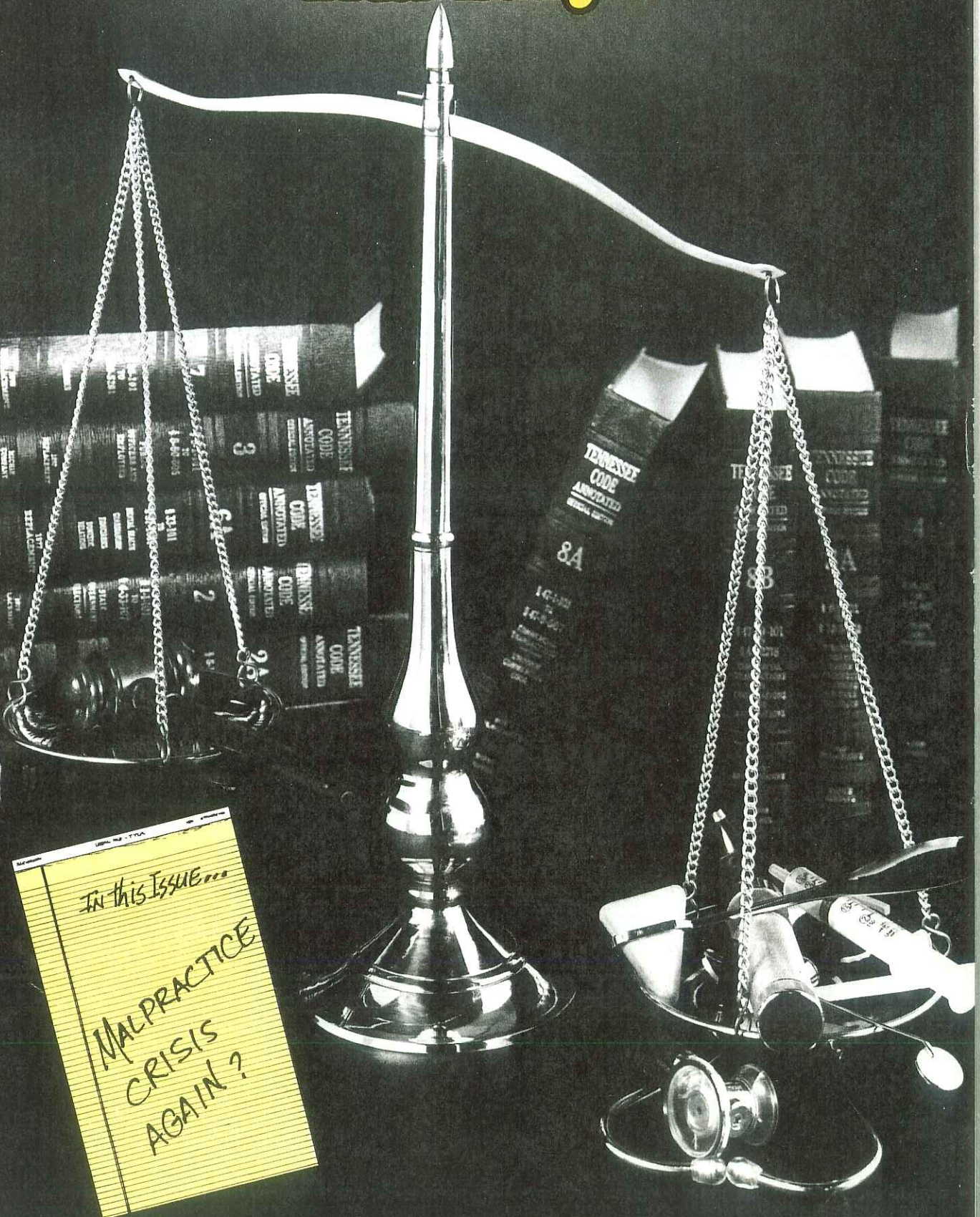


# The Tennessee Trial Lawyer



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## TORTS

### Subpoena the Treating Physician to Trial

By

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Historically, the established procedure among Tennessee plaintiffs' attorneys who want to secure treating physicians' testimony has been to take the doctor's deposition and read it at trial. Because the defense attorney has a chance to cross-examine at the deposition and the practicing physicians are exempt from subpoenaed appearances by T.C.A. § 24-9-105, the courts have treated the deposition as if it were the testimony of a live witness. It has not been necessary to subpoena the physician to testify at trial because it has been the understood practice that the deposition could be read at trial.

A case recently decided by the Tennessee Court of Appeals, however, has potentially devastating effects on this convenient and money-saving practice. *Stokes v. Leung*, 651 S.W. 2d 704 (Tn. App. 1982), *reh'g denied*, Jan. 10, 1983, *permission to appeal denied* 1983. *Stokes* was a medical malpractice action in which damages were for injuries sustained when a patient jumped from her hospital-room window. In an unusual move, the plaintiff tried to introduce in his case-in-chief a deposition of the defendant's witness, a physician. The deposition had not gone well for the defendant. The defense demanded the plaintiff's authority for reading the deposition of an adverse party's witness. The plaintiff cited Tennessee Rule of Civil Procedure 32.01(3)(D), which provides that a deposition may be used when "the party offering the deposition has been unable to procure the attendance of the witness by subpoena."

The defendant contended that the plaintiff had never subpoenaed the doctor, so Rule 32.01(3)(D) should not help his cause. The plaintiff replied that, because T.C.A. § 24-9-105(a) grants a practicing physician exemption from subpoenas, the deposition should be admissible without formally serving the doctor.

T.C.A. § 24-9-105(a) provides:

Official or occupational exemption from subpoena.

— (a) The witness, if he occupies any of the positions, or is employed in any of the capacities enumerated in subdivision (f) of § 24-9-101, is exempt from the penalties provided for the non-attendance of witnesses summoned by the subpoena, provided he claim such exemption at the time the subpoena is served, stating the ground thereof, in which case the officer will return the facts according to the claim.

The court found that this statute did not grant doctors exemption from receiving a subpoena, nor attorneys exemption from the necessity of delivering one before introducing a deposition in place of a witness. Its reasoning was:

In order to determine whether the doctor is amenable to court attendance, the subpoena must be served and the witness must then make his election regarding attendance. We may not presume that election. Therefore, there has been no showing that the plaintiff was unable to procure the attendance of the witness by subpoena. 651 S.W. 2d 710.

The court then denied admission of the deposition offered by the plaintiff. This was upheld by the court of appeals.

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***"The defendant contended that the plaintiff had never subpoenaed the doctor, . . ."***

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How does this holding affect the practical functioning of counsel who wants to introduce a doctor's deposition without burdening his client with the expense and worry of attempting to subpoena the doctor to trial? The *Stokes* case is current Tennessee law on the issue, and the court appears to have reached a technically correct interpretation of the statutory language. A responsible attorney, therefore, can hardly ignore the subpoena requirement anymore.

Taking the court's logic literally, mere issuance of the subpoena will not ensure admission of deposition testimony either. Unless the doctor objects to the subpoena at the time of its issuance, there is no showing of unavailability and, if opposing counsel is aware of the *Stokes* holding, the deposition will still be inadmissible.

What can an attorney do to avoid potential pitfalls created by the *Stokes* case? The first step, at the time of the deposition, is to say to adverse counsel and in front of the doctor and on the record: "Are you going to insist upon adherence to the technical principles of *Stokes v. Leung*. Tennessee Rules of Civil Procedure 32.01(3)(D) and T.C.A. § 24-9-105(a), and require me to subpoena the witness to trial? Or will you waive the obligation to the subpoena to trial?"

Asking this question protects you, regardless of opposing counsel's response. If adverse counsel agrees to the waiver on the record and in front

of the doctor, you should be able to count on reading the deposition in court without having to subpoena the doctor.

Even if he attempts to retract his waiver at trial, you can explain to the court that you were misled by your opponent and relied on his waiver; therefore, the provision of Rule 32.01(3)(E) for exceptional circumstances should allow the reading of the deposition. See *Huff v. Marine Tank Testing Corp.* 631 F. 2d 1140 (4th Cir. 1980).

If the judge will not accept this argument, you can request that he order an instant subpoena for the doctor. Tennessee Rule of Civil Procedure 45.05 (3) provides:

Upon the affidavit of a party or his attorney that the testimony of a witness is important, and that the just and proper effect of his testimony cannot in a reasonable degree be obtained without an oral examination in court, the court may, in its discretion, order the attendance of the witness, although such witness may otherwise be exempt from personal attendance.

If, at the deposition, adverse counsel refuses to waive the subpoena procedure, you should immediately inform the doctor that, because of opposing counsel's insistence, you will have to subpoena him. This scenario has its advantages for your case — a witness who was on your side to begin with is likely to become even more convinced of the righteousness of your cause when faced by opposing counsel with this new nuisance.

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***“What can an attorney do to avoid potential pitfalls created by the Stokes case?”***

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Since the doctor will probably be unaware of his exempt status, you face the delicate dilemma of wanting him to be aware of his right without providing him with unlawful legal counsel. Two possibilities for dealing with the situation are:

- 1) Say to the doctor, “Call your lawyer when served and ask him what you should do. Unfortunately, this will probably cost you some money, but since you are not my client, I am not allowed to give you legal advice.”
- 2) Or, say to the doctor, “Since you are not my client, I cannot give you legal advice, but I can tell you that the law provides that a practicing physician can tell the sheriff who brings him a subpoena that he is exempt from appearing at trial and elects his exemption.”

Of course, these machinations could all become unnecessary with a little action by the Tennessee legislature. A statute should be passed containing the provision that whenever a treating physician's deposition is taken in a case, the admissible parts thereof can be read to the jury by either party without the formality of issuing a subpoena to trial for the witness. In this way, the law would be reconciled with a custom that for years has served justice without sacrificing economy.

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In the meantime, for cases yet to be tried where depositions have already been taken, subpoena the physician to trial.



**ABOUT  
THE AUTHOR . . .**

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