Practitioners should be cognizant of the “Sham Affidavit” rule and how it can be applied to self-serving attempts to manufacture issues of fact for the purpose of defeating summary judgment. In an excellent article titled, “Ignorance Is Not Bliss: ‘Sham Affidavit’ In 9th Cir.,” published in Law 360 on October 29, 2012, Jones Day lawyers, Eric K. Swanholt, Michael S. McCauley and Craig M. Hirsch, discuss the Ninth Circuit’s reaffirmation of the “Sham Affidavit” rule in Yeager v. Bowlin, 693 F.3d 1076 (9th Cir. 2012).

As discussed by the trio of Jones Day authors, every lawyer has no doubt sat through a deposition where a witness answers question after question “I don’t recall… I don’t recall… I don’t recall.” Even after being shown documents designed to refresh the witness recollection, the witness fails to recall the most basic facts concerning his claim. In Yeager v. Bowlin, the Ninth Circuit recently strengthened a weapon for combatting the forgetful witness. The “Sham Affidavit” rule states that “a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.” The rule prevents a party from supporting or opposing the motion with a declaration attesting to facts that directly contradict the witness’s deposition testimony.

The Yeager case presented a somewhat new twist to the “Sham Affidavit” scenario. In Yeager, the plaintiff testified at deposition that he did not recall particular facts. Can the “Sham Affidavit” rule thwart the plaintiff from later recalling those same facts in a declaration opposing summary judgment? The Ninth Circuit answers this question in affirmative, holding that the rule applies when the forgetful witness suddenly remembers significant events in his declaration.

The plaintiff in Yeager v. Bowlin was legendary test pilot Chuck Yeager, who was the subject of Tom Wolfe’s classic 1979 book on the American aviation industry, The Right Stuff. Later, Sam Shepard played Chuck Yeager in the heralded screen version in 1983.

In Yeager v. Bowlin, Yeager sued former friends who owned a company specializing in the sale of aviation-related memorabilia. Yeager claimed that the Bowlins exceeded the scope of a limited consent to use his name and likeness to sell Chuck Yeager memorabilia. At his deposition, Yeager responded “I don’t recall” in response to 185 questions.

As Todd M. Noonan, the defendant’s lawyer, argues in his brief before the Ninth Circuit, “Yeager obstructed all meaningful inquiry at his deposition with his pat response, ‘I don’t recall.’ The subsequent submission of a detailed, substantive declaration in opposition to the motion for summary
judgment represents exactly what the “Sham Affidavit” rule is intended to prevent. Despite suing for fraud, for example, Yeager did not recall whether the Bowlins made any initial representations. Despite asserting breach of oral contract, Yeager had no recollection of the supposed agreements. Despite asserting a claim for breach of written agreement, Yeager did not recall any written contracts with the Bowlins.

Based upon his deposition record, defense counsel argued that Yeager obstructed all meaningful inquiry into the material facts. His testimony amounted to the direct statement that he had no recollection of any facts relevant to his claims.”

Yet, when faced with a dispositive motion, “Yeager’s memory came flooding back” – a miraculous restoration which the trial court deemed “unbelievable.” Although Yeager claimed that his recollection had somehow been refreshed by several documents, these documents were not attached to his affirmation. Moreover, no expert or medical declaration was filed attesting to any memory lapse or confusion suffered by Yeager as a result of age.

In its holding, the Ninth Circuit cautioned that courts should not disavow a declaration as a sham due to minor contradictions between the deposition and the declaration. Such minor inconsistencies might result from honest mistake, newly discovered evidence or credibly refreshed recollection. For the rule to apply, the “inconsistency between a party’s deposition testimony and subsequent affidavit must be clear and unambiguous.” Some form of the "Sham Affidavit" rule exists in many jurisdictions around the country. Both the Ninth Circuit decision and the Defendant's Ninth Circuit brief contain references to many of these precedents outside the Ninth Circuit.

In light of Yeager, Swanholt, McCauley and Hirsch provide valuable lessons for practitioners preparing a witness for or defending a deposition:

1. Witness preparation is of paramount importance. To avoid being the target of a “Sham Affidavit” contention, it is necessary that the practitioner properly prepares his client prior to a deposition and to familiarize him or her with all key documents;

2. Counsel taking the depositions of a “I don’t recall” witness must explore any excuses the witness can later use to justify a newfound recollection of events. Are there particular documents the witness would ask for if she or he wanted to have his or her recollection refreshed? What efforts did the witness make to prepare for the deposition, including the identification of documents reviewed? Conversely, if you are defending the deposition of a witness who repeatedly answers, “I don’t recall,” or does so on a key point, it may be necessary to ask pointed questions on redirect; and

3. Finally, Yeager is instructive for parties submitting a declaration that arguably contradicts prior deposition testimony. It is necessary that such a declaration provides a “sufficiently reasonable” explanation for any inconsistencies with prior deposition testimony. Chuck Yeager provided no specifics about the documents he purportedly reused to refresh a recollection, did not attach those documents to his declaration, and did not provide any other explanation for his initial inability to remember key facts.
Considering his remarkable legacy in the field of American aviation, it is sad that, at the very end of his career, Chuck Yeager did not have “the right stuff.”