



LEGAL MYTH BREAKERS

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WHY DID THE LAWYER CROSS THE ROAD?

As most of you know, Knox County Circuit Court and the United States District Court in Knoxville are just across the road from one another. In this article of Legal Myth Breakers, we look at another issue where the law differs significantly when the lawyer crosses the road from state court to federal court.

Before and throughout most of law school, I believed anyone could be subpoenaed to court. At some point during my legal studies, I became aware that society deemed the time of some professionals too valuable to be needlessly tied up in Court, and as such may be exempt from a trial subpoena. The Tennessee Code specifies persons who are exempt from subpoena to trial, but still be subject to a deposition which may be presented at trial:

- (1) An officer of the United States;
- (2) An officer of this state;
- (3) An officer of any court or municipality within the state;
- (4) The clerk of any court of record other than that in which the suit is pending;
- (5) A member of the general assembly while in session, or clerk or officer thereof;
- (6) A practicing physician, physician assistant, advanced practice registered nurse, psychologist, senior psychological examiner, chiropractor, dentist or attorney;
- (7) A jailer or keeper of a public prison in any county other than that in which the suit is pending;
- (8) A custodian of medical records, if such custodian files a copy of the applicable records and an affidavit with the court and follows the procedures provided in title 68, chapter 11, part 4, for the production of hospital records pursuant to a subpoena duces tecum; and
- (9) A licensed clinical social worker, as defined in § 63-23-105 and engaged solely in independent clinical practice, in proceedings in which the department of children's services is the petitioner or intervening petitioner.¹

This list of persons has expanded, particularly due to the evolution of the health care industry. If such a person is subpoenaed to trial and must file a Motion to Quash to seek relief the court "may" award reasonable attorney's fees and expenses related to the Motion to Quash.²

However, under the Tennessee Rules of Civil Procedure, a Court may still order personal attendance of such witnesses. Tennessee Rule of Civil Procedure 45.05 provides that upon affidavit of a party or party's attorney that a witness's testimony is important, and that "proper effect of the testimony cannot in reasonable degree be obtained without an oral examination in court", the court has the discretion to order such a witness at trial.³

When we cross the road to federal court, there is no such exemption for any of the persons listed in the Tennessee statute. In an unreported 2006 case, the Western District of Tennessee stated, "The court is unaware of any authority that holds that [T.C.A. § 24-9-101] prohibits a party from issuing a trial subpoena to a physician under the federal rules."⁴

In another unreported 2015 case in the Eastern District of Tennessee, a party issued and served a trial subpoena upon a local attorney. The subpoenaed attorney raised Tenn. Code Ann § 24-9-101(a)(6) in support of a Motion to Quash. Magistrate Shirley cited *Hawkins* as persuasive authority in denying the Motion and ruled the Court is not bound by the statute.⁵ Later that year in a Middle District of Tennessee case, Judge Trauger issued an opinion, now reported, stating:

In Tennessee state court, practicing physicians are exempt from being called to testify at trial, although they may be subpoenaed to testify by deposition. See Tenn. Code Ann. § 24-9-101(a)(6). In federal court, there is no analogous exemption for physicians otherwise subject to the subpoena power of the court.⁶

We are unaware of any federal circuit court opinions, reported or otherwise, addressing this issue with the statute. The rationale seems clear, as this is a procedural issue and not one of substantive law under *Erie*. Nonetheless, I had never appreciated this distinction until my good friend David Long pointed it out to me.

I remember in my early days of practice in federal court when former Magistrate Shirley warned many of us the first time we appeared before him that "you are now in the big leagues." This was usually in conjunction with a warning and short lecture about knowing the differences not only in the rules of each court, but also paying attention to other subtle, yet critical differences. This is another reason why reading publications such as DICTA and attending CLE presentations relevant to your practice remain critically important in the practice of law. Even after several years of doing this, I still get a little nervous when I go across that road. Thanks, Dave.

¹ Tenn. Code Ann. § 24-9-101(a).

² Tenn. Code Ann. § 24-9-101(b).

³ The Advisory Commission Comments to this Rule clarify that this is specifically intended to apply to witnesses otherwise exempted by Tenn. Code Ann. 24-9-101. *Hawkins v. Federated Dep't Stores, Inc.*, 2006 U.S. Dist. LEXIS 100398, n.2 (T.C.A. § 24-9-101(a)(6) is mistakenly cited as "T.C.A. § 24-0-101(6)").

⁵ See *Am. Nat'l Prop. & Cas. Co. v. Stutte*, 2015 U.S. Dist. LEXIS 85553.

⁶ *Adams v. Farbota*, 306 F.R.D. 563, 568 n.7 (M.D. Tenn. 2015).

