a method's name is unlikely to be a "material" fact. In contrast, it is much more likely that the specific steps or components of a method—and whether they are satisfied in a particular case—will constitute material facts.

AMTA Rule 7.21 governs testimony by any witness who has an affidavit. See Special Instruction 4 (defining the Hubbard, Savchenko, Heisman, and Moore reports as "affidavits for purposes of" Rule 7.21). Under Rule 7.21(4)(a)(ii), no such witness may testify on direct or redirect examination to any "material facts not included in or reasonably inferred from the witness's affidavit." Under Rule 7.21(4)(c)(ii), "[a] witness's answer does not qualify as a 'reasonable inference' merely because it is consistent with (*i.e.*, does not contradict) statements in the witness's affidavit. Rather, a reasonable inference must be a conclusion that a reasonable observer *would draw* from the particular fact or set facts contained in the affidavit." For that reason, if a witness's report does not give a particular name for the witness's method (or the component parts of that method), it is unlikely that name will constitute a reasonable inference under Rule 7.21(4)(c)(ii).

At the same time, Rule 7.21(4)(ii) is specifically limited to "material" facts. Rule 7.21(4)(c)(i) 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," "regression," 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).

AMTA Rule 7.20 governs demonstrative aids. Under that rule—which was amended during the Summer 2022 Board meeting—"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.

But Rule 7.20, like Rule 7.21, applies only to "material" facts. Because the name of an expert witness's method, standing alone, is unlikely to be material, Rule 7.20 does not generally prohibit a proposed demonstrative aid from including the name of a method that is not itself stated in the expert's report. As noted above, however, it is much more likely that the specific steps or components of a method—and whether such steps or components are satisfied in a particular case—will constitute material facts that may not be included on an expert's demonstrative unless they are specifically contained in the case packet.

NOTE: The comment to Rule 7.20(2)(b) previously stated the rule is implicated by, among other things, "the name of a particular method (or steps of a method) applied by an expert." However, just because the name of a method is potentially implicated by a rule does not mean that it violates the rule in all (or even most) circumstances. In addition, the Board of Directors voted to delete that language at its December 2022 mid-year meeting.

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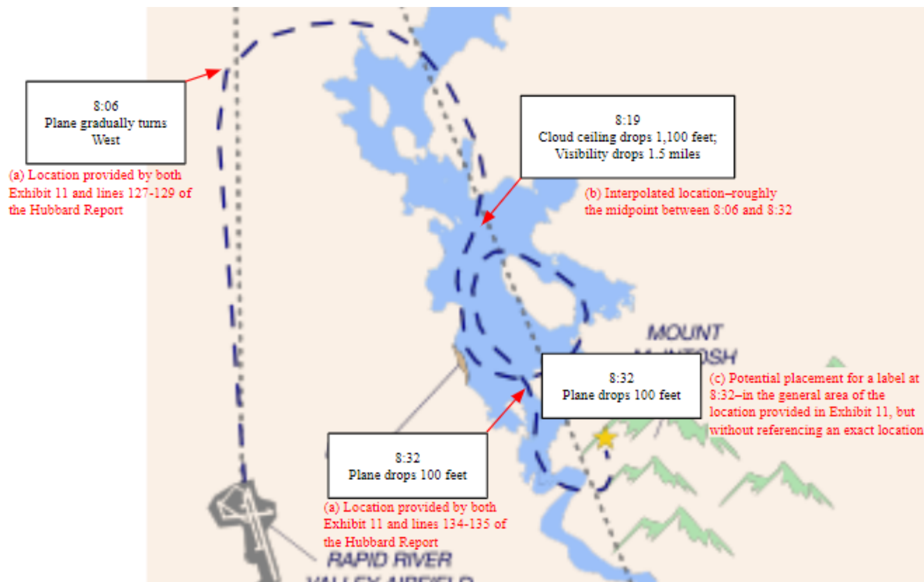
Opinion 5: Demonstrative aids—material from affidavit-less witnesses (Jan. 27, 2023)

Question: Felder and Koller do not have affidavits and thus may offer testimony that is neither stated in nor reasonably inferred from their depositions or anywhere else in the case packet. See Opinion 1 (issued December 12, 2022). If Felder or Koller testifies to such matters, may the testimony be referenced in a demonstrative aid that will be used during closing arguments?

Answer: No. AMTA Rule 7.20(2)(b) provides that "no demonstrative aid may state or include *any* case-specific material fact that is not included in the case packet." Although Special Instruction 5 permits Felder and Koller to offer testimony not included in the case packet, that provision does not modify Rule 7.20(2)(b). Accordingly, no demonstrative aid—whether used during the examination of a witness, an opening statement, or a closing argument—may "state or include" any fact testified to by Felder or Koller that is not included in the case packet.

Opinion 6: Demonstrative aids—adding labels to the flight plan (Jan. 27, 2023)

Question: Is the attached demonstrative aid permitted by AMTA rules? The text in red would not be on the actual demonstrative aid but is included solely to identify the support in the case materials for the information on the slide and the location of the red arrows (which would be on the demonstrative aid).



Answer: The proposed demonstrative aid would violate AMTA Rule 7.20(2)(B). That rule provides "no demonstrative aid may state or include *any* case-specific material fact that is not included in the case packet." As explained in Opinions 3 and 4, 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 states one of "the most frequent places where this rule is implicated involve numbers (including times) [and] the appearance of people or items in physical space" and that "[i]f the case packet does not contain a specific number (for example, 3:12 p.m.) or a precise description about how to calculate it (for example, a witness whose affidavit says that one thing happened at '3:07 p.m.' and later says something else happened 'five minutes later'), that number may not be contained or otherwise depicted in the case packet."

The times and information contained within the proposed tiles are permissible because they are included in or can be calculated directly from the case packet. For example, the cited materials say takeoff occurred at 7:45 and the turn happened 21 minutes later. That is enough to say the turn was at 8:06.

In contrast, the red arrows would violate Rule 7.20(2)(b). For example, the cited materials say that 21 minutes after takeoff the plane "gradually turned east toward Basin Lake until it reached the lake" (Hubbard Rep 128-29) and that it "then turned east and flew towards Basin Lake." (Exhibit 11). Neither statement establishes that the plane was at the specific spot being pointed to at precisely 8:06 The arrow for 8:19 is similarly impermissible. As the explanatory test indicates, that location is "interpolated" because it is "roughly the midpoint between 8:06 and 8:32." Rule 7.20(b)(2) does not permit any sort of "interpolation." Finally, the arrow for the 8:32 slide is also impermissible because the cited materials provide no way of calculating that precise location. Even if the cited materials may allow a rough inference of the plane's location at 8:32, Rule 7.20(2)(b) does not permit such inferences.

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Opinion 7: Guilty Portrayal Rule (March 2023)
Question: May a defense team that calls Mandy Navarra assert Navarra's own actions or inactions caused or contributed to the crash?

Answer: No. Under AMTA Rule 6.11(2), "a defense team may not allege that a witness called by the defense . . . is . . . [a] responsible third party in the . . . wrong." Accordingly, in trials where Mandy Navarra is called by the defense, the defense team may not assert that Navarra (as opposed to Navarra's former employer or other current or former employees of that employer) acted negligently or otherwise wrongfully in connection with the crash. Rule 6.11(2) is not limited to the words spoken by the witness, but includes "the witness's . . . performance, as well as the team's statements and conduct throughout the trial." Violations of this rule "shall constitute a material invention of fact," Rule 6.11(4), and thus may form the basis of a post-tournament complaint to the CIC.

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Opinion 8: Ignorance of AMTA Rules or CIC Guidance (March 2023)

Question: One of our opponents claimed something we did violated guidance contained in a previous CIC opinion. We were not aware of that CIC opinion. Will the CIC consider that a defense if we are accused of violating AMTA rules?

Answer: No. CIC advisory opinions provide authoritative guidance about "the permissibility of certain testimony and demonstrative aids" and are "published to the entire AMTA community." Rule 15.15(2). All participants are responsible for knowing the relevant AMTA rules and being aware of public guidance.

Opinion 9: Procedures for challenging demonstrative aids (March 2023)

Question: We believe our opponents used a demonstrative aid that violated AMTA rules. Will the CIC consider that claim?

Answer: The CIC will consider post-round complaints about demonstrative aids but generally will not entertain requests for point- or ballot-altering relief where the demonstrative aid in question was properly disclosed during the pre-round captains meeting but not discussed with the AMTA Representatives. Rule 7.20(1) defines "demonstrative aid" and Rule 7.20(3) provides that "any demonstrative aid intended to be used during trial" must be disclosed during the pretrial captains meeting. Rule 7.20(3) further states that "[i]f a team believes a proposed demonstrative aid violates this Rule, it must raise the issue with an AMTA Representative before the conclusion of the pretrial captains meeting," who "must determine whether the challenged demonstrative aid complies with Rule 7.20." The CIC stresses that questions or disputes involving demonstrative aids should be surfaced and resolved during the pretrial captains meeting whenever possible, and that teams should err on the side of obtaining clarity about how a demonstrative aid will be used and obtaining a ruling from the AMTA Representative when appropriate. See Rule 7.20(4)(a) (stating "all competitors are responsible for knowing about and complying with" any representations or rulings about how a demonstrative aid will be used during the pre-round captains meeting).

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Opinion 10: "Industry standards" (UPDATED April 2023)

Question: May a witness who has an affidavit, not an expert report, say that the witness's personal practice is to do a certain thing or follow a certain practice and describe that thing or practice as the "industry standard?"

Answer: No. As explained in Opinion 4, a fact is material within the meaning of Rule 7.21(4)(c)(i) if it "bolster[s] the argument in favor of admissibility." A fact is also material if it "affect[s] the merits of the case" by making the witness's testimony or opinion more persuasive than it would be absent that fact. Rule 7.21(4)(c)(i). For that reason, use of a widely recognized term (by a witness who has not prepared an expert report) like "industry standard" will almost always constitute a material fact.

<u>Opinion 11: Non-responsive cross answers (March 2023)</u>
Question: On cross-examination, R. Moore is asked: "You have a spouse who works at Everx Pharmaceuticals, correct?" The witness responds: "My current spouse, yes, but we are currently in the process of finalizing our divorce." Is that allowed?

Answer: No. The fact that the couple is getting divorced is neither "included in or reasonably inferred from" Moore's report, which Special Instruction 4 defines as an affidavit for purposes of AMTA Rule 7.21. The invented fact is material because "affect[s] the merits of the case," Rule 7.21(4)(c)(i), by inoculating the witness against a bias point that is specifically written into Moore's report.

Finally, the testimony is improper because it was not responsive to the question that was asked. Under Rule 7.21(4)(b), a witness who is being cross examined may *only* "testify to material facts not included in their affidavit" if their answer "is responsive to the question posed and does not contradict the witness's affidavit." That rule further explains that "[a]n answer is responsive to the question posed if, and only if, it responds directly to the content of the question" and "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."

Opinion 12: Restrictions on use of defense-called witnesses (April 2023)
Question: Could you please address how the Guilty Portrayal Rule and any related rules apply to Brooklyn Singh?

Answer: As relevant here, AMTA Rule 6.11(2) provides no "defense team may … allege . . . or otherwise suggest that a witness called by the defense is [a] . . . responsible third party in the crime or wrong. To determine if a team violated this rule, AMTA will consider the witness's testimony and performance, as well as the team's statements and conduct throughout trial."

Rule 6.11(2) applies only to "a witness *called by* the defense." The rule thus does not limit the defense's ability to make any allegations or suggestions about Singh in trials in which Singh is not called. It also does not limit the defense's ability to make any allegations or suggestions about the conduct of a person not called by the defense or for whose conduct a witness called by the defense would not be responsible.

Rule 6.11(2) is limited to allegations or suggestions that a defense-called witness is a "*responsible* third party in the … *wrong*." Here, the "wrong" is Gold's alleged malpractice resulting in Skye's wrongful conviction. Even when a defense team calls Singh, Rule 6.11(2) does not require a defense team to assert that Singh conducted a perfect investigation nor "preclude the Defense from arguing that if reasonable police/private investigations did not identify the actual killer, then Gold should not be blamed." Pretrial Order 13. Instead, Rule 6.11(2) only prohibits the defense team from "blam[ing]" Singh "for the wrong conviction or assert[ing]" that Singh's investigation "was incompetent." Pretrial Order 14. Teams are cautioned that while a theory asserting the police investigation was incompetent is not inherently impermissible, it is only proper if the defense does not call Singh as a witness.

Rule 6.11(2) may be violated by both verbal and non-verbal conduct. Some examples of non-verbal conduct that might violate Rule 6.11(2) would include a Singh who is dressed in disheveled clothing and comes to court looking distracted or gives off the impression they are too busy to accomplish a sufficient investigation. By offering these examples, we intend to give some illustrations of the type of conduct the rule prohibits, but our list is by no means exhaustive.

Rule 6.11(2) works in tandem with Rule 6.11(3). That rule prohibits any witness from "recant[ing] statements in or adopted by their affidavits," including by "indicat[ing] through their testimony or portrayals that statements in their affidavit are not true, are no longer true, not complete, coerced, etc. To determine whether a team violated this rule, AMTA will consider the witness's testimony and performance, as well as the team's statements and conduct throughout the trial." Rule 6.11(3).

In Singh's deposition, Singh was asked; "You're aware that Robin didn't commit that crime? That you sent an innocent person to jail?" Singh responded

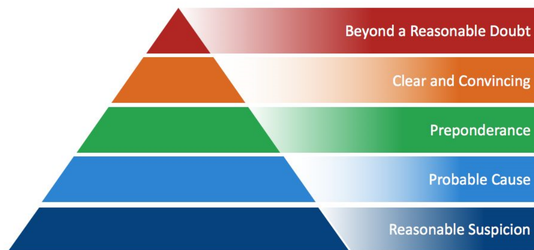
> Yes, I now know that Robin did not murder Quinn Syke. Rolly Tomasi murdered Quinn Skye. Look, *we do the best we can with the information we have. All of the evidence pointed to Robin* and the jury agreed with that evidence.

Singh Deposition, p.23, lines 29-31. At the end of the deposition, Singh was asked: "Who do you blame for the wrongful conviction of Robin Skye?". Singh responded:

> *I don't blame anyone. I did my best.* The prosecutor and Gold both did a fine job. The judge did a fine job. The jurors did their duty. The justice system isn't perfect.

Singh Deposition, p.27, lines 138-40. Finally, Singh concluded Singh's deposition by affirming that "I've said everything I know about Gold, the Skyes, *the 2012 investigation*, and the 2012 trial." Line 142. Accordingly, it also would violate Rule 6.11(3) for any student playing Singh to state or imply (including through non-verbal conduct) that Singh did not do Singh's best in investigating the 2012 case, blames themself for Skye's wrongful conviction, believes that there are other steps that should have been taken, or that the evidence available in 2012 created reason to doubt Singh's guilt.

Opinion 13: "Reasonable doubt" demos (April 2023)
Question: Would either of these demonstrative aids violate AMTA Rule 7.20?



Answer: Neither proposed demonstrative aid would violate Rule 7.20.

Rule 7.20(2)(B) states "no demonstrative aid may state or include any case-specific material fact that is not included in the case packet." As explained in several previous opinions, that standard is more restrictive than the normal Improper Invention standard of Rule 7.21 and does not permit reasonable inferences.

At the same time, however, Rule 7.20(2)(B) is specifically limited to "*case-specific*" materials facts. Without attempting a comprehensive definition of that term, the CIC concludes these particular demonstrative aids would be permissible because the only information contained in them involve basic features of the legal system that could be discussed by counsel during a closing argument without any evidentiary foundation. Teams are cautioned that the CIC interprets "case-specific" narrowly, and that the term does not permit teams to include in demonstrative aids information that is not "included in the case packet" and that would require testimony by a witness.