

## Complaint attempts to force State Bar to levy punishment

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Appalled at the low quality of many death penalty appeals, a State Bar of Texas committee took an unprecedented and dramatic step: It authorized one of its members to file a grievance early this year against habeas lawyer Mark Alexander of McAllen.

If the Texas Court of Criminal Appeals would not enforce standards for writs of habeas corpus, committee members believed it was time for lawyers to begin policing themselves.

“That idea reflects the frustration of people who are interested in this subject because nobody seems to care much,” said Vincent Perini, a Dallas lawyer and then-member of the Committee on Legal Services to the Poor in Criminal Matters.

“It is a complete scandal. It’s a disgrace,” Perini said. “Everyone’s well aware of the problems, but we just go rocking along.”

Sensing enough was enough, the committee decided late last year to break the profession’s unwritten rule that says grievances are filed by a lawyer’s clients, not other attorneys.

One goal was to shake up the state’s habeas lawyers by making an example of Alexander, whose 2002 writ for convicted killer Arturo Diaz reads “like it was written by a fifth-grader,” one committee member said.

A larger goal was to prod the State Bar of Texas - which is primarily responsible under state law for disciplining lawyers and enforcing professional standards - into taking a leadership role in addressing the problem of deficient death penalty writs.

“The bar has, for a long time, taken an ostrich approach; they just buried their head in the sand and ignored it,” said Tarrant County Magistrate Court Judge Allan Butcher, a member of the committee.

The committee’s interest in habeas reform was piqued by a 2002 report by the Texas Defender Service, a nonprofit law firm specializing in death penalty cases, including writs of habeas corpus. Titled “Lethal Indifference,” the report found that 67 percent of writs filed from 1995 to 2000 included no appropriate claims or were based solely on the trial record, allowing the courts to dismiss them out of hand.

Conducting its own review, the committee found Alexander’s writ for Diaz. It contained 19 claims based on nothing outside the record of Diaz’s trial - although habeas writs are supposed to re-examine all aspects of a case in search of new facts - and many of those were incomplete or improperly argued, according to the trial court’s findings.

“We were all scandalized,” Perini said.

Sloppily written and error-filled, the writ states at one point: “The arrest was questionable, the probably (sic) cause was primarily rumors and uncooperated (sic) tips.”

Alexander, a 29-year lawyer, did not return several phone calls seeking comment.

Lawyers appointed to take Diaz’s appeal into federal court found that Alexander also failed to interview Diaz before filing the writ, something State Bar of Texas guidelines say should happen “without exception.”

“I have never met Mr. Alexander,” Diaz, convicted in a 1999 murder and robbery in McAllen, wrote in an affidavit. “He did not call me, write me, or come to visit me in prison. I wrote him several letters asking about my case, and he never responded to any of them.”

In addition, the Court of Criminal Appeals found Alexander in contempt and fined him \$250 for missing a deadline to move Diaz’s case into federal court.

Committee members believed they had a slam-dunk grievance against Alexander but still argued for several years about how best to proceed. Finally, with the statute of limitations approaching in January 2006, they asked Butcher to file a grievance with the State Bar.

The complaint did not make it past the first hurdle in the discipline process, according to a committee member who spoke on condition of anonymity, citing state law that requires the grievance process to be confidential.

An investigator found that Alexander did not violate the state code of conduct for lawyers - the reasons are hidden in the confidential nature of the process - and the decision was upheld by a summary disposition panel.

“We got the thing thrown right back at us,” the committee member said.

Committee Chairman Noe Gonzalez speculated that the grievance system lacks the sophistication to understand the nuances of habeas law, one of the profession’s most challenging areas.

“As a general practice, we don’t put up with bad lawyers. I think this is just a matter of people not generally knowing the writ process,” said Gonzalez, who declined to comment specifically about the Alexander grievance because, as a trial judge in Hidalgo County, he appointed Alexander to write the Diaz writ.

None of the attorneys working in the bar’s grievance section could recall a lawyer being reprimanded for work on a death penalty habeas writ.

But the Committee on Legal Services to the Poor is not ready to give up.

Members recently authorized another grievance, this one against Houston lawyer Les Ribnik, whose largely duplicated writs for Angel Maturino Resendiz, the “Railroad Killer” from Mexico, and Robert Gene Will, a young car thief who was convicted of killing a Harris County deputy, were the subject of a February report in the American-Statesman.

That grievance has not yet been filed, and there is a lively debate within the committee about whether filing grievances is the most productive course toward change.

“I can foresee more of a proactive review of writs as opposed to reactive, which is the way the grievance process is set up,” Gonzalez said. “We know where some of the problems are, but we are trying to identify the solution.”

Recently, the State Bar took several steps toward addressing the situation. In April, board members approved guidelines for capital punishment lawyers that lay out, in highly specific language, the duties of habeas lawyers.

The bar also created a task force to examine the court-appointed habeas system. With 10 members who are judges, prosecutors or defense lawyers, and one member of the public, the group will examine how to best improve the writ system.

Bar President Martha Dickie, a longtime Austin lawyer, said the task force will begin work in November.

“I don’t think it’s something we should ignore, but you don’t want to make impulsive judgments about things,” Dickie said. “We need to examine the whole system.”

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