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Q: Dear Ethics Lawyer,

I have a couple of related questions about the ethics of offering evidence at trial. First, I have some evidence that's not directly relevant, but I'd like to offer it and see what happens, as it would help show that the opposing party is a scumbag. There is a possibility that the other lawyer, who is less experienced, will not timely object. May I ask the questions to offer the evidence unless and until the other side objects and the court excludes the evidence?

Second, I have other evidence that is relevant but is hearsay. Again, may I offer it to see if the other lawyer objects and it is excluded? I've been at many trials at which hearsay that has not been objected to is admitted into the record.

A: These are very good questions. We've all seen irrelevant and hearsay evidence offered and admitted without objection. Many of us have also seen attempts to offer inadmissible evidence in order to improperly taint or influence a trial. The line between these two things is often one of intention or purpose, which is perhaps why the cases and disciplinary decisions on this point are so few. Model Rule 3.4(e) addresses the issue: "A lawyer shall not…in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." The key here is for the lawyer to have a reasonable belief about the offer, based on a legitimate argument that there is a basis for the relevance of the evidence, or an argument that it is either not hearsay or admissible under any one of the many exceptions to the hearsay rule. If the lawyer does not have (and cannot articulate) a basis for a reasonable belief of admissibility, then the lawyer fails the test of Rule 3.4(e) and should not offer the evidence. I note that in your first question you refer to the purpose of offering the "not directly relevant" evidence as being to show the opposing party as a "scumbag." That, without more, would not be a proper basis for offering the evidence.

The question about hearsay evidence may also depend in part upon the treatment of hearsay in the relevant jurisdiction. Is it admissible if not objected to, even if it has little or no probative value? If so, then you could proceed without running afoul of Rule 3.4(e). Under Federal Rule of Evidence 802, "[h]earsay is not admissible" unless it falls within an exception of those rules or other law. Thus, if you could not "reasonably believe" it to be admissible under an exception, Rule 3.4(e)'s proscription would still apply.

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by Mark Hinderks, former managing partner and counsel to an AmLaw 132 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's Legal Ethics & Professional Responsibility practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.