

## Earwigging the Chancellor Prohibited: A Violation of Legal Ethics

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The arrest of prominent Mississippi attorney Richard “Dickie” Scruggs was a stunning and dramatic event. The prosecution and trial of the “King of Torts”<sup>1</sup> attracted both national<sup>2</sup> and international attention.<sup>3</sup> Public fascination was certainly expected since Scruggs is largely credited as the attorney who brought down big tobacco,<sup>4</sup> and because he is the brother-in-law of former Senate Majority Leader Trent Lott.<sup>5</sup> Yet, in addition to the notoriety that the case attracted, Scruggs’s trial also generated attention within the legal community for the reintroduction of a quirky and a then largely unknown term from the Mississippi Chancery Court Rules.<sup>6</sup> That quirky term is “earwigging.”<sup>7</sup>

Earwigging is a legal term that is unique to Mississippi; no other state incorporates the term into any code, rule, or statute.<sup>8</sup> As the term relates to Mississippi law, earwigging is intended to prevent an attorney from discussing facts of a case outside of a formal legal proceeding; basically, it is a prohibition against *ex parte*

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<sup>1</sup> See generally Terry Carter, *Long Live the King of Torts?*, A.B.A. J., Apr. 2008, available at [http://abajournal.com/magazine/long\\_live\\_the\\_king\\_of\\_torts](http://abajournal.com/magazine/long_live_the_king_of_torts) (last visited Mar. 9, 2010). See also Nelson D. Schwartz, *Court Intrigue for the King of Torts*, N.Y. TIMES, Dec. 9, 2007, available at [http://www.nytimes.com/2007/12/09/business/09scruggs.html?\\_r=1](http://www.nytimes.com/2007/12/09/business/09scruggs.html?_r=1) (last visited Mar. 9, 2010); Emily Wagster Pettus, *‘King of Torts’ Cops a Plea*, USA TODAY, Mar. 14, 2008, available at [http://www.usatoday.com/news/nation/2008-03-14-436599049\\_x.htm](http://www.usatoday.com/news/nation/2008-03-14-436599049_x.htm) (last visited Mar. 9, 2010).

<sup>2</sup> See generally Richard Fausset, Jenny Jarvie & Henry Weinstein, *Bribery Case Brings Down Legal Legend*, L.A. TIMES, Mar. 15, 2008, available at <http://articles.latimes.com/2008/mar/15/nation/nascruggs15> (last visited Mar. 9, 2010). See also Nelson D. Schwartz, *The Legal Trail a Delta Drama*, N.Y. TIMES, Jan. 20, 2008, available at <http://www.nytimes.com/2008/01/20/business/20blake.html?em&ex=1200978000&en=990ca446e71e0abd&ei=5087%0A> (last visited Mar. 9, 2010); Peter J. Boyer, *The Bribe: How the Mississippi Lawyer Who Brought Down Big Tobacco Overstepped*, THE NEW YORKER, May 19, 2008, available at [http://www.newyorker.com/reporting/2008/05/19/080519fa\\_fact\\_boyer](http://www.newyorker.com/reporting/2008/05/19/080519fa_fact_boyer) (last visited Mar. 9, 2010).

<sup>3</sup> Paulo Prada & Peter Lattaman, *Mississippi Burning Over Bribery Claims*, THE AUSTRALIAN, Dec. 7, 2007, available at <http://www.theaustralian.news.com.au/story/0,25197,22882214-17044,00.html> (last visited Mar. 9, 2010).

<sup>4</sup> See generally *Who’s Afraid of Dickie Scruggs?*, NEWSWEEK, Dec. 6, 1999, available at <http://www.newsweek.com/id/90457/page/1> (last visited Mar. 9, 2010).

<sup>5</sup> See generally Max Follmer, *Trent Lott’s Brother-In-Law, Nephew, Indicted on Federal Bribery Charges*, THE HUFFINGTON POST, Nov. 28, 2007, available at [http://www.huffingtonpost.com/2007/11/28/trent-lotts-brotherinl\\_n\\_74572.html](http://www.huffingtonpost.com/2007/11/28/trent-lotts-brotherinl_n_74572.html) (last visited Mar. 9, 2010).

<sup>6</sup> Miss. Unif. Ch. Ct. R. 3.10 (1989) (“Earwigging the Chancellor Prohibited”), available at [www.mscc.state.ms.us/rules/msrulesofcourt/uniform\\_chancery\\_rules.pdf](http://www.mscc.state.ms.us/rules/msrulesofcourt/uniform_chancery_rules.pdf) (last visited Mar. 9, 2010).

<sup>7</sup> See *supra* note 1 and *infra* note 19.

<sup>8</sup> A comprehensive search of the legal search engine Westlaw of “earwig!” in “All State and Federal Cases,” “United States Code Annotated,” “State Constitutions for the 50 states and D.C.,” “Code of Federal Regulation,” “State Statues,” and “50 State Survey” returns seventeen total citations; all references are either to Mississippi or refer to the earwig insect.

communications.<sup>9</sup> Yet, even in Mississippi, the only state to prohibit earwigging, it is a rarely used term. It appears that only four cases of record have mentioned the term as it relates to improper ex parte communication.<sup>10</sup> As the term relates to the Scruggs case, earwigging was only mentioned once. This essay notes the reference of the term during the Scruggs trial and examines the probable historical development of how earwigging became a prohibited act in Mississippi.

#### I. EARWIGGING IN THE SPOTLIGHT: THE SCRUGGS'S PLEA AGREEMENT HEARING

The reference to earwigging during the Scruggs trial arose during a March 14, 2008 plea agreement hearing before the federal district court in Oxford, Mississippi.<sup>11</sup> At the hearing, Senior District Court Judge Neal Biggers asked Scruggs whether he agreed with the prosecutor's account of his indictment.<sup>12</sup> Scruggs responded:

I joined the conspiracy later in the game. It's not exactly as the prosecutor allocuted, in that there was no intent to bribe the judge; it was an intent to earwig the judge, Judge Lackey; and that that - - the earwigging idea was not originated by me or anyone in our firm, although we went along with it, at the beginning of - - sometime in March.<sup>13</sup>

Following that statement, Judge Biggers did not comment on Scruggs's reference to earwigging.<sup>14</sup> Rather, Judge Biggers asked Scruggs whether he would plead guilty or not guilty to count one of the indictment (bribery), to which Scruggs responded, "I plead guilty, Your Honor."<sup>15</sup>

As soon as Scruggs pled guilty to bribery, the earwigging comment became instantly moot as far as the trial was concerned. Scruggs offered the term as a simple explanation or justification for his action. The comment did not appear to garner the attention of the court. Yet, outside the courtroom, Scruggs's comment attracted attention.<sup>16</sup> Following the mention of the term, journalist and internet bloggers immediately devoted attention, analysis, and commentary to the elusive term.<sup>17</sup>

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<sup>9</sup> See *infra* note 23.

<sup>10</sup> See *infra* notes 103, 105, 107, and 110.

<sup>11</sup> Transcript of Change of Plea as to Count 1 of the Indictment at 15, *United States v. Scruggs*, No: 3:07CR19 (N.D. Miss. Mar. 14, 2008), *available at* <http://online.wsj.com/public/resources/documents/Scruggstranscript1.pdf> [hereinafter Transcript] (last visited Mar. 9, 2010).

<sup>12</sup> *Id.*; see also Indictment, *United States v. Scruggs*, 2007 WL 4191965, (N.D. Miss. Nov. 28, 2007).

<sup>13</sup> Transcript, *supra* note 11.

<sup>14</sup> *Id.* at 16.

<sup>15</sup> *Id.*

<sup>16</sup> See generally *supra* notes 1-5 and *infra* notes 17-19.

<sup>17</sup> See generally Ashby Jones, *Scruggs: Notes from the Transcript*, LAW BLOG, Mar. 14, 2008, <http://blogs.wsj.com/law/2008/03/14/scruggs-notes-from-the-transcript> (last visited Mar. 9, 2010); Steve Eugster, *Earwigging – A Mississippi Tradition*, WIKISCRUGGS COMMENT, Mar. 10, 2008, <http://wikiscruggs.blogspot.com/2008/03/earwigging-mississippi-tradition.html>, (last visited Mar. 9, 2010); Walter Olson, *Scruggs in Guilty Plea*, Mar. 14, 2008, OVERLAWYERED, <http://overlawyered.com/tag/dickie-scruggs/page/2/> (last visited Mar. 9, 2010); David Rossmiller, *Federal*

Correspondingly in Oxford, where Scruggs lived, had attended law school, and was on trial, the case was a daily topic of coffee klatches and kitchen tables.<sup>18</sup> The case gathered so much attention that the University of Mississippi Law School conducted two discussion panels to address the topics of legal ethics, ex parte communication, and earwiggling.<sup>19</sup> Yet, with all the media attention, internet blogging, and scholarly debate regarding the term, no documented evidence arose regarding how earwiggling became incorporated into Mississippi court rules.

## II. WHAT IS EARWIGGING?

A simple definition of earwiggling located in the Merriam-Webster dictionary defines earwiggling as “to annoy or attempt to influence by private talk.”<sup>20</sup> As the term relates to law, earwiggling is improper ex parte communication.<sup>21</sup> In Mississippi, earwiggling is prohibited by the Mississippi Chancery Court Rules,<sup>22</sup> the Uniform Rules for Circuit and County Court,<sup>23</sup> the Uniform Rules of Justice Court,<sup>24</sup> and the Mississippi Commission on Judicial Performance.<sup>25</sup> The general penalty for earwiggling is contempt of court; the penalty for contempt shall not exceed imprisonment for longer than thirty days and a one hundred dollar fine for each offense.<sup>26</sup>

While Mississippi court rules prohibit “earwiggling,” the term is not cataloged in legal dictionaries. The most current edition of Black’s Law Dictionary<sup>27</sup> does not mention

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*Grand Jury May Probe Scruggs’ Involvement in Wilson Case*, INSURANCE COVERAGE LAW BLOG, Aug. 11, 2008, <http://www.insurancecoverageblog.com/archives/industry-developments-federal-grand-jury-may-probe-scruggs-involvement-in-wilson-case.html> (last visited Mar. 9, 2010).

<sup>18</sup> The case not only created its own commotion, but it also served as a catalyst for further debate when former President Bill Clinton cancelled a scheduled visit to Oxford for a political fundraising visit for his wife Hillary Clinton. Paul Quinn, *Clinton Cancels Oxford Visit to Scruggs*, DAILY MISSISSIPPIAN, Nov. 30, 2007, available at <http://www.thedmonline.com/2.2838/1.109084> (last visited Mar. 9, 2010).

<sup>19</sup> Jennifer Farish, *Trial by Fire*, UM LAWYER, Fall/Winter 2008-2009, at 8, available at [http://law.olemiss.edu/UMLAWWINT09/umlawyer/k\\_news\\_fire.html](http://law.olemiss.edu/UMLAWWINT09/umlawyer/k_news_fire.html) (last visited Mar. 9, 2010). The article discusses two panels the law school held on consecutive days. The first panel specifically discussed “earwiggling” and “ex parte” communication. Members of that panel included Chief U.S. District Court Judge for Northern Mississippi Michael P. Mills, Mississippi Circuit Court Judge Henry Lackey, Oxford attorney Tom Freeland, and law school professor Ben Cooper. The second panel conducted on the following day included Mississippi Supreme Court Judge James W. Smith, President of the Mississippi Bar Robert Bailless, the immediate past President of the Mississippi Bar York Craig, and General Counsel for the Mississippi Bar Adam Kilgore.

<sup>20</sup> WEBSTER’S NEW COLLEGIATE DICTIONARY 357 (1973).

<sup>21</sup> See generally Jeffery Jackson, *Where Is the line? Ex parte Communication and Lawyers-Judges Contacts*, THE MISSISSIPPI LAWYER, 2008, at 17, available at [http://law.olemiss.edu/UMLAWWINT09/umlawyer/k\\_news\\_fire.html](http://law.olemiss.edu/UMLAWWINT09/umlawyer/k_news_fire.html) (last visited Mar. 9, 2010).

<sup>22</sup> See *supra* note 6.

<sup>23</sup> Miss. Unif. Ch. Ct. R. 3.10 (1989) (“Earwiggling Prohibited”), available at [www.mssc.state.ms.us/rules/msrulesofcourt/urccc.pdf](http://www.mssc.state.ms.us/rules/msrulesofcourt/urccc.pdf) (last visited Mar. 9, 2010).

<sup>24</sup> Miss. Unif. R. P. J. Ct. 1.05 (1995) (“Earwiggling the Judge Prohibited”), available at [www.mssc.state.ms.us/rules/msrulesofcourt/rules\\_procedure\\_justicecourt.pdf](http://www.mssc.state.ms.us/rules/msrulesofcourt/rules_procedure_justicecourt.pdf) (last visited Mar. 9, 2010).

<sup>25</sup> Miss. R. of the Miss. Comm’n on Jud. Performance 5(H) (1995) (“Procedures of Commission, H. Earwiggling Prohibited”).

<sup>26</sup> MISS. CODE ANN. § 9-1-17 (2008) (“Punishment of Contempt”).

<sup>27</sup> BLACK’S LAW DICTIONARY (8th ed. 2004).

earwiggling. Yet, maybe even more importantly, in 1936 when earwiggling was first incorporated into the Mississippi Chancery Rules, the term was also not listed in commonly available legal dictionaries.<sup>28</sup> Accordingly, the term that attracted so much attention is not a valid legal term outside of Mississippi. Yet, the term does have a legal legacy, but to trace that legacy, a trip across the Atlantic is required.

### III. THE ORIGIN OF EARWIGGING

The term “earwiggling” originated in Europe and is derived from the word “earwig,” the common name for a small insect.<sup>29</sup> The bug’s name originates from an old wives’ tale, which speculated that the bug burrowed into a person’s ear and poisoned the brain.<sup>30</sup> Later the term became a figure of speech used to describe a whispered communication.<sup>31</sup> The Oxford-English Dictionary notes that by the mid-1800s the term had transitioned from a noun to a verb used to describe a whispered communication used to gain a private bias or influence.<sup>32</sup>

In addition to its transition from a noun to a verb, by the mid-1800s earwiggling had also drifted into British legal discourse.<sup>33</sup> An early use of earwiggling in legal context is found in the January 19, 1850 edition of the weekly British journal *The Legal Observer, Digest, and Journal of Jurisprudence*.<sup>34</sup> In *The Legal Observer*, earwiggling was used in a letter to the editor.<sup>35</sup> The letter, titled *Cheap Law. – Dear Injustice*, was written to express concern over rumored changes within the newly established English county court structure.<sup>36</sup> The author was concerned that inconsequential claims would be more expensive to hire an attorney to litigate than the claim was worth.<sup>37</sup> The letter implied that in those particular cases it would be more economical to allow friends or family of the judge to approach the court to settle the controversy, rather than paying the required attorney fees.<sup>38</sup> The author specifically noted that the use of private influence of friendship or kinship on a judge was “technically called ‘earwiggling.’”<sup>39</sup>

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<sup>28</sup> Earwiggling is absent in BLACK’S LAW DICTIONARY (2d ed. 1910), BALLENTINE’S LAW DICTIONARY (1930), and CYCLOPEDIA OF LAW DICTIONARY (1922).

<sup>29</sup> OXFORD-ENGLISH DICTIONARY E-32 (2d ed. 1989). The bug is also known as the “pincher bug.”

<sup>30</sup> *Id.* (“Earwig: An insect, so called from the notion that it penetrates into the head through the ear.”).

<sup>31</sup> *Id.* (“Earwig, *fig.* An ear whisperer, flatterer, parasite. 1633 FORD *Broken H.* II. i, That gawdy earwig, or my lord your patron, Whose pensioners you are. 1688 *Pol. Ballads* (1860) I. 46 The earwigs of royalty . . . will not hereafter be suffered to mislead majesty by whispering, etc.”).

<sup>32</sup> *Id.* (“Earwig, *v.* a. To pester with private importunities or admonitions. b. To influence, bias (a person) by secret communications; to insinuate oneself into the confidence of (a person).”).

<sup>33</sup> See generally *supra* note 32 and *infra* notes 40 and 55. Since the mid 1850s, the term has been published in various British legal journals. However, the term still remains absent in English legal dictionaries, as evidenced by its absence in THE DICTIONARY OF ENGLISH LAW (1959).

<sup>34</sup> *Cheap Law. – Dear Injustice*, 39 THE LEGAL OBSERVER, DIGEST AND JOURNAL OF JURISPRUDENCE 218 (1850), available at

<http://books.google.com/books?id=1AEvAAAIAAJ&pg=PA218&dq=The+Legal+Observer,+Digest+and+Journal+of+Jurisprudence+and+earwiggling> (last visited Mar. 9, 2010).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

By the 1870s, references in England to earwiggling could be found in both legal chronicles and commercial literature. In 1872, in a biography of English attorney Edwin Wilkins Field,<sup>40</sup> the author described how he once witnessed Mr. Field earwig a judge.<sup>41</sup> The author observed Mr. Field present his case to the court and then later approach that same judge in the hallway to continue to advocate for his client.<sup>42</sup> Mr. Field's actions were not portrayed as illegal or wrong, but rather that Mr. Field had simply taken an opportunity to offer additional points of "facts which he thought had failed to receive appreciation" from the court.<sup>43</sup> In that example, it would appear that earwiggling was essentially the continued oral advocacy to the court outside of the presence of opposing counsel but without any improper (meaning illegal or immoral) influence on the judge.<sup>44</sup>

Around the same time that *Edwin Wilkins Field, A Memorial Sketch* was published, earwiggling was also described in a manner that implied it was clearly unethical behavior. In the May to October 1873 edition of *The Law Times: The Journal of the Law and the Lawyers* in the letters to the editor section titled *Correspondence of the Profession*, the term was twice used, first in a letter to the editor and then in a response letter.<sup>45</sup>

The author of the first letter to the editor, who signed under the name "Q," referenced the changing English court structure and the creation of the county court system.<sup>46</sup> The letter was specifically written in regard to the rules that governed registrars of county courts (which are similar to modern day clerks of court).<sup>47</sup> Apparently registrars, who were lawyers, were prohibited from serving as counsel before the court in which they served as the registrar.<sup>48</sup> It was alleged that as an incentive to increase their pay, registrars, who were paid on a flat fee per case, would often refer claimants to the registrar of an adjacent county, whom served under the same judge riding circuit, under an informal reciprocal agreement.<sup>49</sup> The original registrar would then select a sympathetic

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<sup>40</sup> See generally THOMAS SADLER, EDWIN WILKINS FIELD, A MEMORIAL SKETCH (London, MacMillan & Co. 1872), available at [http://books.google.com/books?id=4V4BAAAAQAAJ&printsec=frontcover&dq=EDWIN+WILKINS+FIELD,+A+MEMORIAL+SKETCH&source=bl&ots=z6kQxsuAEw&sig=7\\_VgDWjC0tg\\_sob7qzRSpXCWn9s&hl=en&ei=6x6MS8bBCsuVtgezvrywDw&sa=X&oi=book\\_result&ct=result&resnum=1&ved=0CAYQ6AEwAA#v=onepage&q=&f=false](http://books.google.com/books?id=4V4BAAAAQAAJ&printsec=frontcover&dq=EDWIN+WILKINS+FIELD,+A+MEMORIAL+SKETCH&source=bl&ots=z6kQxsuAEw&sig=7_VgDWjC0tg_sob7qzRSpXCWn9s&hl=en&ei=6x6MS8bBCsuVtgezvrywDw&sa=X&oi=book_result&ct=result&resnum=1&ved=0CAYQ6AEwAA#v=onepage&q=&f=false) (last visited Mar. 9, 2010).

<sup>41</sup> *Id.* at 144. Edwin Field was a respected London attorney who died in 1871 while trying to save a drowning victim. As a tribute to his life, a statue of Mr. Field is located at The Royal Court of Justice in England. Royal Court of Justice, *Statues*, HER MAJESTY'S COURTS SERVICES, <http://www.hmcourts-service.gov.uk/infoabout/rcj/history.htm> (last visited Mar. 9, 2010).

<sup>42</sup> SADLER, *supra* note 40, at 143-44

<sup>43</sup> *Id.* at 144.

<sup>44</sup> *Id.*

<sup>45</sup> *Correspondence of the Profession*, 55 THE LAW TIMES: THE JOURNAL AND RECORD OF THE LAW AND THE LAWYERS 399, 399-400, 427 (May-Oct. 1873), available at

<http://books.google.com/books?id=rZ4DAAAAQAAJ&pg=PA427&dq=The+Law+Times+and+earwiggin> (last visited Mar. 9, 2010).

<sup>46</sup> *Id.* at 400.

<sup>47</sup> *Id.* at 399.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 399-400.

jury from his district to aid his fellow registrar.<sup>50</sup> The author claimed the improper influence was clearly “judicial earwiggling” and should not be tolerated.<sup>51</sup> As a solution to eliminate the potential improper influence, the author proposed that “district registrars” be created who should be paid a fixed salary for their work, which would theoretically eliminate reciprocal agreements.<sup>52</sup>

In response, “A County Court Registrar” replied in a brief but direct response to what he called an “unjustifiable and unfounded attack.”<sup>53</sup> The response stated that reciprocal agreements, jury packing, and earwiggling did not take place by registrars, and that if such a practice did occur, those responsible should be exposed and punished.<sup>54</sup>

Those examples of earwiggling seemed not only to include improper ex parte communication but also the improper use of a position within the court for an unfair benefit. In addition to those two letters, the editors of *The Law Times* noted that the “Q” letter was not the first time that such a complaint had been alleged against registrars.<sup>55</sup>

Ten years after those letters, a more concise characterization of earwiggling, one closer to the Mississippi meaning of the term, appeared in a letter to the editor in *The Journal of Jurisprudence*, which characterized earwiggling as the private solicitation or influence on judicial opinion.<sup>56</sup> The letter added that suspicions of earwiggling will always occur where private solicitations on the court are not excluded.<sup>57</sup> Consequently, in the thirty years between the first reference to earwiggling and the last example, the seemingly occasional justifiable act of earwiggling had transformed from a gray area of the law into a clear violation of legal ethics.

#### IV. THE MIGRATION TO MISSISSIPPI

The exact migratory path of earwiggling to America and to Mississippi is ultimately uncertain although there are several possibilities. The term certainly could have migrated to America with the millions of immigrants who came during the late 1800s and early 1900s. The term may have also migrated with the cross exchange of legal theories in a British legal journal, or the term could have crossed the Atlantic in commercial literature such as *Edwin Wilkins Field, A Memorial Sketch*.<sup>58</sup> While the exact mode of migration is uncertain, what is certain is that by the 1870s the term was published in literature in America.

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 400.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 427.

<sup>54</sup> *Id.* Along with denying the allegations, the registrar added that the initial author “Q” was ignorant and had no knowledge of what he wrote about. *Id.*

<sup>55</sup> *Id.* “We inserted ‘Q’s’ letter in order to call forth such replies as the above. We should be very glad if all County Court Registrars could remonstrate with the same righteous indignation. Unfortunately this is not the first time that such a complaint has reached us. –ED.” *Id.*

<sup>56</sup> J. Lorimer, *Judicial Patronage*, 25 THE JOURNAL OF JURISPRUDENCE 311, 311-12 (1881).

<sup>57</sup> *Id.*

<sup>58</sup> See SADLER, *supra* note 40.

An early reference to earwiggling in America is found in *Adventures of an Attorney in Search of Practice*,<sup>59</sup> written by Samuel Warren, an English lawyer.<sup>60</sup> The book was first published in America shortly after the Civil War in 1872 and subsequently republished in 1874.<sup>61</sup> The term was used to describe the temptation after a heated argument before the court to try to later consult with the judge in private.<sup>62</sup> The action was described as a form of earwiggling, which the author advised should be avoided because ex parte communication creates a “general disturbance.”<sup>63</sup>

While the example in *Adventures of an Attorney in Search of Practice* demonstrates that the term crossed the Atlantic, there is very little other evidence that the term was incorporated into legal terminology in America at that time. Unfortunately, the delineation of exactly how the term migrated to America, the extent of the usage of the word at the time, and its precise evolution are largely unknown. Yet what is a little more certain is the initial incorporation of the term into the Mississippi Chancery Rules.

## V. THE ORIGIN OF MISSISSIPPI EARWIGGING

The prohibition against improper ex parte communication is a long held legal tradition,<sup>64</sup> but it was not until 1936 that the term “earwiggling” was incorporated into the Mississippi Uniform Chancery Rules.<sup>65</sup> When earwiggling was integrated into the Mississippi Chancery Court Rules, it was initially added as a title to an existing rule.<sup>66</sup> When the 1936 Chancery Rules were redrafted, the substance of the existing 1921 rule against ex parte communication remained unchanged. The most significant change to the rule was the addition of the new title “Earwiggling the Chancellor Prohibited.”<sup>67</sup>

The Chancery Rules were apparently revised because the old rules were not widely known or followed.<sup>68</sup> The issue was so problematic that even as late as 1949, it

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<sup>59</sup> SAMUEL WARREN, *ADVENTURES OF AN ATTORNEY IN SEARCH OF PRACTICE* 199 (4th ed. 1874).

<sup>60</sup> For a general biography of Samuel Warren, see *Samuel Warren*, CLASSIC ENCYCLOPEDIA, [http://www.1911encyclopedia.org/Samuel\\_Warren](http://www.1911encyclopedia.org/Samuel_Warren) (last visited Mar. 9, 2010). The biography does not list Warren as the author of this book, but it does list him as the author of *DIARY OF A PHYSICIAN*, in which he lists *ADVENTURES OF AN ATTORNEY IN SEARCH OF PRACTICE* as his work.

<sup>61</sup> See WARREN, *supra* note 59.

<sup>62</sup> *Id.* at 199.

<sup>63</sup> *Id.*

<sup>64</sup> Beverly Adams, *Legal Ethics*, 1 MISS. L.J. (1928). In the first edition of the *Mississippi Law Journal*, a law student wrote a legal ethics essay. The student specifically noted that improper communication with the judges must not be allowed and should not be tolerated. See also *supra* notes 40, 50, and 62.

<sup>65</sup> *Proceedings of the Mississippi State Bar*, 9 MISS. L.J. 31 (1936) (concerning newly revised Uniform Rules of Practice and Procedure in the Chancery Courts of Mississippi, including Rule 30 entitled “Earwiggling the Chancellor Prohibited”).

<sup>66</sup> V. A. GRIFFITH, *MISSISSIPPI CHANCERY PRACTICE, EQUITY* (1925) (citing the Rules of Practice and Procedure of the Chancery Court of the State revised and Promulgated by the Chancellors at their annual meeting April 26 and 27, 1921).

<sup>67</sup> Compare *supra* note 1 with *supra* note 65.

<sup>68</sup> W. A. White, et al., *Report of Committee on Professional Ethics*, 1 MISS. L.J. 361, 361-62 (1928). The report noted that the Professional Ethics Committee had requested publication of the Code of Professional Ethics, but the Code had yet to be published to the members of the Bar. *Id.* at 362.

was reported that many of the chancery judges did not use the existing chancery rules.<sup>69</sup> To help remedy that concern, in 1935 at the Mississippi State Bar Association meeting, the eldest chancellor in Mississippi, Chancellor R. W. Cutrer, called a meeting to organize “the Chancellors into a cooperative functioning organization ‘having for its primary purpose and objective a comprehensive study of chancery procedural law and the drafting of appropriate statutes.’”<sup>70</sup> To create a formal association, a meeting of all Mississippi chancellors was called on January 6, 1936 in Jackson.<sup>71</sup> At that meeting, the Chancellors’ Association was duly formed, and Chancellor Cutrer was elected President of the Association.<sup>72</sup> Also at that meeting, Chancellor Cutrer appointed a special committee of five chancellors to study and draft new uniform rules for the Chancery Courts.<sup>73</sup>

The Special Committee for Uniform Rules held a meeting in Jackson on August 14, 1936.<sup>74</sup> At that meeting two of the five members on the committee were unable to attend; only Chancellors A. B. Amis, Sr., D. M. Russell and Ben Stevens were present.<sup>75</sup>

The special committee drafted sixty-six rules, many of which were already embedded in Mississippi Supreme Court decisions, but had not been formally adopted into the Chancery Rules.<sup>76</sup> During the revisions, each rule was given a title, which had not been previously incorporated into the 1921 rules. After the committee completed its work, Chancellor Amis,<sup>77</sup> Chairman of the Committee, submitted a report of the newly drafted rules to the Chancellors’ Association for consideration. His report stated that new and more defined rules needed to be created:

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<sup>69</sup> WILLIAM ETHRIDGE, JR., ANNOTATED RULES OF CHANCERY, CIRCUIT, AND SUPREME COURTS OF MISSISSIPPI, ii (1949). The Preface of the annotated rules states:

The only generally available copy of the most recent rules of the chancellors is in Volume 9 of the Mississippi Law Journal at pages 31-48 (1936). I am advised that many of the chancellors use and enforce these rules, but that a number of chancery judges do not use them at all. The same situation seems to prevail with the bar in general.

<sup>70</sup> R. W. Cutrer & W.S. Welch, *Report of the Chancellors’ Association to the Mississippi State Bar Association*, 9 MISS. L.J. 28 (1936).

<sup>71</sup> *Id.* Present at the meeting were: Chancellors R. W. Cutrer, A. B. Amis, Sr., Ben Stevens, V.J. Stricker, M. B. Montgomery, R. E. Jackson, N. R. Sledge, J. A. Finley, T. P. Guyton and D. M. Russell. *Id.*

<sup>72</sup> *Id.* Chancellor R. W. Cutrer was elected president and W. S. Welch was elected executive secretary. *Id.*

<sup>73</sup> *Id.* at 30. The special committee consisted of Chancellors A. B. Amis, Sr., D. M. Russell, N. R. Sledge, R. E. Jackson and Ben Stevens. Chancellor Sledge resigned and was replaced with L. A. Smith, Sr. *Id.*

<sup>74</sup> *Id.* at 28.

<sup>75</sup> *Id.* at 30. Additionally the Secretary of the Chancellors’ Association, Chancellor W. S. Welch, was also present, but the report did not state his level of participation in drafting the revised rules.

<sup>76</sup> *Id.* at 31.

<sup>77</sup> *Id.* Chancellor Amis had also recently served on another special committee for the Chancellors’ Association, the Legislative Committee. That special committee had worked to propose bills to the legislature for consideration. The committee had instructed Amis to lobby the Mississippi state legislature on the issue. Chancellors Amis and Russell were the only two chancellors to serve on both committees; however there was no mention of Chancellor Russell lobbying the legislature.



The proposed rules are intended to cover the former rules adopted by the Chancellors in 1921, but to make such changes in them as the Practice Act of 1924 has made appropriate; and also to *put into the form of definite rules many of the features of procedural law which are already embedded in the decisions of our Supreme Court, and to bring forward some appropriate new suggestions. . . .*

*The reason for putting into the form of definite rules many of the features of procedural law which are embedded in the decisions of our Supreme Court is that a considerable number of lawyers, especially among the younger element thereof, are not familiar with the rules so announced; and the adoption of definite rules in regard thereto will make such matters of procedure readily available to them as well as to make all other practitioners before the court.*<sup>78</sup>

The rules were then adopted by the Chancellors' Association as presented by the special committee.<sup>79</sup> Afterward the Chancellors' Association presented the rules to the State Bar for consideration.

When Chancellor Cutrer presented the new rules to the State Bar he noted the work of the special committee.<sup>80</sup> He reported to the State Bar that "Chancellor A. B. Amis, Sr., after a conference with other Chancellors of the State and after an exchange of letters with all of the Chancellors, prepared rules for consideration by the special committee."<sup>81</sup> After the new rules were presented to the State Bar, the rules were approved as presented with little discussion.<sup>82</sup> It is likely that Chancellor A. B. Amis, Sr. incorporated the term "earwiggling" into the Mississippi Chancery rules.

## VI. THE ROLE OF CHANCELLOR A. B. AMIS, SR.

Based on his role as the primary drafter of the 1936 Chancery Rules and Judge Amis's reputation as a legal scholar, it is reasonable to conclude that inclusion of earwiggling into the Chancery Rules may be attributable to him. While there is no conclusive proof that he personally integrated the term, it can be inferred through circumstantial evidence.

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<sup>78</sup> A. B. Amis, Sr. *Report of the Committee on Uniform Rules of Practice and Procedure in the Chancery Courts of Mississippi*, 9 MISS. L.J. 31 (1936) (emphasis added).

<sup>79</sup> Cutrer & Welch, *supra* note 70, at 30.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Minutes of the State Bar Association, 9 MISS. L.J. 48, 48-49 (1936).

A. B. Amis, Sr. was born on February 7, 1867 in the Greenfield community along the Newton County-Scott County line in Mississippi.<sup>83</sup> By 1890, he was enrolled as a law student at the University of Mississippi.<sup>84</sup> While in law school, Amis served as a “Tutor in History” under Professor P. H. Eager, Professor of Mental and Moral Philosophy, Logic, History and Political Economy.<sup>85</sup> Professor Eager taught several courses in the History Department and specifically taught a course on English history based on a *Short History of the English People*, which had been published in 1874.<sup>86</sup>

Professor Eager was born in Mississippi to parents who were both college graduates.<sup>87</sup> He was an alumnus of Mississippi College, Richmond College, and had been a graduate student at the University of Chicago.<sup>88</sup> Prior to teaching at the University of Mississippi, he taught at several other educational institutions on diverse subjects.<sup>89</sup> Yet literature was his specialty, which had “been enhanced by his extensive European travels.”<sup>90</sup> In addition, Professor Eager was married to the former Mary Whitfield, sister of A. H. Whitfield, who served as Chief Justice of the Mississippi Supreme Court and Professor of Law at the University of Mississippi.<sup>91</sup> Accordingly, it is possible Amis became acquainted with earwigging during his tenure as an assistant for Professor Eager.

It is equally possible that Amis became familiar with the term during his professional career as an attorney or during his service as a chancery judge. In 1893, after graduating from Ole Miss, Amis, then twenty-five and newly married, began his law practice in Meridian, Mississippi.<sup>92</sup> For the next several decades he established a thriving law practice, served as Meridian city attorney for nineteen years, and in 1930 took the bench as a chancery judge.<sup>93</sup>

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<sup>83</sup> A. B. Amis, III, *Personal Sketch of A. B. Amis, Sr.*, [http://www.nchgs.org/html/a\\_b\\_amis.html](http://www.nchgs.org/html/a_b_amis.html) (last visited Mar. 9, 2010). Chancellor Amis’s namesake grandson wrote a short biography of his grandfather published by the Newton County, Mississippi Historical and Genealogical Society website.

<sup>84</sup> BULLETIN OF THE UNIVERSITY OF MISSISSIPPI, HISTORICAL CATALOGUE 1849-1910, Marshal & Bruce Co., Nashville, Tenn. 51 (June 1910), available at <http://books.google.com/books?id=MKZBAAAIAAJ&pg=PA30&dq=Bulletin+of+the+University+of+Mississippi#PPP1,M1> (last visited Mar. 9, 2010).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*; J. R. GREEN, *SHORT HISTORY OF THE ENGLISH PEOPLE* (MacMillan & Co., London 1874).

<sup>87</sup> P. H. Eager, *Lafayette Rupert Hamberlin: Dramatic Reader and Poet.*, in PUBLICATIONS OF THE MISSISSIPPI HISTORICAL SOCIETY, 171-72, n.1 (Franklin Riley ed., 1903).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* Professor Eager served as a Professor of Mathematics at Mississippi College (1878-82), President of Brownsville Female College (1882-87), Professor of English at Baylor College (1887-1890), Professor of Philosophy at the University of Mississippi (1890-1891), President of Baylor College (1891-94), and Professor of English at Mississippi College (1895-forward). *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*; see also *History of the Department of Classics at the University of Mississippi*, <http://www.olemiss.edu/depts/classics/history.html> (last visited Mar. 9, 2010).

<sup>92</sup> See Amis, *supra* note 83.

<sup>93</sup> *Id.*

During the 1930s as a chancellor, Amis wrote on many broad subjects,<sup>94</sup> but he focused more attention on the profession of law. Amis specifically focused his writings on the practical application of the law. Immediately after taking the bench Amis wrote and distributed at his own expense *Duties of Executors, Administrators, and Guardians*.<sup>95</sup> Some years later, an unnamed attorney commented on Chancellor Amis's writing:

His bar had so long neglected efficiency in this branch of their work that to aid them and himself in his efforts, he wrote and had printed at his own expense a paper bound booklet on probate practice which he distributed to the lawyers of his district. . . . *I doubt that Chancellor Amis had any statute of another state which he followed.* He didn't need any to show him the way or how to proceed. *He was a statesman judge, with a creative and searching mind . . . he had command of terse and fitting language such as the statutes mentioned disclose,* and he had the patriotic willingness to labor to correct such evils as these statutes and others he drew were designed to eradicate.<sup>96</sup>

The comment that Amis did not necessarily follow the statutes of other states and that he was a “statesman judge, with a creative and searching mind” is significant. The mention that Chancellor Amis did not consult other statutes certainly offers a possible reason why earwiggling was incorporated into the Mississippi Chancery Rules, when no other state had a similar statute or rule.

Chancellor Amis also published legal references when he saw the need for clarity and guidance. In 1935, Amis published a legal treatise on divorce titled *A Brief of the Law of Divorce and Separation in Mississippi* which served as a reference in Mississippi for decades.<sup>97</sup> When writing his book, Chancellor Amis specifically stated that he undertook the work because there was a need for clarity. The foreword stated:

GENTLEMEN OF THE BAR: This book is a brief in fact as well as in form. The only excuse for its preparation and publication, if any be required, is that *I felt that something of the sort was needed; and since no abler man, of whom there are many, would undertake the task, I assumed to do it.*<sup>98</sup>

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<sup>94</sup> One article that Amis wrote that was unrelated to law is a rather interesting piece about the social and dating practice of his hometown during the 1880s. A.B. Amis, Sr., *Recollections of Social Customs in Newton and Scott Counties, Mississippi Fifty Years Ago* (1934), available at <http://www.scottlee.com/recollections.html> (last visited Mar. 9, 2010).

<sup>95</sup> See Amis, *supra* note 83.

<sup>96</sup> *Id.* (emphasis added). The citation was not attributed to a specific attorney.

<sup>97</sup> *Id.* See also JOEL BUCKLEY & W. E. MORSES, AMIS ON DIVORCE AND SEPARATION IN MISSISSIPPI (1957).

<sup>98</sup> See Amis, *supra* note 83 (emphasis added).

Chancellor Amis's dedication to the profession of law did not go unnoticed as evidenced by his fellow chancellors appointing him to various committees within the Chancellors' Association.<sup>99</sup> Nor did his work go unnoticed by the public when Amis ran for a third term as Chancellor in 1938. During his reelection bid, a local newspaper editorial endorsed Chancellor Amis as it praised not only his legal intelligence, but his dedication to the greater community. The editorial stated:

God blessed this man with *rare intelligence and a full understanding of the Law*, and had the Maker of men given him the ability to acquire friends easily and a more full use of the tongue, he might have been one of the nation's contemporary greats.<sup>100</sup>

By all accounts Chancellor Amis was an academic who vested himself to the diligent improvement of the profession of law and his community. Thus when Amis was appointed in 1936 to draft new rules for the Chancery Courts, it can be presumed that Amis included earwiggling as an attentive improvement for understanding and ease of application of the Chancery Rules.

From 1936 to today, the prohibition against "earwiggling" in Mississippi has remained almost unchanged. Since it was drafted in 1936, the only real substantive change the earwiggling rule has received has been a change in numbering.<sup>101</sup>

## VII. MISSISSIPPI CASES AND RELATED RULES

There are only four cases of record in Mississippi that reference earwiggling.<sup>102</sup> Furthermore, each case only involved an allegation of earwiggling. In those cases, the courts were hesitant to entertain allegations of earwiggling, resolving only in one case to inform the person alleging the complaint that the proper forum for an ethics complaint is specified in Rule 8 of the Mississippi Rules of Discipline.<sup>103</sup> The four cases are also relatively uninformative. In *Boyd v. Mississippi*, a murder suspect, who pled guilty to murder, sought post-conviction relief for ineffective assistance of counsel, claiming his prosecutor had earwigged the circuit judge.<sup>104</sup> The court found the claim to be without merit and dismissed the claim.<sup>105</sup> In *McNeil v. Hester*, a plaintiff brought a motion

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<sup>99</sup> See *supra* notes 70 and 75.

<sup>100</sup> See Amis, *supra* note 83 (emphasis added). The biography of Chancellor Amis does not attribute the editorial to a specific paper.

<sup>101</sup> See Rules in Chancery State of Mississippi 17 (1971). The revised rules were adopted by the Chancellors' Association on January 9, 1970, and then were ratified and approved by the Mississippi Supreme Court May 14, 1971. The only modification of the "earwiggling" rule was a change of numbering from number 30 to number 28.

<sup>102</sup> See *infra* notes 104, 106, 108, and 111.

<sup>103</sup> See *infra* note 106.

<sup>104</sup> 926 So. 2d 233 (Miss. Ct. App. 2006).

<sup>105</sup> *Id.* at 239. The appeal was based on an affidavit that the defendant claims was signed by his counsel, however his attorney denied that he prepared or signed the affidavit. The court believed the "affidavit" to be at best an unsworn statement and at worst a forgery. *Id.*

alleging that the defendant's counsel earwigged the chancery judge.<sup>106</sup> The chancery court denied the motion. On appeal, the Mississippi Supreme Court found the issue to be moot since the chancery court lacked jurisdiction over the underlying issue of the appeal.<sup>107</sup> In *Lyle v. Anderson*, a prisoner brought a civil rights claim against prison officials.<sup>108</sup> The case was initially dismissed, which the prisoner appealed. The prisoner alleged *inter alia* that his case was initially dismissed because the court had been "unlawfully earwigged and otherwise influenced by political powers" to stop his case.<sup>109</sup> The Fifth Circuit Court of Appeals found no evidence to support that claim, but reversed and remanded on an unrelated issue.<sup>110</sup> Finally in a divorce matter in *Jacobs v. Jacobs*, an ex-wife alleged that her ex-husband had earwigged the chancery judge.<sup>111</sup> The ex-husband had sent the chancellor a letter after the divorce was final but two years prior to the ex-wife's appeal for modification. The Mississippi Court of Appeals found that the ex-husband did not receive preferential treatment from the chancellor and therefore dismissed the earwigging complaint.<sup>112</sup>

The relatively few cases for an eighty-year-old rule is unexpected. One explanation for the reason for the limited number of cases is the punishment. The punishment for earwigging is contempt of court.<sup>113</sup> A chancellor has substantial discretion to determine whether a party is in contempt, and an appellate court will not reverse the chancellor's decision unless it is manifestly erroneous.<sup>114</sup> A second explanation is that the rule stems from the state trial courts' rules. Mississippi state courts do not generally publish opinions and those opinions are of a limited searchable record; unless an appeal for a contempt charge is filed, the punishment would not be readily searchable. Finally, the rule has essentially been phased out with more relevant law.

If an attorney intentionally has improper ex parte contact with a judge, that attorney will now be disciplined according to the Rules of Discipline for the Mississippi Bar<sup>115</sup> and the Mississippi Rules of Professional Conduct.<sup>116</sup> If an attorney were to

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<sup>106</sup> 753 So. 2d 1057, 1075-76 (Miss. 2000). The plaintiff filed a motion to correct the record prior to the final order authorizing closing of the estate and discharge of executors. The Chancellor denied the Motion, from which the Plaintiff appealed. With the appeal pending, the Chancellor entered the final order. The Plaintiff alleged that counsel for the defendant earwigged the judge and requested sanctions. The chancellor subsequently denied the motion.

<sup>107</sup> *Id.* at 1076. On appeal, the Mississippi Supreme Court determined that the chancery court lacked the jurisdiction to close the estate, but denied the request for contempt for earwigging since there was no denial of relief from which to appeal. *Id.*

<sup>108</sup> 77 F. App'x, 734, 739 (5th Cir. 2003).

<sup>109</sup> *Id.* at 739.

<sup>110</sup> *Id.*

<sup>111</sup> 918 So. 2d 795 (Miss. Ct. App. 2005).

<sup>112</sup> *Id.* at 797. After the divorce was final, the ex-wife filed a motion for contempt of court and modification of final dissolution order, and ex-husband filed a motion for clarification, motion to dismiss motion for contempt and modification of final order, and counter-motion for contempt. *Id.* at 796. The Chancery Court denied ex-wife's motion and granted ex-husband's motion for contempt and ordered ex-wife to pay attorney fees and ex-husband's out of pocket expenses. *Id.* Ex-wife appealed. The Court of Appeals affirmed on the grounds that modification could not be considered for appellate review. *Id.* at 798.

<sup>113</sup> *See supra* note 26.

<sup>114</sup> *Watkins v. Watkins*, 942 So. 2d 224, 228 (Miss. Ct. App. 2006).

<sup>115</sup> *See* RULES OF DISCIPLINE FOR THE MISSISSIPPI STATE BAR (1984)

engage in improper ex parte communication, that attorney specifically would be punished under Rule 8.4 of the Mississippi Rules of Professional Conduct.<sup>117</sup> In the Scruggs case, the power of the state bar to discipline was demonstrated when Scruggs was disbarred according to Rule 6 of the Mississippi Rules of Discipline.<sup>118</sup>

Initially the prohibition against earwiggling only applied to lawyers but was added to apply to judges in 1995 by the Mississippi Commission on Judicial Performance.<sup>119</sup> Yet if a judge were to engage in improper ex parte communication that judge would be punished according under Canon 2(B) of the Mississippi Code of Judicial Conduct, instead of the earwiggling rule.<sup>120</sup>

Moreover, Rule 8.3 of the Mississippi Rules of Professional Conduct requires that if an attorney knows of a legal ethics violation, that attorney must report that violation to the state bar.<sup>121</sup> Consequentially, since the punishment for earwiggling under the state trial court rules is contempt, a relative minor punishment for a violation of legal ethics, the rules of professional conduct have essentially superseded the earwiggling rule. As a result, while earwiggling is still prohibited, the term has been phased out of relevance.

#### VIII. CLOSING THOUGHTS

Earwiggling is a unique quirk to Mississippi law that probably would have continued to go relatively unnoticed had Scruggs not infamously used the term. When Chancellor Amis incorporated the term into the Chancery Rules over eighty years ago it is doubtful that he could have imagined the attention that such an unassuming term would attract. Accordingly earwiggling, while unique and exclusive to Mississippi, has essentially been superseded and did not prove helpful in plaintiff lawyer Dickie Scruggs's defense.

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<sup>116</sup> See MISS. R. OF PROF'L CONDUCT (1987).

<sup>117</sup> MISS. R. OF PROF'L CONDUCT 8.4.

<sup>118</sup> Miss. Bar v. Scruggs, 5 So. 3d 342, 342 (Miss. 2008).

<sup>119</sup> See *supra* note 25.

<sup>120</sup> MISS. CODE OF JUDICIAL CONDUCT CANNON 2(B).

<sup>121</sup> MISS. R. OF PROF'L CONDUCT 8.3.