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QUALITY OF JUSTICE: Defense called lacking for death row indigents But system supporters say most attorneys effective

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Poor defendants facing the death penalty in Texas have been appointed attorneys with temporary law licenses, substance abuse problems, conflicts of interest or records of mishandling clients' cases.

An examination of 461 capital cases by The Dallas Morning News found that nearly one in four condemned inmates has been represented at trial or on appeal by court-appointed attorneys who have been disciplined for professional misconduct at some point in their careers. Others have been represented by court-provided attorneys who dozed during trials, failed to investigate their case or put in minimal preparation.

In addition, The News found that measures put in place in 1995 to ensure that people facing the death penalty got at least an adequate defense often carry little weight.

"When you think of a system, you think of some structure in place that is orderly and consistent," said Elisabeth Semel, director of the American Bar Association's Death Penalty Representation Project. "Texas is the antithesis of that."

Defenders of the current system say that most appointed attorneys are effective, although their pay is low and their ability to hire experts and investigators is often limited. They point out that reversals of convictions for ineffective assistance of counsel are rare.

Since 1963, the U.S. Supreme Court has required that defendants who cannot afford an attorney be provided one. Over the years, several states have set up public defender systems to meet this requirement. In Texas, however, elected judges appoint private attorneys for trial and the first stage of appeal, and the counties pay the bill. There are no statewide standards or funding.

In recent months, Gov. George W. Bush's presidential candidacy has drawn national attention to Texas' busy death chamber and its patchwork system of appointing attorneys for poor defendants. The Republican governor, who has signed death warrants for 144 prisoners during his five years in office, has expressed confidence in the system.

"Texas is a leader in the United States in reference to making sure our indigents are cared for. You can take numbers and skew them any way you want to, but

judges are conscientious, they're interested and they try really hard," said Judge Olen Underwood, presiding judge of the Second Administrative Judicial Region. The region includes Harris County, which has sent more people to death row than many states. "The dilemma that we have in Texas is we appoint lawyers, then the resources which we have to support that lawyer are limited."

The News reviewed cases of the 461 inmates on death row as of May 1, using public records, court documents and dozens of interviews with judges and attorneys. Among the findings:

- *About one in four has been defended by lawyers who have been reprimanded, placed on probation, suspended or banned from practicing law by the State Bar of Texas.

- *In about half of those instances, the misconduct occurred before the attorney was appointed to handle the capital case. The infractions that triggered bar discipline - an extraordinary step reserved for severe misbehavior - included failing to appear in court, falsifying documents, failing to present key witnesses and allowing clients to lie.

- *Even some attorneys with clean disciplinary records put forth only minimal effort - rarely meeting with their clients, failing to investigate, spending only a few hours preparing for the trial, missing court deadlines and even dozing off during trials.

- *Minimum qualifications for attorneys handling death penalty cases instituted in 1995 are spotty at best. Locally developed lists of trial attorneys the courts have declared qualified include more than two dozen with prior disciplinary records. At the appellate level, the list includes some young, inexperienced attorneys and a handful with disciplinary records.

Judge Mike McCormick, the presiding judge of the Texas Court of Criminal Appeals, said a disciplined lawyer is not necessarily a bad lawyer.

"There are many, many, very, very competent attorneys who have had grievances and have had disciplinary sanctions that in no way impact or reflect upon their ability to try a lawsuit," he said.

"You can say, well, this sure doesn't pass the smell test, but there's nothing legally wrong with that person a disciplined attorney practicing law. There are lots and lots of doctors who maybe have had some problems that are practicing medicine."

Judges around the state defend their handling of appointments, saying they know better than anyone else who is best qualified to handle a complex case. And supporters say Texas provides plenty of safeguards in the appeals process.

Critics say the safeguards are meaningless and the definition of effective representation is ridiculously low in Texas.

"What they want is something more than a warm body, but less than a good attorney," said Jeff Pokorak, clinical professor of law at St. Mary's University in San Antonio. He has represented about 100 death row inmates, mostly on appeal.

The U.S. Supreme Court ruled in 1984 that criminal defendants are entitled not just to have a lawyer, but an effective one.

In recent years, Texas courts have ruled that defendants received an adequate defense even though their lawyers napped in court, had previously prosecuted their client, had a personal relationship with a prosecution witness or had been suspended or disbarred.

While recent national polls show most Americans continue to favor the death penalty, the margin of support has slipped.

"Texans support the death penalty on the assumption it is administered fairly. If they knew what a damn roll of the dice it was, they might not be so sanguine," said Dallas criminal attorney Vince Perini, former chair of the state bar Committee for Legal Representation for those on Death Row.

Even some supporters of the death penalty have expressed reservations about how it is applied and have concerns that some innocent people may have been executed.

Critics say such concerns are well-founded.

"It is a mistake to assume that we are now seeing just several isolated instances," said Nancy Gist, director of the Bureau of Justice Assistance at the Department of Justice in Washington, which recently sponsored a national conference on indigent defense. She pointed to findings in Illinois that 13 death row inmates had been wrongfully convicted and a recent Columbia University study that found widespread problems in the application of the death penalty.

System changes

In 1995, the Texas Legislature tried to improve the system representation by requiring the state's nine judicial districts to set minimum standards for lawyers appointed to death penalty cases and to post a list of those attorneys.

But the standards vary widely from county to county and the lists often are not updated or monitored. Judges occasionally ignore the lists completely. And in June, the Court of Criminal Appeals said that was OK, ruling that a defendant had not been harmed even though his attorney was not on the list.

A check of "capital qualified" lists around the state found that they include more than two dozen attorneys with disciplinary problems.

Harris County is known for the most stringent qualifications, including requiring a test to show competency. But the local judicial district's list includes several disciplined attorneys.

Among them is one lawyer whose license to practice has been suspended twice. The judge who ordered the most recent suspension, in 1995, delayed its activation so the attorney could finish a capital murder case he had been appointed to handle. He has since received other death penalty cases - as well as another reprimand from the bar.

About 8 percent of the lawyers involved in the death row cases reviewed by The News had been disciplined at some point in their careers. Overall disciplinary rates for the state's 66,000 attorneys during the same period of years were not available.

But over the last five years, the rate has been about 1 percent annually, according to the state bar.

Although being disciplined does not necessarily mean that an attorney is not qualified to handle a capital case, a record of serious misbehavior should be a red flag to judges, said David Dow, a law professor at the University of Houston who studies court appointments in death cases.

"It is unimaginable that trial judges would appoint lawyers who have been suspended or reprimanded," he said.

But he added that it is not surprising that such lawyers get appointments, because good attorneys often try to avoid them. The reason is simple: Done correctly, a capital case can consume a practice for months or years, requiring hundreds of hours of work that easily costs \$50,000 or more. Appointed attorneys are typically paid less than half that amount, and the courts provide little or no money to hire investigators or expert witnesses that they need to provide a full defense.

Even the dedicated lawyers who are committed to indigent defense cannot afford to take more than a capital case every now and then.

As a result, Mr. Pokorak said, "The pool available to try capital cases is generally under-experienced and certainly under-trained. ... You can't kill people on the cheap. That's what Texas has always wanted to do, is kill people on the cheap."

Appellate process

In 1995, Texas lawmakers also decided to make changes in the death penalty appellate process.

Previously, death row inmates who wanted to seek a second level of state appeal, called the writ of habeas corpus, had to hire their own attorneys or find someone to take the case for free. The Legislature, in an effort to shorten the

time between sentencing and execution, decided to pay for an attorney for the habeas appeal.

The state habeas process, which is routinely followed by a similar process in federal court, allows defendants to re-examine the entire trial and raise for the first time any issues related to fairness - including the effectiveness of court-appointed attorneys. It is a complex area of law, requiring not just a review of the trial record but a search for new evidence

In theory, the new law sounded good. Many states do not provide attorneys for this appeal.

As put into practice, however, the law has been a disaster, attorneys say.

"We went out of the frying pan into the fire," said Mr. Perini. "The Court of Appeals just screwed it up."

Under the new system, the Court appointed the habeas attorneys from a list of qualified lawyers it developed.

There was trouble from the beginning. Legislators provided \$2 million per year for the program - half the amount requested.

Then nearly 400 inmates asked for attorneys.

Faced with too many requests and too little money, the court capped the amount an attorney could earn for the appeal at \$7,500 - such a low figure that many of the state's most respected appellate attorneys refused to apply for the work.

"Nobody wanted these cases at that amount except either the lawyers who had no clients or the baby lawyers who had no experience," said Judge Charles Baird, a Democrat and a former member of the Court of Criminal Appeals. Although he supports the death penalty, Judge Baird is co-founder of the National Committee to Prevent Wrongful Executions and he has become a leading critic of the Texas system.

Indeed, records from the Court show that some attorneys who had been licensed less than two years received habeas appointments. The ABA recommends at least three years experience for such work.

In an effort to attract better attorneys, the court removed the \$7,500 cap, but it set no minimum qualifications. The result, according to Judge Baird: "We appointed some absolutely terrible lawyers. I mean lawyers that nobody should have, much less somebody on death row on his last appeal."

The results soon became evident. Several attorneys missed filing deadlines, prompting the Court to reject the appeals - putting the inmates one step closer to execution without review.

Those who did make deadline often filed only the most minimal of appeals: One attorney filed only 51/2 pages. Most run many pages longer. He never quoted the trial record and cited only three cases.

With the limit lifted, the court soon ran out of money. The governor's office stepped in with another \$600,000 - but set a new limit of \$25,000 per attorney. While larger than the original cap, that's still not enough for some complex cases, critics say.

But Judge McCormick said Texas is going beyond its constitutional duty in providing attorneys for the appeal.

"What people need to understand is that ... The right to bring habeas corpus is a grant of grace from our legislators," he said.

Judge McCormick said the system is a "model for the nation" and it has been improved over the years. The Legislature returned the appointment authority to trial judges, who must appoint from the high court's list of qualified attorneys. In addition, lawmakers passed a provision that allows a defendant to file again if his lawyer misses the deadline.

Abilene attorney Erika Copeland said that's not enough to persuade her to take another state habeas appeal.

Ms. Copeland took one of the first habeas appeals under the 1995 changes because she was one of the few people familiar with James Clayton's case.

On paper, she met the qualifications. But she was in over her head.

"I'm not an idiot," Ms. Copeland said. "I could do something if I knew what the rules are. I just flat didn't know what I was doing." And the state offered little assistance, she said.

Her client was executed in May. Ms. Copeland said she will not accept another habeas case under the current system. "I feel like I was a tool," she said. "I feel like they used me in a process to execute my client."

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