

# DIRECT EXAMINATION



PRESENTED BY:

JUDGE MEGAN SHAFRITZ  
AND  
WILLIAM T. COUNOS, II, ESQ.



# PLANNING YOUR DIRECT



- Thoroughly know the facts of your case
- Know the story you want to tell
- Decide on the theme of your case
- Decide on the role this witness will play in the story

# PREPARE YOUR EXAMINATION



- Why are you calling this witness?
  - Establish facts
  - Corroboration
  - Documentary evidence
  - Is this the best witness for this purpose?
- Write out your questions or outline them
- Review exhibits you are using
- Anticipate problems/objections. Have a back up plan

# PREPARE THE WITNESS



- Spend time practicing with the witness
  - Eliminates the element of surprise
- Avoid having witness memorize answers
- Practice your direct exam out loud
- **Non-client:** Be careful how you do it
  - No advice
  - No coaching (impression)
  - Disclaimer statements

# DO'S AND DON'TS OF DIRECT EXAMINATION



- Manner of interrogation/non-leading
  - Ask who, what, where, when, why, how (“W&H”) questions
- When are leading questions okay?
- Type of questions:
  - Short and easily understandable
  - Avoid legal terms/use plain everyday language
  - Don't “information dump”
  - Avoid repetition of the same facts
- **Witness is the “star”** of the examination
- Facilitate the connection to jury

# CONTROL THE WITNESS



- Avoid questions that allow for a narrative
- Ask questions that are directed to a specific and limited period of time
- Instruct the witness politely if you have to

# “SNAP SHOT” TECHNIQUE



- **Frame the subject** you want to ask questions about, then ask the W&H questions.
- **EXAMPLES**
- **Purpose:** Clues jury into what you will be asking about; makes it easier to ask “W&H” questions

# DON'T BE TIED TO YOUR OUTLINE



- Trial is a fluid situation, must be flexible
- Best way to prepare – know your case
- Try to anticipate possible scenarios
- Dealing with damaging facts
  - Two schools of thought on how to handle



# DEALING WITH THE UNAPPEALING WITNESS



Situations involving a problematic personal issue:

- Unkempt
  - Take corrective action if possible
  - Clean them up/Hairdresser
- No appropriate clothes
  - Get them appropriate clothes
- Odor Issue – Need to have the hard conversation

# SEQUENCING OF WITNESS



- Use order that works best for telling your story
- Start with the strongest witness (cross-proof)
- E.g.: Negligence cases – Defendant’s bad conduct
- Sequence of your examination
  - Begin and end with the most important points
- Focus groups can be very helpful

# TRIAL WILL BE ABOUT WHAT IT SPENDS THE MOST TIME ON



- **MULTI-ISSUE CASE: LIABILITY/DAMAGES**
  - Spending too much time on liability can decrease the importance of damages
- **Alternate your witnesses; make your time equal/even/proportional**
  - Add before/after witnesses
  - Add treatment providers
- **Be aware of scheduling experts/professional witnesses**

# WHEN POSSIBLE, USE OPPOSING WITNESSES TO PROVE YOUR CASE



- Generally applies on cross, but may involve calling witness on direct exam
- Weigh the risks of calling witness, balance good vs. bad
- Elicit facts that are favorable to your case
- Can be a lay or expert witness
  - Defendant
  - Lay witnesses identified or deposed by defense
  - Treating doctor, therapist or chiropractor deposed or identified by defense

# BASIC EXPERT DIRECT



- Preparation protected by V.R.C.P. 26(b)(5)(C)
- Background (introduce to jury or qualify)
- Essence of testimony: What were you asked to do in this case?
- How did you do it? What you are looking for and why? Explain each step
- Explain what was found to be significant at each step
- Opinion
- Explain how the opinion ties into the facts, a claim or defense
- **If rebutting** opposition's expert opinion – **must be disclosed**

# LAY PERSON'S OPINION



- Vermont Rule of Evidence 701
- Rationally based on the perception of the witness
- Helpful to a clear understanding of:
  - Testimony of the witness
  - Determination of a fact in issue
- Not based on scientific, technical or other specialized knowledge
- May embrace ultimate issue/Rule 704

# ADVANCED DIRECT



- Use techniques to make the direct testimony more compelling
- **Remember the theater of trial**
  - Use your tone, rhythm, body language, or movement as signal to jury
  - Listen to the witness/watch the jury's reaction
- Ask provoking questions using other side's theory so witness can deny or refute it
- **Change manner of introduction of witnesses**
- **Headline:** tell the jury why it is important that they listen to this witness

# EXAMPLE – APPROACH TO EXPERT



- “Please introduce yourself to the Jury”
- “You are the expert who is going to tell the Jury about Plaintiff’s injuries”
- “Do you have an opinion as to what Plaintiff’s injuries are and whether or not they are permanent?”
- “Before we get into your opinions, please tell the Jury a little bit about yourself”
- “Why did you choose to become an Orthopaedic Surgeon?”
- When satisfied on qualifications, go through your regular outline: “What were you asked to do in this case? Etc.”



# TESTIFYING IN THE MOMENT



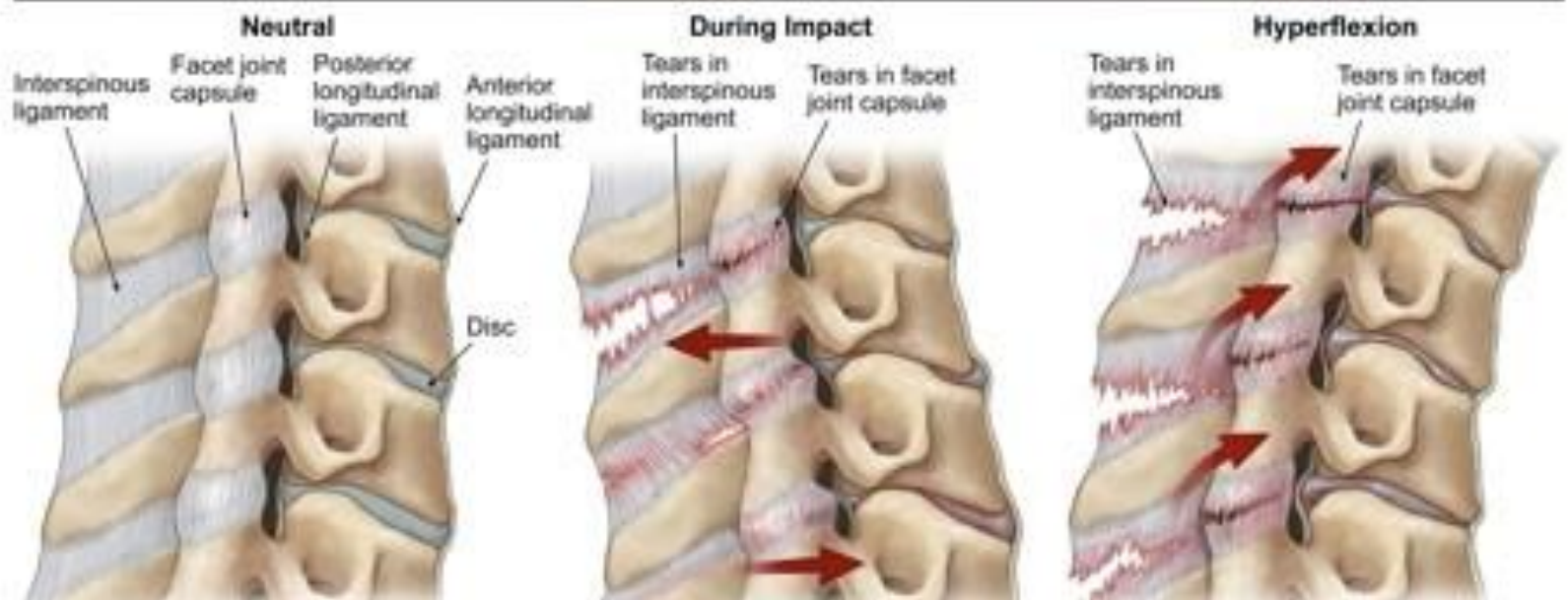
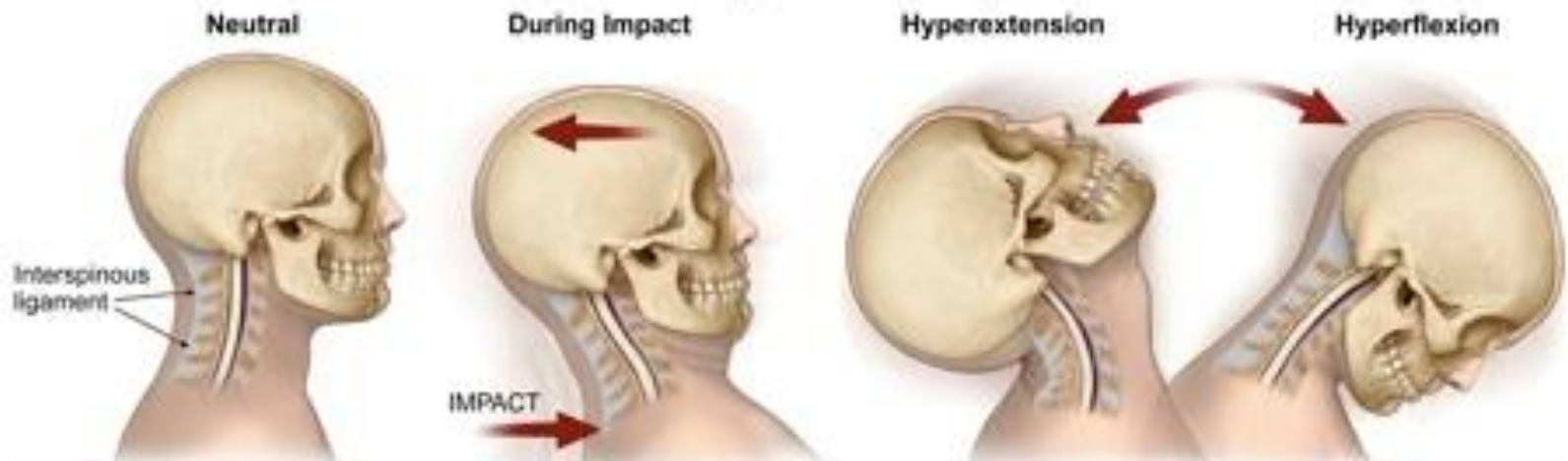
- Ask questions that are active rather than passive
- Try to involve as many senses as possible
  - See, hear, smell, taste, and feel
- Important to set the scene
- Ask questions in the present tense

# REFRESHING RECOLLECTION/ DEMONSTRATIVE EXHIBITS



- Vermont Rule of Evidence 612
  - While testifying: writing/object must be produced
  - Before testifying: production discretionary
  - Terms, conditions may be imposed on production and use
- Generally a five-step process. Remember to establish that witness has forgotten fact (cue words: “Do you recall?”) and that there is a writing or object that will refresh his/her memory. Witness must also state that memory is refreshed after reading document, and return exhibit to counsel.
- Exhibits
  - Try to incorporate demonstrative exhibits
  - When and how to use them

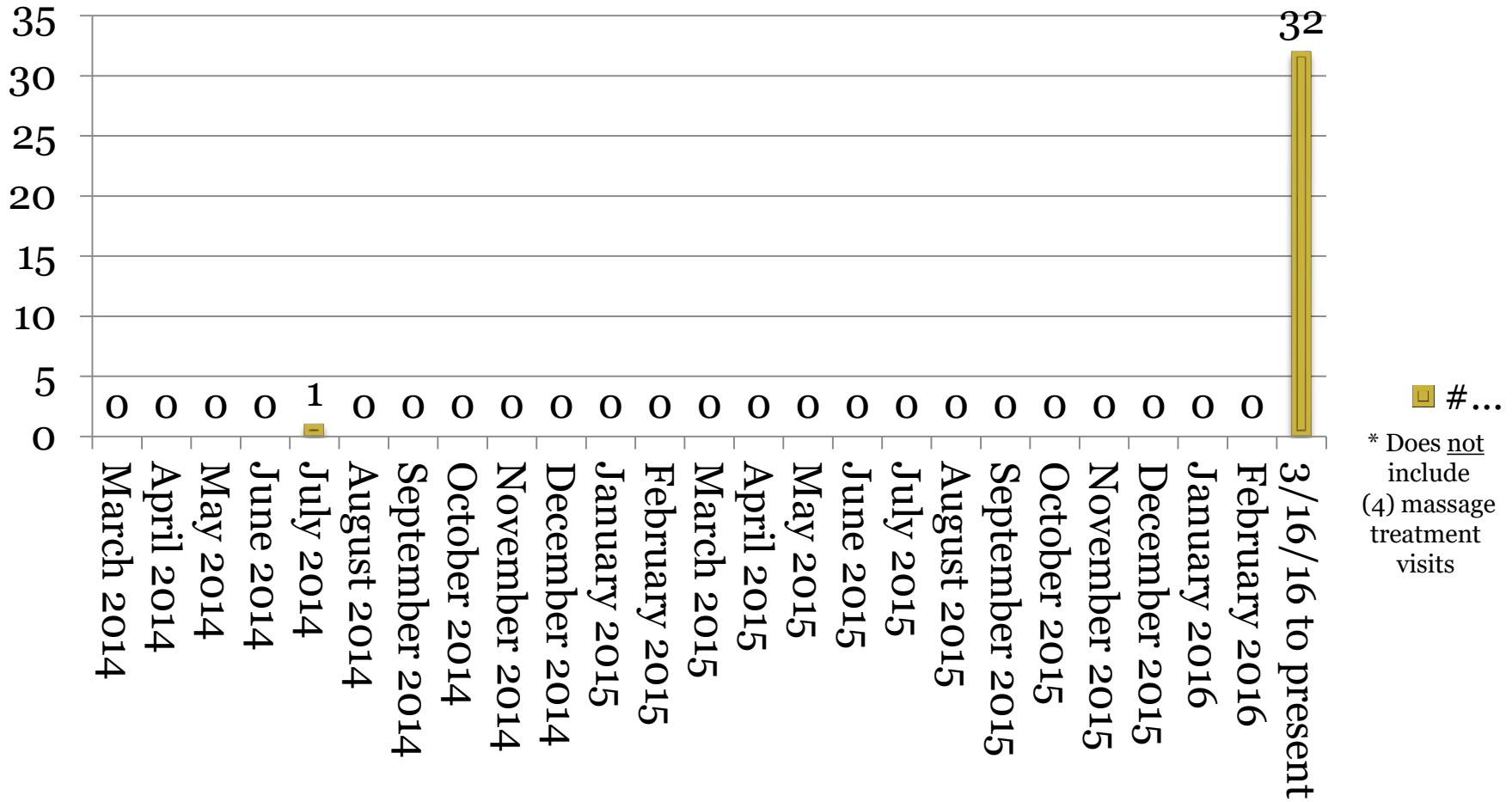
# Cervical Ligament Injuries



# Subacromial Shoulder Injection



There were **no** treatment visits for neck pain in the 20 months prior to this crash **and 32 *since***



# VIDEOTAPED TESTIMONY



- Great for the other side's experts/witnesses – terrible for yours
- Boring for jury to watch
- Testimony is locked in before trial, giving the other side a great advantage
- Testimony is taken in the atmosphere of a deposition
  - Tendency to go on too long/TMI
  - More concerned about preserving record/objections
  - Missing cues from jury

# THANK YOU!



- ANY QUESTIONS?

