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Suit criticizes defense of poor in Ontario County

By JAMES GOODMAN, Staff writer

A person arrested, jailed and too poor to afford a lawyer in Monroe County is likely to be in contact with the Public Defender's Office the next day.

But in Ontario County, which does not have a public defender's office, several days or more could pass before a person jailed without funds has a lawyer in private practice assigned to the case. Staying in contact with the lawyer can be problematic as well.

Tosha Steele of Geneva, for example, sat in jail for five days without seeing a lawyer after being arrested on a drug charge last July. She was visited by her appointed attorney only once in jail during the five months she awaited resolution of her case.

"I didn't know what was happening," said Steele, 31, who is now serving a six-year sentence and is part of a class-action lawsuit brought against the state by the New York Civil Liberties Union, claiming inadequate legal representation for the poor.

Forty-five years after the U.S. Supreme Court ruled that a person too poor to hire a lawyer in a criminal case must be provided one, Ontario County has come under criticism from the Civil Liberties Union, which cites Ontario County as an example of a "broken public defense system" that represents poor defendants too late and in too limited a way.

Criticism also has come from the National Legal Aid & Defender

Association, which in a recent report about Ontario's system of representing the poor in criminal and Family Court matters concluded that "the taxpayers cannot be assured that their dollars are spent effectively and efficiently and in a manner calculated to ensure that justice is served."

Ontario is one of nine counties in the state that rely on an assigned counsel program to represent the poor in criminal cases. Most counties, including the other counties surrounding Monroe, have public defenders, although some are part time. Legal aid societies for representation of the poor in criminal cases are used in some instances.

John Kennedy, administrator of the Ontario County Assigned Counsel Program, says Ontario is among the counties being singled out to draw attention to statewide problems detailed two years ago by a commission convened by state Chief Judge Judith Kaye.

"The question is, is any county in this state willing or able — politically, financially — to step up to the plate and provide the resources to meet these goals?" said Kennedy.

Proposals at the state level would begin to address some of the concerns raised by the Kaye Commission, which called for statewide standards and increased funding for representing the poor.

But the kind of system used at the county level can make a big

difference in whether representation of the poor is a meaningful reality.

Unlike most other counties in the state, which have some form of public defender system, Ontario County still relies on an assigned counsel system. Lawyers in private practice are hired at an hourly rate set by the state — \$75 an hour for felony and Family Court cases and \$60 an hour for misdemeanors — and they largely handle the cases on their own.

Monroe County, by contrast, has a Public Defender's Office designed to put the accused in contact with a lawyer early on, and with a staff of seven investigators, the office can take an independent look at the evidence.

Faced with the annual cost of the assigned counsel more than doubling to \$1.8 million since 2003 as a result of the state raising the hourly rate, the Ontario County Board of Supervisors has established a special committee to consider whether to switch to a public defender's office. A decision is expected this year.

Robert Zimmerman, a defense lawyer on the committee, said "the overriding yardstick" in deciding whether to make the switch should be the quality of representation provided for the poor.

"If you start down the slippery slope of not providing quality representation to these folks, then the rights of all are potentially in jeopardy," he said.

Levels of compliance

Providing legal representation for those who cannot afford lawyers was firmly established as a constitutional right by the U.S. Supreme Court in its 1963 Gideon v. Wainwright decision, which said "lawyers in criminal courts are necessities, not luxuries." New York's current system for representation of the poor dates to 1965.

Under Edward Nowak, who recently retired after 30 years as Monroe County public defender, the office provided early and continued assistance for people awaiting trial. As many as five paralegals and interns now go six times a week to the County Jail to interview the latest arrivals, and staff lawyers are encouraged to make weekly visits — called "Monday Night Jail."

"At the early stage of the case is when you find witnesses in a case, when you are trying to figure out what the case is worth," said Brian Shiffrin, first assistant public defender in the Monroe office.

Timothy Donaher, Nowak's successor, who spent eight years in the office as an assistant public defender, said he is committed to continuing those practices.

The efficiencies of Monroe's public defender system are evident in the statistics. Based on the 23,960 cases that the Monroe office received last year with a \$6.7 million budget, the county spent an average of \$282 per case. That's almost \$200 less per case than the \$496 average rung up by the court-appointed program in Ontario County, which spent \$1.8 million on 3,560 cases in 2007.

The lack of a full-time public defender in Ontario means that Kennedy, a lawyer who works part time running the program with two assistants, visits the Ontario County Jail only two or three times a week to determine eligibility of defendants. Assigned counsel can hire investigators, but that happened only about 50 times last year.

In cases that appear in the city courts of Canandaigua and Geneva, as well as in the town of Phelps, the judges match up the defendants with lawyers.

Recurring problems

In Ontario County, a big shortfall can be the limited contact that an assigned lawyer has with a defendant, even with the possibility of a long sentence.

That's the underlying problem with the representation provided to Steele, one of three Ontario County defendants who are part of the New York Civil Liberties lawsuit filed last November.

All 20 of the plaintiffs from five counties claim inadequate representation and want an overhaul of the state system.

Steele said her court-assigned lawyer, Michael Roulan, visited her just once in jail and missed an Oct. 5 court date. Roulan said he was not given the court date.

Roulan, according to a summary he subsequently compiled about the case, first met Steele at her July 30 court appearance — five days after her arrest for possession of crack cocaine — when he was assigned. Since she was on parole after a conviction for selling drugs, Steele was ineligible for bail.

"I did discuss these charges with Tosha, and it seemed to me that she was caught red-handed ... with drugs hidden inside of her pants," Roulan said.

The stakes became higher when Roulan said he was told by an assistant district attorney on Sept. 21 about drug sales Steele had allegedly made in June and that a sentence of 12 years was possible for Steele, who has three young children.

Steele said her communications with Roulan were largely in brief meetings in the holding cell next to the courtroom, with other inmates present, and in several telephone calls. His jail visit didn't come until October.

In late November, Steele ended up pleading guilty to third-degree drug possession and received a six-year sentence.

On the day of her guilty plea, the DA's office filed three counts of third-degree criminal sale of a controlled substance but agreed that these new charges would be satisfied by her plea of possession.

Roulan said Steele received excellent representation and her six-year sentence was half the maximum.

But Steele, who claims she was not involved in the alleged drug sales, faults Roulan for not taking an independent look at the evidence and thinks "people would have better communications with the lawyers" under a public defender system.