

Litigation Section

The Mississippi Bar

E-Newsletter

May 2012

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Message From Section Chair Doug Minor

Welcome to the Litigation Section of The Mississippi Bar. I am privileged to serve as the Section's Chair for 2011-2012 and continue its service to the Bar's civil litigators. We have worked diligently over the past year to continue the Section's tradition of specialized offerings to the Bar's civil litigators.

Over the past year the Section has continued its publication of the Mississippi Rules Annotated in association with the Mississippi Law Institute and Mississippi College School of Law. The Section has also continued to provide scholarship monies to the University of Mississippi Law School and Mississippi College School of Law, and to contribute to both schools' building funds. Currently, the Section is finalizing its annual CLE Seminar. The Seminar, entitled "Effective Advocacy – A View From the Bench," will be held on June 8, 2012 at the Mississippi Sports Hall of Fame.

The Section encourages you to attend the Litigation Section meeting on July 13, 2012, during the Bar's Annual Convention at the Hilton Sandestin. The Section was fortunate in securing the availability of Dr. Amy Singer, Ph.D., one of the nation's top trial consultants, as the speaker for the Section meeting. Dr. Singer is a licensed psychologist and a principal with Trial Consultants, Inc. ("TCI") out of Gainesville, Florida. She has worked with attorneys in several high profile criminal cases, including the trials of Casey Anthony, Dr. Kevorkian, Michael Jackson, William Kennedy Smith and O. J. Simpson. Dr. Singer founded TCI in 1979, and it is currently one of the oldest jury/trial consultant firms in the country. Dr. Singer's presentation is entitled "Leveraging Social Media for Voir Dire Strategy." We hope that that you will plan to travel to Destin this year to hear Dr. Singer.

The Executive Committee encourages all members to get involved with the Section. In addition to encouraging you to attend our CLE Seminar and the annual convention, we strongly encourage each of you to submit written materials for the Section newsletter. We know that Mississippi is the proud home of some of the most renowned litigators in the country, and that our lawyers represent clients across a wide array of different legal disputes. Your submissions are a great vehicle for sharing information with other members and networking with colleagues who have similar practices. We would like for the Section's newsletter to become a forum for thoughtful discussion among Section members about the day to-day issues we all face.

Finally, we are interested in feedback from you regarding how the Section can better serve you. Please feel free to contact any member of the Executive Committee and relay any ideas you may have, including other opportunities for the Section to promote the Bar and the civil practice of law in the state.

Much has changed in the legal environment since I began the practice of law 17 years ago, both within Mississippi and nationally. The members of the Section and litigators across the state are entrusted with a vital responsibility – the support, protection and advancement of our civil justice system. The Litigation Section is uniquely positioned to play a strong role in this effort. I encourage all members to become more involved in the Section's work. We look forward to hearing from you, and hope to see you at the CLE Seminar in June and at the annual convention.

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What I Learned at the Movies on Legal Ethics and Professionalism

By: Anita Modak-Truran

Law and film seamlessly weave together, and are often inseparable, in our popular culture. In 2008, the ABA Journal featured an article on the 25 best law movies, remarking that “in a town built on copyrights and cosmetic surgery, lawyers have done far more than pen the small print in studio contract. From the incisive Henry Drummond [to] the regal Atticus Finch, lawyers have provided some of Hollywood’s most memorable cinematic heroes and some of its most honorable and thoughtful films.”

The best and worst of the films in the legal genre offer a perfect opportunity to brush up on how lawyers should or should not conduct themselves in their professional careers. I thought I would share my impressions on what I have learned at the movies on legal ethics and professionalism.

From Baby Lawyer to Atticus Finch Clone, we all know that the lawyer’s role involves more than spewing off sound bites in a courtroom or your spouse when you need to remind him or her who wears the lawyer shoes (in my case stilettos) in the family. The preamble to the Mississippi Rules of Professional Conduct (“MRPC”) provides that the lawyer’s role is advisor, advocate, negotiator, intermediary and evaluator.

The penultimate lawyer – the one who offers sage advice, negotiates with diplomacy, judiciously evaluates the chances of success and plans for the worst and advocates with heart and soul – is Atticus Finch. In “To Kill A Mockingbird,” Atticus represents a black man wrongly accused of a raping a white woman in a society intolerant to integration.

Atticus Finch sets the gold standards. He demonstrated “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation” and exceeded the bounds of competent representation. See MRPC 1.1. In representing Tom Robinson, Atticus “exercise[d] independent

professional judgment and render [ed] candid advice.” See MRPC 2.1. He assessed not only the law, but evaluated other considerations, including the “moral, economic, social and political factors” relevant to his client’s situation. *Id.*



But we all know that lawyers come in all shapes and sizes on the big screen and in real life. Not everyone is Atticus Finch, and not one style of advocacy fits all. The commonality shared by all good lawyers, however, is zealously. “A lawyer zealously asserts the client’s position under the rules of the adversary system.” See MPRC, Preamble; accord MPRC 3.1-3.9.

Cinematic examples of zealous advocacy are many. Some are profound. In “A Few Good Men,” which revolves around a court martial proceeding of a high ranking military official, Lt. Kaffee (Tom Cruise) wants the truth. He demands it. Colonel Jessup (Jack Nicholson) tells him that he can’t handle the truth. “Son, we live in a world that has walls, and those walls have to be guarded by men with guns. Who’s gonna do it? You? You, Lt. Weinburg? I have a greater responsibility than you could possibly fathom. You weep for Santiago, and you curse the Marines. You have that luxury. You have the luxury of not knowing what I know. That Santiago’s death, while tragic, probably saved lives. And my existence, while grotesque and incomprehensible to you, saves lives. You don’t want the truth because deep down in places you don’t talk about at parties, you want me on that wall, you need me on that wall.”

What I Learned at the Movies on Legal Ethics and Professionalism, cont'd

Without context, “the truth” can often be a lofty concept flying above our heads. In “A Few Good Men,” the truth was that Colonel Jessup did order an illegal mission. An advocate understands that context shapes the truth and then lays bricks and mortar to substantiate the client’s position. In “Philadelphia,” a small time lawyer named Joe Miller (Denzel Washington) represents Andrew Beckett (Tom Hanks), a brilliant young attorney fired from a conservative firm for having AIDS. The two men are opposites in every way, but they are brought together as lawyer and client in part because Miller needed the work and Beckett couldn’t find anyone else to take the case.

Every time I see that final scene where Washington asks his client about the law, I get a chill, because it reminds me of what all this legal mumbo jumbo is about. Miller asks his client: “What do you love about the law, Andrew?” After some hemming and hawing, Andrew responds: “It’s that every now and again - not often, but occasionally - you get to be a part of justice being done. That really is quite a thrill when that happens.”

Anita Modak-Truran is an attorney at the Butler Snow law firm in Ridgeland.

2012 CLE Seminar “Effective Advocacy – A View From the Bench”

The Litigation Section of The Mississippi Bar is proud to host the 2012 CLE Seminar “Effective Advocacy – A View From the Bench” to be held Thursday, June 8, 2012, at the Mississippi Sports Hall of Fame in Jackson.

This CLE will be presented by a panel of ten trial and appellate judges from Mississippi’s state and federal courts, as well as a jury consultant from Decision Quest. The topics will cover the full array of litigation issues starting with discovery disputes and ending with appellate advocacy.

If you believe that a behind the curtain view of what influences judges and juries will help your practice, we encourage you to join us on Friday, June 8, 2012 for this rare opportunity. Seating is limited, so please take the time to complete and return the application. Members of the Litigation Section of The Mississippi Bar will receive a discount.

Litigation Section
Effective Advocacy—
A View from the Bench

Friday, June 8, 2012
Mississippi Sports Hall of Fame
1152 Lakeland Drive
Jackson, Mississippi



Presented by
The Mississippi Bar
Litigation Section



Litigation Section Awards Scholarships to Law Students

University of Mississippi Law School

The Litigation Section awarded scholarships, in conjunction with the Moot Court Board, to two outstanding law school trial practice students at the University of Mississippi Law School Awards Day on April 20, 2012 at the Khayat Law Center. The Litigation Section presented Abe McGlothlin and Jenna Harris each with a \$1000 scholarship.



Mississippi College School of Law

On behalf of the Litigation Section, Dean Jim Rosenblatt presented Kate Morgan and Samuel Gregory with a \$1000 scholarship each for their continuing education. The scholarships were presented at the Law Day Awards ceremony on April 12, 2012 at the Mississippi College School of Law.

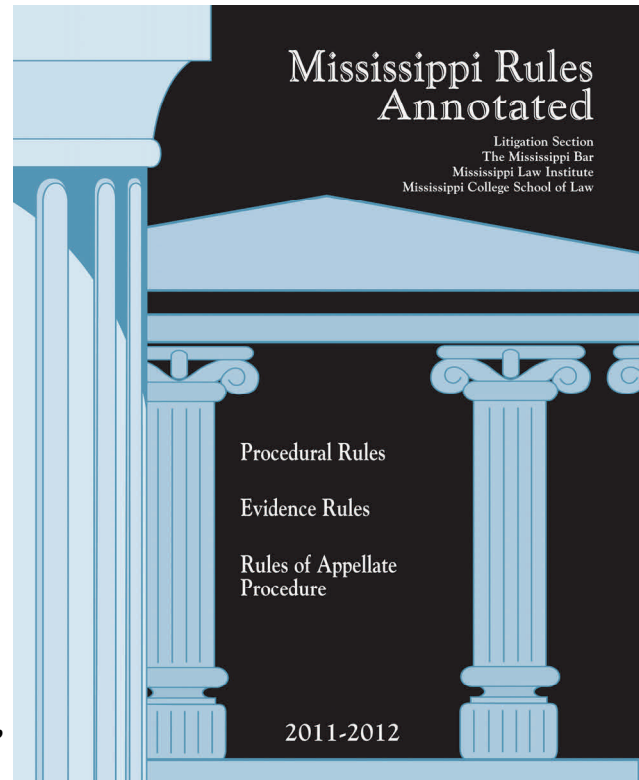


2011-2012 - Mississippi Rules Annotated

The Litigation Section partnered with the Mississippi Law Institute Press and the Mississippi College School of Law to publish the 2011-2012 Mississippi Rules Annotated. Mississippi Rules Annotated is the most comprehensive compilation of case annotations available on the market for the civil procedure, evidence and appellate court rules. Annotations are arranged topically, making it easier to pinpoint cases that discuss a particular portion of a rule.

The sale and distribution of the books is handled by MLI Press. All inquiries should be directed to: Tammy Upton at 601-925-7107 or tupton@mc.edu.

COST: \$135.00 plus shipping and handling. Shipping and handling charges - \$10.00 for 1 book, \$15.00 for 2 to 4 books, \$22.00 for 5 to 10 books, \$40.00 for 11 to 20 books.



- If you are a member of the Litigation Section of the Mississippi Bar, you will receive a \$15.00 discount and your book will cost \$120.00 plus shipping and handling.
- If you are in the Jackson area, you may save the shipping and handling fee by picking up copies at MLI Press at 151 East Griffith Street. For more information about MLI Press, click [here](#)
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The Social Network: American Jurors Reaching out of the Courtroom and Into Trouble

By: *Mark Dreher*

A United States congressman, confronted with his own sexual exhibitionism, surrenders his office.¹ A popular entertainer, frustrated with a concert review from a local column, utters incendiary, homophobic accusations.² A well-known critic's wry remark following a tragic automobile accident sparks controversy.³ And it all happens in the same week.

That's right. In the span of just four days (June 16-20, 2011), Rep. Anthony Weiner, singer Cee Lo Green, and film critic Roger Ebert were front-page news and late-night talk show fodder. Their public careers were marred — or even derailed — as a result of “140 characters or less” postings on their personal microblog (Twitter) accounts.



These increasingly common indiscretions highlight a disturbing trend, one that reaches all the way to the jury box. Was it really two years ago that popular Today show personality Al Roker came under fire for publishing photographs of his jury duty experience on his Twitter account?⁴ Mr. Roker's postings were limited to initial selection and the jury lounge. Unfortunately, many others are not. They have seeped into the courtroom itself, compounding problems with the integrity of an embattled judicial process. In December 2010, Reuters Legal, working in conjunction with Westlaw, described the following:

“The data show that since 1999, at least 90 verdicts have been the subject of challenges because of alleged Internet-related juror misconduct. More than half of the cases occurred in the last two years. Judges granted new trials or overturned verdicts in 28 criminal and civil cases — 21 since January 2009. In three-quarters of the cases in which judges declined to declare mistrials, they nevertheless found Internet-related misconduct on the part of jurors.”⁵

WHAT'S AT STAKE

Trial by jury is one of the foundational rights Americans enjoy.⁶ Our legal tradition holds that an impartial jury is one free from outside influence and that its deliberations are limited to evidence introduced in the proceedings; however, the near-limitless capacity of the internet generally, and the ubiquitous presence of social networking like Twitter and Facebook specifically, challenge these time-honored tenets. Here's how:

“John Boy” Legal Research

The enduring cultural image of the 1970s television show *The Waltons* is the “good night” scene. Viewers saw the façade of the Waltons' home, lights in the windows were extinguished one by one, and the interminable litany began: “Good night, children. Good night, Momma. Good night, Elizabeth. Good night, John Boy....”⁷ Flash forward to the internet age. Jurors are admonished in courtrooms across America to refrain from independently researching the cases they will be deciding. They are told to avoid the evening news, to forego the newspaper; occasionally, they are even expressly instructed to avoid internet research. Nonetheless, the allure of anonymous, instant-access information with a mouse click is a powerful one. Google Earth can pull up a crime scene, and any number of medical websites can describe medical conditions in great detail. But when jurors conduct these searches on their own, often with incomplete information or assumptions, it resembles that scene from *The Waltons*; it is, essentially, calling out blindly in the dark. More importantly, the resulting prejudice can overturn an entire trial:

- In Florida, an eight-week trial in which the defendant was accused of illegally selling prescription drugs through internet pharmacies ended in mistrial when a juror admitted to conducting independent research, including research into evidence that had been excluded. The court considered excusing the juror and

The Social Network: American Jurors Reaching out of the Courtroom and Into Trouble, cont'd

continuing — until learning that eight other jurors had done the same thing.⁸ A separate Florida conviction was overturned (and a new trial granted) when a juror used his smartphone to look up the meaning of the term “prudent” from the jury instructions.⁹

- In Maryland, the Court of Special Appeals found that a juror’s independent internet research into a psychological condition attributed to a key witness — with symptoms including lying — “constituted egregious misconduct.”¹⁰
- In New Hampshire, a juror disclosed to his fellow members that the accused in a sexual assault trial was a convicted sex offender, defying the court’s directive against such research and thwarting one of the case’s pivotal evidentiary rulings. The juror was charged with contempt and levied with a fine for the cost of the proceedings.¹¹
- In Pennsylvania, a juror in a capital-murder trial conducted internet research on the victim’s injuries, then volunteered that information in the midst of the jury’s deliberations, prompting a partial mistrial and contemplated criminal contempt charges against the juror.¹²
- In Georgia, a juror performed internet research in a rape case. The case ended in mistrial; the juror was fined \$500 for violating specific jury instructions prohibiting such research.¹³

The Digital Soapbox

This all-access phenomenon is not limited to jurors’ bringing inappropriate information into their deliberations. With social networking platforms like Facebook and Twitter, there is the equally troubling risk of jurors documenting and publishing their thoughts and deliberations inappropriately outside the confines of the courtroom.

- In Michigan, a juror was excused, fined \$250, and ordered to write a five-page essay on a defendant’s right to trial by jury under the Sixth Amendment after posting on her Facebook page that it was “gonna be fun to tell the defendant they’re GUILTY.”¹⁴
- In California, a post-conviction discovery that a juror in a gang-related assault case posted “Can it get any more BORING than going over piles and piles of [cell phone] records” on his Facebook page threatens not only the conviction but raises issues of disclosure and discovery into the records themselves.¹⁵
- In Pennsylvania, convicted state senator Vincent Fumo pursued a new trial, arguing that a juror improperly leaked information about the trial via his Facebook status.¹⁶
- In New York, a juror who e-mailed details of the jury’s deliberations in a rape case to a prosecutor friend caused a mistrial and incurred a \$1,000 fine.¹⁷

Dangerous Liaisons

Perhaps the most egregious act a juror can perform, though, is not gathering extrinsic evidence, broadcasting private deliberations into an anonymous blogosphere, or even e-mailing a friend about the trial. Rather, it is to inject themselves improperly into the dynamics of the trial itself. When jurors pull back the veil separating them from other jurors, witnesses, parties, or even the judge, their actions fundamentally taint the proceedings and compromise the integrity of any results:

- In Maryland, the former mayor of Baltimore was convicted of embezzlement. She discovered that five of the jurors in her case had become Facebook friends with each other during the course of the trial and challenged the rulings before ultimately settling prior to appeal.¹⁸

The Social Network: American Jurors Reaching out of the Courtroom and Into Trouble, cont'd

- In West Virginia, a fraud conviction was overturned when it was discovered that a juror had posted to her MySpace page (another social networking site) the following message to the defendant: *“Hey, I dont know you very well But I think you could use some advice! I havent been in your shoes for a long time but I can tell ya that God has a plan for you and your life. You might not understand why you are hurting right now but when you look back on it, it will make perfect sence. I know it is hard but just remember that God is perfect and has the most perfect plan for your life. Talk soon!”*¹⁹
- In Georgia, a judge dismissed an entire panel amid allegations of jury tampering when a juror reported that she had been contacted via Facebook by a friend of the defendant’s.²⁰
- In New York, a state trial court determined that a juror breached her obligations by sending a “friend” request on her Facebook account to a government witness but rejected the challenge to the jury’s guilty verdict.²¹
- In England, a juror was convicted for contempt of court and sentenced to eight months in jail for exchanging Facebook messages with a defendant during a drug trial.²²

WHAT’S THE FIX?

With example after example of jurors unable or unwilling to “power down” their Web-based alter-egos to preserve the sanctity of the jury trial, where can courts (and parties) turn for solutions? Even as penalties for violations get stiffer and more creative, we cannot lose the fact that “a solution must focus on educating jurors before trial, as remedial measures after the fact are designed to preserve the finality of the verdict.”²³ Well-crafted pretrial jury instructions, particularly those that identify the internet culprits with some specificity, are a good place to start. For example, pattern instructions in New York state:

In this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, internet chat or chat rooms, blogs, or social websites, such as Facebook, MySpace, or Twitter.²⁴

New Jersey’s pattern instruction builds on this specificity to explain to jurors the rationale of the restriction:

You should not review or seek out information about the issues in the case, the parties, the attorneys, or the witnesses, either in traditional formats such as newspapers, books, advertisements, television or radio broadcasts, or magazines or through the internet or other computer research. You also should not attempt to communicate with others about the case, either personally or through computers, cell phones, text messaging, instant messaging, blogs, Twitter, Facebook, Myspace [*sic*], personal electronic and media devices, or other forms of wireless communication. You should not go on the Internet or participate in or review any websites, Internet “chat rooms” or “blogs,” nor should you seek out photographs or documents of any kind that in any way relate to this case.

Why is this restriction imposed? You are here to decide this case based solely on the evidence — or lack of evidence — presented in this courtroom. Many of you regularly use the Internet to do research or to examine matters of interest to you. The information you are accessing is not evidence.²⁵

That is, jurors should be told not only what the specific prohibitions are, but why that is so. The deterrent effects of a fine or a constitutional essay pale in comparison to the costs associated with a mistrial or a reversal. The far

The Social Network: American Jurors Reaching out of the Courtroom and Into Trouble, cont'd

better approach is to convince jurors to “buy in” to the judicial process from the outset. Nor is this concept limited to individual state approaches. In 2010, the Federal Judicial Conference Committee on Court Administration and Case Management adopted the following model instruction:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom. Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet, and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn, and YouTube.²⁶

On July 5, 2011, Casey Anthony — a 25-year-old mother accused of murdering her two-year-old daughter — was acquitted in a high-profile Florida trial. Three months earlier, the Orlando Sentinel received a letter from a potential juror who was excused in the initial jury selection process. The May 10, 2011, letter stated, in part:

While I would like to believe that most potential jurors have good intentions, I also believe that most are clueless as to appropriate behavior while waiting to be selected/rejected. [...] I do not believe it is the media that will taint the jury in this or any other high profile case, but rather, the lack of proper instruction given to potential jurors/jurors about what can/cannot be discussed at various stages of the trial process. And if this means that a judge must admonish all potential jurors each morning prior to Voir Dire that they risk being held in contempt of court if they discuss the case with anybody prior to being excused from service, then so be it.²⁷

That admonishment is one that officers of the court of every stripe should take to heart, for every potential medium.

¹ Hernandez, R., *New York Times*, June 16, 2011, “Weiner Resigns in Chaotic Final Scene.”

² Swenson, A., *CityPages Blogs*, June 17, 2011, “Cee Lo Green Calls Me Gay, Asks if His Masculinity Offends Me.” Available at: <http://blogs.citypages.com/gimmenoise/2011/06/cee_lo_green_gay_twitter_homophobic.php>. Last accessed July 29, 2011.

³ Nededog, J., *Hollywood Reporter*, June 20, 2011, “Film Critic Roger Ebert Enrages Fans with ‘Insensitive’ Ryan Dunn Tweet.” Available at <<http://www.hollywoodreporter.com/live-feed/film-critic-rogerebert-enrages-203413>>. Last accessed July 29, 2011.

⁴ Weiss, D., *ABA Journal*, May 29, 2009, “Media Atwitter over Al Roker’s Twitter Photos from Jury Duty Wait.”

⁵ Grow, B. *Reuters Legal*, December 8, 2010, “As Jurors Go Online, Trials Go Off Track.”

⁶ U.S. Const., 6th Amendment (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . .”); id at 7th Amendment (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

The Social Network: American Jurors Reaching out of the Courtroom and Into Trouble, cont'd

⁷ To see the ongoing cultural relevance of this image, consider this automobile insurance commercial: <<http://www.youtube.com/watch?v=KajIm9lgImw>>.

⁸ Schwartz, J., *New York Times*, March 17, 2009, "As Jurors Turn to Web, Mistrials are Popping Up."

⁹ *Tapanes v. State*, 43 So.3d 159 (Fla. App. 4 Dist. 2010).

¹⁰ *Wardlaw v. State*, 185 Md. App. 440, 453, 971 A.2d331, 338 (Md. App. 2009).

¹¹ Timmins, A., *Concord Monitor*, March 26, 2009, "Juror Becomes a Defendant."

¹² Grow, B., *Reuters Legal*, January 19, 2011, "Juror's Online Research Prompts Mistrial and a Criminal Probe."

¹³ Simmons, A., *Atlanta Journal-Constitution*, March 30, 2010, "Georgia Courts to Bar Jurors from Internet."

¹⁴ *Standard-Examiner*, September 2, 2010, "Facebook Juror Gets Homework Assignment from Judge."

¹⁵ Egelko, B., *San Francisco Chronicle*, March 31, 2011, "Juror's Facebook Postings an Issue in Appeal."

¹⁶ Snyder, A., *South Philly Review*, December 16, 2010, "Fumo Seeks New Trial."

¹⁷ Zambito, T., *New York Daily News*, June 15, 2011, "Juror Gets \$1000 Fine for Sending Email During Rape Case, Causing Mistrial."

¹⁸ Holden, B., *Baltimore Sun*, June 23, 2011, "Courts Must be Prepared for Tech-savvy Jurors."

¹⁹ *State v. Dellinger*, 225 W.Va. 736, 696 S.E.2d 38 (W.Va. 2010).

²⁰ Purser, B., *The Sun News*, June 23, 2011, "Alleged Jury Tampering Halts Start of Shooting Trial of Fort Valley Man." Available at <<http://www.macon.com/2011/06/23/1606284/alleged-jury-tamperinghalts-start.html>>. Last accessed July 29, 2011.

²¹ Walter, N., N.Y.L.J., March 3, 2010, "Access to Internet, Social Media by Jurors Pose Challenges for Bench."

²² Deans, J., *The Guardian*, June 16, 2011: "Facebook Juror Jailed for Eight Months."

²³ Fallon, T., 38 *Hofstra L.R.* 935, 953, Spring 2010, Note: "Mistrial in 140 Characters or Less? How the Internet and Social Networking are Undermining the American Jury System and What Can be Done to Fix It."

²⁴ New York Pattern Criminal Jury Instructions 2d, *Jury Admonitions*, No. 6.

²⁵ New Jersey Model Civil Jury Instructions, 1.11C.

²⁶ Judicial Conference Committee on Court Administration and Case Management Model Jury Instruction, *The Use of Electronic Technology to Conduct Research or Communicate about a Case*.

²⁷ Saracino, L. *Orlando Sentinel*, May 10, 2011, "Sentinel Exclusive: Letter from Potential Casey Anthony Juror Who was Dismissed from Case."

Mark Dreher is an attorney at the Butler Snow law firm in Ridgeland.

Substantial Justice in Eminent Domain Proceedings: The New Date of Valuation for Privately-Owned, Public Utility Companies

By: Michael C. McCabe, Jr.



In 2011, amid much fanfare, Mississippi voters overwhelmingly approved an initiative to amend the Mississippi Constitution to prohibit state and local government from taking private property by eminent domain and then conveying it to private interests in the name of public interest economic development for a period of ten years after the acquisition. Earlier that same year, the Mississippi Supreme Court quietly rendered its own reformation of Mississippi eminent domain law when it handed down its decision in *Dedeaux Util. Co., Inc. v. City of Gulfport*,¹ in which it held that Section 11-27-19 of the Mississippi Code, which sets the date of valuation of property subject to eminent domain as the date of filing of the complaint, is unconstitutional as applied to privately-owned, public utility companies. This article discusses the *Dedeaux* opinion and how the Court reached its conclusion.

I. Background

Dedeaux Utility Company, Inc. (“Dedeaux”), was the holder of Certificates of Public Convenience and Necessity for certain water and sewer services in Harrison County, Mississippi, and had operated as a local utility company since 1971. In the early 1990s, the City of Gulfport, Mississippi (“Gulfport”), annexed the area served by Dedeaux and, on December 3, 1996, filed a complaint of eminent domain against Dedeaux, Cause Number 96-01102, in the Special Court of Eminent Domain, Harrison County, Mississippi, First Judicial District. In addition to condemning those assets which existed on the date of filing, the Complaint also sought to condemn any later additions, extensions and/or supplements.

Gulfport did not take possession of the utility until December 20, 2004 (shortly after the entry of a final judgment in the first trial), a full eight years after filing its eminent domain complaint. During that eight year period of time, Dedeaux continued to operate the utility system and, it argued, accumulated assets as Contributions in Aid of Construction² (“CIAC”), all in accordance with its duty under Section 77-3-21 of the Mississippi Code to provide reasonably adequate service to its certificated area. According to Dedeaux, its tangible asset base continued to grow from December 3, 1996, through the date that Gulfport took possession of the utility system on December 20, 2004.

The parties appealed the final judgment entered following the first trial, and upon review, the Supreme Court of Mississippi reversed the judgment and remanded the case for a new trial.³ Approximately two years later, the case was tried for a second time. On October 7, 2008, the eminent domain court entered a final judgment, fixing the compensation and damages owed to Dedeaux. The judgment did not award Dedeaux compensation for Gulfport’s taking of the additions that Dedeaux claimed it had accumulated in the eight years between the date Gulfport filed its eminent domain complaint and the date Gulfport took possession of the utility company. The parties appealed the judgment entered following the second trial.

On appeal, the Mississippi Supreme Court held, among many other things, that Section 11-27-19 of the Mississippi Code was unconstitutional as applied to privately-owned, public utility companies and that, “in these specific cases, the applicable date for purposes of determining due compensation is the actual date the property is transferred (here, December 20, 2004).”⁴

Substantial Justice in Eminent Domain Proceedings: The New Date of Valuation for Privately-Owned, Public Utility Companies, cont'd.

II. The Date of Valuation vs. the Duty to Provide Reasonably Adequate Service

Section 14 of the Mississippi Constitution states that “[n]o person shall be deprived of life, liberty, or property except by due process of law.” Section 17 of the Mississippi Constitution states that “[p]rivate property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof.” The Fifth Amendment to the United States Constitution prohibits the taking of private property for public use, “without just compensation.” The Mississippi Legislature has mandated that “[e]vidence of fair market value shall be established as of the date of the filing of the complaint.”⁵

However, Section 77-3-21 of the Mississippi Code imposes upon public utilities the responsibility to provide reasonably adequate service to the citizenry within its certificated area. Dedeaux argued that this required it to accept and maintain improvements to its water and sewer system when such work was necessary. Thus, in order to comply with Section 77-3-21, Dedeaux argued that it added assets to its system between the date of filing of the Gulfport’s eminent domain complaint on December 3, 1996, and the date that the City actually took over possession and operation of the Dedeaux assets on December 20, 2004.

The statutes cannot be reconciled in fairness to public utility companies. In establishing the property valuation date as the date of filing of the eminent domain complaint, Section 11-27-19 fails to account for a delay of the date of physical taking following the filing of an eminent domain complaint. More importantly, it fails to account for the assets that a utility system must acquire and maintain as a matter of state law during the pendency of the eminent domain proceeding under Section 77-3-21.

In ordinary eminent domain cases, the date of the valuation of property is the date of the filing of the condemner’s complaint, without regard to any increased value of the property after that date.⁶ This is generally based upon the need for designation of some definitive time for the purpose of evaluating the property.⁷ However, the taking of public utility property is different than condemnation of a private home or business, because, in the case of a public utility, there is a statutory obligation imposed upon utility owners to continue the provision of reasonably adequate service to its customers.⁸

III. Substantial Justice in Eminent Domain Proceedings

At its most basic level, the Court’s resolution of this conflict is premised upon the recognition that “[f]air-market value ‘is not an absolute standard nor an exclusive method of valuation. . . .’”⁹ Rather, “[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law.”¹⁰ Thus, “[c]ourts have had to adopt working rules in order to do substantial justice in eminent domain proceedings.”¹¹

Based upon this flexibility inherent in eminent domain proceedings, the Court explored how best to reconcile Dedeaux’s right to just compensation with the conflict posed by Sections 11-27-19 and 77-3-21 of the Mississippi Code.

A. The Approach Adopted by Other Jurisdictions

The distinction between the condemnation of private property and public utility property had been long recognized in other states. In *Passaic Consol. Water Co. v. McCutcheon*,¹² the high court of New Jersey recognized that an eminent domain act that did not compensate a public utility company for its compulsory improvements made after the date of filing of the eminent domain complaint deprived the company of its constitutional right that private property shall not be taken for public use without just compensation.

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In *Passaic*, several municipalities sought to acquire the waterworks of the Passaic Consolidated Water Company (the “water company”). A commission was appointed to negotiate a price with the water company, and after negotiations failed, the commission initiated condemnation proceedings to acquire the water company through eminent domain. The eminent domain petition was filed on April 24, 1928. New Jersey’s Eminent Domain Act at that time was in all pertinent respects the same as Section 11-27-19 of the Mississippi Code in that it fixed the date of valuation of condemned property as the date of filing of the eminent domain complaint.¹³ The Court immediately recognized the dilemma faced by a public utility company that is subject to condemnation:

In the ordinary case of condemnation, no injustice by this provision of the statute is done to the owner, as he is under no obligation to extend, improve, or add to his property. In the present case the situation is different. The water company is a public utility. It is subject to regulation by the Board of Public Utility Commissioners. It must render adequate service. It cannot lawfully refuse to make repairs, improvements, additions, and extensions which are required for such service. It serves a population of 425,000. This number is increasing. To adequately serve its present patrons and new customers will require the expenditure of a considerable sum between the date of filing the petition and the completion of the condemnation. The condemnation proceedings will take a very considerable period of time. This is evidenced by the fact that the court gave until May 1, 1929, for the filing of the commissioners’ report. The property is varied. It consists of pumping and filtration stations, reservoirs, mains, pipes, meters, fire hydrants, etc. It is located in four counties. During the two years preceding the commencement of these proceedings, \$710,000 had been expended for main extensions and other property. For such similar expenditures during the condemnation proceedings the statute affords no method of compensation.¹⁴

The water company, like *Dedaux*, contended that it was “entitled to the constitutional provision that private property shall not be taken for public use without just compensation, and that the General Eminent Domain Act of 1900 . . . does not afford just compensation.”¹⁵ The commission argued that the eminent domain statute was sufficient for this purpose. In ruling that the eminent domain statute was not sufficient, the Court noted that the condemnation proceedings would likely last longer than two years and that in the meantime the water company would be compelled by orders of the commission to make improvements in order to render adequate service to the public that it served.¹⁶ The Court held that

[f]ailure to provide a method by which the owner can be reimbursed for the extension and betterments it is obliged to make during the pendency of the [eminent domain] proceedings is a serious matter, and deprives the water company of just compensation for its property if the statute cannot be so construed as to include such payments.¹⁷

In *Ariz. Corp. Comm’n v. Tucson Gas, Elec. Light & Power Co.*,¹⁸ the Supreme Court of Arizona recognized that Arizona’s eminent domain statute was insufficient for the assessment of just compensation due a public utility company that has made compulsory improvements after the date of filing of an eminent domain complaint. *Ariz. Corp. Comm’n* was an appeal from the judgment of a lower court vacating and annulling orders of the Arizona Corporation Commission (the “Commission”) requiring the public utility company to make capital improvements necessary to serve the public. Arizona’s eminent domain statute at that time fixed the date of valuation of condemned property as the date of summons.¹⁹ The lower court had vacated the Commission’s orders on the basis that they deprived the public utility company of its property without just compensation in that they compelled the

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public utility company to make improvements under a legislative condemnation plan that would never afford compensation for such improvements.²⁰ Instead of weighing the validity of the Commission's orders, the Arizona Supreme Court resolved to address the root of the problem: "[T]he legal conflict we are here called upon to determine would never have arisen were it not for the condemnation proceedings instituted by the City of Tucson. . . . We believe . . . that a determination of the constitutional question is essential to the deciding of this case."²¹

The Court analyzed the principles underlying the general rules of eminent domain, noting that "[t]he right of the owner to use and enjoy the property until it is actually taken is undoubted."²² However, the Court explained:

[A] point of time must be fixed upon with reference to which the damages shall be assessed and to which the title shall be assessed and to which the title shall relate But, wherever that point of time is fixed, up to that point of time the owner may put improvements upon his property and recover their value, but after that point of time improvements will be made at the risk of being taken without compensation. . . . This rule, however, may not afford 'just compensation' to a public utility the property of which is the subject of condemnation. . . . [D]efendant, as a public utility, may be under the necessity of making improvements to and extensions of its physical properties, the cost of which cannot properly be absorbed as expense of maintenance and operation. For any such betterments and improvements as may be reasonably necessary and prudently made between the date of the awards and the orders of appropriation, the defendant is entitled to compensation; and the judgments should so provide.²³

In concluding that the Arizona eminent domain statute was unconstitutional when applied to public utility properties, the Court ruled that:

The constitutional provision [requiring just compensation] must take precedence over the statutory provisions of Section 27-916, supra. The statutory provision is unconstitutional when applied to the taking of public utility properties. It occurs to us that the eminent domain statute of the State of Arizona was created for no other purpose than the condemnation of real estate and its appurtenances. We conclude that the condemnation statute, as a whole, is wholly inadequate, inappropriate, inapplicable, and insufficient as a means of assessing the compensation to be paid to a public utility for its physical properties and additions thereto made under compulsion of law.²⁴

New Jersey and Arizona are but two in a number of states that have ruled that public utility properties must be valued so as to provide compensation for the addition of assets after the date of filing of an eminent domain complaint.²⁵ The Court in *Dedeaux II* found many of these authorities to be helpful and persuasive.²⁶

B. Gulfport's Argument Against a New Date of Valuation

In response to these authorities, Gulfport argued that the Mississippi Public Service Commission already affords a supplemental source of just compensation for the taking of assets donated to a public utility after the date of filing of the eminent domain complaint in that Section 77-3-201, et seq., of the Mississippi Code establishes a procedure by which a public utility may challenge the economic feasibility of making capital expenditures to expand its services after an eminent domain action has been filed.²⁷ The Court in *Dedeaux II* rejected this argument without comment; however, its weaknesses are readily apparent.

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Section 77-3-201, et seq., is a part of Mississippi's statutory scheme dealing with the regulation of public utilities; it has nothing to do with eminent domain or just compensation, those matters being controlled by Section 11-27-1, et seq. As a result, *Hinds-Rankin Metro. Water & Sewer Ass'n, Inc. v. Miss. Pub. Serv. Comm'n*²⁸ – cited by Gulfport in support of its position – has no application. *Hinds-Rankin Metro. Water & Sewer Ass'n, Inc.* dealt with the constitutionality of Section 77-3-205—not Section 11-27-19. In fact, *Hinds-Rankin Metro. Water & Sewer Ass'n, Inc.*, was not a condemnation case at all. The public utility in the case was never at risk of losing title to the facilities it was required to construct; rather, it had argued that the forced construction of facilities for the extension of service was, in and of itself, an unconstitutional taking.²⁹ Dedeaux never took that position.

Moreover, the statutory scheme cited by Gulfport does not relieve a public utility company from its obligation to provide reasonably adequate service to its certificated area. First, the statutory scheme cited by Gulfport provides a remedy to property owners who desire service from a public utility and not a remedy to the public utility itself.³⁰ Second, a public utility has no choice but to accept title to the contributed property and maintain and operate such facilities—it is “obliged” to do so even after the institution of eminent domain proceedings.³¹

Gulfport also argued that the procedure set forth in Section 77-3-201, et seq., was apparently not available to the public utilities in the cases from other jurisdictions, on which the Court ultimately relied. But similar arguments were made in those cases. For instance, in *Passaic Consol. Water Co. v. McCutcheon*³² the condemning authority argued that it had the power to contract for the acquisition of facilities constructed after the initiation of eminent domain proceedings and, thus, there was no need to alter the date of valuation for public utility assets acquired after the date of filing of the eminent domain complaint. This alternate “procedure” for just compensation was both considered and rejected by the *Passaic* Court:

This is tantamount to saying that, notwithstanding that the act fails to provide a method for just compensation, the proceeding may be sustained if the commission offers to purchase or condemn the property which it cannot take in the initial condemnation proceedings. The fallacy of this reasoning is that a condemnation proceeding cannot be had under an invalid act. The owner is not required to submit its property to such jeopardy. Whether or not to proceed to acquire the additional property cannot be optional with the condemning party. It must be a remedy to which the party can resort of his own motion or compel the movement of the municipality by mandamus. It is also a doubtful question whether the language of section 1 of the 1923 act is broad enough to give the commission the power which it is claimed it does. An owner should not be obliged to have his property subjected to condemnation under statutes which are of doubtful meaning. Corrective legislation can be obtained which will insure the proper execution of the constitutional mandate respecting the acquisition of private property.³³

The same reasoning has to be extended to Gulfport's proposition, which is tantamount to saying that, notwithstanding that Section 11-27-19 fails to provide a method for just compensation, the proceeding may be sustained if property owners invoke the protection of Section 77-3-203(b). Even then, public utilities would still be obliged to accept title to the new facilities, maintain them, and operate them without the hope of ever receiving just compensation.

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C. The Dedeaux II Holding

The practical issue faced by the Court in *Dedeaux II* was the eight year delay between the date that Gulfport filed its eminent domain complaint and the date that Gulfport finally assumed ownership of the system. During that period of time, Section 77-3-21 required Dedeaux to render “reasonably adequate service” to Dedeaux’s certificated area. In the event that Dedeaux did not render “reasonably adequate service” to its certificated area, then the Public Service Commission could revoke and cancel Dedeaux’s certificate.³⁴

Recognizing this conflict between Sections 11-27-19 and 77-3-21 and the flexibility inherent in determining just compensation, the Court adopted the approach of the other states that have faced this issue: “[I]n the interest of doing ‘substantial justice’ in the eminent-domain proceeding so as to provide Dedeaux with its constitutional right to just compensation, this Court finds that the ‘ordinary rules of valuation must . . . change’”³⁵ Because the eminent domain court held otherwise, the Court concluded that it erred and remanded the case with the following instruction to the eminent domain court:

The jury may consider not only the value of the property at the time the petition was filed but also the worth of all extensions, additions, and improvement of the property which were necessarily and in good faith subsequently made or commenced by Dedeaux in accordance with its operating authority. These figures should be “subject to setoffs arising out of [Dedeaux’s] continued use of the property during that time[,]” including revenues earned.³⁶

IV. Conclusion

The holding in *Dedeaux II* regarding the date of valuation for privately-owned, public utilities represents a reasonable compromise of the interests of all parties to eminent domain proceedings relating to a regulated industry. On the one hand, the courts, the condemning authorities and the condemnees are entitled to the designation of some definitive time for the purpose of evaluating the property. On the other hand, the public utility is entitled to just compensation, but it has a statutory duty to render reasonably adequate service to its certificated area even after the eminent domain complaint has been filed. While the date of the filing of the eminent domain proceedings seems reasonable and logical in most other situations, it fails to account for a public utility’s statutory duty to render reasonably adequate service. In the end, the statutory date of valuation must yield to the public utility’s constitutional right to just compensation.

While Mississippi eminent domain law continues to evolve, both in the courts and at the polls, attorneys representing condemning authorities and condemnees in public utilities litigation should be particularly aware of the new date of valuation announced in *Dedeaux II*.

¹63 So. 3d 514 (Miss. 2011) (“*Dedeaux I*”). This opinion was the result of the parties’ appeal of the final judgment entered after the second trial. Another opinion, *Dedeaux Util. Co., Inc. v. City of Gulfport*, 938 So. 2d 838 (Miss. 2006) (“*Dedeaux I*”), addressed the parties’ appeal following the first trial. A detailed recitation of the procedural history of this litigation is unnecessary for purposes of this article. However, to date, the litigation stemming from Gulfport’s efforts to acquire Dedeaux has comprised two lawsuits, two trials and three appeals. The case will likely be tried a third time before all is said and done.

²“Contributions in Aid of Construction” are tangible and intangible assets that are contributed to a public utility company by land developers, and “[t]hese assets include pipelines installed by and paid for by the developers under their projects” as well as “easements, rights-of-way, wells, lift stations and tank sites.” *Dedeaux I*, 938 So. 2d at 840. Once the contributed assets are connected to the utility system, the title to those assets is transferred to the public utility company. *Id.* According to De-

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deaux's expert, James Elliott, "in fast-growing service areas, CIAC provides a 'very significant sourc[e] of value added.'" *Dedeaux II*, 63 So. 3d at 519. Mississippi eminent domain law requires that CIAC be included in the valuation of a public utility company. *See Dedeaux I*, 938 So. 2d at 842-43 (excluding opinion of expert witness who failed to include CIAC in valuation of *Dedeaux* during the first trial).

³*See generally Dedeaux I*, 938 So. 2d at 838.

⁴*Dedeaux II*, 63 So. 3d at 537.

⁵MISS. CODE ANN. § 11-27-19.

⁶*See Paulk v. City of Tupelo*, 204 So. 2d 153, 154 (Miss. 1967); *Pearl River Valley Water Supply Dist. v. Wright*, 203 So. 2d 296, 297 (Miss. 1967).

⁷*Wright*, 203 So. 2d at 297.

⁸*See* MISS. CODE ANN. § 77-3-21.

⁹*Dedeaux II*, 63 So. 3d at 535 (quoting *United States v. Fuller*, 409 U.S. 488, 490 (1973)).

¹⁰*Id.* (citations omitted).

¹¹*Id.* at 535-36 (alteration in original) (citations omitted).

¹²144 A. 571, 573 (N.J. 1929).

¹³*Id.* at 571.

¹⁴*Id.* at 572.

¹⁵*Id.*

¹⁶*Passaic*, 144 A. at 573.

¹⁷*Id.*; *see also New Jersey Water Serv. Co. v. Borough of Butler*, 148 A. 616 (N.J. 1930) (reaffirming *Passaic*).

¹⁸189 P.2d 907, 911 (Ariz. 1948).

¹⁹*Id.* at 908.

²⁰*Id.* at 910.

²¹*Id.*

²²*Id.* at 909.

²³*Ariz. Corp. Comm'n*, 189 P.2d at 909-10 (quoting *Pub. Util. Dist. No. 1 of Douglas County v. Wash. Water Power Co.*, 147 P.2d 923, 928 (Wash. 1944) and JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 742 & § 962 (3rd ed. 1997).

²⁴*Id.* at 911.

²⁵*See Citizens Utils. Co. of Cal. v. Super. Ct. of Santa Cruz County*, 382 P.2d 356, 361 (Cal. 1963):

Since the taking of property in eminent domain without the payment of just compensation is prohibited by our Constitution, it would be unconstitutional to take a utility's property valued as of the date of the summons and without compensating it for involuntary and compulsory improvements installed by it after such date that result in an increase of value of the system.

See also Ill. Cities Water Co. v. City of Mt. Vernon, 144 N.E.2d 729, 732 (Ill. 1957):

We believe the present situation is exceptional and that the value of all waterworks property, including that necessarily added subsequent to the date the condemnation petition is filed, may be determined in an eminent domain proceeding. . . . Nothing short of such an amount conforms to the constitutional requirement of just compensation.

See also Iowa Elec. Light & Power Co. v. City of Fairmont, 67 N.W.2d 41, 47 (Minn. 1954) ("The gas company should be properly compensated for any such betterments, extensions, or improvements it was required to make after the award was made but before relinquishing possession of the property, subject to setoffs arising out of its continued use of the property during that time."); *Pub. Util. Dist. No. 1 of Douglas County v. Wash. Water Power Co.*, 147 P.2d 923, 928 (Wash. 1944):

[D]efendant, as a public utility, may be under the necessity of making improvements to and extensions of its physical properties, the cost of which cannot properly be absorbed as expense of maintenance and operation. For any such betterments and improvements as may be reasonably necessary and prudently made between the date of the awards and the orders of appropriation, the defendant is entitled to compensation

²⁶*See Dedeaux II*, 63 So. 3d at 536-37.

²⁷*See* Brief of Appellee at 5-6, *Dedeaux Util. Co., Inc. v. City of Gulfport*, No. 2010-CA-00290 (Miss. Aug. 31, 2010).

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²⁸263 So. 2d 546 (Miss. 1972)

²⁹*Id.* at 552-53.

³⁰See MISS. CODE ANN. § 77-3-203.

³¹See MISS. CODE ANN. § 77-3-203(b) (“[U]pon . . . conveyance or assignment of such facilities and easements to the utility, the holder of the certificate for the area and service affected shall be obliged promptly to connect the same to its systems and provide such service.”); see also § 77-3-29 (confirming that the Public Service Commission may “require every public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities within the certificated area . . .”).

³²144 A. 571, 573 (N.J. 1929).

³³*Id.* (citations omitted).

³⁴See MISS. CODE ANN. § 77-3-21; see also *Capital Elec. Power Ass'n v. City of Canton*, 274 So. 2d 665, 668 (Miss. 1973):
[A]n award of a certificate of public convenience and necessity by the Public Service Commission to an electric utility is an exclusive permit to furnish electricity to the persons using electricity in the area designated and certificated to the utility so long as the utility holding the certificate is capable and willing to provide electric energy to the persons within the area.

³⁵*Dedeaux II*, 63 So. 3d at 537 (quoting *Ill. Cities Water Co. v. City of Mount Vernon*, 144 N.E.2d 731, 732 (Ill. 1957)).

³⁶*Id.* (alterations in original) (quoting *Iowa Elec. Light & Power Co. v. City of Fairmont*, 67 N.W.2d 41, 47 (Minn. 1954)).

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Recap of 2011 Annual CLE Program - “Focus on the Jury”

The Litigation Section of the Mississippi Bar hosted its 2011 CLE program on June 17, 2011. Last year’s program was entitled “Focus on the Jury.” This 6 CLE credit hour seminar explored new issues of jurors using social media during trials, revealed secrets of effective jury selection, looked inside a jury’s deliberations and examined ways of bringing jury instructions into plain English. Speakers included John Corlew, author of *The Mississippi Jury: Law & Practice*; Paulette Robi- nette from JurySync, a jury consultant; Lydia Quarles, Stennis Center for Public Service; and Carol Murphey, The Mississippi Model Jury Instruction Commission. The attendees not only reviewed current trends in opinions concerning jury deliberations but participated in ongoing efforts by the Mississippi Bar, the Stennis Institute and the Mississippi Judicial College to make jury service more effective for the public and litigators.

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2011 Annual Section Meeting Review

On Friday, July 15, 2011, the Litigation Section hosted a presentation on E-Discovery at the Mississippi Bar Convention in Sandestin, FL. The session covered practical and productive E-Discovery strategies designed to let lawyers meet their digital duties in every matter. The keynote speaker was Tom O'Connor, a nationally known consultant, speaker and writer in the area of computerized litigation support systems. A panel of distinguished judges also attended and participated in an interactive panel discussion on E-Discovery following Tom's presentation. The lessons learned in this session were that every litigator now must be competent to identify, process, and produce electronically stored information and that knowing the requirements and basic techniques of E-Discovery could mean the difference between winning and facing a malpractice action for botched E-Discovery.



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