



Dear Ethics LawyerTM

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I'm getting ready for my first jury trial, and like many lawyers these days I don't have much actual trial experience. I'm thinking about my opening statement and closing argument. Of course, I understand that lawyers can't say things that are outright false or misleading. But are there other ethical boundaries on persuasion? This case will turn on competing versions of what happened, and I want to call the jury's attention to the truthfulness (or lack thereof) of the opposing party. Can I just say that I think she's not telling the truth?

A: Short answer—No. A lawyer may not express his or her personal opinion of a witness' truthfulness. This and other ethical limitations on argument are contained in Model Rule 3.4 Fairness to Opposing Party and Counsel. Rule 3.4(c) states that 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, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."

The simplest way to avoid these pitfalls is to always argue, compare and contrast what the admissible evidence shows or will show. Catch yourself and change direction if you ever begin a sentence with "I think" or "In my opinion." Challenge credibility of an opposing party or witness by referring to impeachment, inconsistencies of testimony with writings, other statements by the witness or statements or testimony of other witnesses. In making an opening statement, apart from the ethical limitation on referring to matters that won't be admissible, beware referring to matters that won't be proved in the trial—the jury will remember what you promised them (a good lawyer on the other side will remind them in closing) and you will lose credibility in addition to violating Rule 3.4.

Do these same rules apply in an arbitration? That question is not clearly resolved. Rule 3.4 references what the lawyer shall not do "in trial." This reference is different from Rule 3.3's use of the term "tribunal", a term generally taken to encompass trials, arbitrations and other evidentiary proceedings to describe other duties in connection with a proceeding. But is an arbitration a variety of trial, just one with a different fact-finder and different rules? That is a question to be decided another day—the safe approach is to assume the rule is the same.

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 134 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.