

**SEEKING OR SUGGESTING THE TRUTH?**

**AN EXAMINATION OF CANADIAN LAWYERS' QUESTIONING PRACTICES**

by

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## LAWYERS' QUESTIONING PRACTICES

### **Abstract**

Ninety-one court examinations of lawyers asking questions to witnesses were analyzed. Each unique examination was coded for the frequency of utterance type being spoken (i.e., questions identified as open-ended, probing, closed yes-no, leading, forced choice, multiple, clarification, re-asked, as well as for offered opinions and facilitators), the assumed purpose type of each utterance (i.e., unknown, administrative, information gathering, challenging the witness' account/details), lawyer type (i.e., prosecutor vs. defence), and examination type (i.e., direct vs. cross). The results showed that approximately 80% of the questions asked were inappropriate for gathering reliable information. In addition, there were no significant differences found between prosecutors or defence lawyers regarding the proportions of the utterance type spoken. However, there was a significant difference with some utterance types as a function of examination type; direct examinations contained significantly more closed yes-no, probing, and open-ended questions, whereas cross examinations contained significantly more leading and clarification questions. There were no significant differences found between lawyer type as a function of purpose type, with the exception of cross (vs. direct) examinations containing significantly more challenges. Although the findings were expected, these data suggest that the vast majority of courtroom questioning practices run counter to the truth-seeking function of the judiciary. Implications for the role of these questioning practices in the courtroom are discussed, along with the extent to which courtroom interviewing practices are in line with the concerns raised by lawyers when arguing against the inadmissibility of statements due to inadequate police interviewing practices.

*Keywords: courtroom questioning, lawyers, truth-seeking, question types*

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### List of Abbreviations and Definitions

<u>Abbreviation</u>	<u>Page</u>	<u>Definition</u>
<i>sine qua non</i>	p. 2	“Without which not; that without which the thing cannot be, i.e., the essence of something” (Yogis, 1983, p. 198).
FPT	p. 19, 61	Federal-Provincial-Territorial
<i>R v.</i>	p. 20, 21, 27	Regina (Queen Elizabeth II) versus.
X (or X'd)	p. 30, 98	Symbol used in court transcripts to identify the direct examination.
XX (or XX'd)	p. 30, 31, 94, 98	Symbol used in court transcripts to identify the cross examination.
<i>voir dire</i>	p. 30	A trial within a trial that “refers to a hearing out the presence of the jury [or witness] by the court upon some issue of fact or law that requires an initial determination by the court or upon which the court must rule as a matter of law alone” (Yogis, 1983, p. 224).



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## Chapter 1: Introduction

An overarching goal of the criminal justice system is for triers of fact to make informed decisions. This is facilitated primarily through the gathering of accurate and complete information from victims, witnesses, and suspects (Milne & Bull, 1999). The information required to make the best informed decisions tends to be collected through police interviewing, and to a lesser extent, through courtroom examinations. Regardless of who gathers the information, arguably the most fundamental aspect of these processes (i.e., police interviews and courtroom examinations) is asking questions (Oxburgh, Myklebust, & Grant, 2010). Empirical studies have shown that the types of questions asked impact the quality of the information gathered (e.g., Loftus, Miller, & Burns, 1978; Loftus & Palmer, 1974), with most of the research in the area focusing on how well police officers conduct their interviews. Collectively, the glut of this empirical literature has reported that police interviewers do not tend to follow best practice for gathering information (e.g., Fisher, Geiselman, & Raymond, 1987; Myklebust & Alison, 2000; Snook & Keating, 2010; Snook, Luther, Quinlan, & Milne, 2012; Wright & Alison, 2004), despite some officers having had received training about proper interviewing techniques (Lamb, Hernshkowitz, Orbach, & Esplin, 2008). Moreover, the (poor) questioning practices of the police often form the foundation of strategies by defence lawyers (e.g., use experts to testify that the overuse of leading questions tainted the evidence). Surprisingly, little empirical attention has been paid to how well lawyers – through their questioning practices – influence the quality of information gathered in the courtroom.

Of the extant empirical studies that have examined the questioning practices of lawyers, most have pertained to questioning vulnerable witnesses (e.g., children;

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witnesses with intellectual disabilities; e.g., Andrews & Lamb, 2016; Kebbell, Hatton, & Johnson, 2004; Zajac, Gross, Hayne, 2003), contained small sample sizes (e.g., Kebbell, Deprez, & Wagstaff, 2003), are limited to a few judiciaries (i.e., Scotland [e.g., Andrews & Lamb, 2016], Australia [e.g., Kebbell et al., 2003, 2004], and New Zealand [e.g., Zajac et al., 2003; Zajac & Cannan, 2009]), and focused mainly on sexual assault crimes (i.e., rape; e.g., Andrews & Lamb, 2016; Kebbell et al., 2003; Westera, Zydervelt, Kaladelfos, & Zajac, 2017). The goal of current research program is to contribute to the growing body of research on courtroom questioning practices by examining the extent to which Canadian lawyers adhere to best practices. This goal is accomplished by using a larger sample size than used in previous studies, and by using a more generalizable group of adult witnesses (i.e., different crimes and witness types).

### **1.1 Questioning and Memory**

Asking questions is the *sine qua non* of the justice system's truth-seeking function. Much research has been devoted to studying the relationship between question types and information gathering quantity and quality (e.g., Clifford & George, 1996; Fisher et al., 1987; Loftus, 1982; Loftus & Palmer, 1974; Loftus & Zanni, 1975; McLean, 1995; Milne & Bull, 1999; Snook & Keating, 2010; Snook et al., 2012; Wright & Alison, 2004), and many of these studies have reported that asking particular questions can directly impact the accuracy and completeness of witnesses' testimony and memory (e.g., Clifford & George, 1996; Davies, Westcott & Horan, 2000; Fisher et al., 1987; Loftus & Palmer, 1974; Memon, Holley, Milne, Koehnken, & Bull, 1994; Memon & Vartoukian, 1996; Memon, Vrij, & Bull, 2003; Milne & Bull, 1999; Read, Powell, Kebbell, & Milne, 2009; Shepherd, 2007).

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It is essential for questioners to ask questions that empirical research has shown to be the gold standard for eliciting accurate and reliable testimony (Fisher & Geiselman, 1992; Griffiths & Milne, 2006; Milne & Bull, 1999).

**1.1.1 “Good” questions.** Although there is some discrepancy between scholars on how question types are classified and/or defined (e.g., Fisher et al., 1987 vs. Griffiths & Milne, 2006; see Milne & Bull, 1999, & Oxburgh et al. 2010), the literature generally agrees on what questions are considered to be superior (and inferior) for gathering reliable and accurate information in the interview setting; a topic that has been a point of scholarly interest for a long time. Studies examining interview questioning styles date back to the turn of the 20<sup>th</sup> century. Early scholars (e.g., Stern 1903/1904; Varendonck, 1911) classified questions into one of two categories: *Bericht* (i.e., open) or *Verhör* (i.e., closed). Since this time, others have categorized questioning style using terms such as, *active* and *passive* (DuBois, 1937); *guided* and *free* (Kluckhohn, 1945); or *directive* and *non-directive* (Maccoby & Maccoby, 1954). More recently, contemporary researchers typically use terms like *inappropriate* and *appropriate* (Milne & Bull, 1999), or *productive* and *non-productive* (Griffiths & Milne, 2006). Regardless of the categorical name assigned to classify questioning strategies, research has shown that open-ended questions are the premier choice for gathering complete and accurate information from witnesses.

Structurally, open-ended questions tend to start with *Tell*, *Explain*, or *Describe* (TED questions; e.g., “Tell me about your evening last night.”, “Describe the assailant for me.”). Open-ended questions are viewed as the most preferred questions to ask because such invitations allow for free and uninhibited recall from the respondent, and encourage longer and more accurate responses (Milne & Bull, 1999; Snook et al., 2012). Of all the

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question types, asking open-ended questions has been found to result in respondents providing the most accurate information (i.e., the proportion of correct vs. incorrect is greatest; Kebbell et al., 2003). Importantly, the mere structure of open-ended questions also protects against the questioner suggesting any of their own biases or viewpoints onto the person being questioned. Although it is possible that the respondent may still provide erroneous information, it is important to consider that the questioner did not play a role in soliciting that information.

A secondary productive or appropriate question type, but are narrower in scope, are probing questions. In terms of structure, probing questions typically start with *Who*, *What*, *Where*, *Why*, *When*, or *How* (5WH questions; e.g., “Who was with you last night?”, “Where did this crime occur?”, “How long were you with this person?”). While it is preferred to begin questioning using as many open-ended questions as possible, sometimes the responses lack specificity and require further inquiry (e.g., lacking enough precise detail to press charges or implicate a person of a crime; Westera et al., 2017). Thus, probing questions should be thought of as the appropriate follow-up type of questions to further comprehension, and probe the information gained from previously asked open-ended questions. For example, the response to the open-ended question “Tell me about the room you were in?” may yield information outlining particular items of interest (e.g., weapon, drug paraphernalia). Following up with probing questions might further provide specifics on these items: “You mentioned you saw a weapon. What sort of weapon was it?”; “Where was the weapon located?” Taken together, open-ended and probing questions are recognized by interviewing experts<sup>1</sup> as two question types that best produce accurate and complete information from interviewees.

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**1.1.2 “Bad” questions.** Various other questions are almost unanimously agreed upon by researchers as being associated with poor questioning. That is, questions that are extremely specific or leading in nature can steer the witness toward a certain answer and have the potential to contaminate the witness' memory (Westera et al., 2017). The following question types fit into this concerning category and can place limits onto the respondent, calling into question the authenticity of the information gathered from the witness. These poor questioning concerns become magnified if the witness is vulnerable (e.g., children [Zajac et al., 2003], witnesses with disabilities [Kebbell et al., 2004], intoxicated, sleep deprived), or prone to yea-saying (i.e., acquiescence; Kebbell, Hatton, Johnson, & O'Kelly, 2001; Zajac, 2009). In fact, some studies have shown that vulnerable populations will attempt to answer questions that they do not understand or even questions that make no sense (e.g., “Is red heavier than yellow?”; Pratt, 1990; Waterman, Blades, & Spencer, 2001).

One ineffective question type is known as a closed yes-no question. Closed yes-no questions request answers that are extremely narrow in scope, and tap only into recognition memory. Typically, closed yes-no questions are answered with one word or short responses (e.g., Question – “Did the thief have red hair?” Answer – “No, he did not.”). If the goal of questioning is to obtain as much accurate information as possible, then asking closed yes-no questions facilitates limited responding and focuses on a small aspect of interest. Granted, a questioner may ask a closed yes-no question to confirm information that they are privy to, but such an approach opens up the opportunity for misinformation to be adopted by the respondent. Closed-ended questions also cause the respondent to take on a passive role in the interview process. Since answers to closed yes-no questions yield relatively little additional information, the witness does not have to

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work hard at retrieving the requested information from memory. Put differently, asking questions that only tap into recognition aspects of memory renders the witness a passive participant in the questioning process because s/he is only confirming/denying notions presented by the questioner. Moreover, there is no way to know whether the witness is simply guessing at the answer. The consensus within the scientific community is that asking closed yes-no<sup>2</sup> questions should be done so sparingly (Griffiths & Milne, 2006; Griffiths, Milne, & Cherryman, 2011).

Leading questions are arguably the epitome of the 'bad' questions, and should be avoided during an interview. By definition, a leading question contains a preferential answer from the respondent, and may contain other (possibly correct or incorrect) information embedded within the question (e.g., "The car was driving quite fast before the crash, right?"). It may be tempting for a questioner to ask a leading question if they have developed a preconceived hypothesis about the event in question (i.e., the vehicle was speeding). However, carrying such a viewpoint into the interview setting has already sabotaged the information-seeking function of the investigative interview, and has turned it into a confirmation-seeking exercise (Gibbons, 2003; Maley, 1994; see Newbury & Johnson, 2006). Recall the above leading question example: beyond the problem of providing information to the respondent via the question (i.e., type of vehicle, speed of vehicle) – which may be factually wrong to begin with – a more concerning issue with leading questions is that the respondent may adopt this information into their testimony. Doing so brings in concerns about the reliability and validity of the reported information. That is, the information actually originated from the questioner and not the respondent. Furthermore, if the respondent adopts the information embedded within the question, the questioner may interpret the respondent's answer as confirming their original hypothesis,

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adding to the concerns of leading questions. Although some researchers distinguish between varying levels of leading questions (e.g., suggestive [Sternberg, Lamb, Esplin, Orbach & Hershkowitz, 2002], misleading [Milne & Bull, 1999], mildly vs. heavily leading [Kebbell et al., 2003]), it is generally agreed that *any* type of leading question may taint the information gathered from witnesses.

Forced choice questions (aka fixed alternative [Richardson, Dohrenwend, & Klein, 1965], selections [Hargie, Saunders & Dickenson, 1987], or option-posing questions [Korkman, Santtila, Westeråker, & Sandnabba, 2008; Luther, Snook, Barron, & Lamb, 2015; Shepherd, 2007]) present the respondent with a controlled range of possible answers to choose from (e.g., “Did this crime occur last week or two weeks ago?”). The concern with this type of question is that response limits are placed on the respondent by the questioner (Fritzley & Lee, 2003). Moreover, the correct answer (e.g., the crime occurred two days ago) may not be one of the available options. Research conducted with vulnerable witnesses has shown that respondents may simply guess at the answer and arbitrarily choose one of the choices that the questioner provided, even when the correct answer is not one of the options (Larsson & Lamb, 2009; Milne, Clare, & Bull, 1999). In other child sample studies, option-posing questions have been reported as putting pressure on the respondent to give an answer (Saywitz, Snyder, & Nathanson, 1999), and have also been found to elicit minimal information (i.e., shorter response; Larsson & Lamb, 2009). Although a recent study by Luther and colleagues (2015) examining police interviews with children found that forced choice questions were asked infrequently by questioners (approximately 3% of all questions asked), the respondents still chose one of the forced choice options (whether or not either of the options were correct). In fact, the results from Luther and colleagues revealed that the first choice option of forced choice



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questions was chosen by the child respondent over 40% of the time. These findings are concerning given that both the information and the answer is being derived from the interviewer and not the interviewee. Furthermore, any follow-up questions may be based on the potentially incorrect information. Despite the fact that the majority of studies exploring the effects of forced choice questioning have been tested with children, evidence from other studies suggest that adults are just as susceptible to poor questioning practices (e.g., Kebbell et al., 2001; Poole & White, 1991; see Zajac, 2009). For example, Kebbell and colleagues (2001) reported that some adults may incorrectly assume that the forced choice options provided by the questioner are the only alternatives available, and thereby omit the actual correct answer from their response.

Asking multiple questions (aka marathon questions; Shepard, 2007) in the interview setting should also be avoided. Multiple questions refers to the idea of asking several questions without giving the respondent an opportunity to provide an answer to any one of the questions asked (e.g., “Did you see him at the party? Where was he standing? Who else was there? Was he actually standing? When did you go home?”). The danger of asking multiple questions is that the respondent does not know which question to answer. Furthermore, if the respondent did attempt to give a response following the many questions, it is not always clear which question the answer is paired with (e.g., Question – “Were a lot of people at the party? Did you drink a lot? How many drinks did you have?” Answer – “I’m not really sure. Maybe eight or nine I think”), although some findings suggest that the last question asked may typically be the question that the respondent answers (Kebbell & Johnson, 2000; Perry et al., 1995). Asking multiple questions complicates the information-gathering process, and has the potential to add confusion and misunderstanding for both the questioner and respondent.

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Re-asking a question that has been previously asked earlier in the interview may also facilitate confusion. Take for example, a respondent who has earlier been asked about what they did last night, and provided an answer of being at home. If the questioner asks this same question later on, then the respondent may feel as though their previous answer has not satisfied the questioner, especially interviewees who are vulnerable (e.g., children; Myers, Saywitz, & Goodman, 1996) or in a vulnerable state (e.g., sleep deprived; intoxicated). Moreover, if the respondent decides to amend their previous response by saying that they were not at home, but instead were at a party, then this sort of scenario may give rise to suspicion or doubt toward the information provided (i.e., the reliability of the information). On the other hand, asking the same question over and over again suggests that the questioner is not listening actively to the respondent, is not skilled at interviewing, or is trying to elicit a response that may be in line with any previously held hypotheses about the event in question. The literature has raised concerns about asking repeated questions to witnesses because of its perception of being coercive and the fact that the testimony provided may change, thus giving rise to its credibility (e.g., Brock, Fisher, & Cutler, 1999; Gilbert & Fisher 2006; Poole & Lamb, 1998; Poole & White 1993). However, work by La Rooy and Lamb (2011) with a sample of 37 children aged 4 to 11 years, found that repeating questions led to the respondents maintaining their previous answer 54% of the time, but had also led the children to elaborate on their previous response about 27% of the time.

Questions that involved reciting verbatim what the respondent has stated, or paraphrasing the answer back to the witness in the form of a question are known as clarification questions (e.g., Question – “What flight was he on?” Answer – “It was flight 229.” Question – “*Okay, so he took flight 229?*” Answer – “Yes, exactly.”; clarification

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question emphasized). Similar to other question types, different researchers refer to this questioning style using various titles (e.g., echo questions [Milne & Bull, 1999; Oxburgh, Ost, & Cherryman, 2012], parroting [Shepard, 2007]). While it is recognized that this type of question may be natural to do from the point of view of the questioner's comprehension (e.g., Korkman, Santtila, & Sandnabba, 2006), the efforts dedicated toward asking clarification questions is wasteful of the time allotted to the interview. Rather, if the questioner wants to check in with the witness to ensure that they have understood the response information correctly, experts have argued that it would be better to perform a summary with the respondent – but only after all of the information-gathering questions have been asked on the topic of interest (Fisher & Geiselman, 1992; Milne & Bull, 1999). Providing a summary will protect against the respondent adopting any language or concepts that the questioner may use via the clarification question. That is, the questioner summarizes back the information using the respondent's words instead of paraphrasing. Moreover, if the questioner is unsure of something the respondent stated, rather than ask a clarification question ("You said the car was..."), it would be more appropriate to ask an open-ended (e.g., "Tell me more about the car."), or probing question (e.g., "What do you mean by the car was..."). Further, it may be possible that paraphrasing the words back to the respondent may result in confusion or adoption of misinformation.

Beyond the aforementioned question types, the literature also notes that opinions (i.e., posing a personal belief or viewpoint to the respondent; e.g., "I really believe you were at that party and not at home last night."), or statements (i.e., any possible utterance that does not constitute a question; e.g., "This water is for you to drink if you get thirsty.") may be spoken by the questioner throughout the interview. Neither opinions nor

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statements are questions, per se (i.e., the structure does not expect or facilitate an answer), but they both capture important interlocutor utterances that occur during the interview process. However, as a questioner, offering an opinion or giving a statement about the event of interest does not add any merit to the interview. On the contrary, opinions have the potential to sway the respondent's answer should s/he adopt the questioner's proposed opinion into his or her answer. As is the case with other poor question types, concerns about where the information originated from is a factor to consider when the questioner offers an opinion. Similarly, the aim of a statement is not to gather information from witnesses, although witnesses are free to comment following an offered statement, and questioners may use a combination of statements to cue the witness toward a topic to be questioned on. It may actually be more appropriate to offer statements during the pre-interview stages. In other words, prior to starting the substantive part of the questioning, the questioner may find it useful to give an indication of the direction that the interview will go (e.g., providing statements referencing the purpose of the questions); however, such statements as these are not appropriate in the middle of the information-gathering process. Given that the objective of this process is to gather information from the witness, these particular utterances during the information gathering portion of the interview are not helpful and should be avoided.

Finally, some literature (e.g., Snook et al., 2012) has proposed facilitators (i.e., verbal indicators or encouragements; e.g., "Alright, yeah", "Okay", "Mmhmm") as another possible utterance spoken during an interview. The phrasing of facilitators can be difficult to define in the interviewing setting (Oxburgh et al., 2010) and consequently can be viewed as either a good or bad part of the questioning process, depending on the context, tone, and expression of the questioner. On the one hand, muttering "mmhmm" or

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“yes, okay” may simply be the questioner’s way of displaying their engagement with and focus towards the respondent. Furthermore, such verbal cues may encourage the respondent to continue providing information. However, such encouragements or acknowledgements may be interpreted by the respondent as an indication that s/he is saying the correct answer (i.e., information that is pleasing to the questioner). Such interpretations can become dangerous should the respondent be unsure as to whether the information being reported is accurate (e.g., they are guessing, but the questioner seems to be affirming the response). Moreover, if the information being reported is confirming the questioner’s preconceived hypotheses, then the questioner may inadvertently encourage such confirming responses through the use of facilitators or verbal acknowledgments. Given that no research to date appears to have built a strong case for whether facilitators are ‘good’ or ‘bad’ in the interview setting, these utterance types might be best thought of as ‘neutral’ utterances; however, for the purpose of the current study, facilitators will be categorially assigned as being on the poor questioning side in order to be more conservative.

**1.1.3 Questioning and its effects on memory.** Psychologists generally agree that there are three distinct processes involved with memory; namely, encoding, storing, and retrieving processes. Encoding has to do with inputting information into memory. Storing has to do with retaining the information in a permanent (i.e., long-term memory) or semi-permanent (i.e., short-term memory) basis. Retrieval (i.e., memory recall) refers to the notion of accessing information from memory; otherwise known as remembering (see Ekuni, Vaz, & Bueno, 2011 for an in-depth review). It is important to note that the quality of each of these memory processes hinges on a number of external elements or factors. Take the encoding process, for example; encoding information may be dependent

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on the state of the person during the event. Perhaps the witness to a crime was inebriated with alcohol – studies show that witnesses to a mock-crime who had ingested alcohol performed poorly on an eyewitness recall test (Hagsand, Roos-af-Hjelmsäter, Granhag, Fahlke, & Söderpalm-Gordh, 2013; Yuille & Tollestrup, 1990). Other studies have shown how different factors such as the eyewitness' stress levels (Yuille, Davies, Gibling, Marxsen, & Porter, 1994), the amount of violence observed (Clifford & Hollin, 1981; Clifford & Scott, 1978), the level of witness' involvement (Yuille et al., 1994, but see Roberts & Blades, 1998 for conflicting findings), and the witness' focus of attention all affect the memory encoding process (see Milne & Bull, 1999). Although all memory processes are important concepts for gathering information, the process of most interest to the current study is memory retrieval as a function of questioning.

One of the most important findings in memory research related to retrieval factors is the fact that memory is malleable and reconstructive. That is, the repeated processing of memory can cause it to change (Loftus, 1979; Simons & Chabris, 2011), often without the memory holder being aware that a change has occurred (Neath & Surprenant, 2003). Similar to encoding, research has identified a number of factors that affect the retrieval process, such as inferences (i.e., people making a guess about a memory; e.g., Loftus & Palmer, 1974), stereotypes (i.e., an attempt to fill in memory gaps with typecasts similar to the event in question; Kahneman & Tversky, 1973), partisanship (i.e., people with particular affiliations or loyalties may be biased in their reporting; Boon & Davies, 1996), scripts (i.e., reliance on *typical* information vs. *actual* information; Bower, Black, & Turner, 1979), emotional factors (e.g., negative emotions can hinder retrieval processes; Holmes, 1974), and context effects (i.e., cues from the environment that

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trigger memories; Godden & Baddeley, 1975). See Milne and Bull (1999) for a more in depth review of the above listed factors relative to questioning and memory.

Research has shown that the way questions are asked can result in different information being recalled (e.g., Loftus, 1975; Loftus, Altman, & Geballe, 1975; Loftus & Palmer, 1974; Loftus & Zanni, 1975; Loftus, Miller, & Burns, 1978; Read & Bruce, 1984; Warren & Lane, 1995). A classic study conducted by Loftus and Palmer (1974) demonstrated that simply changing one word within a question was enough to result in eyewitnesses providing drastically different answers. In the first experiment, participants were shown a film depicting a traffic accident and then asked to answer some questions about what they had witnessed. The researchers were most interested in the participants' answer to a question about the traveling speed of the vehicles involved in the accident (e.g., "About how fast were the cars going when they *hit* each other?"). To test whether the question in and of itself impacted the answers, the researchers placed participants ( $n = 45$ ) into five different groups, and used a different verb within this particular question to describe the action of the accident for each group. That is, the word describing the impact of the cars was interchanged for other words that conceivably changed in degree of severity (e.g., *smashed*, *collided*, *contacted*, or *bumped*). Results from the first experiment showed that participants rated the speed of the vehicles as travelling faster when *smashed* (40.8 mph) was used in the question as compared to *collided* (39.3 mph), *bumped* (38.1 mph), *hit* (34.0 mph), or *contacted* (31.8 mph),  $F'(5,55) = 4.65$ ,  $p < .005$ .

In Loftus and Palmer's second experiment, participants again watched a motor vehicle accident on film and were put into one of two different groups. The first group was asked "About how fast were the cars going when they *hit* each other?" while the second group was asked "About how fast were the cars going when they *smashed* into

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each other?" Similar to the first experiment, significant differences were found for rates of speed between the *smashed* (10.46 mph) and *hit* (8.00 mph) groups, with a medium effect size found ( $d = 0.40$ ). Both groups, however, were asked the question "Did you see any broken glass?" In reality, no broken glass was shown in the video depicting the car accident. Despite this, the participants in the *smashed* group (yes = 16) reported that they recalled seeing broken glass more often as compared to the *hit* group (yes = 7), yielding a medium effect size ( $d = 0.59$ ).

Loftus and Zanni (1975) were also able to demonstrate that changing one word in a question from being an indefinite article (i.e., *a*) to a definite article (i.e., *the*) produced different expectations and responses from participants. Following the same procedure outlined above (i.e., participants watched a scene from a car accident and were asked questions), the researchers asked the participants to answer a series of questions about the film; in particular, some questions pertained to items that had appeared in the film, while other questions pertained to items that were not present in the film. For example, half of the subjects would read the question "Did you see *a* broken headlight?" while the other half read "Did you see *the* broken headlight?". The results indicated that participants in the *definite* article condition reported seeing an item that was not present 15% of the time, whereas participants in the *indefinite* article condition reported seeing a non-existent item only 7% of the time. Compared to when the item in question was actually present, participants in the *definite* condition reported seeing the item 17% of time, while participants in the *indefinite* condition reported it 20% of the time (a lack of data resulted in not being able to be compute an effect size). Taken together, these studies demonstrated that the slightest change of how a question is framed can result in very different information recalled from memory. Such findings lend support toward the



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notion that questioners should aim to only ask 'good', as opposed to 'bad', questions for obtaining accurate information.

Given that accessing memory is a fundamental piece of the information-gathering process, truth-seeking questioners aim to avoid the contamination of the retrieval process through poor questioning – much the same way that officers are taught to secure a crime scene (see St-Yves, 2014). When it comes to questioning witnesses in the interview setting, the questioner is essentially trying to piece together a story based on the information provided by the witness. Therefore, questioning should be conducted in such a way that preserves the witnesses' memory. The questioner should avoid asking questions that may alter any information in the respondent's memory. But, is this done in reality?

### **1.2 Police Questioning**

Most of what we know about interviewing practices by criminal justice practitioners come from research on police interviews. Fisher, Geiselman, and Raymond (1987) are credited as conducting one of the first studies to analyze police interviews. Using a descriptive analysis of 11 video-taped interviews of eyewitnesses by eight different police investigators, the researchers found that most questions were very direct and elicited brief responses, and little or no assistance was given to enhance the witnesses' memory. With regard to question types asked, most were categorized as specific and/or direct types of questions (e.g., "What color was the suspect's shirt?"), while very few were classed as open-ended. According to Fisher and colleagues, a typical interview consisted of three open-ended ("good") questions and 26 short-answer or narrowly focused ("bad") questions. In other words, approximately 10% of all questions asked during the interviews were deemed to be appropriate for gathering several pieces of

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information. Moreover, other concerns such as interrupting the witness, excessive use of question-answer format, inappropriate sequencing of questions, and using a staccato style of questioning (i.e., abrupt speech, punctuated by pauses and interruptive of overall conversation) were also observed. It is important to note that the researchers did not provide operational definitions for what constituted open-ended vs. narrower scope questions; however, the examples provided throughout Fisher et al.'s manuscript suggest that open-ended questions consisted of questions akin to "Can you describe what happened?", while direct, short answer questions were "Do you remember whether...?". Without having access to the raw data, it is unknown how these authors quantified such question types.

Almost a decade later, Clifford and George (1996) found that approximately three quarters of questions asked by police interviewers were identified as closed yes-no, while less than 3% were identified as open-ended questions. Since these studies, there has been a push – largely from researchers in the United Kingdom (UK; e.g., Baldwin, 1992a, 1992b, 1993; Irving, 1980; Irving & McKenzie, 1989, 1993) – for proper interview training to be given to police officers conducting such interrogations. An alarming number of wrongful conviction cases in the UK led to the introduction of the Police and Criminal Evidence Act in 1986 (for further detail on this legislation, see Zander 1990), which resulted in new investigative interviewing techniques being developed that were heavily influenced by the principles and concepts in social psychology (e.g., Cognitive Interview; Fisher & Geiselman, 1992; PEACE; see Milne & Bull, 1999; see also Snook, Eastwood, & Barron, 2014). Although this new style of police interviewing was adopted by various police organizations in the UK and others internationally, data examining the

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questioning practices of many police agencies from around the globe have found less than stellar results (see Myklebust & Alison, 2000; Walsh & Milne, 2008).

Researchers have also examined the quality of police interviews in Canada. In their content analysis of 15 audio-taped police interview transcripts, Wright and Alison (2004) coded the questions that police officers asked to the interviewing witness. Specifically, the coded question types included those identified as closed yes-no, selection (i.e., comparable to “forced choice” as outlined in the present paper), identification (i.e., comparable to “probing” as outlined in the present paper), open, leading/misleading, re-asking, and clarify questions. The researchers also presented their data in a novel form by calculating the time distributions for each of the questions asked over the, on average, 40 minute interview. They found that officers asked a closed yes-no question once every 49 seconds; an identification (i.e., probing) question every minute; a clarification question once every two minutes and 29 seconds; a leading/misleading question once every three minutes and 35 seconds; a selection (i.e., forced choice) question once every six minutes and 13 seconds; an open-ended question once every six minutes and 15 seconds; and re-asked a question once every 10 minutes and 32 seconds.<sup>3</sup> Taken together, data from Wright and Alison’s study indicates that police interviews contain, on average, only a third of good quality questions; of this, however, less than 5% were open-ended questions. Almost two-thirds of the remaining questions, on average, were considered to be poor in nature.

More recently, Snook and colleagues (2010, 2012) replicated Wright and Alison’s (2004) core findings using a larger sample of police interviews and a wider selection of question types. In their analysis of 90 police interview transcripts, Snook and Keating (2010) found that, on average, approximately: 35% of questions asked were closed yes-

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no questions; 32% were probing; 16% were clarification; and 6% were open-ended; the remaining question types (i.e., multiple, re-asked, forced choice, leading, and opinion/statement) were found to be asked less than 5%. Similar trends were found in a subsequent study by Snook, Luther, Quinlan, and Milne (2012) in an examination of police interviews with suspects/accused persons. They found that approximately: 40% of the questions asked were closed yes-no; 30% probing; 8% clarification; 7% opinion/statement; 6% multiple; all other question types (the same questions identified by Snook & Keating) were asked less than 4%. It is worth noting is that open-ended questions comprised less than 1% of all questions asked, and according to the researchers, approximately over 60% of the suspect interviews did not contain a single open-ended question. Although Snook and colleagues (2010, 2012) analyzed a wider range of question types than Wright and Alison (2004), the findings and conclusions from all of these studies are similar; Canadian police officers are using the best questioning practices infrequently.

There have also been a number of formal inquiries launched by the Canadian courts exploring why miscarriages of justice have occurred in various cases (e.g., FPT Heads of Prosecutions Committee Working Group, 2004; Lamer, 2006; Hickman, Poitras, & Evans, 1989), and have identified inappropriate interviewing by the police as a major concern. In fact, one of the core recommendations from the *Report on the Prevention of Miscarriages of Justice* (FPT Heads of Prosecutions Committee Working Group, 2004) suggested that witness interviewers:

*should receive training about the existence, causes and psychology of police-induced confessions, including why some people confess to crimes they have not committed, and the proper techniques for the interviewing of suspects (and*

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*witnesses) that are designed to enhance the reliability of the product of the interview process* (p. 74; emphasis added by current author).

Moreover, specific recommendations from this report stated that police officers need to make great efforts toward preventing any contamination of the witness' evidence through unnecessarily communicating privy information to the witness (i.e., recommendation 103; e.g., asking leading and closed questions). It was also explicitly recommended that police interviewers should reserve their personal commentary on the case or the accused in order to prevent witness contamination (i.e., recommendation 104; e.g., offering opinions).

Interestingly, defence lawyers will raise faults in police interviews if the crime proceeds to trial (e.g., Barry, 2017). Pointing out such faults during court proceedings has the potential to result in evidence being dismissed (e.g., police interview that contains defendant's confession), and can lead to defendants being acquitted. Such an approach taken by defence lawyers essentially takes the police to task by indicating that the interviewing approaches and techniques used during their interrogation were wrong and, as a result, the malpractice by the police should warrant the lawyers' client dismissed of the charges (for examples, see *Ibrahim v. The King*, 1914; *Lam Chi-ming v. The Queen*, 1991; *R v. Mushtaq*, 2005; *R v. Prager*, 1972; *Saunders v. United Kingdom*, 1996). In some cases (e.g., *R v. Heron*, 2009; *United States v. LeBrun*, 2004), the defendants have been acquitted because interviewing officers either misled the accused about evidence during questioning or promised leniencies during the interview (Marcus, 2006; Williamson, 2006). Still, there are other court case examples where appellant lawyers have unsuccessfully challenged the police's interviewing and questioning practices (e.g.,

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*R v. Oickle*, 2000). Nonetheless, the strategy of pointing out poor police interviewing as a potential issue is still often raised as a defence argument.

The issue remains that if police officers are conducting substandard interviews with witnesses and suspects that results in questionable information, then it is not surprising that lawyers would point this out in the name of justice being served. However, if police officers are being accused of tainting evidence through the use of improper question practices, a natural follow-up question is how well are the questioners in the courtroom (i.e., lawyers) performing at the same task?

### **1.3 Courtroom Questioning**

In the courtroom setting, the term used for an interview is 'examination'. It is important to note, however, that while the purpose of a courtroom examination differs from a police interview (e.g., the aim of the police is to construct an accurate account of the events that transpired, whereas the lawyers' aim is to convince triers of fact to accept their version of the events; Kebbell et al., 2003; Westera et al., 2017), the process is largely the same in that witnesses are asked questions about their experience of a past event (i.e., the crime). Consequently, the same concerns surrounding the effects of questioning on memory applies. In fact, the magnitude of this concern increases given that many courtroom witnesses have been previously interviewed and questioned multiple times prior to taking the stand (e.g., during the police interview; at depositions). Studies have shown that as people are questioned multiple times about past events, their reported information becomes increasingly unreliable and inaccurate (see Roediger, Jacoby, & McDermott, 1996).

The types of questions that are asked to witnesses by lawyers will likely be dependent on the nature of the examination that the witness is undergoing. In the

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adversarial system, witness evidence is collected by one of two examinations: direct<sup>4</sup> or cross examination. A direct examination is conducted by the lawyer who has called the witness to the stand. This lawyer (i.e., the direct examiner) will elicit information from the witness by asking a series of questions that are considered to be relatively open in nature (Evans, 1995; Murphy & Barnard, 1994; Stone, 1995). That is, it is assumed by the courts that the witness is friendly to the side that has called them forward to testify.<sup>5</sup> Once the direct examiner has completed their questions to the witness, the opposing lawyer is subsequently given an opportunity to ask the witness a series of questions about the information that the witness just reported. For example, if the prosecuting lawyer has called the witness to the stand, then the defence lawyer would conduct the cross examination. The main purpose of cross examination is to test the quality of any of the evidence that has been presented during the direct examination (Evans, 1995), regardless of its accuracy (Henderson, 2002). As such, the questioning approach is often much less friendly than that observed in a direct examination (see Kebbell et al., 2003, 2004).

Importantly, cross examiners are permitted to ask the exact type of questions that directly contradicts the approaches that are recommended for obtaining complete and accurate accounts. In fact, Henderson (2002) described cross examination as “a virtual *how not to* guide to investigative interviewing” (p. 279). Many textbooks have written about cross examination strategies for discrediting the witness’ direct testimony, and include suggestions of always asking leading questions, attacking the witness’ credentials, and ensuring the witness feels pressure to recant their testimony (Evans, 1995; Glissan, 1991; Stone, 1995; Wellman, 1997). Not surprisingly, many others have also written about the challenges and problems associated with these aspects of the cross examination for expert and lay witnesses alike (e.g., Henderson, Heffer & Kebbell, 2016;

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Zajac, 2009). Nevertheless, cross examination is considered to be one of the most fundamental aspects of the adversarial system (Eichelbaum, 1989; Evans, 1995) as it allows the testing of the witness evidence given under direct examination to be scrutinized of any inaccuracies or inconsistencies. Cross examination also allows for subsequently eliciting extra, useful information in favour of the cross examiner's case (Evans, 1995; Yarmey, 1979).<sup>6</sup>

There have been ample studies examining various questioning components of the courtroom (e.g., Andrews & Lamb, 2016; Brenann, 1995; Danet 1980; Danet & Bogoch, 1980; Hanna, Davies, Crothers, & Henderson, 2012; Kebbell et al., 2003, 2004; Kebbell & Johnson, 2000; Murphy & Barnard, 1994; Perry et al., 1995; Westera et al., 2017; Zajac & Cannan, 2009; Zajac et al., 2003), with most examining the effects of confusing courtroom language (i.e., legal terminology and vocabulary) on witnesses. Specifically, most courtroom studies have focused on how questions phrased with complicated jargon or form (i.e., negatives, double negatives, complex syntax) impact the witness' confidence and accuracy. For example, a study by Perry and colleagues (1995) assessed how question forms presented by lawyers to child witnesses in the courtroom impacted understanding and accuracy of witness response. The results of this study showed that all participants had significantly less comprehension and accuracy in their response when asked complex (54%), as compared to simple (90%) questions. In a replication of Perry and colleagues' (1995) work, Kebbell and Johnson (2000) added an additional question type (e.g., leading questions) and used an adult population rather than children. Similar to the previous findings, confusing questions reduced the participants' accuracy ( $d = 1.64$ ) and confidence ( $d = 1.06$ ) in their answers. Moreover, Kebbell and Johnson noted that participants rarely asked for any of the confusing questions to be explained or clarified,



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suggesting that such an approach to questioning (i.e., use of complex and confusing language) by lawyers runs counter to the truth-seeking function of the court.

Less attention, however, has been dedicated to exploring the specific questions types that lawyers ask to witnesses in the courtroom, akin to studying of police interviews. Of the studies that have assessed courtroom questioning, most have been limited by small sample sizes (approximately 6 to 16 transcripts), or have focused on cases with a less generalizable sample of witnesses (e.g., children; intellectually disabled witnesses; Andrews & Lamb, 2016; Kebbell et al., 2004; Zajac et al., 2003). Although focused primarily on victims who were sexually assaulted, Kebbell, Deprez, and Wagstaff (2003), and Zajac and Cannan (2009) appear to be the only two studies that have quantified lawyers' questioning practices with an adult victim population.

In their study, Kebbell and colleagues (2003) investigated the frequency of question types asked during courtroom examinations of six alleged rape trials. The authors were interested in comparing the types of questions asked to complainants and defendants during both sets of examinations. The researchers employed a 2 (complainant vs. defendant) X 2 (direct vs. cross examination) quasi-experimental design. Specifically, some of the question types explored were open-ended, probing (although Kebbell et al. referred to this type as "closed questions"), yes-no questions (comparable to "closed yes-no questions" as outlined in the present paper), mildly leading questions, heavily leading questions, and multiple questions (see Kebbell et al., 2003 for additional question types considered). Kebbell et al. did not find any meaningful differences in the types of questions asked to a complainant or defendant overall; however, differences emerged between the questions asked during the direct and cross examinations. Significantly more open-ended and probing questions were asked during the direct examination, whereas

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significantly more closed yes-no, heavily leading, and multiple questions were asked (as expected) during the cross examination. More specifically, for direct examinations of complainants, approximately: 22% of questions were open-ended; 27% were probing; 49% were closed yes-no; 1% were heavily leading; and 3% were multiple. By contrast, for cross examinations of a complainants, approximately: 6% of questions were open-ended; 10% were probing; 82% were closed yes-no; 15% were heavily leading; and 9% were multiple. When the witness was a defendant, for direct (vs. cross) examinations, approximately: 20% (vs. 12%) of questions were open-ended; 27% (vs. 10%) were probing; 50% (vs. 78%) were closed yes-no; 1% (vs. 14%) were heavily leading; and 3% (vs. 7%) were multiple. In sum, Kebbell et al.'s (2003) findings suggest that most questions asked by lawyers are considered to be poor, or at the very least, constraining for the witness to respond fully.

Zajac and Cannan's (2009) study extended Kebbell et al.'s (2003) study by examining how lawyers asked questions to children vs. adult witnesses. An additional consideration of this study was exploring whether or not the type of lawyer asking the question (prosecutor vs. defence lawyer) had any effect on the quantity of questions asked. Among others, the types of questions considered by Zajac and Cannan (2009) were what they referred to as open (comparable to "probing questions" as outlined in the present paper), closed (comparable to a combination of "closed yes-no questions" and "forced choice questions" as outlined in the present paper), and leading questions (see Zajac & Cannan, 2009 for remaining coding categories). The results of their study found that prosecuting lawyers (vs. defence lawyers) asked significantly more proportionally open questions to both adult (45% vs. 11%) and children (34% vs. 11%), respectively. Prosecutors also asked significantly more proportionally closed questions to adults (40%)

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than defence lawyers (23%). Conversely, defence lawyers (vs. prosecutors) asked significantly more proportionally leading questions to both children (46% vs. 23%) and adults (66% vs. 15%). Based on this proportional data, these authors concluded that prosecutors and defence lawyers differed in questioning style. However, it is important to note for both the Kebbell et al. (2003) and the Zajac and Canan (2009) studies that questions types were not mutually exclusive; a single question might have been coded as both a closed and leading type of question.

### **1.4 Current Study**

To date, there has never been a published empirical study of the questioning practices of Canadian lawyers. The main goal of the current study was to assess the types of questions being asked to witnesses in the Supreme Court of Newfoundland and Labrador, and whether lawyers are adhering to best practices when engaging in a truth-seeking function. In order to conduct a worthwhile comparison with other studies (e.g., Kebbell et al., 2003; Snook & Keating, 2011; Snook et al., 2012; Zajac & Cannan, 2009), the questioning practices of lawyers were quantified as a proportion (i.e., mean percent) of questions asked during the examination. The aim of the current study was to merge the research designs outlined by Kebbell et al. (2003) and Zajac and Cannan (2009), and explore courtroom questioning as a function of examination type (direct vs. cross; e.g., Kebbell et al., 2003) and lawyer type (prosecuting vs. defence lawyer; e.g., Zajac and Cannan, 2009) collectively. Additionally, the question types outlined in the Snook and colleagues' (2010, 2012) studies were adopted for use in the current study because in comparison to other questioning studies (e.g., Kebbell et al., 2003; Zajac & Cannan, 2009; Wright & Allison, 2004), Snook et al.'s (2010, 2012) proposed questions offered more diverse possible utterances that could potential be captured during content analysis.

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Moreover, the work of Snook and colleagues was based upon the widely accepted proposals of question types as suggested by Griffiths and Milne (2006).

To add to the extant literature, the purpose of each question asked was also quantified in the present study. No prior studies appeared to have categorized the assumed purpose of why each question is asked by lawyers. Given that the Canadian court system is under duress due to the large volume of cases in limbo waiting to be tried, exploring the purpose of each question may yield information about time management in the courtroom. That is, if lawyers dedicate much of their questioning time to utterances that do not move the case forward (i.e., utterances not focused on gathering relevant facts and information), then such a malpractice approach has the potential to tie up valuable courtroom timelines, schedules, and resources. Moreover, spending unproductive time on topics or inquires that do not achieve the goal of the judiciary (i.e., seeking the truth) may result in longer than anticipated trials, and push other court cases further down the docket schedule. A recent Supreme Court of Canada ruling (*R v. Jordan*, 2016) set precedent that if a defendant cannot be tried before a judge within a reasonable amount of time, then the defendant's right to a speedy trial (see *Speedy Trial Act of 1974*, 2012) becomes violated, and the defendant's case is stayed (i.e., the case gets thrown out rendering the defendant free). Perhaps an assessment of the purpose behind each asked question can indicate how much time is dedicated toward seeking the truth.

Based on trends observed in other studies (e.g., Kebbell et al., 2003; Zajac & Cannan, 2009; Westera et al., 2017), it is expected that the questioning practices of Canadian lawyers' will be similar to lawyers from other commonwealth countries. More precisely, cross examinations are expected to have significantly more leading questions than direct examinations, whereas direct (vs. cross) examinations will contain more

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probing and open-ended questions. However, it also expected that the frequency of asking open-ended questions will be relatively minimal. In terms of the types of questions asked by lawyers, it is expected that prosecutors (vs. defence lawyers) will ask a higher proportion of open-ended and probing questions, whereas defence (vs. prosecuting lawyers) are expected to ask more closed yes-no and leading questions.

## Chapter 2: Methods

The current study used publicly available, archival data from the Supreme Court of Newfoundland and Labrador (Trial Division) in St. John's. Based on the rules and recommendations provided by the *Tri-Council Policy Statement* (Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, and Social Sciences and Humanities Research Council of Canada, 2014), no Institutional Review Board approval was required for this study. A consultation with the Chair of the Interdisciplinary Committee on Ethics in Human Research board at Memorial University of Newfoundland confirmed that a formal ethics review was not required (R. Adams, personal communication, 2016). Measures were nevertheless taken to ensure that any personally identifying information within the archival data (e.g., case identification numbers, names of people involved in court proceedings) were replaced with anonymized identifiers. In other words, each case and names of persons involved (e.g., lawyer, judge, clerk, and witness) were assigned an arbitrary numeric value for the purposes of data entry and analyses.

### 2.1 Data Collection Procedure

Verbatim transcriptions of 12 court cases, in the form of Microsoft Word files, were obtained from the Supreme Court of Newfoundland and Labrador. The courthouse clerk randomly selected cases from archival files for this study and provided digital copies of transcribed cases. Embedded in each court case were discrete sections with descriptive headings (e.g., administrative procedures, closing summations by lawyers, lawyers' examinations of witnesses on the stand). Any unique direct or cross examinations were individually extracted in its *entirety* into a new Word document. For

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ease of analysis, multiple new documents each containing only one unique examination (i.e., a direct or cross) of a single witness were then created.

The method of separating each examination from the raw transcripts was facilitated by certain indicators in these transcripts. The starting point of each examination (i.e., direct or cross) was always the section heading; it was always bolded, underlined, and in all capital letters (e.g., **MS. JANE DOE, X'd, SWORN, BY MR. JOHN SMITH**). The first name indicated the name of the witness, and the second name was the name of the lawyer conducting the examination. The ending point of each examination was identified in one of two ways. First, the transcript was read to determine when the examination was coming to a close (e.g., "No further questions, my lord"), which was often made clear when a new section heading indicated that the witness was now being questioned by the opposing lawyer (e.g., **MS. JANE DOE, XX'd BY MS. JANE SMITH**). The second indicator was when the transcriber wrote "**(WITNESS EXCUSED)**", which was typically written by the transcriber when all of lawyers had completed their examinations of the witness, and the judge stated explicitly that the witness could step down from the stand. See Appendix A for an example of a unique examination.

**2.1.1 Special cases of the data collection procedure.** Witnesses were sometimes required to step down from the stand during the middle of the examination. For instance, the opposing lawyer or the judge may develop a concern related to an issue brought up during the examination and require a *voir dire* without the witness present. This was indicated by the transcriber writing "**(WITNESS ASIDE)**". Any time that this sort of scenario took place, only the sections that the witness was on the stand were retained, and all other information that occurred while the witness was off the stand was excluded.

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Once the witness was placed back on the stand, as indicated by a section heading (e.g., **MS. JANE DOE RESUMES THE STAND, XX'd BY MS. JANE SMITH**), the continued examination was retained until one of the aforementioned boundary indicators were identified.

Beyond the aforementioned exceptions, one additional decision was made with respect to any follow-up examinations outside of the direct and cross examinations. Follow-up examinations occurred in eight of the court cases; specifically, there were 17 re-direct and two re-cross examinations. Given that the lawyer conducting the re-direct (or re-cross) examination was always the same lawyer who conducted the original direct (or cross) examination, the re-direct (or re-cross) examination was always paired with the original direct (or cross) examinations to make a single unique examination document, respectively. It is important to note that the rules of engagement for direct and cross examinations are the same for re-direct and re-cross examinations (see Evans, 1995). For coding purposes, however, the order that the examinations occurred in the actual trial (e.g., direct, cross, re-direct, re-cross) was followed. Put differently, the direct and cross examinations would be read in their entirety (and coded) prior to reading and coding the re-direct portion of the direct examination; likewise, the re-direct examination was read/coded before reviewing the re-cross examination (if applicable). Given the nature of the data transcription (e.g., section titles indicating type of examination), the coder (i.e., author) was not blind to the type of examination being coded. No measures were taken to blind the coder to this information because the language used throughout the transcribed examinations, by various courtroom players (e.g., judge; "It's your witness for cross examination, Ms. Hines"), clearly indicated the type of examination being conducted.



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On average, 7.58 ( $SD = 5.04$ ,  $Range = 1 - 18$ ) unique examinations (i.e., direct and/or cross) were extracted from a single court case file. Any sections of the court cases where an examination of a witness was being conducted was retained for analysis; all other sections and associated information were excluded from consideration.

### 2.2 Sample

**2.2.1 Descriptive statistics for cases.** The 12 cases occurred between 1991 and 2014. Six of the cases pertained to crimes against persons (e.g., assault), and six cases were classified as hybrid (i.e., crimes against property and person; e.g., trafficking a controlled substance; see Table 1; see also Appendix B, Section 1 for more information related to crime types).

Ten cases had one prosecutor and one defence lawyer, one case had two prosecutors and two defence lawyers, and one case had two prosecutors and one defence lawyer. Twenty-five different lawyers were involved in the 12 cases (two lawyers were each involved in two different cases), and 16 (64.00%) of these lawyers were men.

**2.2.2 Descriptive statistics for examinations.** Ninety-one unique examinations were extracted from the 12 court cases; there were 47 direct examinations and 44 cross examinations, and there were 47 unique witnesses examined. Twenty-six (55.32%) of the witnesses were identified as being a prosecution witness (i.e., called to the stand by the prosecutor and underwent a direct examination led by the prosecutor), while the remaining 21 (44.68%) witnesses were defence witnesses (i.e., called and underwent direct examination by the defence lawyer). In terms of witness type, 23 (48.94%) were eyewitnesses, 15 (31.91%) were police officers, five (10.64%) were defendants, three (6.38%) were victims, and one (2.13%) was a character witness. Twenty-nine (61.70%) of the witnesses were men. With the exception of three witnesses whom only experienced

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a direct examination, all other witnesses underwent both a direct and cross examination (see Table 2 for the gender of each witness type, based on pronouns, for each court case).

The mean number of examinations conducted by each of the 25 different lawyers was 3.64 ( $SD = 2.86$ ,  $Range = 1 - 9$ ). Of the 91 unique examinations, 47 (51.65%) were conducted by a prosecutor and 44 (48.35%) were conducted by a defence lawyer.

Table 1. *Number of Direct and Cross Examinations as a Function of Year and Crime Type*

<b>Case #</b>	<b>Year</b>	<b>Crime Type</b>	<b>Number of Direct Examinations</b>	<b>Number of Cross Examinations</b>
1	1991	Person	9	9
2	2006	Hybrid	1	1
3	2008	Hybrid	3	3
4	2009	Hybrid	3	3
5	2009	Hybrid	2	2
6	2010	Person	3	3
7	2012	Hybrid	1	1
8	2012	Person	6	5
9	2013	Person	8	8
10	2013	Person	4	2
11	2013	Hybrid	4	4
12	2014	Person	3	3

Table 2. *Witness Type, Witness Gender, and Number of Examinations for Each Witness*

Case #	Witness	Gender	# of Examinations	Case #	Witness	Gender	# of Examinations
1	Eyewitness	Female	2	8	Police Officer	Male	2
	Victim	Female	2		Police Officer	Male	2
	Eyewitness	Male	2		Police Officer	Male	2
	Victim	Female	2		Police Officer	Male	2
	Victim	Female	2		Police Officer	Male	1
	Character	Male	2		Police Officer	Male	2
	Eyewitness	Female	2	9	Eyewitness	Female	2
	Eyewitness	Male	2		Eyewitness	Female	2
	Eyewitness	Male	2		Eyewitness	Male	2
2	Defendant	Male	2		Eyewitness	Female	2
	3	Police Officer	Male		2	Eyewitness	Male
		Police Officer	Male	2	Eyewitness	Male	2
Defendant		Male	2	Eyewitness	Female	2	
4	Police Officer	Male	2	10	Defendant	Male	2
	Police Officer	Male	2		Police Officer	Male	1
	Eyewitness	Male	2		Police Officer	Female	1
5	Police Officer	Male	2		11	Eyewitness	Female
	Police Officer	Male	2	Eyewitness		Female	2
6	Eyewitness	Female	2	Police Officer		Male	2

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	Eyewitness	Male	2		Defendant	Male	2
	Eyewitness	Female	2				
7	Eyewitness	Male	2	12	Eyewitness	Female	2
					Eyewitness	Female	2
					Eyewitness	Female	2

*Note.* Under the heading “# of Examinations”, a two (2) indicates that the witness underwent both a direct and cross examination, whereas a one (1) indicates that the witness underwent a direct examination only.

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### 2.3 Coding

In addition to the main independent variables of interest outlined above, there were various nuisance variables that were recorded. A content dictionary (see Appendix B) and coding guide (see Appendix C) were developed based on previous research (e.g., Griffiths & Milne, 2006; Snook & Keating, 2010; Snook et al., 2012; Wright & Allison, 2004) for the coding of utterance types and identifying other relevant information (e.g., whether an examination was a direct or cross).

The number of utterances within each unique examination transcript was coded, along with the frequency of utterance types spoken, and the assumed purpose of each utterance type. The following nuisance variables were also coded: the assumed gender of each lawyer (1 = male vs. 2 = female), the type of witness on the stand (1 = victim, 2 = eyewitness, 3 = police officer, 4 = defendant, 5 = character), the assumed gender of each witness (1 = male vs. 2 = female), the type of crime the alleged defendant committed (1 = person, 2 = property, 3 = hybrid, or 4 = unknown), and the year that the trial took place (assigned a numeric value equal to the year; i.e., the year 2013 was entered as 2013).

The following 13 utterance types were coded (See Appendix B, specifically Section 3.1, for additional details about each type):

*Open-ended:* These utterances invite the witness to recall answers freely from memory. They allow for a wide range of responses, and typically start with “tell,” “explain,” or “describe.” For example, “Tell me about the argument with your wife” would constitute an open-ended question.

*Probing:* These utterances tap into cued recall memory and tend to generate answers that are narrower in scope compared to those provided from open-ended questions. The goal of this type of question is to obtain additional

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information from the witness. They usually commence with “who,” “what,” “why,” “where,” “when,” or “how”. An example of a probing question would be, “What part of her body hit the ground first?”

*Closed yes-no:* These utterances tap into recognition and are typically answered with a “yes” or “no” response. An example of a closed yes-no question would be, “Did he have his face covered?”

*Leading:* This type of utterance suggests/implies an answer to the witness. That is, the desired answer is embedded in the question. For example, the question “You were drunk, right?” constitutes a leading question.

*Forced Choice:* This type of utterance only offers the witness a limited, usually two, number of response options. “Did you kick or punch the other woman?” would be an example of a forced choice question.

*Opinion:* This involves posing a personal opinion or belief to a witness related to the allegations before the court. For example, “I think you assaulted Mr. Norman” would be classified as an opinion.

*Statement:* This refers to a statement of fact. This variable is coded for utterances that dictate the direction of where the conversation is going, or is a verbal declaration that is not in the form of a question. For example, “Now Ms. Thomas, that water is there for you” would be coded as a statement.

*Multiple:* This utterance type involves the questioner asking several questions at once, without giving the witness a chance to respond after each question. An example of this would be, “How did you get there? What did you do inside? Did you say anything to him?”

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*Re-asked:* This variable is scored if the questioner re-asks a question that the witness has already answered at an earlier point in the examination. An example of a re-asked utterance would be as follows: “Lawyer: Where did you go last night? Witness: Nowhere. I stay home. Lawyer: *Okay, come on Fred, where did you go out to last night?*” (re-asked question emphasized).

*Clarification:* In this utterance type, the questioner duplicates or paraphrases the answer that the witness has given in order to provide the questioner with a better understanding what the witness said. An example of a clarification question would be as follows: “Witness: John said he went to a movie. Lawyer: *Okay, so John went to a movie?* Witness: Yes, that’s right.” (clarification question emphasized).

*Facilitators:* This refers to verbal utterances that encourages the flow of conversation, or are said between utterance spoken by someone else (i.e., witness, judge, clerk, opposing attorney). For example, “Um-hmm”, “Yes”, or “Okay” would be coded as facilitators.

Not all utterances could be classified into the aforementioned types. As a result, the following two types were added to the coding guide (see Appendix B, specifically Section 3.1, for additional details and information about each type):

*Command:* This refers to a questioner giving a directive or telling the witness to do something. For example, utterances like “Just point him out.” or “Speak up now” would be examples of commands.

*Incomplete:* This is coded when the utterance is not finished being spoken because the questioner was interrupted or cut off by another speaker or witness, or

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because the questioner did not complete the thought. For example: “So, how often would you go to –” would be coded as incomplete utterances. Additionally, utterances deemed “(inaudible)” or “(unintelligible)” by the transcriber are also coded as incomplete. For example: “Okay, and (unintelligible).” would also be coded as incomplete.

The following three purpose types were also coded (see Appendix B, specifically Section 4.1, for additional details and information about each type):

*Administrative:* This refers to any utterance that is considered to be a procedural aspect of the courtroom (i.e., housekeeping matters). It can be legal actions or references to any aspect unrelated to the case/charges being heard. For example, if the judge or lawyer tells the witness that the microphone is not there to amplify their voice, then the purpose type of that utterance would be coded as administrative.

*Case Based:* This refers to any utterance that is both directly and indirectly related to the case being heard. For example, any questions asking about the crime, or information leading up to the crime would be scored as case-based. Importantly, there are two subcategories of case-based utterance purposes types that need to be sub-scored. The first subtype is called *information gathering*, and these utterance purpose types target unique details of what transpired with respect to the crime. For example, “Lawyer: Okay, just describe what happened when you saw the body on the floor” would be coded as an open-ended question with an information gathering case-based purpose subtype. The second subtype is called *challenging the accounts/details*, and these utterance purpose types occur



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when the questioner raises points in order to challenge the reliability of the witness' accounts. For example, "Lawyer: Now, at least one officer asked you whether you touched her, and at that time you said that you didn't remember. Now you're saying you never touched her. Do you see any difference in that?" would be coded as a closed question with a challenging the accounts/details case-based purpose subtype.

*Purpose Unknown:* This purpose type is to say that the utterance's purpose does not fit into the category of case-based or administrative (as outlined above). Typically, purpose unknown is coded for any utterances that have been coded as an *incomplete* or *facilitator* utterance type.

### **2.4 Inter Rater Reliability**

Reliability of the data were measured by having a secondary, independent individual code 19 (20.88%) random examination transcripts; eight direct and 11 cross examinations. The research assistant underwent training to learn about the practical aspects of coding transcripts, the structure and content of the coding guide, and the content dictionary. The secondary coder was blind to the expectations of the study. In addition, the research assistant practiced coding some examination transcripts (not included in the current study sample) prior to commencing the inter rater coding duties. The first step for the research assistant was to count the number of identified interlocutor utterances (based on the content dictionary) in each unique examination transcript. A total of 2,183 utterances were considered in the reliability analysis, and there was disagreement on what constituted a complete utterance for only 16 of the utterances.<sup>7</sup> The agreement between coders, measured using Cohen's Kappa (Cohen, 1960), for utterance ( $\kappa = .70$ ) and purpose ( $\kappa = .83$ ) types was excellent (Landis & Koch, 1977).

## Chapter 3: Results

### 3.1 Total Utterances

A total of 8,312 utterances were extracted from the 91 unique examinations. Since the sole focus of the study was to analyze lawyers' questioning practices, a total of 1,039 utterances were removed because they were spoken by a judge ( $n = 984$ ), clerk ( $n = 54$ ), or an unidentified speaker ( $n = 1$ ). An additional 1,116 utterances were removed prior to analyses because they were either statements ( $n = 880$ ), incomplete phrases ( $n = 173$ ), or commands ( $n = 63$ ) because they were indirectly related to the information-gathering process. In other words, 15% of the utterances were not actual questions to witnesses. Opinions were retained for analyses because of their inherent objective in the courtroom setting is to present their version of the case facts.

The number of utterances comprising the final sample was 6,157. When split by examination type, 3,106 (50.45%) of the utterances occurred during a direct examination, and the remaining 3,051 utterances occurred during the cross examinations. When split by lawyer type, 3,459 (56.18%) of the total utterances were spoken by prosecutors, and the remaining 2,698 utterances were spoken by defence lawyers.

### 3.2 Utterance Types: Descriptive Statistics

The average number of utterances per examination was 67.66 ( $SD = 47.99$ ,  $N = 91$ ,  $Range = 14 - 220$ ,  $95\% CI = 57.67, 77.65$ ). When broken down by lawyer type, the mean number of utterances spoken by prosecutors was 72.40 ( $SD = 43.82$ ), and was 67.50 ( $SD = 52.11$ ) for defence lawyers. When broken down by examination type, direct examinations contained, on average, 66.09 ( $SD = 46.36$ ) utterances, and cross examinations contained 69.34 ( $SD = 50.16$ ) utterances.

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The distribution of utterance types is contained in Table 3, and shown in Figure 1. As can be seen, the type of utterance spoken most frequently were closed yes-no questions, followed by probing and leading questions. Open-ended questions were the third least spoken utterance in all transcripts, having comprised less than one percentage of all utterances asked per examination. Taken together, 'good questions' (i.e., open-ended and probing) accounted for 22.03% of all utterances.

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Table 3. Mean Percentage, Standard Deviation, and Confidence Intervals of Utterance Type as a Function of Examination Type and Lawyer Type

Utterance Type	Mean Percentage (N = 91)	Examination Type		Lawyer Type	
		<i>Direct</i> (n = 3,106)	<i>Cross</i> (n = 3,051)	<i>Prosecutor</i> (n = 3,459)	<i>Defence</i> (n = 2,698)
Closed	28.43 (11.13) [26.11, 30.74]	32.40 (10.90) [29.20, 35.60]	24.18 (9.82) [21.19, 27.17]	30.47 (11.50) [27.10, 33.85]	26.24 (10.41) [23.08, 29.40]
Probing	21.59 (14.19) [18.63, 24.55]	29.39 (13.89) [25.31, 33.47]	13.26 (8.82) [10.58, 15.94]	22.47 (14.14) [18.32, 26.62]	20.65 (14.35) [16.29, 25.01]
Leading	20.14 (16.00) [16.81, 23.47]	10.53 (8.91) [7.91, 13.15]	30.41 (15.55) [25.68, 35.14]	19.30 (16.28) [14.52, 24.07]	21.05 (15.83) [16.23, 25.86]
Clarification	10.38 (7.54) [8.81, 11.95]	7.90 (4.98) [6.44, 9.36]	13.04 (8.87) [10.34, 15.73]	9.40 (8.48) [6.92, 11.89]	11.43 (6.32) [9.50, 13.35]
Facilitator	9.19 (10.31) [7.05, 11.34]	9.22 (10.33) [6.18, 12.25]	9.17 (10.42) [6.00, 12.34]	7.92 (9.81) [5.03, 10.80]	10.56 (10.77) [7.29, 13.83]
Multiple	7.09 (4.23) [6.21, 7.97]	7.07 (3.98) [5.90, 8.24]	7.11 (4.54) [5.73, 8.49]	6.93 (3.94) [5.77, 8.08]	7.27 (4.56) [5.88, 8.65]
Forced Choice	2.14 (2.83) [1.55, 2.73]	2.49 (3.14) [1.57, 3.42]	1.75 (2.42) [1.02, 2.49]	2.36 (2.65) [1.58, 3.13]	1.90 (3.02) [0.98, 2.82]

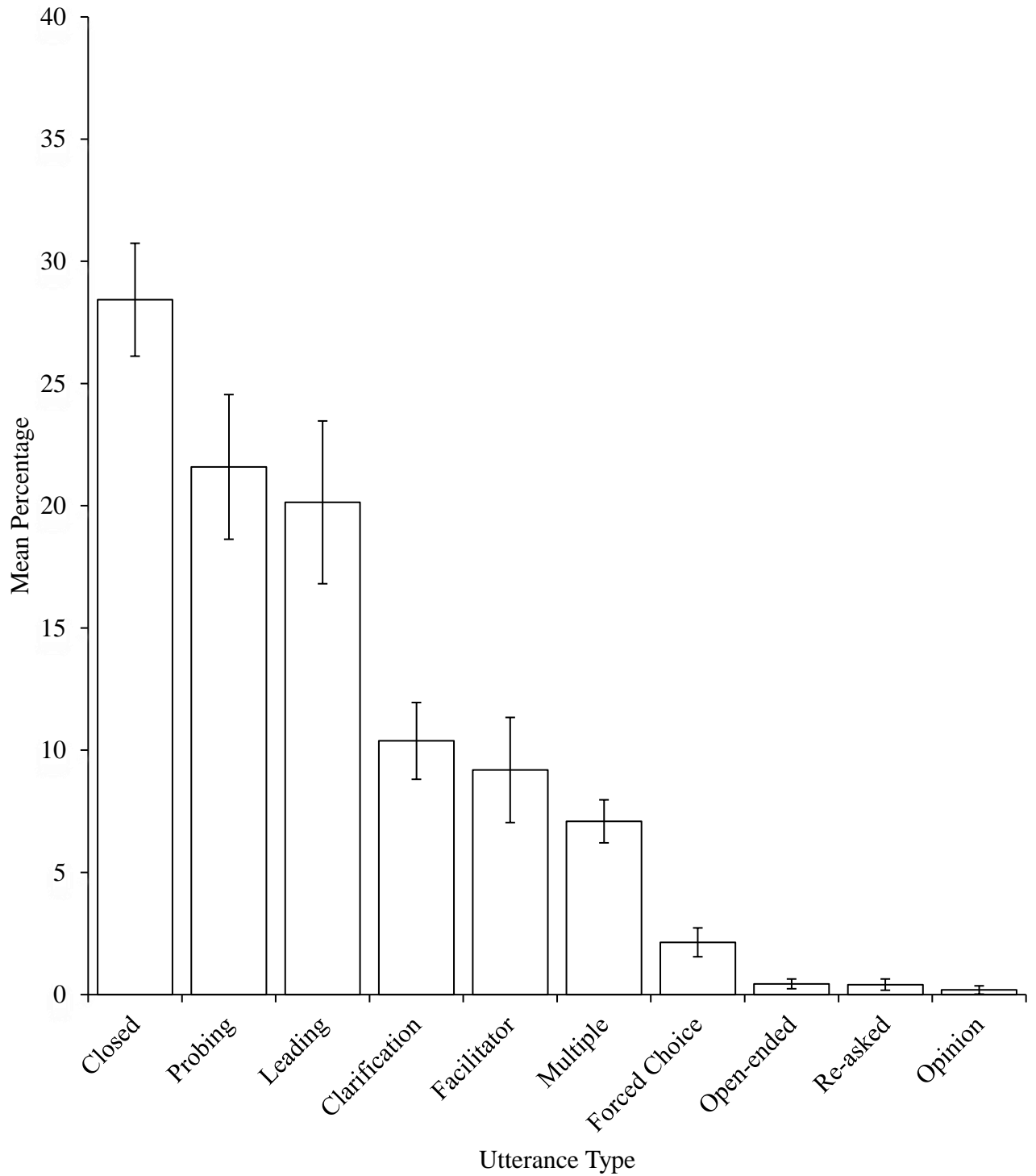
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Open-ended	0.44 (0.99) [0.23, 0.64]	0.78 (1.27) [0.40, 1.15]	0.07 (.25) [0.00, .15]	0.51 (1.06) [0.20, 0.82]	0.36 (0.92) [0.08, 0.64]
Re-asked	0.41 (1.12) [0.18, 0.64]	0.19 (0.57) [0.02, 0.35]	0.65 (1.47) [0.20, 1.09]	0.43 (1.32) [0.04, 0.82]	0.39 (0.87) [0.13, 0.66]
Opinion	0.19 (0.82) [0.02, 0.36]	0.03 (0.20) [0.00, 0.09]	0.37 (1.14) [0.02, 0.71]	0.23 (1.02) [0.00, 0.53]	0.16 (0.52) [0.00, 0.32]

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*Note.* The Standard Deviations are contained within the round brackets, while the 95% Confidence Intervals are contained within square brackets.

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*Figure 1.* Mean percentage of utterance type, and associated 95% confidence interval per examination ( $N = 91$ )

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### 3.3 Utterance Types: Step-Wise Regression

A step-wise regression was performed on each of the ten question types using eleven predictors. The eleven predictors included: examination type (1 = direct, 2 = cross); lawyer type (1 = prosecutor, 2 = defence); lawyer gender (1 = male, 2 = female); dummy variables of whether the person on the stand was a victim, eyewitness, police officer, defendant, or character (each individual variable, 0 = no, 1 = yes); witness gender (1 = male, 2 = female); crime type (1 = person, 3 = hybrid); and year of court case (entered as a numeric expression). The correlations between each of the predictors are contained in Table 4. As can be seen, there were significantly negative correlations between the year that the examination took place and male lawyers ( $p < .003$ ), and with witnesses who were either a victim ( $p < .001$ ) or a character witness ( $p < .006$ ). There was a significant positive correlation between the year and witnesses who were a police officer ( $p < .018$ ). Crime type was significantly positively correlated with male witnesses ( $p < .002$ ), and witnesses who were a police officer ( $p < .005$ ) or a defendant ( $p < .035$ ). Crime type, however, was significantly negatively correlated with eyewitnesses ( $p < .006$ ). Prosecuting lawyers were significantly negatively correlated with male lawyers ( $p < .002$ ). Victim witnesses were significantly negatively correlated with both eyewitnesses ( $p < .011$ ) and male witnesses ( $p < .002$ ). Eyewitnesses were found to be significantly negatively correlated with witnesses who were police officers ( $p < .001$ ), or a defendant ( $p < .002$ ), and male witnesses ( $p < .001$ ). Police officers were significantly negatively correlated with defendants ( $p < .031$ ), but significantly positively correlated with male witnesses ( $p < .001$ ). Lastly, the defendant was found to be significantly positively correlated with male witnesses ( $p < .009$ ). All other correlations were non-significant.

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Moreover, the correlation test found that there was no multicollinearity among any of the independent variables (all  $r_s < |.67|$ ).



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Table 4. *Correlations between Predictor Variables (N = 91)*

	Year	Crime Type	Direct	Prosecutor	Male Lawyer	Victim	Eyewitness	Police Officer	Defendant	Character
Crime Type	.20	-	-	-	-	-	-	-	-	-
Direct	.02	-.02	-	-	-	-	-	-	-	-
Prosecutor	.02	-.02	.08	-	-	-	-	-	-	-
Male Lawyer	-.32*	-.11	.05	-.33*	-	-	-	-	-	-
Victim	-.52*	-.18	-.01	-.01	.18	-	-	-	-	-
Eyewitness	.04	-.29*	-.03	-.03	-.02	-.27*	-	-	-	-
Police Officer	.25*	.30*	.05	.05	-.18	-.17	-.66*	-	-	-
Defendant	.13	.22*	-.01	-.01	.09	-.09	-.36*	-.23*	-	-
Character	-.29*	-.10	-.01	-.01	.10	-.04	-.15	-.10	-.05	-
Male Witness	.09	.33*	.00	.00	-.15	-.34*	-.47*	.47*	.28*	.12

Note. \*  $p < .05$

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The zero-order correlations can be found in Table 5. As can be seen, open-ended questions were significantly positively correlated with direct examinations ( $p < .001$ ). Probing questions were significantly negatively correlated with the year that the trial took place ( $p < .016$ ), but were significantly positively correlated with direct examinations ( $p < .001$ ). Closed yes-no questions were significantly positively correlated with direct examinations ( $p < .001$ ), witnesses who were male ( $p < .016$ ) and witnesses who were police officers ( $p < .035$ ), but were significantly negatively correlated with eyewitnesses ( $p < .019$ ). Leading questions were significantly negatively correlated with direct examinations ( $p < .001$ ). Opinions were significantly negatively correlated with direct examinations ( $p < .048$ ) and defendant witnesses ( $p < .011$ ). There was also a significant negative correlation between multiple questions and eyewitnesses ( $p < .015$ ), re-asked questions and year of trial ( $p < .007$ ), and also a significant negative correlation with clarification questions and direct examinations ( $p < .002$ ). Facilitators were significantly positively correlated with the year that the trial went to court ( $p < .001$ ) and the type of crime that took place ( $p < .045$ ). All other correlations were non-significant and the correlation test showed that there was no multicollinearity among the utterance types and independent variables (all  $r_s < |.63|$ ).

Given the large number of independent variables contained within all of the unique transcripts, paired with the fact that there were 10 different dependent variables, a Bonferroni's correction was applied to the significance cut off value in order to reduce the chances of Type I error from occurring due to multiple pairwise tests being conducted on the data. Therefore, the new alpha value for the regression test was .005 (i.e.,  $\alpha = .05/10$ ).

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Table 5. Zero-Order Correlations between Utterance Type and Predictors ( $N = 91$ )

Utterance Type	Year	Crime Type	Direct	Prosecutor	Male Lawyer	Victim	Eyewitness	Police Officer	Defendant	Character	Male Witness
Open	.18	.14	.36*	.08	.03	-.06	.12	-.10	.02	-.07	-.13
Probing	-.25*	.07	.57*	.06	.19	.05	.05	-.09	.02	.00	.02
Closed	-.13	-.15	.37*	.19	-.16	.01	-.25*	.22*	-.01	.16	.25*
Leading	.09	-.19	-.62*	-.06	-.18	.08	.05	-.16	.09	.02	-.06
Forced Choice	.08	-.01	.13	.08	-.10	.04	-.07	.17	-.12	-.07	-.03
Opinion	.13	-.04	-.21*	.04	.03	-.06	-.04	-.10	-.27*	-.04	.05
Multiple	.05	.03	-.01	-.04	.11	.14	-.26*	.17	.08	-.04	.05
Re-asked	-.29*	-.12	-.21	.02	.17	.01	.13	-.09	-.06	-.06	.11
Clarification	-.07	.18	-.34*	-.14	.06	-.07	.14	-.03	-.11	-.04	-.10
Facilitators	.36*	.21*	.00	-.13	.12	-.21	.13	.07	-.08	-.12	-.15

Note. \*  $p < .05$

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A step-wise regression using the open-ended utterance type as the dependent variable revealed that examination type emerged as a significant predictor of open-ended questions,  $F(1, 89) = 13.25$ ,  $\beta = -.36$ ,  $p < .001$ ,  $R^2 = .13$ . Specifically, lawyers' tendency to use open-ended questions with witnesses on the stand was higher for direct examinations. Moreover, as can be seen in Table 3, direct examinations contained proportionally more open-ended questions than did cross examination ( $d = 0.78$ ).

The step-wise regression analysis using the probing utterance type as the outcome variable indicated that two predictors (examination type and year) explained 40% of the variance for probing questions,  $F(2, 88) = 28.93$ ,  $p < .001$ . That is, lawyers' tendency to use probing questions with witnesses was higher in direct examinations ( $\beta = -.58$ ,  $p < .001$ ), and during earlier years (i.e., cases that went to court further in the past;  $\beta = -.27$ ,  $p < .003$ ). As shown in Table 3, direct examinations contained proportionally more probing questions than cross examination ( $d = 1.39$ ).

The step-wise regression analysis using the closed yes-no utterance type as the outcome variable also found examination type to be a significant predictor of closed yes-no questions,  $F(1, 89) = 14.23$ ,  $\beta = -.37$ ,  $p < .001$ ,  $R^2 = .14$ . Direct examinations contained proportionally more closed yes-no questions than did cross examinations ( $d = 0.79$ ; see Table 3)

The step-wise regression analysis using the leading utterance type as the dependent variable revealed that examination type significantly predicted the use of leading questions,  $F(1, 89) = 56.83$ , ( $\beta = .62$ ,  $p < .001$ ,  $R^2 = .39$ ). That is, lawyers' spoke proportionally more leading utterances during the cross examinations. Cross examinations contained proportionally more leading questions than direct examinations ( $d = 1.57$ ; see Table 3).

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The step-wise regression analysis with clarification questions as the outcome variable found that examination type also predicted the use of clarification questions, as well,  $F(1, 89) = 11.81, p < .002, \beta = .34, R^2 = .12$ . That is to say, lawyers' use of clarification utterances was higher during cross examinations. Cross examinations contained proportionally more clarification utterances than did direct examinations ( $d = 0.71$ ; see Table 3).

The step-wise regression analysis using facilitators as the outcome variable found that year emerged as a significant predictor of using facilitators,  $F(1, 89) = 13.53, \beta = .36, p < .001, R^2 = .13$ . Put differently, lawyers tended to use facilitators more often in case that went to court a short time ago (i.e., tried in more recent years).

All other step-wise regression analyses conducted with the remaining utterance types as the outcome variable did not find any other independent variables emerging as significant predictors (all  $ps > .005$ ).

### **3.4 Purpose Types: Descriptive Statistics**

In terms of the purpose of each utterance, 89.73% of the utterances were used to obtain information relevant to the case ( $SD = 10.62, 95\% CI = 87.52, 91.94$ ). Specifically, 87.92% of the total utterances were classified as information gathering ( $SD = 10.51, 95\% CI = 85.73, 90.11$ ), and 1.81% were classified as challenging the accounts/details of the witness ( $SD = 3.56, 95\% CI = 1.07, 2.55$ ). Only 1.06% of the utterances were considered to be administrative in nature ( $SD = 1.89, 95\% CI = 0.67, 1.45$ ), and 9.21% of the utterances were considered to have an unknown purpose ( $SD = 10.33, 95\% CI = 7.06, 11.36$ ).

The distribution of purpose types as a function of examination type and lawyer type is shown in Table 6. As can be seen, the most frequent purpose type was information

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gathering, followed by unknown, challenges, and administrative. Specifically, information gathering purposes were found to be proportionally higher in direct (vs. cross) examinations, and spoken proportionally more often by prosecutors (vs. defence lawyer). Utterances with an unknown purpose were proportionally higher in direct (vs. cross) examinations, and spoken proportionally more often by defence lawyers (vs. prosecutors). Challenging purposes were proportionally most frequently spoken by defence lawyers (vs. prosecutors), and were significantly proportionally higher in cross (vs. direct) examinations. Utterances that were administrative in purpose were proportionally higher in direct (vs. cross) examinations, and spoken proportionally more frequently by prosecutors (vs. defence lawyers).

Table 6. *Mean Percentage, Standard Deviation, and Confidence Intervals of Purpose Type as a Function of Examination Type and Lawyer Type*

Purpose Type	Examination Type		Lawyer Type	
	<i>Direct</i> ( <i>n</i> = 3,106)	<i>Cross</i> ( <i>n</i> = 3,051)	<i>Prosecutor</i> ( <i>n</i> = 3,459)	<i>Defence</i> ( <i>n</i> = 2,698)
Information Gathering	89.25 (10.86) [86.06, 92.43]	86.51 (10.06) [83.45, 89.57]	89.18 (9.84) [86.29, 92.07]	86.58 (11.14) [83.20, 89.97]
Unknown	9.24 (10.36) [6.20, 12.28]	9.17 (10.42) [6.00, 12.34]	7.94 (9.85) [5.05, 10.83]	10.56 (10.77) [7.29, 13.83]
Challenge	.37 (1.30) [-.01, .76]	3.34 (4.48) [1.98, 4.70]	1.70 (3.45) [.69, 2.71]	1.92 (3.71) [.80, 3.05]
Administrative	1.14 (2.06) [.54, 1.74]	.98 (1.71) [.46, 1.49]	1.18 (1.96) [.61, 1.75]	.93 (1.82) [.38, 1.49]

*Note.* The Standard Deviations are contained within the round brackets, while the 95% Confidence Intervals are contained within square brackets.

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### 3.5 Purpose Types: Step-Wise Regression

A step-wise regression was performed on each of the four purpose types using the same eleven predictors as outlined above in the Section 3.4. The zero-order correlations are shown in Table 7. As can be seen, utterances with an unknown purpose were significantly positively correlated with the year that the case went to trial ( $p < .001$ ) and with crime type ( $p < .043$ ). Administrative purpose types were significantly positively correlated with crime type ( $p < .015$ ), and witnesses who were male ( $p < .035$ ). Information gathering purpose types were significantly negatively correlated with both trial year ( $p < .004$ ) and the type of crime ( $p < .020$ ). Challenging the account/details of the witness were also significantly negatively correlated with direct examinations ( $p < .001$ ), but significantly positively correlated with witnesses who were victims ( $p < .005$ ). All other correlations were non-significant and the correlation test revealed that there was no multicollinearity among the purpose types and independent variables (all  $r_s < |.43|$ ).

Similar to the regression analyses conducted with utterance types, a Bonferroni's correction was applied to the significance cut off value in order to reduce the chances of Type I error from occurring given the multiple pairwise tests being conducted on the purpose type data. For these analyses, the new alpha value for the regression test was .0125 (i.e.,  $\alpha = .05/4$ ).

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Table 7. Zero-Order Correlations between Purpose Type and Predictors (N = 91)

Purpose Type	Year	Crime Type	Direct	Prosecutor	Male Lawyer	Victim	Eyewitness	Police Officer	Defendant	Character	Male Witness
Unknown	.36*	.21*	.00	-.13	.12	-.21	.13	.07	-.08	-.12	-.15
Administrative	.03	.26*	.04	.07	-.14	-.09	-.14	.12	.07	.13	.22*
Info Gathering	-.31*	-.25*	.13	.12	-.10	.12	-.06	-.02	.00	.08	.11
Challenge	-.16	-.03	-.42*	-.03	.03	.30*	-.12	-.18	.20	.05	-.01

Note. \*  $p < .05$



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The regression analysis using the unknown purpose type as the outcome variable indicated that two predictors (year and lawyer gender) explained 19% of the variance for utterances with an unknown purpose,  $F(2, 88) = 10.46, p < .001$ . That is, male lawyers' (10.02%) tended to speak more utterances with an unknown purpose ( $\beta = -.26, p < .0125$ ), as compared to female lawyers (7.47%); more recent (vs. earlier) court cases also tended to have a higher volume of utterances that were identified as having an unknown purpose, ( $\beta = .45, p < .001$ ).

The regression analysis that entered information gathering as the dependent variable found that the year emerged as a significant predictor of utterances with an information gathering purpose,  $F(1, 89) = 9.317, \beta = -.31, p < .004, R^2 = .10$ . Specifically, lawyers' tendency to speak utterances for the purpose of gathering details more often during court cases that were tried in earlier (vs. more recent) years.

The regression analysis using the challenging the accounts/details purpose type as the dependent variable revealed that two predictors (examination type and witness type) explained 26% of the variance for utterances that were challenging in nature,  $F(2, 88) = 15.62, p < .001$ . Specifically, lawyers tendency to ask more challenging questions was higher during cross (vs. direct) examinations, ( $\beta = .42, p < .001$ ), and more often to victim witnesses ( $\beta = .29, p < .003$ ). Cross examinations contained more challenging purpose types than direct examinations ( $d = 0.90$ ), and victims were challenged (5.76%) more than the other witness types [eyewitnesses (1.39%), police officers (0.82%), defendant (3.79%), and character (3.03%), respectively].

The regression analysis using the administrative purpose type as the outcome variable did not find any other independent variables emerging as being significant predictors (all  $ps > .014$ ).

## **Chapter 4: Discussion**

The goal of the current study was to quantify the types of questions asked by lawyers to witnesses on the stand by examining a sample of court transcripts. This goal was achieved by coding each utterance spoken to a witness during the direct and/or cross examinations by courtroom questioners. In general, the majority of questions asked by lawyers were those that interviewing and questioning experts agree should be avoided during an information-gathering interview setting – confirming findings reported in previous courtroom questioning studies (e.g., Kebbell et al., 2003, 2004). When analyzing the effect of examination type on utterances, many of the similar findings observed in previous studies also emerged in the current study (e.g., Kebbell et al., 2003). That is, significantly more ‘good’ questions were asked during the direct examinations, while significantly more ‘bad’ questions were asked during the cross examinations. Moreover, the purpose behind most utterances spoken appears to be for the purpose of gathering information. Taken altogether, the findings from the current study provides descriptive insights into how well the truth-seeking function of the judiciary process is working. At the very least, this study raises some important concerns about the quality of the information-gathering process utilized in the Canadian adversarial system.

### **4.1 Utterance Types**

The findings observed in the current study suggest that lawyers fail to ask questions that allow witnesses to talk and provide information freely. Research suggests that open-ended questions (and by extension, probing questions) are the ‘gold standard’ for helping witnesses directly and uninhibitedly provide the information themselves (Fisher & Geiselman, 1992; Milne & Bull, 1999; Powell, Fisher, & Wright, 2005). Using these preferred questions simultaneously protects against the questioner tainting the

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information – directly or indirectly. This study found that open-ended questions are used rarely in the courtroom setting (less than one percent), while approximately one-fifth of question asked were probing. Such a finding suggests that lawyers do not follow the guidelines of expert interviewers in their quest for obtaining good quality evidence from witnesses. Given the strict definition applied to open-ended questions in the current study (i.e., open-ended questions were coded only if they met the structure of *Tell*, *Explain*, or *Describe*), it is challenging to contrast the present findings with those reported by previous research who utilized different questioning definitions. For example, in their courtroom studies, both Kebbell and colleagues (2003, 2004), and Zajac and colleagues (2003, 2009) provided little detail about the operational definition of exactly what an open-ended question entails beyond being questions “that require more than a few words to answer” (Kebbell et al., 2003, p. 52) or “does not restrict response options” (Zajac & Cannan, 2009, p. S40). Additionally, the in-text examples provided by these researchers suggest that their version of open-ended questions encompassed utterance types that the current study identifies as probing questions. Furthermore, many of the previous courtroom studies did not code for utterances identified as probing. Nevertheless, when taken together, the conclusions from this study still echoes that of other researchers: questions that allow for open and free recall of information from the witness were used infrequently.

Analyses revealed that nearly 80% of the questions asked are considered to be inappropriate and extremely poor for gathering information. In particular, the predominate use of closed yes-no questions speaks highly of the control that is being exerted by the lawyers over the witnesses. Given that the scope of closed yes-no questions are extremely narrow in nature and primarily tap into recognition factors of

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memory, asking closed yes-no questions in the courtroom setting renders the witness to be mainly passive in the information-gathering process, and only allows for limited responses. To say differently, the witness is the one who holds the information of interest and should be the one mainly involved at producing said information. By imposing constraints on the witness via closed yes-no questions, the lawyer is essentially acting as the proverbial gatekeeper of the information and witness evidence. Further, since closed yes-no questions only require a small limited response, this perpetuates minimal information being brought forth onto record rather than full and complete testimony, and leaves little room for the witness to elaborate, extend, or explain their answer. In fact, any information that does result from a closed yes-no question has been directed by the questioner and not by the respondent. Such limiting and narrow scoped questions results in the witness only confirming or denying the information provided in the question by the lawyer. Closed yes-no utterances have been heavily criticized in the police interviewing setting (e.g., Fisher et al., 1987; Griffiths et al., 2011; Snook et al., 2012) as being used as a form of witness control. These same criticisms also point out that any information obtained via closed yes-no questions is tied directly to the questioner's request, not only casting doubt on where the information originates from in the first place, but also bringing into question whose testimony is being given (i.e., the questioner's or the respondent's).

Additionally, a large percentage of questions asked were leading. Leading questions are perhaps thought of as the 'worst of the worst' because the information contained in the question itself can create inaccurate responses, and misconstrue any information that is gained from asking such a question. Moreover, a wealth of literature has identified the major problems associated with leading questions (e.g., Loftus &

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Palmer, 1974; Loftus & Zanni, 1975; Warren & Lane, 1995). The proportion of leading questions in the current study are in line with those reported from Kebbell and colleagues (2004), but appear to be less than the results found by other researchers (e.g., Kebbell et al., 2003; Zajac et al., 2003; Zajac & Cannan, 2009). It is important to note, however, that some previous studies subdivided leading questions into 'mildly leading' vs. 'heavily leading' question types (Kebbell et al., 2003), or were asked to a non-adult group of witnesses (i.e., children; Zajac et al., 2003; Zajac & Cannan, 2009). All of the previous courtroom studies listed here also categorically assigned one question into a variety of utterance types; that is, for example, a question may be coded both as a leading and closed question resulting in 'double-dipping' of proportions. Such an approach used by these previous researchers may account for discrepancies found in leading questions between the current and previous findings. Nevertheless, the heavy use of the leading questions observed here speaks to another way that lawyers' exhibit control over the witness. By providing information to the witness through the question, lawyers can essentially steer the witness evidence toward an outcome favourable for their case, and limits the role that the witness plays in providing the information of interest.

The remaining 'bad' utterance types (i.e., clarification, facilitators, multiple, forced choice, re-asked, opinion) accounted for one-third of the questions asked to witnesses on the stand. As pointed out, a wealth of problems is associated with all of these utterance types (e.g., forced choice may only offer limited – perhaps incorrect – response options; multiple questions overwhelm witnesses and the respondent may not know which question to answer). Granted, the use of these and other poor questioning approaches may be strategic and purposeful from the lawyers' perspective. The maxim offered by Evans (1995) suggesting that lawyers should "never ask a question to which

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[they] do not know the answer” (p. 118) showcases why lawyers are more interested in asking limiting and constraining questions to witnesses. The implications of such approaches allow the questioner to maintain control of the evidence being elicited. When such poor questions are utilized by police interviewers (as shown by numerous formal inquiries (e.g., FPT Heads of Prosecutions Committee Working Group, 2004), defence lawyers cry foul. Clearly, the objectives of officers in the interrogation room versus defence lawyers in courtroom might be considered different because the job of a police officer is to gather ‘facts’ of an event, while the job of a lawyer is to present the possibility of ‘alternative facts’ of the event. Yet, if a certain style of questioning is deemed to be inappropriate in one setting according to one group (i.e., poor police interviews as said by lawyers), but is considered acceptable in another setting (i.e., witness examinations in the courtroom as said by lawyers), it would seem that this is a simple case of the proverbial pot calling the kettle black. In other words, the use of poor interviewing questions – regardless of the setting – warrants poor evidence quality, and should be avoided by *all* criminal justice questioners.

When comparing the current study’s results with similar studies in the police literature (e.g., Snook & Keating, 2010; Snook et al., 2012), lawyers ask substantially more poor questions during their witness examinations than police officers do during their witness interrogations. Although the current data show that lawyers appear to ask relatively less closed and probing questions than police (28% vs. 40%; 22% vs. 32%, respectively), lawyers are noticeably worse at asking open-ended questions (0.5% vs. 6%), and ask many more leading questions (20% vs. 3%). These comparative findings are somewhat intriguing and rather duplicitous when considering that, as mentioned, police questioning practices have come under fire by the courts as being a major factor for some

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recent miscarriages in justice (see Lamer, 2006). The findings in the current study suggest that the parties involved in making a case against the police for using poor questioning practices (i.e., lawyers) are apparently no better at performing the same task.

**4.1.1 Differences between lawyers.** When utterance types are examined by lawyer type, the trends of utterances spoken by each lawyer mirrors that observed in the overall findings. That is, with the exception of leading questions being asked second most frequently for defence lawyers, the most frequently asked utterances are closed yes-no; the least frequent being opinions. Regardless of whether the lawyer is sitting at the prosecution or defendant's table, it is highly likely that all lawyers received similar training, or rely upon the same guidance tools pertaining to examining a witness on the stand. Therefore, it is not surprising that no significant differences emerged for any of the utterance types when analyzed by lawyer type. Likewise, lawyer type did not significantly predict any of the utterance types. These findings, however, run counter to research that has reported differences between prosecutors vs. defence lawyers for questions asked to witnesses (Zajac et al., 2003; Zajac and Cannan, 2009). Zajac and colleagues (2003) found that defence lawyers asked a greater proportion of leading and closed questions, while prosecution lawyers asked a greater proportion of "appropriate questions" (p. 206; i.e., likely akin to open-ended and probing questions used in current study) to children. However, Zajac and Cannan's (2009) study contained a sample of adult witnesses (being compared to child witnesses), and reported that prosecutors (vs. defence lawyers) asked significantly more open-ended and closed questions to adult witnesses; defence lawyers reportedly asked more leading questions to adults than prosecutors. The discrepancy in the current study's findings relative to that reported by previous research may be due to the way each study operationalized question types, and

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also due to the fact that utterances in the Zajac and colleagues' studies could be classed into more than one questioning category. The diversity of utterance types employed in the current study is also much wider than that of previous studies. It is also possible that utterances that were classed into certain categories here (i.e., forced choice) might have been classed into a different category (i.e., closed or leading) by other researchers. Previous studies appear to have collapsed open-ended and probing questions into one category, while the current study separated these into two different utterance types. Nevertheless, replication of the current study may render further support of the findings reported here.

**4.1.2 Differences between examinations.** There were many significant differences found for utterance types as a function of examination type, and examination type was found to be a significant predictor of many utterance types. Significantly more closed yes-no, probing, and open-ended questions were asked during the direct examination, while cross examinations contained significantly more leading and clarification questions, as well as more offered opinions than direct examinations. These findings are both similar and contradictory to the results found by Kebbell and colleagues (2003, 2004). In their study, Kebbell et al. reported that significantly more open and closed (i.e., akin to the definition of probing utterance type used in the current study) were asked during the direct examination, while significantly more yes/no (which is akin to the definition of closed yes-no utterance type used in the current study), leading, and multiple questions were asked during the cross examination. With the exception of multiple utterances having no clear pattern, and closed yes-no questions occurring in the opposite direction, all other findings from the current study matched Kebbell et al.'s (2003, 2004) reports.



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Of particular importance was the finding that closed yes-no questions were asked more frequently during direct examinations. Given that direct examinations are supposed to be relatively open in nature, it is interesting to observe that an utterance type that put limits and constraints on the witnesses' accounts were employed more frequently by direct examiners. It may be the case that such an approach is being done purposefully as a strategy for exhibiting control over the lawyer's own witness, thereby regulating the quality of information that is being elicited by the witness before the court. Of course, regardless of whether the lawyer is acting as the direct or cross examiner, the goal of any witness examination is to elicit information favouring one particular side of the argument. By asking such constraining questions, the direct examiner may be hedging their bets against what sort of information can be tested during the cross examination. However, it is important to note that cross examinations still contained a high proportion of closed yes-no questions; second only to leading questions.

The present study also found that clarification utterances were spoken more frequently in the cross (vs. direct) examination. With the exception of previous police interview studies (e.g., Snook et al., 2012), no other courtroom studies appear to have coded for this particular utterance type. This observed finding may be due to the fact that cross examiners are attempting to persuade the triers of fact to side with their version of events by ensuring certain answers are repeated. Bringing attention to an answer by repeating it ensures that the triers of fact involved in the case have undoubtedly heard the testimony. Moreover, it would be to the cross examiner's advantage to ensure that incriminating testimony is repeated multiple times. Such testimony evidence will be a major factor when the verdict decision has to be made based on the evidence presented.

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The two largest effects were found for probing and leading utterance types, and in opposite direction to one another. Finding that more probing utterance were spoken in the direct (vs. cross) examination is not entirely surprising since these questions help achieve the goal of the direct examination in obtaining information in a relatively open nature. The relative lower use of probing questions during the cross examination is likely due to the fact that the cross examiner can only ask questions about information brought up in the direct (and this information has likely come from the direct examiners heavy use of probing and closed yes-no questions observed here). Likewise, the large use of leading questions in the cross (vs. direct) examination is because the cross examiners are attempting to suggest an alternative explanation for the case at hand. Although leading questions are thought by interviewing experts as the bane of all question types, courtroom experts recognize the leading question as one of the main tenant and strength of a cross examination. As a British Queen's Council put it, "[direct examination] is where the witness gives the evidence... [but] cross examination is where I give the evidence and the witness says 'yes' or 'no'" (as quoted in Henderson et al., 2016, p. 181).

The best type of question to ask (i.e., open-ended) was found to be spoken more frequently during the direct examination, as compared to the cross examination. Although this is an encouraging finding, it is important to keep in mind that the proportion of open-ended questions asked during the direct examination is still minuscule. Over 6,000 utterances were coded in this study, and only 29 were identified as open-ended. Specifically, 24 of these were asked during a direct examination while only five were asked during a cross examination. Such a lack of use of the premier utterance type during a truth-seeking process would likely be viewed by some as abhorrent, and suggests that

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courtroom questioners are being aberrant when it comes to adhering to best questioning practices.

Despite the reported findings here, a recent study comparing historic (circa 1950-1959) and contemporary (circa 1996-2011) courtroom questioning practices suggests that prosecuting lawyers appear to be improving their questioning practice over time by way of asking more open-ended questions in recent court cases (see Westera et al., 2017). Such a finding is encouraging and suggests that prosecutors are starting to adhere to the evidence identifying open-ended questions as the best information gathering questions. However, it should be noted that Westera et al.'s version of an open-ended question is more in line with the definition of a probing question used in the current study. Unfortunately, Westera and colleagues also found no change in the approach taken by lawyers during the cross examination. They found that the most frequently spoken utterance type by the cross examiner is still leading questions.

### **4.2 Purpose Types**

One of the more encouraging findings from the current study is that the greatest proportion of questions asked to witnesses were found to be for the purpose of gathering information; nearly ninety percent of the utterances were dedicated to this purpose. At the very least, such a finding suggests that courtroom questioners are focusing their pursuits toward gathering relevant information for the case, but this finding needs to be considered in light of the *types* of questions being asked to achieve this purpose. As noted, the vast majority of information gathering utterances were still found to be those identified as poor questioning approaches. To say differently, most of the question types asked (e.g., closed, leading) are those that produce less accurate and reliable information.

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To that effect, despite the main purpose of asking questions to be for gathering information, the information may still be questionable in and of itself.

**4.2.1 Differences between lawyers.** No significant differences were found for any of the purpose types when broken down by lawyer type. Although no studies appear to have explored the assumed purpose behind each utterance spoken in the courtroom, one of the question categories proposed by Zajac and Cannan (2009) coded for credibility-challenging aspects of lawyers questioning, and might be comparable to the challenge purpose type used in the present study. In the current study, a challenge purpose type was defined as when the questioner raises points in order to test the reliability of the witness' accounts. Zajac and Cannan, however, identified their credibility-challenging question category in one of two ways: The first subtype of credibility-challenging questions (i.e., CR1; see Zajac & Cannan, 2009) was defined as those that suggested that the witness had poor memory or confusion (e.g., "Do you think that he maybe had touched you on your leg but you mistook it for your backside?"), referred to alcohol or drugs (e.g., "The fact that you can't remember is because you'd had a quite a lot of wine to drink hadn't you?"), or questioned the certainty of the witness (e.g., "Are you sure about that?"). The second subtype (i.e., CR2; see Zajac & Cannan, 2009) was defined as questions that suggested the witness was lying or being untruthful (e.g., "I suggest to you that you are making this whole thing up."), involved repetition of the question or answer (similar to the clarification utterance type in the current study; e.g., Question – "Who was there at that stage?" Answer – "They were all there." Question – "All of them?"), referred to delayed disclosure (e.g., "Why didn't you tell your mum at the time?"), referred to a positive relationship with the accused (e.g., "Haven't you always been quite affectionate toward your Uncle [X] and always gave him

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a big hug before going to bed?”), or referred to other witnesses (e.g., “[X] is going to give evidence and he will say...”). In their study, Zajac and Cannan (2009) reported that defence lawyers asked more CR1 type of credibility-challenging questions to complainants than prosecutors. Moreover, defence lawyers also asked more CR2 type of credibility-challenging questions to both children and adults than prosecution lawyers. It might be the case that the use of a broader operational definition of “a challenge” might have led to differences as a function of lawyer type.

**4.2.2 Differences between examinations.** Significantly more utterances with a challenging purpose were spoken in the cross (vs. direct) examination. This is an expected finding given that the one of the main principles of a cross examination is to contest the testimony given during the direct examination. Unfortunately, Zajac and Cannan (2009) did not specifically analyze their findings in terms of the examination type, so no comparison with previous literature is possible. However, one of the more interesting findings within this analysis revealed that witnesses who were alleged victims (as compared to the other witness types) received the brunt of the challenging utterances. This finding is in line with reports given in previous work. For example, Zajac and Cannan (2009) reported that complainants (i.e., likely akin to victims in the current study) received more credibility-challenging questions (i.e., CR1 and CR2) from the defence, as compared to the prosecuting lawyers. Additionally, although Kebbell and colleagues (2003) did not test for whether questions asked to witnesses were challenges, they did report that complainants were asked significantly more questions in the cross examination when compared to the questions that defendants were asked during the direct examination. Taken together, the current findings paired with some previous studies suggests that victims will experience a far worse task on the stand than other witness

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types. This is an alarming concern since victims are often the people that come forward to make the complaint and may actually be scared off to do so, especially when the treatment of victims on the stand (by way of challenges) may be unnerving for them.

### **4.3 Proposal of Better Courtroom Questioning**

While the trends offered by the Westera et al. (2017) study appear to be headed in the preferred direction, they did not offer a solution to the concern about courtroom questioners using poor questions for gathering information. In the not so distant past, police officers were challenged with this same issue and have implemented a change in practice and policy for conducting interviews with witnesses (e.g., PEACE; see Milne & Bull, 1999; Snook et al., 2014). In the same way that officers have changed their interviewing practices, it is possible that lawyers can also make the same valuable changes to their questioning practices, and still conduct thorough courtroom examinations of witnesses. The crux of the judicial process hinges on the evidence and facts presented in court, and much of this evidence is testimony. While much of the evidence presented in court comes from witnesses, other courtroom evidence may be available in the form of video footage, DNA analysis, or testimony reported by a multitude of others. Much akin to the new approach that police officers take in their interview, the existing evidence is used to support, counter, or challenge any of the statements given by witnesses. It is possible for lawyers to take a note from the changes in the police world and apply them to their setting. That is, by asking the preferred types of questions (i.e., open-ended) during the direct and cross examinations, but utilizing the evidence of the case to challenge the testimony at any point.

Consider the following example to illustrate: Assume the direct examination lawyer wants to elicit evidence about a man's description. Instead of asking a closed

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(e.g., “Did he have a coat on?”) or probing (e.g., “What was he wearing?”) question, a better approach would be to ask an open-ended question (e.g., “You said you saw a man, describe him for me”). Rather than limiting the witness’ response to a simple ‘yes’ or ‘no’, or by narrowing their scope to focus only on what the man was wearing, asking an open-ended question removes the lawyer from contaminating memory and can possibly provide new information. Such limiting questions (e.g., closed and probing) only allow for confirmation of the information encapsulated in the question (i.e., the outfit of the man). However, in addition to providing clothing details – essentially what the other two utterance types are tapping into – a response to an open-ended question might yield information about the man’s ethnicity, hair length/colour, accessories (e.g., glasses, knapsack), or even if the person is a man at all. When it comes time for the opposing lawyer to cross examine the witness, the lawyer is still allowed to follow the rules outlined by the court for testing the credibility of the direct testimony, but can achieve this goal via the best questioning practices with the available evidence (e.g., “You said in your direct testimony that the man had a jean jacket, but we have CCTV footage of the man wearing a rain jacket. Explain that to me.”).

Proponents who endorse standard questioning practices of lawyers will no doubt object to the proposal offered here. Critics may try to make the case that lawyers are allowed to ask these ‘bad’ types of questions because it is their job to represent their client well and by all means necessary. Furthermore, the current rules of engagement in the courtroom allow for such poor questioning practices to occur (e.g., leading questions during the cross examination). Yet, if this same logic was applied to the police setting – who arguably have the job of representing the community – then a new question about the justice system needs to be addressed: why is it acceptable to call foul on the police for

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asking bad questions, but it is viewed as a necessary evil by lawyers to do their job? Such a question may lead to a philosophical debate as to what exactly justice is and how it is achieved, and is beyond the scope of this paper. Nevertheless, the abundance of literature that recognizes the concern that questioning has on memory is alarming enough, and regardless who is asking the questions (police officer vs. lawyer), contamination of memory is a real possibility – especially with leading and closed questions.

### **4.4 Limitations and Future Directions**

**4.4.1 General limitations.** The reported findings presented in the current study need to be considered in light of some limitations. The generalizability of lawyer questioning practices is bounded to the fact that all lawyers in the current sample are practicing in the province of Newfoundland and Labrador. Due to this fact, to claim that this sample represents all Canadian lawyers is a stretch. It would have been more preferable to have used a larger sample and cross section of Canadian lawyers for conducting the question analyses, however, due to logistical constraints related to coding and number of data files available, analyses and subsequent conclusions had to be conducted with the current data set. Although the trends presented in this paper would likely remain the same, future studies should purposefully target a larger and broader sample (of both transcripts and unique lawyers) in order to provide a more complete picture of courtroom questioning practices.

A more important limitation lies with the quality of the dataset itself. All findings are based from transcribed archival data that was provided digitally (i.e., as Microsoft Word document files) to the author. Without having access to the audio recorded files from the court session, there is no way to test the accuracy of the transcription. Granted, minor spelling and grammatical errors are of no real concern considering the goal of the



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present study. Furthermore, it is highly unlikely that any major transcription mistakes would derail the general findings reported here. According to a clerk at the trial division courtroom office, all transcriptions of the cases used in the present study were transcribed by a variety of people. Assumedly, all transcribers adhered to the rules of transcription when formulating the word file documents, but this information (i.e., transcription consistency) was not provided. Nevertheless, if one could check the reliability of the transcription quality with the original audio recordings, then the confidence of the reported findings would only be strengthened.

Given the nature of working with transcribed documents, other valuable and informative pieces of information (e.g., pragmatic elements; see Gibbons, 2003) that may have enlightened the coding process are missing. For instance, the tone in which questions were asked to witnesses (e.g., yelling in anger, being sarcastic or empathic to witness) is unavailable. Similarly, the state of the witness on the stand (e.g., being hostile, crying) is also not fully captured in transcription; it is possible that certain responses from the witness may inform follow-up questions from the lawyer. Although one may be able to guess at the tone of the questions asked (or the state of the witness) based on the transcribed words alone, the true mood/intention behind the lawyers' questions (and witnesses' answers) cannot be accurately determined. Moreover, other confounding social context effects (e.g., body language or other physical motions related to the questions/responses; Gibbons, 2003) exhibited either by the lawyer or the witness are not able to be captured due to the format of the current dataset. In everyday normal conversational settings, context effects are important elements that assist the flow of conversation. Thus, in more serious settings such as the courtroom whereby consequential outcomes are at play, such context effects are a central element to

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encapsulate when gathering legally binding information and evidence. Such physical motions, language, or actions (if existing in the court transcripts analyzed here) may influence or inform the line of questioning that a lawyer decides to take with the witness. Future studies may want to consider replicating the current study and utilize the court proceeding's audio (or video, if available) recordings to help inform question coding decisions. At the very least, hearing (and seeing) the verbal gestures can add another element not being tapped by the current study.

**4.4.2 Design limitations.** One design concern is the slight dependency issue within the analyses. That is to say, most of the lawyers in the current study conducted multiple examinations, and may have possibly influenced the trends observed here. However, it is important to note that each examination was conducted with a different witness on the stand, and different questioning approaches may have been used. It would have been ideal to have each examination conducted by a different lawyer; however, the logistics of the data collection prohibited this more intensive process. Clearly, it is important that replications of this study should aim to gather a wider, more diverse dataset to test the strength of the conclusions found herein.

Given the quasi-experimental design of this study, no control could be applied to the availability of documented evidence in possession of each lawyer for all of the different court cases. The amount or magnitude of available evidence may have impacted the choice of questions used during witness examination. Perhaps the lawyers whom had limited external evidence favouring their case elected to use more narrowly-focused questions (e.g., closed, leading) during witness examinations in an effort to control the testimonial facts presented before the court. Future researchers may want to selectively choose court cases that are more closely alike (i.e., similar type of crime, similar

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available evidence) in order to parse out any effects that available documented evidence is rendering.

The design also did not allow control of various other characteristic factors related to the courtroom players. For example, the number of years that each lawyer had been practicing law was not available for analysis, and could be an extraneous variable related to question choices. It is logical to assume that lawyers with more years of practice may be better at formulating questions to witnesses compared to less experienced lawyers. Thus, the question remains as to whether a lawyer cohort effect may inform some of the current findings; although this is unlikely, researchers could easily test this inference by way of a simple comparison of lawyers' experience (i.e., having more vs. less experience practicing law). Furthermore, there is absolutely no way to control for the answers given by any of the witnesses on the stand. The answers to certain questions previously asked may very well inform the examiner's choice for any follow-up questions.

Another factor that may impact the lawyers' questioning practices is the courtroom environment itself. All of the cases analyzed here were tried by judge-alone and had a limited number of courtroom players involved (e.g., judge, lawyers, defendant, witness, and clerk). Perhaps including the presence of a jury may render a slight change in question choices. Since a jury plays a key role in the outcome of the trial, lawyers have an added element to consider when planning their questioning process. In a jury trial, lawyers not only need to ask certain questions in order to elicit the desired information from the witness on the stand, but also need to be able to use this information and questioning procedure to paint a certain story to the jury. Much research has demonstrated that jurors rely on a story model when making their verdict decisions (e.g., Pennington & Hastie, 1986, 1988). Analyzing questioning practices with the presence of

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a jury may result in lawyers using better or worse types of questions, however, this remains to be seen.

**4.4.3 Future studies.** The current study provided important information with respect to the questioning practices in the courtroom, particularly focusing on lawyers' questions to witnesses on the stand. Future studies may also want to explore the questioning practices of judges to witnesses. In a criminal bench trial, it is not uncommon for a judge to ask questions to the witness during the trial. Based on advocacy practices recommended to lawyers in many texts (e.g., Evans, 1995; Glissan, 1991; Stone, 1995; Wellman, 1997), lawyers ask certain questions for the purpose of gaining evidence that favours their case. A judge, however, is considered to be the unbiased party of the law and makes the verdict decision based on the evidence (both external and witness testimony) presented in court. Judges also have the right to further examine the witness by way of questions after the direct and cross examiners have completed their questions. Granted, intervening questioning from the judge should be a rarity, but it sometimes a necessity in order to ensure a complete understanding of the testimonial evidence, expedite the trial process, and to further probe for information that they feel is important in rendering a justified verdict (see Hobgood, 1981). Initially, it may be expected that judges are no better than lawyers at asking questions to witnesses given their background as a previously practicing lawyer. Although no empirical studies appear to have explored the questioning practices of judges to witnesses on the stand directly, evidence from other related in-court questioning (e.g., jury selection) suggests that jurors are more likely to provide honest and candid answers when questioned by a judge, as compared to being questioned by an attorney, because of the perception that the judge is an authority figure (see Lieberman & Sales, 2007). Yet, other commentators suggest that the increased social

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distance between the juror and judge may reduce disclosure from a potential juror (Suggs & Sales, 1980). Although the juror selection findings summarized here provides no support for whether judges will ask more appropriate information-gathering questions to witnesses, the fact that the potential jurors answer differently to a judge suggests that judges' questions may be different from lawyers. At the very least, an analysis of courtroom questioning practices of judges to witnesses is called for in both adversarial and inquisitorial models of justice.

As noted during the review of literature in the current paper, analyses of police and lawyer questioning practices have been conducted in many commonwealth and European countries (e.g., Canada [Snook & Keating, 2010; Snook et al., 2012; Wright and Alison, 2004]; UK [Andrews & Lamb, 2016; Baldwin, 1992a, 1992b; Milne & Bull, 1999; Kebbell & Johnson, 2000; Kebbell et al., 2003, 2004]; Norway [Myklebust & Alison, 2000]; Australia [Westera et al., 2017]; and New Zealand [Zajac & Cannan, 2009; Zajac et al., 2003]). Future researchers may also be interested in examining the questioning practices of lawyers from Asian countries or collectivistic cultures. A recent study that examined police interviewing styles in Japan reported comparable findings – although with slight variations – to those conducted in English-speaking European countries (see Wachi et al., 2014). It would be interesting to see if similar parallels observed in the current study (i.e., Canadian lawyers are less effective than Canadian police officers in the interview setting) were found in other international studies, as well.

A notion proposed in this paper is that thorough courtroom examinations can still be conducted while adhering to and using what the interview literature refers to as best practice questioning approaches. If lawyers agreed to gather evidence via open-ended questions, the question still remains on the impact of the witness evidence obtained

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during trial. Would the evidence be better or worse? What impact would asking open-ended questions have for strengthening or weakening each lawyers' case? Future studies could test these and other remaining questions in mock-trial laboratory based studies, controlling for the factors mentioned above and the types of questions asked to witnesses on the stand.

### **4.5 Concluding Thoughts**

By applying the same qualifier as Wright and Alison (2004), this study does not aim or pretend to be decisive, nor should any of the conclusions drawn from the results observed here accurately represent the questioning practices of all Canadian lawyers. Given that the present study is relatively exploratory in nature, the analyses should – at the very least – represent an important first step toward determining whether Canadian lawyers are asking questions to witnesses that facilitate the most reliable and accurate information.

In fact, it may be premature to reprimand the lawyers for such findings when they are well within their rights, as deemed by the courts, to examine witnesses in the present form. Perhaps a more central issue may be educating judges about the dangers that the current questioning approaches poses for seeking the truth and administering justice. Beyond judges, the current policy in the adversarial system may need to be revisited and amended in order to protect everyone involved in the justice process – from the police officers who conduct the initial investigations to the witnesses on the stand being questioned by lawyers. The best way to ensure that the people in our communities are protected, and justice is served, is to use evidence-based practices to guide our legal system.

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### Footnotes

<sup>1</sup> It should be noted, however, that some researchers (e.g., Goodworth, 1979; Shepard, 2007) have lumped the 5WH questions in with the TED questions (i.e., collectively classed as open-ended questions), while others (e.g., Loftus, 1982; Milne & Bull, 1999) suggest that 5WH questions are better thought of as a closed-specific question type. For the purpose of this study, the author agrees with the viewpoint proposed by Griffiths and Milne (2006) and regards the 5WH questions as being different (in purpose and form) from the TED questions.

<sup>2</sup> Some scholars (e.g., Griffiths & Milne, 2006) categorically lump and subdivide appropriate closed yes-no questions together with open-ended and probing questions (i.e., as “good” question types) by arguing that closed questions are appropriate when the interview process is almost finished (i.e., coming to a “close”).

<sup>3</sup> In their study, Wright & Alison (2004) used the terms ‘closed identification’ for probing questions and ‘closed selection’ for forced choice questions. To limit confusion between study comparisons, the author has chosen to place the question type terminology/language defined in the current study in parenthesis, where appropriate. Despite Wright and Alison (2004) using different terms to identify question types, the structure of their defined questions match that outlined in the Snook and colleagues (2010, 2012) studies, and the current study.

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<sup>4</sup> Some literature uses the term 'examination-in-chief' instead of 'direct examination'.

Both terms refer to the same procedural concept. For the purpose of this paper, the term direct examination is used throughout.

<sup>5</sup> However, according to some commentators, there is very little empirical support for whether direct examinations are truly conducted in an open nature or friendly approach (see Kebbell et al., 2003, 2004).

<sup>6</sup> Further examination of the witness beyond the direct and cross examinations is possible. Any additional follow-up questions would be conducted as re-direct examination or re-cross examinations. All of the rules of engagement that applied to the direct and cross examinations apply for the follow-up examinations, respectively. See Evans (1995) for additional explanation.

<sup>7</sup> Cohen's Kappa could not be calculated for the number of utterances. This was because the author's decision of labelling utterances always resulted in a constant. In other words, the author always said 'yes' to whether a phrase in the transcript was a constant. Thus, the utterance decisions being made by the secondary, independent inter rater were always being compared to the same constant. See Tabachnick and Fidell (2001) for an explanation related to this issue.

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### Appendix A – Sample Examination

*Note.* The identifying information (e.g., names, crime type) of all people in the following transcript is fake and for illustrative purposes only. The utterance number is bolded in brackets before each testimony question. The coded utterance type is bolded and underlined in parenthesis after the question utterance, and the coded purpose type is italicized within the same parenthesis separated by a dash (–). ‘Q.’ indicates the question being asked and ‘A.’ indicates the witness’ response to the question.

#### **MS. COURTNEY LEITMAN, SWORN, XX'D BY MR. PARSONS**

- (1) MR. PARSONS: Just a couple of quick questions for you, Ms. Leitman. So you indicated that it's initially pretty much at your insistence that Ms. Coogan went to the police to report what she's alleging here today? (**Leading** – *Case Based: Information Gathering*) A. I told her that she needed to think about it.
- (2) Q. Right, and initially she was somewhat reluctant to do so? (**Leading** – *Case Based: Information Gathering*) A. She was scared.
- (3) Q. Okay. You also indicated that you had observed some texts on Ms. Coogan's telephone? (**Leading** – *Case Based: Information Gathering*) A. Yes.
- (4) Q. At any stage did you notice Ms. Coogan editing the contents of what might have been on her telephone? (**Closed** – *Case Based: Information Gathering*) A. No. I have the same phone, and I don't think that's possible.
- (5) Q. Okay, what about deleting messages, did you see anything like that? (**Closed** – *Case Based: Information Gathering*) A. No, I did not.
- (6) Q. Okay. So Ms. Coogan stayed the night at your house and then – (**Incomplete** –



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*Purpose Unknown*) A. Yes.

(7) Q. You guys – you didn't go to work together, that's correct, is it? (**Leading** – *Case Based: Information Gathering*) A. Yes, but she drove me to work in her vehicle.

(8) Q. Okay, do you recall what time her shift started that day? (**Closed** – *Case Based: Information Gathering*) A. It was a day shift as well. She started maybe half an hour, or an hour after me.

(9) Q. Okay, and was there any point during that day that you guys were apart from one another for any extended period of time? (**Closed** – *Case Based: Information Gathering*) A. No. Actually that's why she went to work, she didn't want to be alone.

(10) MR. PARSONS: Just give me one second here. Those are the only questions I had for you. Thank you. (**Statement** – *Administrative*)

(11) MS. WENDELL: Nothing on re-direct. Thank you. (**Statement** – *Administrative*)

(12) THE COURT: You're free to go, Ms. Leitman. Thank you very much. (**Statement** – *Administrative*)

**(WITNESS EXCUSED)**

**Appendix B – Transcript Coding Guide Dictionary**

**Section 1: Case Characteristics**

**Case Number:** The numeric code assigned to the case given by the court. This code is found on the Detailed Report Summary (Main White Binder).

**Year:** The year that the case went before the Supreme Court of Newfoundland and Labrador. This is indicated by the first four numbers in the Case Number or is timestamped within the original main transcript. When coding the year, it is preferable to use the year that the current case is heard before the court. For example, if the case number is 20090T12345, but has a timestamp within the original main transcript of September 21, 2013, then use '2013' as the year.

**Crime Type:** This is the type of crime that has occurred. *Person* refers to crimes against an individual(s) and include, but are not limited to: uttering threats, harassment, kidnapping, stalking, rape, assault, aggravated assault, indecent assault, sexual assault, hate crimes, domestic violence, and murder. *Property* refers to crimes against property and include, but are not limited to: break and enter, burglary, arson, theft, shoplifting, larceny, vandalism, property damage, embezzlement of money, identity theft, and extortion. *Hybrid* refers to a combination of the two types and include, but are not limited to: fraud, prostitution, robbery, public intoxication, drug trafficking, drunk driving. *Unknown* refers to a code where the crime type cannot be determined based on the details within the transcripts. Crime Type is coded based on details within the court transcripts.

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### Section 2: Transcript Characteristics

**Transcript Number:** The numeric code assigned to the transcript for each unique question session within a specific case.

**Examination Type:** The type of examination being conducted to the witness on the stand. *Direct Examination* is when a witness is being interviewed by the lawyer who called the witness to testify, and this examination type can be identified at the top of the transcript by an "X'd" (e.g., "Mr. Bob Loblaw, Sworn, X'd by Ms. Erika Weaver").

*Cross Examination* is when a witness on the stand is being interviewed by the opposing lawyer, and can be identified at the top of the transcript by an "XX'd" (e.g., "Mr. Bob Loblaw, XX'd by Ms. Erika Weaver").

**Questioner ID:** This is a unique number assigned to each questioner as a way to anonymously identify each court official. See the identification list contained within the Main White Binder to match the correct ID to the questioner.

**Questioner Type:** Refers to the type of court official leading the examination of the witness on the stand, and can be found either in the Detailed Report summary or through reading details within the court transcript. The *Crown* lawyer(s) represents Her Majesty the Queen. The *Defence* lawyer(s) represents the defendant.

**Questioner Gender:** This is the assumed gender of the questioner, as determined by information provided on the Detailed Report summaries (Big White Binder), and/or through details found during readings of the transcripts (i.e., name, pronouns used).

**Witness ID:** This is a unique number assigned to each witness on the stand. See the identification list contained within the Main White Binder to match the correct ID to the witness.

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**Witness Type:** Refers to the type of witness on the stand under examination by the Questioner. The *Victim* is someone who allegedly suffered from a criminal act. This information is gathered by through details found during readings of the transcripts. An *Eyewitness* is a person who observed the crime in question, or is connected to the crime in question (e.g., the mother of a victim), and has some form of person evidence in support of either the complainant or defendant. A *Police Officer* refers to any witnesses who were part of the investigation process and are testifying with respect to their role. For example, a police officer may be the person who has arrested the suspect, or someone who has taken pictures of the crime scene. The *Defendant* is someone who is alleged to have committed the crime that is in question before the court. Often, the defendant can be identified by the name on the case name. For example, *R. vs. Bob Loblaw* indicates that Mr. Loblaw is the defendant. This detail can also be confirmed through readings of the transcripts. An *Expert* is someone who is called before the court to testify based on having extensive education or training in a particular subject. For example, a medical doctor may be considered an expert witness because they are testifying about medical aspects related to the case, or a police officer may be testifying in their role as an expert finger print identifier. When coding the witness type, specify the type of expert (e.g., Doctor, Police Officer, Academic Researcher). A *Character* witness is someone called before the court to vouch for another person involved in the court proceedings (e.g., victim, accused). Generally, Character witnesses were not present at the duration of the crime. Friends, family, or clergy might be examples of character witnesses in a court proceeding.

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**Witness Gender:** This is the assumed gender of the witness, as determined by information provided on the Detailed Report summaries (Big White Binder), and/or through details found during readings of the transcripts (i.e., name, pronouns used).

### **Section 3: Utterance/Question Types and Frequencies**

**Frequency:** The number of times that each utterance or question occurred during the examination between the time that the witness is sworn on the stand and when the witness has answered all the questions from the questioner (this is typically identified within the transcript when the questioner states that they have no further questions and/or the witness is excused from the witness stand). Additionally, the witness may be asked to step off of the stand during the middle of the examination so the court officials (i.e., judge and lawyers) can converse without having the witness present. Typically, this is identified within the transcripts by “(Witness Aside)”. Any utterances or questions that occur while the witness is not on the stand are ignored, and therefore not counted or coded. It is only after the witness has returned to the stand (as indicated in the transcript) that the next utterance or question is coded.

#### **Section 3.1: Question/Utterance Definitions**

**Open-ended:** These questions invite the witness to recall answers freely from memory. They allow for a wide range of responses, and typically start with “tell,” “explain,” or “describe.” For example, “Tell me about the argument with your wife” would constitute an open-ended question. Cueing the witness before the question is still only coded as open (i.e., cued open / invitation). For example, “You said you went to the movies last night (*cue*), tell me about the film (*open*)”.

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IMPORTANT NOTE: For any questions that contain open language (“tell”, “explain”, “describe”), but are not presented as an invitation to the witness are not coded as Open. Rather, in most cases (depending on the structure of the question), the question will be coded as a Closed. For example, “Can you *tell* us about your relationship with your wife?” contains open language (i.e., *tell*), but is structured in the form of a Closed question (i.e., Can you...).

SECONDARY NOTE: When situations like the example above arise, code the questions as the appropriate structure, however, please flag these locations in the transcript in the SPSS file. The purpose of doing this is to re-consider these question types during data analysis. It is possible that witnesses may interpret a “Can you tell us...” (closed) question as being an open invitation, despite the structure of the question being in the form of a Closed question.

***Probing:*** These questions tap into cued recall memory and tend to generate answers that are narrower in scope compared to those provided from open-ended questions. The purpose of this type of question is to obtain additional information. They usually commence with “who,” “what,” “why,” “where,” “when,” or “how” (5WH). An example of a probing question would be, “What part of her body hit the ground first?” Note: Sometime the 5WH prompts are omitted by the questioner (e.g., “Your address?” as compared to “what’s your address?”), however, the question is still coded as probing. Cueing the witness before the question is still only coded as probing. For example, “You said you went to the movies last night (*cue*), what movie did you see? (*probing*)”.

***Closed Yes/No:*** These questions tap into recognition and are typically answered with a “yes” or “no” response. Some examples of a closed yes/no question would be, “Did he have his face covered?” or “Do you remember what day of the week it was?” or

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“Was anyone there?” or “Would you recognize him today?” Cueing the witness before the question is still only coded as closed. For example, “You said you went to the movies last night (*cue*), did you buy a ticket? (*closed*)”.

**Leading:** This type of question suggests/implies an answer to the witness. That is, the desired answer is embedded in the question. For example, the question “You were drunk, right?” constitutes a leading question. There is no indication prior to the question being asked that the information was alluded to by the witness. Cueing the witness before the question is still only coded as leading. For example, “You said you went to the movies last night (*cue*), but you really didn’t like the film you saw, right? (*leading*)”. Leading questions can be asked in various forms including a straightforward lead (e.g., “Isn’t it a fact that...?; You’re not suggesting...?; You tell the truth, I take it?; That’s the reason...”), a taunting/critical lead (e.g., “Surely you don’t believe that...do you?; Surely you’re not suggesting that...?; Do you really think that?; Obviously...?; Anyone would...wouldn’t they?”), a justification lead (e.g., “You were only doing what comes naturally, weren’t you?; Anyone could see that she had pushed you too far this time, hadn’t she?”), or an incriminating lead (e.g., “You’ve got to admit that...?; You knew that what you were doing was wrong, didn’t you?”). Additionally, a leading utterance may be presented in the form of a statement (instead of as a question). For example, “Obviously then, you were aware of her relationship with Bob Loblaw.”

**IMPORTANT NOTE:** When coding cross examination interviews, it is necessary to keep in mind the information that the witness provided during the direct examination. Utterances throughout the cross examination may appear to be leading in structure, however, the information that is being inquired about might have been previously provided by the current witness on the stand. For example, assume that at some point

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during the direct examination the witness said: “Kenny had N64 games in his room and played them all the time”. Next, assume that during the cross-examination the questioner asks the witness: “Kenny just played a bunch of games in his room, didn’t he?” Although this question is presented in a leading format, this example would actually be coded as clarification because the information being discussed has previously been provided by the current witness on the stand. In contrary, however, if witness #1 provided specific information during their interview (e.g., “Witness #1: Kenny had N64 games in his room”), but the primary questioner incorporates this information into a question while interviewing Witness #3 (e.g., “Lawyer: So I understand that your brother, Kenny, had a bunch of Nintendo 64 games in his room, right?”), then the question asked to Witness #3 is actually a leading question. See the *Clarification* section of this guide for additional information.

**Forced Choice:** This type of question only offers the witness a limited, usually two, number of response options. “Did you kick or punch the other woman?” would be an example of a forced choice question. Cueing the witness before the question (with previously stated information) is still only coded as forced choice. For example, “You said you went to the movies last night (*cue*), now did you go to the early show or the late show? (*forced choice*)”.

**Opinion:** This involves posing a personal opinion or belief to a witness related to the allegations before the court. For example, “I think you assaulted Mr. Norman”, “I suggest that you...”, “I put it to you...” would all be classified as an opinion.

**Statement:** This refers to a statement of fact. This can be coded for utterances that dictate the direction of where the conversation is going, or is a verbal declaration that is not in the form of a question. For example, “Now Ms. Thomas, that water is there for



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you.”, or “Let’s take a break and rise at 2pm.”, or “For the record, the witness has pointed to the accused.” would be coded as a statement.

**Command:** This refers to a questioner giving a directive or telling the witness to do something. For example, utterance’s like “Just point him out.” or “Speak up now” would be considered as commands. Other examples of commands include: a court official (e.g., the judge) passing control of the proceedings to another court official (e.g., “Lawyer #1: Okay, Mr. Adams, that’s all the questions I have. My friend may have some though. (*statement*). **Judge: Mr. Fisher (*command*).** Lawyer #2: Okay, did you buy a ticket to the movies last night? (*closed*)”); a court official (e.g., the judge) directing the proceedings by saying things like “Cross-exam?”, “Re-exam?”, “You can step down”; or stating that evidence is to be made an exhibit or consent in court (e.g., “I suggest we call this exhibit CL No.1”).

**Multiple:** This question type involves the primary interviewer asking several questions at once, without giving the witness a chance to respond after each question. An example of this would be, “How did you get there? What did you do inside? Did you say anything to him?” In multiple question cases, note the question types that follow in order. In this example, the utterance would be coded as Multiple, but note that the question types were: Probing, Probing, and Closed, respectively. Cueing the witness before the questions is still only coded as multiple. For example, “You said you went to the movies last night (*cue*), what movie did you see? Did you like the movie? How long was the movie? (*multiple – probing, closed, probing*)”.

**Re-asked:** This variable is scored if the questioner re-asks a question that the witness has already answered at an earlier point in the session. For example, “Lawyer: Where did you go last night? (*probing*) / Witness: Nowhere. I stay home. / Lawyer:

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**Okay, come on Fred, where did you go out to last night?** (*re-asked*). NOTE:

Questions/utterances that the witness misheard or misunderstood are not coded as re-asked. For example, “Lawyer: Is that an assumption based on what he normally wears? (*closed*) / **Witness: Pardon?** / **Lawyer: Is that an assumption based on what you see him normally wear?** (*closed* – NOT re-asked).” In this example, both of these questions are to be coded as closed.

**Clarification:** This question type is defined as any question where the questioner duplicates or paraphrases the information from any of the current witness' previous answers (these answers could have been provided during either of the direct examination or cross examination) in order to provide the questioner with a better understanding what the witness said. A duplicate example of a clarification question would be as follows: “Witness: John said he went to a movie. Questioner: **Okay, so John went to a movie?** (*clarification*) Witness: Yes, that's right.” A paraphrase example of a clarification question would be as follows: “Witness: We arrived home shortly before 7:00pm and hung out for two to three hours. / Lawyer: So roughly, I gather from what you're saying, you and her were at your house for a few hours together (*clarification*). / Witness: Between two and three, yes.” Other examples of clarification include the questioner repeating the spelling for names of persons or places (e.g., “Lawyer: How do you spell Portugal Cove? (*probing*) / Witness: P-O-R-T-U-G-A-L / Lawyer: **P-O-R-T-U-G-A-L Cove. Okay, thank you.** (*clarification*)”, or speaking utterances such as, “I'm sorry?”, “Pardon me?”, or “I didn't catch that.”

IMPORTANT NOTE: It is important that clarification questions be considered within the context of the present conversation. Although a question may appear in the format of another utterance style (i.e., closed, probing, leading), the questioner's intention

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may be for clarification purposes, and can be determined by analyzing the surrounding conversation contexts. For example: “Witness: I live at 230 Elizabeth. / Lawyer: You said 230 Elizabeth, **do you mean Elizabeth Avenue?** (*this question appears in a closed structure format [i.e. ‘do you...’], but the intention is for **clarification***) / Witness: Yes. / Judge: **Where did you say?** (*this question appears in the probing structure format [‘where...’], but the intention is for **clarification***).”

NOTE: Any information that the primary questioner received or uses from a different witness at an earlier point during the trial is not clarification and would be considered leading (see the **Leading** section of this guide for additional information).

**Facilitator:** This refers to verbal utterances that encourages the flow of conversation, or are said between utterance spoken by someone else (i.e., witness, judge, clerk, opposing attorney). For example, “Um-hmm”, “Yes”, “Thank you”, “Okay”, “Sure”, “I see”, or “Sorry for interrupting” would be coded as facilitators. Note that facilitators are not coded when they are expressed at the beginning of an utterance that contains a question. For example, in the statement, “Okay, yes. So when did you meet Joe?”, the initial communication (i.e., ‘Okay, yes’) is ignored, and the rest of the utterance is coded as the correct question type (i.e., *probing*).

**Incomplete:** This is coded when the question is not finished being asked because the questioner was interrupted or cut off by another speaker or witness, or because the questioner did not complete the thought. For example: “Lawyer: So how often would you —” would be coded as incomplete. Additionally, utterances deemed “(inaudible)” or “(unintelligible)” by the transcriber are also coded as incomplete. For example: “Lawyer: Okay, and (unintelligible).” would be coded as incomplete. However, if the utterance contain enough information to properly categorize the question, then code the utterance

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accordingly. For example: "Lawyer: Did you send this email here dated (inaudible) to John?" Furthermore, utterances that appear incomplete, but contain enough information to determine the direction and/or interpretation of the question can be coded into their proper question category, too. For example, "Lawyer: So how often would you fight with your sisters, Maria and Eliz - ", would still be coded as a probing question, because enough information is presented to determine the question's intent.

### **Section 4: Utterance Purpose**

**Utterance Number:** This is the unique tracking code assigned to each utterance made by a questioner or court official on the transcript. If the first utterance in the transcript is the witness talking (e.g., stating their name), then this utterance is **not** labelled as 'utterance #1'. Rather, the first utterance by a court official is the true first utterance. All other questions/utterances thereafter (regardless of whom is asking the question) are coded consecutively. Additionally, Utterances can be broken over more than one line in the examination transcript, but would still only be coded as a single utterance for the speaker. For example, the following "broken" exchange between the lawyer and witness would be coded as a single utterance by the lawyer:

Lawyer: When you stated that –

Witness: Yes

Lawyer: - you picked up Bob at the –

Witness: Okay, right

Lawyer: - store, did you note the time?

However, an exception to this is when the witness answers the questioner before the questioner has completed their utterance. For example, the following "broken"

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exchange between the lawyer and witness would be coded as two separate utterances (as indicated by the number in parenthesis) by the lawyer:

Lawyer: (1) Okay. Do you recall any contact between your father and Emily –

Witness: No.

Lawyer: - during those occasions? (2) Okay. Do you recall any occasion when the three of you were in the room together?

Witness: No.

**Speaker:** This is the type of person who is stating the utterance. It can be any of the court officials and is determined by reading details within the transcript. Examples include, but are not limited to: the Crown, Defence, Judge, Clerk, or Accused.

### **Section 4.1: Utterance Purpose**

**Administrative:** This refers to any utterance that is considered to be a procedural aspect of the courtroom. It can be legal actions or references to any aspect unrelated to the case/charges being heard. For example, if the judge or attorney tells the witness that the microphone is not there to amplify their voice, then this utterance would be coded as administrative. Other examples include when the court officials interact with each other and are not directing their utterances toward the witness, or are not talking about information related to the case. For example: “Lawyer #1 (directed to witness): Why don’t you remember the conversation with Emily? (*probing / case-based*) / Lawyer #2 (directed to the judge): Well how can he possibly answer that? (*probing / administrative*) / Lawyer #1 (directed to judge): I’d like the witness to answer, Mr. Justice (*statement /*

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*administrative*) / Judge (directed to Lawyer #2): Okay. Elaborate on the concern (*command / administrative*)." Another example might include when a court official inquires as to whether counsel has access to evidence being referred to in court (e.g., "Witness: May I refer to my police note to recall the time of the incident? Lawyer #1: Yes (*facilitator-purpose unknown*). Judge (directed to opposing counsel): Have these notes been disclosed to you? (*closed-administrative*). Lawyer #2: Yes, I do. Thank you. (*facilitator-purpose unknown*).

**Case-based:** This refers to any utterance that is both directly and indirectly related to the case being heard. For example, any questions asking about the crime, or information leading up to the crime would be scored as case-based. There are two subcategories of case-based utterance purposes that need to be sub-scored. The first type is **information gathering**, and these utterances target unique details of what transpired with respect to the crime. For example, "Lawyer: Okay, just describe what happened when you saw the body on the floor." would be coded as an open-ended question with an information gathering case-based purpose. The second type is **challenging the accounts/details**, and this occurs when the questioner raises points to challenge the reliability of the witness' accounts. For example, "Lawyer: Now, at least one officer asked you whether you touched her, and at that time you said that you didn't remember. Now you're saying you never touched her. Do you see any difference in that?" would be coded as a closed question with a challenging case-based purpose. Other examples include, "Lawyer: Is it possible that you did say these things, but don't remember?"

**Purpose Unknown:** This is to say that the utterance's purpose does not fit into the category of case-based or administrative. Typically, purpose unknown is applied when the utterance type is coded as *incomplete* or *facilitator*.

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**Appendix C – Transcript Coding Guide**

**Section 1: Case Characteristics**

Case Number: \_\_\_\_\_

Year: \_\_\_\_\_

Crime Type:                      Person              Property              Hybrid              Unknown

**Section 2: Transcript Characteristics**

Transcript Number: \_\_\_\_\_

Examination Type:              Direct Examination              Cross Examination

Questioner ID: \_\_\_\_\_

Questioner Type:              Crown              Defence

Questioner Gender:              Male              Female

Witness ID: \_\_\_\_\_

Witness Type:              Victim              Eyewitness              Police Officer  
   Defendant              Character              Expert (specify: \_\_\_\_\_ )

Witness Gender:              Male              Female

**Sections 3 & 4: Frequency of Question Types and Assumed Purpose**

Number of Times Question Appeared in Transcript

<b>Question Type</b>	<b>Frequency</b>
Open	
Probing	
Closed Yes/No	
Leading	

<b>Question Type</b>	<b>Frequency</b>
Forced Choice	
Opinion	
Statement	
Command	
Multiple	

<b>Question Type</b>	<b>Frequency</b>
Re-asked	
Clarification	
Facilitator	
Incomplete	



# LAWYERS' QUESTIONING PRACTICES

Number of Time Utterance Purpose Appeared in Transcript

<b>Utterance Purpose</b>	<b>Frequency</b>
Purpose Unknown (N/A)	
Administrative	
Case-based	
<i>Information Gathering</i>	
<i>Challenging</i>	
Grand Total	