



# Legal Updates 2019

# Power Issues in Medico-Legal Defense Law

- Legal Indemnity
- Impact of EMR
- Status of Tort Reform
- Opioid Litigation
- Significant Court Rulings



# Legal Indemnity

- Definition of Indemnity
- Explanation of Pre-Reform Law
- Tort Reform's Impact-Several Liability
- Ramifications on Physician/Hospital Defense



## Pre Tort Reform

- Joint and Several Liability

# Several Liability

-Defendant will only be held liable for his/her/its percentage of liability.



# Indemnity

- Individual takes on the obligation to pay for any loss or damage that has been or might be incurred by another.

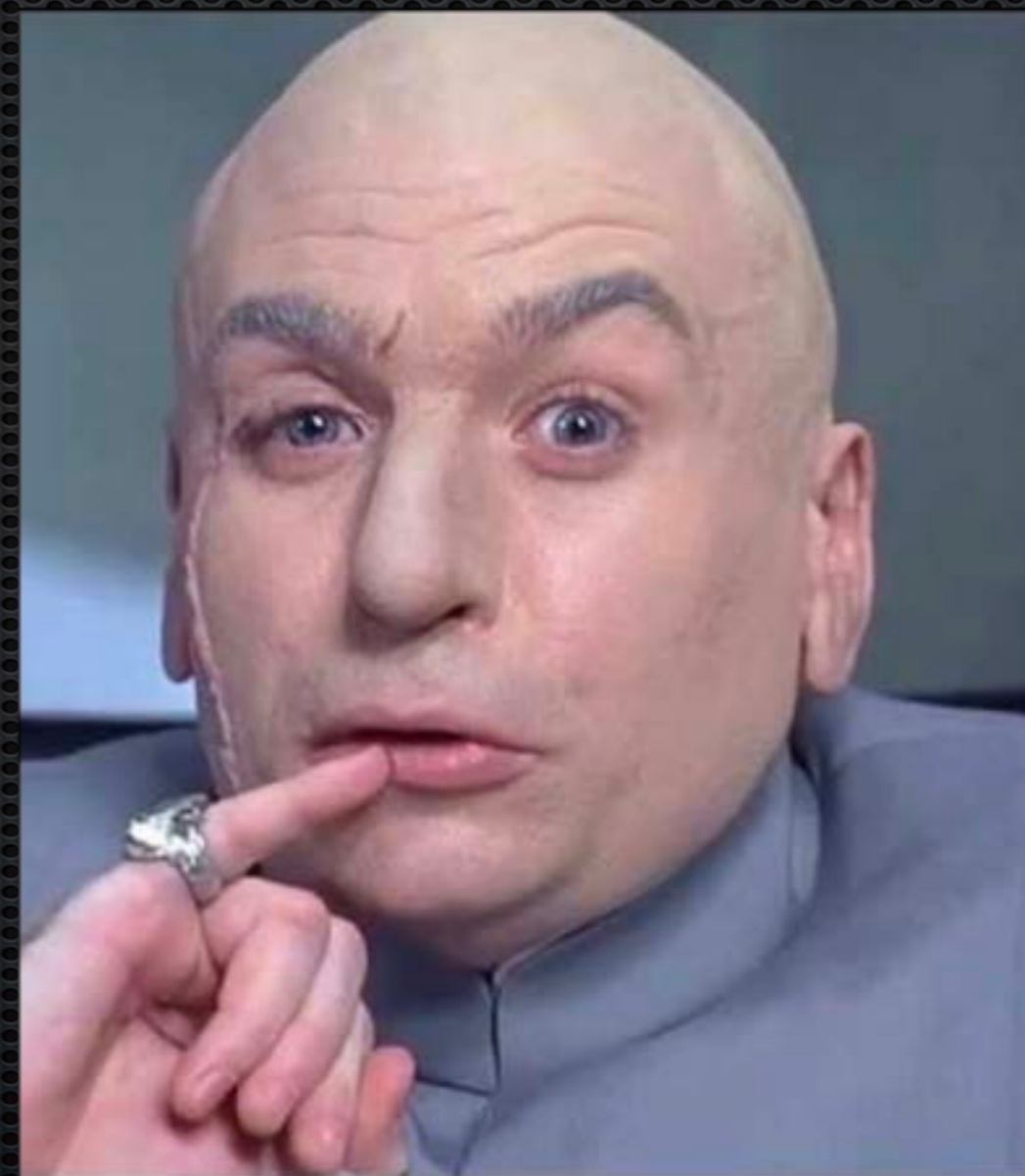


# Impact of Several Liability on Medical Malpractice Litigation

- Procedural for Pretrial Litigation
- Strategy/Tactics of Plaintiff Attorneys to Create Conflict
- Strategy/Tactics of Defense Counsel
  - Focus on apportionment of fault
  - Challenging the “common defense” mindset
- Procedural for Trial

# Plaintiff Attorney Case Tactics

- Choice of Party Defendants
- Waiting to Sue Potential Targets
- Forcing Defendants to Consider Adding other Un-Named Doctors





# Defense Tactic Modifications

- Required!!
- Communication from the Outset
- Complete Openness with Clients and Carriers
- Understanding of Why



OM



## Impact of Electronic Medical Records



Event Management for Medical Records

# Audit Trails

- Shows Who
- Shows What
- Shows When
- Shows How Long



*Request for Production:*

*Produce the “audit trail” pertaining to the medical records of Susan Smith and Cindy Lou Smith’s April 1, 2016 hospital admission. This request specifically seeks the documentation the defendant is required by federal law to maintain documenting the access to these patients’ medical charts.*

# Spoliation

-Computer Records

-Mobile Devices



Re: My Clients:  
Matter: Preservation/Spoilation Letter

Dear Risk Manager

As you know, I represent [redacted]. When we spoke last Thursday, you indicated you were not represented by counsel. If you have since retained counsel, please advise me of their identity so that I may correspond with them directly.

As you know, [redacted] has been in the exclusive control of evidence pertinent to my client's claims against [redacted], and as such [redacted] has had the obligation to preserve all such evidence. It is [redacted] duty to not only not destroy evidence, but to take affirmative steps to preserve such evidence. Inasmuch as [redacted] had a reasonable anticipation of litigation connected to this matter, I trust you have fulfilled this obligation. Out of an abundance of caution, however, I write to demand that [redacted] fulfil this obligation.

Specifically, this writing will serve as a demand that you preserve all documents, tangible things, electronically stored information, data, medical records, evidence, pathology specimens, pathology slides, isolates, films, records, photographs, videotapes, and any tangible or intangible item of any kind whatsoever that relates in any way to my clients or the claims in this case, or which may be potentially relevant to the issues in this case. As used in this letter, "you" and "your" refers to [redacted], its predecessors, successors, parents, subsidiaries, divisions, affiliates, officers, directors, agents, employees, physicians and health care providers. Do not dispose of, alter, destroy, damage any such items or materials, as I expect that this information and evidence will be both discoverable and admissible in litigation. Take whatever precautions necessary to preserve and protect such evidence. Failure to preserve this material will result in a request for a spoliation instruction at any trial in this matter. Spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim. A presumption of spoliation arises when it is shown that a party has attempted to suppress or destroy evidence.

My demand for preservation of evidence extends to, but is not limited to, the following:

- 1) The medical records of [redacted]; to include films, monitoring printouts, EKG's, labs, medical test results, and any other records pertaining to such;

# New Challenges:

- Record Security
- Record Production
- Witness Preparation
- Need For IT Experts to Explain Data
- Dealing with Inaccuracies in the System





# Status of Tort Reform

# Statutory \$350,000 Cap on NonEconomic damages

Determined not enforceable by the Oklahoma Supreme Court.

# 12 Okla. Stat. 19.1

- Affidavit of Merit
- Accounting of Claimed Damages
- Medical Authorization



Unconstitutional in 2017

# Johns v. St. Francis

[Okla. Stat. tit. 12, § 19.1 \(Supp. 2013\)](#)

# Existing Reform

- 12 Okla. Stat. Sec. 3009.1



# Opioid “Crisis” Impact on Litigation

- History of Opioid Litigation
- Opioid “crisis”
- Impact of political and media movement on Medical Negligence Litigation



# Significant Court Rulings

- Peer Review
- Cole v. Josey*-“Savings Clause”
- \$350,000 cap not enforced



A hand is visible on the left side of the frame, pointing towards a screen. The screen displays three icons: a scale of justice, a house, and a classical building with columns. The background is dark with a blue glow and a pattern of small white dots.

QUESTIONS?