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THE QUALITY OF JUSTICE: Attorney of records Legal aid funds went to man who saw documents, not clients

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Dallas County criminal court judges paid more than \$1 million in legal aid funds during the last five years to a lawyer who did not defend poor people accused of crimes.

The judges routinely hired Fred McDaniel to review records, write letters and prepare orders on legal challenges and lesser requests from prison inmates convicted in their courts.

Last year, Mr. McDaniel was paid nearly \$250,000 for this work, making him by far the highest paid lawyer from the fund.

The arrangement, unique in Texas, began more than 20 years ago. But it has gone unnoticed by the Dallas County commissioners, who set the budget and approve judicial payments for court-appointed attorneys.

The judges appoint Mr. McDaniel under state laws that permit them to use private lawyers to represent poor people charged with crimes or to help review prisoners' claims that they were illegally convicted, which are applications for writs of habeas corpus.

But there is no law that authorizes hundreds of appointments to Mr. McDaniel for assisting judges with routine matters, such as answering inmate mail.

"I don't know of any authority to appoint counsel in these circumstances," said Rick Wetzel, chief administrator of the Texas Court of Criminal Appeals. "That's what they have their staffs for."

Most of the judges said they could not cite a law that allows such appointments. Others said their power to do so was inherent.

"I have the authority of the running of the court," said Judge Harold Entz. "It's necessary for the operation of the court."

Judges who appoint Mr. McDaniel said they lack the time and staff to do the work, and they praised his legal skills and work ethic.

"The reason we use him so heavily is he has made a specialization of this kind of legal work, and he does a great job," said state District Judge Karen Greene, one of those who appointed him the most.

Dallas County Commissioner Jim Jackson, an outspoken critic of judicial spending, said he was unaware that judges had paid Mr. McDaniel almost a quarter of a million dollars last year to be their legal adviser.

"It doesn't sound like something I would put the stamp of approval on," he said.

Mr. McDaniel, 55, said the county is getting a good deal because he is experienced, efficient and impartial in his recommendations.

"I want to do the best I can," he said. "I don't want to foul up."

The Texas process of providing attorneys for poor defendants, especially in death penalty cases, drew national scrutiny during last year's presidential campaign because of widespread questions about the quality of representation.

Again this year, the Texas Legislature is considering measures that would replace the county-funded, judge-controlled system with state financing, uniform competency standards and centralized appointments.

Flaws in system

The state's judges have acknowledged that the system is flawed but maintain that they alone have the expertise to ensure that defendants get adequate representation.

Houston lawyer Brian Wice, one of a handful of Texas lawyers who specialize in post-conviction matters, accused the Dallas judges of abusing their discretion by essentially making Mr. McDaniel an unelected judge or their law clerk.

"What they are doing is not right. And if it is right, it ain't legal," said Mr. Wice, a former law clerk at the Court of Criminal Appeals who has written, lectured and worked extensively on writs of habeas corpus.

"We are creating a category of de facto judges who don't answer to anyone except the judge who appoints them."

As part of an ongoing examination of the state's methods of providing attorneys to poor criminal defendants, The Dallas Morning News examined all invoices that Dallas judges submitted last year to the county auditor's office to pay lawyers they hired.

The felony courts paid \$7.8 million to 376 court-appointed attorneys. About \$1.5 million of the total was for appellate work, which included post-conviction complaints from inmates.

During the last fiscal year, which ended in September, Mr. McDaniel earned \$245,921 - nearly \$60,000 more than the next highest paid lawyer. Only 15 other lawyers were paid more than \$100,000. Mr. McDaniel also earned \$1,000 from misdemeanor courts last year.

He earned \$1.15 million from 1996 through last year, according to auditor records. That includes some payments from misdemeanor courts.

Almost three-fourths of Mr. McDaniel's fees last year were for work done on writs.

The remaining payments - totaling \$67,288 - were for handling other post-conviction matters, according to The News' computer analysis.

The largest portion of these concerned prisoner claims that they had not been properly credited for time they spent in jail while awaiting trial.

Letters to inmates

Mr. McDaniel said he often writes letters notifying inmates about a court's decision on back-time claims. He said he also answers prisoner letters requesting information from their trial court. Judges refer to the handwritten, often vague and rambling letters as "jail mail."

In almost all of the cases without writs, Mr. McDaniel billed the county for one hour of work listed as "correspondence." He was typically paid \$50 to \$100.

Gerry Meier, another judge who appointed Mr. McDaniel, said she did so only on writs of habeas corpus cases. She said she and her clerks handle complaints about back-time and answer inmate mail.

"I don't think it's necessary for attorneys to be appointed in those matters," Judge Meier said.

In most other counties, judges rarely appoint lawyers to handle writs or any other post-conviction claims. They do the work themselves, assign it to staff attorneys, rely on recommendations from prosecutors, or don't respond.

In Harris County, judges stopped appointing private attorneys on writ cases several years ago after District Attorney Johnny Holmes complained that they were improperly delegating their duties.

"All those people are the sweetheart appointees of the judiciary, doing those hard things that they don't have to be accountable for," said Mr. Holmes, who retired from office in January.

Judges in Tarrant County don't appoint lawyers to review writ cases because it's too costly, said Chuck Mallin, head of the district attorney's appellate section. "I don't think the Commissioners Court would go for that here," he said.

Bexar's system

The only other large county that routinely uses lawyers to screen cases is Bexar County, which has three full-time staff attorneys and three law student interns to assist the felony court judges.

The staff attorneys are paid between \$50,000 and \$60,000 per year and the interns receive about \$11,000, said Melissa Fischer, the criminal district courts administrator for the county.

"All of our people combined don't cost \$240,000," she said.

Dallas County employs three staff attorneys for judges. Those attorneys are paid between \$38,000 and \$83,000 per year.

Kerry Young, the chief staff attorney, said his office could not handle the additional workload that handling writs would entail.

The county also has eight full-time criminal court magistrates, who perform routine functions like arraignments and guilty pleas. Boyd Patterson, the chief magistrate, said they also handle some post-conviction writs of habeas corpus.

He said he did not know why the judges chose to rely more heavily on Mr. McDaniel and other appointed attorneys.

Mr. McDaniel billed Dallas County last year for more than 2,200 hours of work on 1,120 cases, according to The News' analysis. There are 2,080 hours in a year of 40-hour work weeks.

Mr. McDaniel said he takes work home almost every night and works on weekends. He said he hasn't taken more than a weekend off in more than two years.

"I've been told I work too much," he said.

A former Houston judge who lobbied for the law that allows judges to appoint lawyers in writ cases said he never expected that judges would use one lawyer so heavily.

"I'm not saying the man is doing anything wrong. He may be doing an absolutely wonderful job. I think it's a physical impossibility to do it in the way in which we envisioned," said Jay Burnett, a criminal court judge for 13 years before re-entering private practice in 1999.

Mr. McDaniel operates from a one-lawyer office in DeSoto. In addition to his work for the judges, he has a practice in criminal and civil matters. One of his clients was rock musician David Crosby, for whom he handled an appeal of a drug conviction.

A former Marine Corps lawyer, Mr. McDaniel is an affable, soft-spoken man whose hobby is collecting antiques. He is well-regarded around the Frank

Crowley Courts Building, where his wife, Lana McDaniel, has served as a criminal courts judge since 1995. She does not appoint him.

Favoritism dismissed

Judges dismissed any suggestion of favoritism.

"I don't appoint him because he's married to Lana," former District Judge Edwin King said before leaving office in January. "I appoint him because he's good at what he does, and he takes care of business, and I can rely on him."

Mr. McDaniel got all but one of his appointments from 11 of the 15 judges. His wife and three other judges relied on lawyer Leslie McFarlane to help handle post-conviction matters.

Ms. McFarlane earned \$88,085 last year from those appointments, records show.

The invoices signed by the judges and the lawyers they appoint cite the state law that authorizes payments for representing indigent defendants or work on writ cases.

On each of Mr. McDaniel's invoices, the pre-printed description of his appointment had a line drawn through the words "to represent the defendant."

Mr. McDaniel and judges who appointed him said that he represents the court.

"He is not the lawyer for the defendant, he is the lawyer designated by the court as kind of a special master to look into it and see if there is anything there," said Mr. King.

Mr. Jackson, a county commissioner since 1978, said he thought attorneys were being appointed only to represent poor defendants.

"All we see is the expenditure for court-appointed attorneys," he said. "I would have assumed and have assumed that court-appointed attorneys means appointing attorneys for people going to trial."

After being told about Mr. McDaniel's appointments, Mr. Jackson asked the county budget office to investigate.

Budget discussions

County Judge Lee Jackson, who presides over the commissioner's court, said he expected the issue would surface during discussions of next year's budget.

"Sometimes it's our job to encourage them the judges to look at alternatives, and I feel sure we will be doing that in the budget process," he said.

Review of writs of habeas corpus is an arcane area of law rooted in ancient doctrine that no person should be denied liberty without a legal conviction. The

Latin phrase, which means "you have the body," is an instruction to officials to justify incarceration.

Most writs deal with fundamental errors or constitutional issues such as the right to an effective lawyer or the right of appeal. Prisoner requests for DNA testing or claims of new evidence also are handled through writ petitions, which are supposed to be filed after an appeal is exhausted.

The prisoner files his petition with the court in which he was convicted and sentenced. The trial court forwards its recommendation, if any, to the Texas Court of Criminal Appeals. The Austin court makes the final decision in all writ cases.

Prisoner petitions were infrequent until the Court of Criminal Appeals reaffirmed the right of post-conviction review in a 1972 decision, said Dallas lawyer Mel Bruder, a former law clerk at the court.

Dallas judges began appointing defense lawyers to screen writ cases and make recommendations, he said.

"I'm sure it had mostly to do with time and somebody who could play more of a role of an advocate as opposed to an arbiter that had to decide," Mr. Bruder said.

Mr. McDaniel entered the picture in 1980, after the Court of Criminal Appeals ruled that it was a conflict to appoint defense attorneys to review writs.

He said the judges approached him because he had just ended a three-year stint in the district attorney's appellate section, where he responded to writ applications.

"I started answering writs for Judge John Mead and James Zimmermann, and then got called up by other judges, and it expanded from there," Mr. McDaniel said.

Undesirable work

By the late 1980s, records kept by the auditor show, Mr. McDaniel had become one of the county's highest paid appointed attorneys. The reason, he said, was that other attorneys do not like the work.

"I've approached some other attorneys to see if they were interested in doing some of these writs ... and they were not interested," Judge Greene said. "But I'm always open to other attorneys."

Judge Greene, Judge Entz and Mr. King said their predecessors and senior judges advised them after they took the bench that they could use Mr. McDaniel to handle post-conviction matters.

"If it ain't broke, don't fix it," Judge Entz said.

Karen Wise, who supervises writ reviews for the Dallas County district attorney's office, said the appointed system has worked well.

"I think it's a very responsible way to deal with it. Inmates are getting the attention they deserve without taking up the trial judges' time," she said.

But Assistant District Attorney John Long, who advises county commissioners on legal matters, said he is skeptical of the practice's legal standing.

"It seems to me that the purpose of appointment of counsel in the compensation is to see the accused is protected rather than the judge," he said.