Communicating Implausibilities During Cross Examination

Albert J. Moore[†]
Paul Bergman[††]

I. Introduction

This Article develops a paradigm (model) for effectively communicating to judges or juries during cross examination implausibilities in adverse witness' stories. The trial advocacy literature generally recognizes that pointing out implausibilities is an effective method of discrediting unfavorable testimony.[1] Less discussed, however, is a generally-applicable model that litigators can use to identify evidence which demonstrates that testimony is implausible.[2] This Article sets forth such a model, which we call a model of inferential argument, and demonstrates how to use that model to identify evidence suggesting that adverse testimony is implausible.

An advocate who intends to argue that adverse testimony is implausible might in theory be content to use the inferential argument model to identify evidence supporting the implausibility claim and then to communicate that argument to the trier of fact for the first time during

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[1] *See, e.g.*, PETER MURRAY, BASIC TRIAL ADVOCACY 182 (1995) ("[T]o show that the image being presented by the other side is not accurate or believable...[,] [s]he can compare the opposition's version with common experience."); THOMAS MAUET, TRIAL TECHNIQUES 230 (4th ed. 1996); PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 26 (3d ed. 1997). Other common bases of arguing that adverse testimony is unworthy of belief are that the testimony conflicts with testimony from more believable witnesses and that the witness supplying the testimony is biased.

[2] *But see* BERGMAN, *supra* note 1, at 48-56.

final summation. However, psychological research consistently demonstrates that triers of fact evaluate evidence as they take it in.[3] Consequently, it is ordinarily in an advocate's best interests to communicate arguments throughout trial as important evidence emerges. With that in mind, this Article demonstrates how to effectively communicate an argument during cross examination that adverse testimony is implausible.

The example below illustrates how an advocate might develop an implausibility during cross examination. This Article then works backwards to demonstrate how use of the inferential argument model could have led to the evidence through which the cross examiner communicates the argument.

II. A Well-Known Cross Examination

The cross examination occurred during the 1991 rape trial of William Kennedy Smith. Kennedy Smith was charged with raping Patricia Bowman.[4] The trial, which took place in Florida, received "gavel to gavel" coverage on national television because the defendant was a Kennedy, one of America's most prominent and powerful families. In this example, defense attorney Roy Black cross examines government witness Ann Mercer.

According to the prosecution, Bowman and the defendant met for the first time at a bar and danced on the night of the alleged rape.[5] Later, Bowman and the defendant went to the Kennedy family compound in Palm Beach.[6] They walked around the estate to the beach, where the rape allegedly occurred.[7] (The defense version was that Kennedy Smith and

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[3] *See* Eugene Borgida & Nancy Brekke, *Expert Psychological Testimony in Rape Trials: A Social-Cognitive Analysis*, J. PERSONALITY & SOC. PSYCHOL. 1988, v. 55, at 372.

[4] *See* Videotape: *Florida v. William Kennedy Smith* pt. 1 (The American Lawyer/Courtroom Television Network Video Library Service, available through Court TV) [hereinafter Videotape: *Florida v. Smith*]. This is a timed videotape, and times will be included when applicable.

[5] *Id.* at 1:10:56:13.

[6] *Id.* at 1:15:14:46.

[7] *Id.* at 1:44:25:88.

Bowman had consensual sex that evening.[8]) After the alleged rape, Bowman telephoned her friend Ann Mercer and asked Mercer to pick her up at the Kennedy estate.[9]

On direct examination, Mercer testified that she arrived at the Kennedy compound and found Bowman distraught and hysterical, and Bowman told her of the rape.[10] Bowman also asked Mercer to find Bowman's shoes, which Bowman had lost.[11] Mercer testified that she and the defendant searched the house and grounds for the shoes before Mercer left with Bowman.[12] In the following cross examination excerpt, defense attorney Black tries to suggest that Mercer's actions that night were implausible.[13]

Q1:   You say you went to the Kennedy home on the early morning hours of March 30th, is that correct?
A1:   Yes.
Q2:   Your friend says that she was raped, is that right?
A2:   Yes.
Q3:   What she tells you is that she wants her shoes, is that correct?
A3:   Yes.
Q4:   Several times she was worried about her shoes.
A4:   Yes.
Q5:   So you went into the house, is that correct?
A5:   Yes.
Q6:   Into the house where the rapist is, right?
A6:   I guess you could say that, yes.
Q7:   It's dark in there.
A7:   Yes.
Q8:   You go through the kitchen, right?
A8:   Yes.

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[8] *See generally id.* (commentary and cross examination creates an inference of consent).

[9] Videotape: *Florida v. Smith* at 43:46:47.

[10] *Id.* at 45:50:00

[11] *Id.* at 46:32:27.

[12] *Id.* at 46:46:00 & 47:21:00.

[13] Most people who watched the trial believed that at least a portion of the cross examination was extremely effective. Your reaction, years later and reading rather than watching it, may be different. Even so, the cross is a useful basis for illustrating the development of an inferential argument.

Q9: Into this little hallway?

A9: Yes.

Q10: It's dark in this hallway, isn't it?

A10: Right.

Q11: You meet up with this man who your friend says is a rapist? Isn't that correct?

A11: I was not afraid of him, no. I was not afraid of him.

Q12: No, that's not my question, Miss Mercer. You understand my question? My question is, did you meet this man who your friend says is the alleged rapist?

A12: Yes.

Q13: In this dark hallway, is that right?

A13: Yes.

Q14: And you ask him to help . . . you ask the rapist to help you find her shoes, is that correct?

A14: Yes.

Q15: And he turns around and goes with you, out of the house, is that right?

A15: Yes.

Q16: Through the dining room to begin with, is that correct?

A16: Yes.

Q17: It's dark in that house, right?

A17: Yes.

Q18: You're walking through the dining room with this man, is that correct?

A18: Yes.

Q19: The man who is allegedly a rapist, right?

A19: Yes.

Q20: You go out the door of the dining room, don't you? Into a little patio area?

A20: Correct.

Q21: With this man who is the alleged rapist, is that right?

A21: That's right.

Q22: You go out past the patio and onto the lawn, is that right?

A22: Right.

Q23: It's dark out, isn't it?

A23: Right.

Q24: With this man who's the alleged rapist?

A24: Yes.

Q25: You go across the lawn with him, is that right?

A25: Yes.

Q26: Towards the beach?

A26: Yes.

Q27: As you go across the lawn you get to a place where there are hedges and a concrete wall, isn't that right?

A27: Yes.
Q28: And you're still with this man who is the alleged rapist, is that right?
A28: Yes.
Q29: You get to a dark stairway, isn't that correct?
A29: Yes.
Q30: There are no lights in that stairway, is there?
A30: No.
Q31: You go down this stairway, right?
A31: Right.
Q32: With this man?
A32: Right.
Q33: There's a door down at the bottom of the stairway, is that right?
A33: Right.
Q34: You and this man who is the alleged rapist go out the door, is that correct?
A34: Right.
Q35: Out onto the beach?
A35: Right.
Q36: And you then spend several minutes looking for the shoes with this man who is the alleged rapist, is that right?
A36: Right.
Q37: Then after a while you say well let's forget about looking for the shoes and let's go back?
A37: Right.
Q38: Is that correct?
A38: Right.
Q39: You and he go towards the door, is that right?
A39: Right.
Q40: You enter that doorway?
A40: Right.
Q41: It's a dark stairway?
A41: Right.
Q42: In fact you even told us today he's behind you, is that right?
A42: Right.
Q43: Going up the stairs, this man who is alleged to be the rapist is behind you in this dark stairway, is that correct?
A43: Right.
Q44: The two of you go up the stairway, isn't that right?
A44: Right.
Q45: You get to the top and you start going across the lawn, isn't that correct?
A45: Right.
Q46: And you go into the house with him?

A46: Yes.

Q47: And you go into this hallway and down towards the kitchen again, is that right?

A47: Yes.

Q48: Where you meet up with your friends?

A48: Yes.

Q49: Now there's one thing you forgot to tell us in that scenario on direct examination, what you said to this man who's the alleged rapist when you left, you forgot about that didn't you?

A49: I wasn't asked that, sir.

Q50: Didn't you tell him you were sorry?

A50: No, I did not.

Q51: Oh, didn't you tell him Ms. Mercer that you were sorry that you had to meet under these circumstances?

A51: Ah, I used those words. . .

Q52: I didn't ask you why you used them. I said did you say you were sorry you had met him under those circumstances?

A52: I did not mean I was sorry.

Q53: I didn't ask you what you meant.

D.A.: Objection, not being allowed to answer the question.

Judge: Overruled, please answer the question.

Q54: The question is did you say to this man, "I'm sorry we met under these circumstances?"

A54: Yes, I said that.

Q55: To the man who's supposedly the rapist, is that right?

A55: Yes.

Q56: The man who raped your friend, right?

A56: Yes.

Q57: Your friend who you say is hysterical, right?

A57: Yes.

Q58: You said, "I'm sorry we met under these circumstances."

A58: What I said and how I said it. . .

Q59: No, did you say "I'm sorry we met under these circumstances."

A59: Yes.

D.A.: Objection, argumentative; she's not being allowed to answer the question.

Judge: Overruled.

Q60: Is that what you said Ms. Mercer?

A60: Yes.[14]

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[14] Videotape: *Florida v. Smith* at 49:24:65.

III. Implausible Testimony Conflicts With Everyday Experience

Most of us distrust information that conflicts with our everyday experiences. Based on our experiences, we tend to form judgments about expected behavior in common settings. For example, if we know that a pet owner had just lost a treasured pet, we would be likely to distrust information that the pet owner was smiling and happy five minutes later. Our experiences with people who have lost treasured animals strongly suggest that there are unlikely to be happy moments after the loss occurs. Such common reasoning is the basis of many implausibility arguments. That is, an argument that adverse testimony is implausible typically asserts that the testimony is unworthy of belief because it conflicts with everyday experience.

IV. A Model of Inferential Argument

Now consider a model you can use to support an argument that adverse testimony is implausible. Recognize at the outset that the model does not itself identify an implausibility. You will have to rely on your own judgment and experience (perhaps informed by experts or others with experiences in specific or unusual situations) to recognize in the first instance that a trier of fact may regard adverse testimony as implausible. What the model does is to help you be thorough when identifying the evidence supporting and possibly rebutting your implausibility conclusion.

The inferential model you can use to support an argument that adverse testimony is implausible is straightforward:

Step One: If X is true,
Step Two: Then we would not expect Y to also be true.
Step Three: Because. . . .
Step Four: Unless. . . .
Step Five: Therefore the factfinder should infer. . . .

Like a tango, an implausibility argument typically takes two. The argument is that something a witness did or said (Step One) is improbable

in the light of something else the witness did or said (Step Two). Explicitly setting out the apparently inconsistent statements or activities constitutes the model's first two steps.

Your immediate reaction may be that anything beyond steps one and two should be unnecessary. For example, if Step One consists of information that a pet owner had just lost a treasured pet, and Step Two consists of information that the pet owner was happy moments later, surely any factfinder will recognize the implausibility. Your reaction may on occasion be accurate. Adverse testimony may be so obviously implausible that your argument needs no supporting evidence. However, it is often risky to assume that a factfinder needs no help recognizing implausible testimony.[15] Variations in people's experiences and attitudes often require that you marshal the evidence that supports your implausibility claim.

By way of analogy, assume that you are shown one of those cryptic ink blots employed by psychologists and you see a "big black bird flapping its wings." Although the "bird" in the ink blot may appear obvious to you, another viewer may not see it when shown the identical ink blot. The second viewer will usually have a better chance of seeing the bird if you provide supporting information. For example, you might say something like: "In the upper left hand corner is the tip of the bird's

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[15] A notorious example of this reality took place during the first Los Angeles murder trial of the brothers Erik and Lyle Menendez in the early 1990's. The Menendez brothers were charged with brutally killing their parents by shooting each of them numerous times. The brothers' defense (which if accepted would have reduced the gravity of the offense to manslaughter) was that owing to their father's earlier sexual abuse of Lyle, the brothers reasonably (although mistakenly) believed that their parents were about to kill them. The prosecution offered what it considered powerful evidence of the defense's implausibility. That evidence consisted of the brothers' own account of the killings, which was that after they killed the father and nearly killed the mother, they went out of the house, fetched more shells, returned and shot the mother again. The prosecution argued that, had the brothers really shot their parents out of fear for the brothers' own lives, they would not have continued to shoot the mother when neither parent presented a threat. However, this was apparently not the inference drawn by some of the jurors, who when interviewed on national television after the verdict, suggested that Lyle Menendez may have been mistaken when he testified that he reloaded the gun to shoot his mother a second time. The first trial resulted in a hung jury. In the second trial, the brothers were convicted of murder and sentenced to life in prison. *Dateline NBC* (NBC television broadcast, Feb. 21, 1994).

wing, and then just to the right of that is his head." The same is true with implausibilities. Supporting an implausibility argument with evidence to point a factfinder to your desired inference is like pointing out the features of an ink blot to help a viewer see the same picture you do.

Thus, in most cases you will have to move on to Step Three. Here, you explicitly identify the factors that lead you to conclude that adverse testimony is implausible. As you will see in the next section, those factors will be the source of many of your cross examination questions.

Steps Four and Five act as "checks" on the probative value of an implausibility argument. Step Four in the model requires you to identify and explicitly identify explanations that a witness might reasonably give that have the potential to undermine (vitiate) the seeming implausibility. While evidence rules may allow you to cut off explanations during cross examination, your adversary will have a chance to elicit them on redirect examination. Thus, you need to consider potential explanations to assess the probative value of a seeming implausibility. For example, assume that you think it likely that the pet owner will explain that "the reason I was happy is that my pet was ill for months, death was expected and it was painless." If you think that the factfinder will accept this explanation, you might decide not to put the argument forward at trial.

Step Five recognizes that implausibilities, even if accepted as such, will not necessarily produce your desired inferences. For one thing, a factfinder might not see a connection between an implausibility and your desired inference. For example, a factfinder may think, "So it does not make sense that the pet owner would have been happy moments after finding out that the pet had died? So what does that prove?" Or, since an implausibility (like any other item of circumstantial evidence) may lead to multiple inferences, a factfinder who accepts testimony as implausible may reach a different inference from your desired one. For example, you may want the factfinder to infer that the pet owner's implausible happiness after the pet died suggests that the owner, in reality, hated the pet. However, a factfinder might infer from the implausible happiness that the pet owner was so overwrought that the owner behaved irrationally. Thus, Step Five asks you to test your argument's probative strength by identifying explicitly what inference you want the factfinder to draw from the implausibility.

V. Applying the Inferential Argument Model to the Mercer Cross Examination

This section applies the inferential argument model to the testimony of Ann Mercer. Defense attorney Black actually puts forward two implausibilities in Mercer's story:

* It is implausible that Mercer would have walked around a dark estate with a man she thought was a rapist in order to look for a pair of shoes.
* It is implausible that Mercer would apologize to a man she thought was a rapist for "meeting under these circumstances."[16]

Set out according to the inferential argument model, these arguments look like this:

A. Argument 1: "Shoes" (Questions 1-48)

Step One: If Bowman told Mercer that Smith had raped her,

Step Two: Then we would not expect Mercer to have gone through the house and on to the beach alone with someone she thought was a rapist to look for Bowman's shoes.

Step Three: Because. . . .

(1) Mercer would have been afraid of Smith.

(2) It was dark inside and outside the house.

(3) Mercer would not have wanted to spend a substantial amount of time with someone she was afraid of in a dark place.

(4) Mercer would have wanted to seek immediate medical attention for Bowman.

Step Four: Unless. . . .

(1) Mercer was not afraid of Smith because she believed that Smith was a "date rapist" and not someone who raped or attacked strangers.

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[16] *See supra* text accompanying note 14. Remember, Black would not have relied on the implausibility paradigm to identify these implausibilities at the outset. Black would rely on his own judgment and experience (and perhaps that of colleagues) to decide what if anything might be implausible about the story in the first place.

(2) Mercer was not afraid of Smith because she believed that Smith had just committed one rape and would, therefore, not try to commit another.

(3) Mercer was not afraid of Smith because she believed that other people were in the house and would hear any screams for help.

(4) Mercer felt that she had to look for the shoes (even if Mercer was afraid of Smith) because Bowman was very distraught and insistent about getting her shoes. Mercer thought finding the shoes would help to calm Bowman.

Step Five: Based on this implausibility in Mercer's testimony the factfinder might infer either (1) that Bowman did not tell Mercer that Smith had raped her; or (2) that Mercer did not believe Bowman when she accused Smith of raping her.

B. Argument # 2: "I'm sorry" (Questions 49-60)

Step One: If Mercer was told by Bowman that Smith raped her,

Step Two: Then we would not expect Mercer to have said to Smith "I'm sorry we had to meet under these circumstances."[17]

Step Three: Because. . . .

(1) Mercer would have been angry with Smith for having raped her friend.

(2) Mercer knew that her friend was still distraught and hysterical as a result of the alleged rape.

Step Four: Unless. . . .

(1) Mercer was so upset and confused by the incident that she made the remark because she didn't know what else to say.

(2) Mercer was being sarcastic and didn't want to upset Smith by explicitly accusing him of rape.

(3) Mercer was "star struck" meeting a Kennedy and said something inappropriate.

Step Five: Based on this implausibility in Mercer's testimony the factfinder should infer either (1) that Bowman did not tell Mercer that

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[17] *See supra* text accompanying note 14.

Smith had raped her, or (2) that Mercer did not believe Bowman when she accused Smith of raping her.

VI. From Preparation to Performance: Translating Inferential Arguments Into Cross Examination

Developing an argument according to the inferential argument model does not commit you to a particular style of cross examination.[18] Below are some of the factors you will want to consider when deciding how to communicate an implausibility argument during cross examination.

A. Can I Elicit the Supporting Evidence With Safe Questions?

Your first consideration consists of deciding whether you can elicit the evidence supporting an implausibility argument with "safe" questions. Questions are safe when the witness' answer must either:

(1) provide the supporting evidence to support the argument; or
(2) set the witness up for impeachment. (For example, the cross examiner can impeach an unfavorable answer with a prior statement, or an unfavorable answer would be inconsistent with common experience.)[19]

Returning to the Kennedy Smith case, you will see that both of the arguments developed by defense attorney Black rest almost exclusively

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[18] This Article focuses on using a model of inferential argument during cross examination; however, the model can also inform opening statement, closing argument and even direct examination. For example, the prosecutor in the Kennedy Smith case could have included one or more of the Step Four explanations during direct of Ann Mercer. *See generally* ALBERT J. MOORE ET AL., TRIAL ADVOCACY: INFERENCES, ARGUMENTS AND TECHNIQUES (1996) (discussing how implausibility arguments impact preparation for all aspects of trial).

[19] For further discussion of the use of safe questions on cross examination, see MOORE ET AL., *supra* note 18, at 163, and BERGMAN, *supra* note 1, at 187.

on safe questions. Mercer is between a rock and a hard place: either she supplies Black's desired answer, or she will be impeached. For example, Mercer must admit that she was alone in a dark house and on a beach with someone she was told was a rapist, or Black will impeach her with her direct examination testimony.

Step Three, which calls on you to make supporting evidence explicit, allows you to assess a question's safety. If safe questions tending to support an argument are unavailable, you can decide in the quiet of your law office whether to forego an argument on cross or run the significant risk of trying to establish it through unsafe questions.

B. "Pacing" Decisions

"Pace" involves the number of questions that are devoted to the presentation of an argument. The faster the pace, the fewer the questions.[20] For an argument based on an implausibility, the fastest pace is two questions, juxtaposing the two aspects that create the implausibility. For example, Black might have limited the "I'm sorry" portion of the cross to two questions:

> Q: Ms. Mercer, on direct examination you told the jury that Ms. Bowman told you that Mr. Smith raped her, correct?
> Q: Yet after you searched for Ms. Bowman's shoes you told Mr. Smith that you were sorry that you had to meet him under these circumstances, correct?

Such a quick pace makes sense only when an implausibility is so glaring that merely juxtaposing the evidence giving rise to it is sufficient to impress the argument on a factfinder. More often, effective illustration of an argument will require eliciting evidence supporting one or more Step Three factors into an examination. Such factors consist of case-specific evidence suggesting that conduct is improbable, and thus often help to persuade a factfinder to draw a desired conclusion.

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[20] "Pace" demonstrates the importance of using leading questions on cross. Open questions generally give control of pace to the witness; leading questions give control of the pace to examining counsel.

Black's cross examination in the Kennedy Smith case slows the pace to the extent of reminding the jury that Mercer uttered these words to a rapist (Q's 55-56) at a time when her friend was hysterical (Q-57).[21] Mercer's attempted explanations and denials give Black further opportunities to slow the pace by through repetition of the fact that the witness did indeed utter the words (Q's 50, 51, 52, 54, 58, 59, 60).[22]

Black might have developed the "shoes" implausibility argument at a faster pace (*i.e.*, with fewer questions). For example, the portion of the cross examination devoted to this implausibility might have looked as follows if Black had used thirteen rather than forty-nine questions to develop the argument:

Q1: You say you went to the Kennedy Home on the early morning hours of March 30th, is that correct?

Q2: Your friend says that she was raped, is that right?

Q3: What she tells you is that she wants her shoes, is that correct?

Q4: So you went into the house, is that correct?

Q5: Into the house where the rapist is, right?

Q6: It's dark in there, right?

Q7: You go through the house and on to the beach?

Q8: With the alleged rapist, correct?

Q9: It's dark outside, isn't it?

Q10: And you spend several minutes looking for the shoes outside with this man who is the alleged rapist, is that right?

Q11: As you are coming back into the house, you go through a dark stairway, correct?

Q12: Going up the stairs, this man who is alleged to be the rapist is behind you in this dark stairway, is that correct?

Q13: Then you continued back through the house with this man where you meet up with your friends, correct?

This version of the cross examination sets forth the same Step Three factors as Black's actual cross examination, but quickens the pace by dividing the overall event ("looking for shoes") into fewer sub-events.

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[21] *See supra* text accompanying note 14.

[22] *See supra* text accompanying note 14.

In the abstract, no single pace is objectively "best." The goal should be to slow the pace enough to communicate the argument but not make it so slow that the jury will become bogged down in detail and lose sight of the argument or see counsel as "talking down" to them by "beating an obvious point to death."

The inferential argument model does not dictate a specific pace. Making that decision requires you to use your "ear" for cross, so you can imagine how the cross will sound to the factfinder at various paces and pick the pace that sounds best. However, explicitly identifying the Step Three factors on which an argument rests can help you decide how fast a pace to choose. And by considering their relative probative strength, you might elicit some factors at a faster pace than others.

C. Scope of Cross Examination

Legal commentators generally agree that effective cross examinations often have a limited scope, focusing on an advocate's strongest points.[23] Explicitly identifying factors supporting your arguments (Step Three of the model) helps you make these "scope" decisions. You may choose not to refer to weaker factors, perhaps mentioning them, if at all, during final summation, if they are supported by other evidence in the record.

Black's Kennedy Smith cross examination, though quite detailed, is consistent with a "limited scope" approach. When developing the "shoes" implausibility, for example, Black ignores one of the Step Three factors on our list: that Mercer's searching for shoes is implausible because she would have wanted to seek immediate medical attention for Bowman.[24] Black may nevertheless have mentioned this factor during closing argument, because it is a legitimate inference from Mercer's story that Bowman had told her she had been raped.

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[23] *See, e.g.*, MAUET, *supra* note 1, at 218-19.

[24] Black easily could have developed this point in his cross with questions like:

Q: Your friend says that she was raped, is that right?
Q: You didn't immediately take your friend to the hospital, did you?
Q: You didn't immediately drive your friend away from the scene, did you?
Q: You went to look for her shoes, is that correct?

D. Excluding Explanations

When you communicate an argument to a factfinder during cross examination, in most circumstances you will also be communicating it to the adverse witness. Realizing where you are headed, the witness may try to explain away the seeming implausibility. Having anticipated the witness' likely explanations in Step Four (and decided to proceed with the argument), you can decide whether you want to try to exclude the explanation during cross. Unless an explanation is so weak as to itself be implausible, in most cases you will want to cut off explanations during cross examination. Even if the explanation ultimately emerges during redirect, excluding it during cross allows you to impress the implausibility on the factfinder, so that by redirect the factfinder has largely decided that the adverse witness lacks credibility.[25] For example, if you look back at Black's cross examination of Ann Mercer (Q's 12, 52, 53, 59) you will see that he cuts off her every attempt to explain her behavior.[26]

Note how Black's cross examination takes advantage of evidence rules which allow him to communicate his argument while excluding Mercer's explanations.[27] Black uses leading questions to control the scope of her answers.[28] The leading questions limit Mercer to confirming the Step Three factors. Because answers must be responsive to questions, Mercer has no opportunity to volunteer potential Step Four explanations.[29]

E. Identifying the Desired Inference

A final decision you will have to make when communicating an argument on cross examination concerns whether to explicitly identify your desired inference. A major reason to do so is to make your argument

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[25] Of course, the inferential argument model cannot answer the question of why our adversary system includes a coercive element that prevents a witness who wants to do so from volunteering explanations during cross.

[26] *See supra* text accompanying note 14.

[27] *See supra* text accompanying note 14; *see also* FED. R. EVID. 611.

[28] *See supra* text accompanying note 14.

[29] Admittedly, even the most leading questions ever asked are no guarantee of eliminating immediate explanations. Some judges routinely allow witnesses to explain, either at the witness' or opposing counsel's request.

clear for any factfinder who "missed it." On the other hand, by specifying one inference you risk losing a factfinder who accepts your argument but not your inference.[30]

For example, returning to Step Five, you will see that Black might have concluded this portion of the Mercer cross by identifying either of at least two possible "bottom line" inferences:

* Bowman never told Mercer that she (Bowman) had been raped, and therefore no rape took place; or
* Mercer did not believe Bowman's rape claim, and therefore the jury should not either.

Black might have communicated these inferences during his cross examination of Mercer by asking questions such as the following:

Q: Ms. Mercer, isn't it true that the reason you were willing to walk all around the dark estate with Mr. Kennedy Smith is that Ms. Bowman never told you that she had been raped?

Q: Ms. Mercer, isn't it true that the reason you were willing to walk all around the dark estate with Mr. Kennedy Smith is that you did not believe Ms. Bowman's claim that she had been raped?

Obviously, Black would not have expected Mercer to answer either of these questions affirmatively. He would have asked them for the sole purpose of explicitly identifying his desired inference for the jury. Nevertheless, Black asked neither of these questions- nor did he identify any other possible "bottom line." Perhaps he thought the argument was clear enough already. Or perhaps he thought either "bottom line" was equally helpful, and did not want to focus on one at the risk of alienating jurors who might have been thinking of the other. Or perhaps he thought the judge would see such questions as argumentative and permit Mercer to volunteer rebuttal in response. In any event, this is an issue of professional judgment that the model alone cannot answer.

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[30] For further discussion of the costs and benefits of asking questions intended to communicate your desired inference to the jury, see MOORE ET AL., *supra* note 18, at 180-83.

VII. Conclusion

Trying to establish on cross examination that a witness' testimony is implausible is a common task for trial advocates. The inferential argument model described in this Article is one tool that can help you accomplish this task, in any kind of case and with any adverse witness. The model does not determine what constitutes an implausibility. Instead, it helps you to be explicit about why a factfinder should consider adverse testimony to be implausible, to evaluate your arguments by considering potential explanations, and to communicate the argument effectively during cross examination.

The model can also help you to learn from experience. If you believe that a cross was less successful than you had hoped, the model can help you identify what led to the deficiency. For example, perhaps a factfinder failed to accept Steps One and Two—you considered something to be implausible that the factfinder did not.[31] Or, it may be that you did not communicate the argument successfully; perhaps you were done in by unsafe questions, or too fast or slow a pace. By breaking the dynamic of cross examination into concrete steps, the model can help you evaluate and improve on your trial skills.

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[31] What you identify as an implausibility, and the inference you identify from that implausibility, will largely reflect your life experiences. At the end of the day, however, whether your argument succeeds ultimately depends on a factfinder's life experience.