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THE QUALITY OF JUSTICE: Attorney's inexperience no barrier He worked on appeal after winning delay to take class on process

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AUSTIN - Attorney Kerry Lee had no permanent license to practice law and no background in capital murder defense.

But he was appointed by a trial judge to handle the appeal of death row inmate Henry Lee Dunn Jr. Mr. Lee had been practicing law for less than two years.

And the state's highest criminal appeals court let him stay on the case even after he signaled his inexperience by asking the court to delay the appeal so he could take an introductory course in death-penalty defense.

"Counsel has found that he has more questions than answers as work on the brief has progressed," he wrote. "The instruction and written materials available to ... me will be invaluable to assuring appellant is competently sic represented by the below signed attorney."

Mr. Lee, who lost his temporary law license in 1998, did not return repeated messages left at his home near Tyler seeking comment.

The presiding judge on the Texas Court of Criminal Appeals said he didn't recall Mr. Lee's request for a delay to take a class and added that an attorney is presumed to be qualified if he or she is licensed by the state.

"It's a tough nut to crack, trying to say this lawyer's competent and this attorney's not," Judge Michael J. McCormick said. "In the end, it's the attorney's duty to know their own limitations, and not accept cases if they can't handle them."

A death penalty appeals expert disagreed, saying that an underqualified attorney might not recognize his own shortcomings, or might feel pressured by a local judge to accept a case against his better judgment.

In any case, Houston attorney Jim Marcus said, the appeals court could have forced a change in lawyers on its own accord, if they noticed problems.

"Courts fashion remedies," he said. "That's what they do."

When a defendant in Texas cannot afford to hire an attorney - and the vast majority cannot - a trial judge appoints one to be paid for by the county. For appeals, the judge can appoint the same or a different attorney.

While the Lee case is an extreme example, The News found more than 100 death row inmates who have been represented by court-appointed attorneys with troubled professional histories or whose performance has become an issue in protracted appeals.

Judge McCormick and other supporters of the system said that a lawyer with a disciplinary history is not necessarily a bad lawyer. They add that Texas provides multiple safeguards to ensure that defendants get a fair trial.

Mr. Lee's troubles began even before he started practicing law. Although he passed the Texas bar exam, the state Board of Law Examiners decided in February 1994 that it would only give him a probationary law license. That status indicates the board sees a problem either with the person's background or character. Records show that in this instance, the board was concerned about Mr. Lee's failure to repay student loans and other debts.

Nonetheless, Mr. Lee was appointed in October 1995 to handle the appeal of Mr. Dunn, who had been convicted of kidnapping and murdering a Tyler man, a killing that Mr. Dunn attempted to justify on the grounds that the victim was gay.

Visiting state District Judge Leon F. Pesek, who made the appointment, did not return calls to his Texarkana office.

Earlier that fall, a new state law had taken effect that required counties to develop minimum standards for defense lawyers appointed to capital murder cases. Smith County set only two hard-and-fast rules for appellate attorneys: They must have previously filed a "quality defense brief on a first-degree felony case," and they must be attorneys in good standing with the State Bar of Texas.

Mr. Lee met neither of these qualifications, records suggest.

The Court of Criminal Appeals and the 12th District Court of Appeals, the two courts that would have fielded appeals out of Tyler, show no cases other than the Dunn appeal that were handled by Mr. Lee.

Even after the Court of Criminal Appeals gave Mr. Lee an extension so he could attend the class in capital defense, he missed that deadline. He filed his brief only after the court threatened to jail him for contempt.

And when the time came for him to argue the case in front of the court, Mr. Lee - by then fighting to keep his provisional law license - was a no-show. The court left him on the case and denied his appeal, noting that six of the 11 arguments he had filed were "inadequately briefed and presented nothing for review."

Records show that Smith County paid Mr. Lee \$8,647 for the Dunn case.

Mr. Dunn's subsequent appellate lawyer has made Mr. Lee's performance a basis for further appeals - so far unsuccessful.

In March 1998, Mr. Lee lost his probationary license after bouncing checks for state bar dues and occupational taxes and failing to appear at a board hearing to defend himself.

The board expressed concern that there was a "likelihood that he would harm a client, obstruct the administration of justice, or violate state bar rules" if he continued to practice law.