

CIVIL GIDEON: *The Right to Counsel in Civil Cases*



By Alan Houseman, Executive Director, Center for Law and Social Policy.

Two workshops at the NLADA Annual Conference in Seattle focused on recent developments in cases seeking to expand the right to counsel in civil cases. While it is unlikely that such a right will emerge at the federal level because of the current and likely future make-up of the U.S. Supreme Court, there are some new emerging efforts in Washington State and Maryland, among other states, to develop a civil right to counsel through state court litigation. In Washington, the Northwest Justice Project and a private law firm sought to establish a right to civil counsel in *Smith v. City of Moses Lake*. In that case, a 79-year-old mentally ill man whose only income was Social Security disability benefits was civilly prosecuted by a city in order to remove him from and demolish his home. The plaintiff asserted that the failure to provide civil counsel in this case violates: (1) the federal constitutional provisions on due process; (2) the state constitution which requires appointment of counsel when a fundamental liberty interest is at stake; and (3) the Washington law against discrimination on the grounds that counsel should have been appointed as a

reasonable accommodation of the man's disabling mental illness. The case was dismissed on grounds of mootness in the Washington Court of Appeals.

In Maryland, a former state attorney general represented the defendant in *Frase v. Barnhart*, which at the time of the Annual Conference was pending before the Maryland Court of Appeals (the highest court in Maryland). This case raised the issue of an indigent defendant's right to counsel in a contested child custody matter under the Maryland Declaration of Rights, the Maryland constitution. The case was heard before the Maryland Court of Appeals in September 2003. (In December, after the Annual Conference, the court held by a 4-3 vote that a lower court had wrongly imposed conditions on Deborah Frase's custody of her son, but declared it "inappropriate" to rule on her claim of a "right to counsel" in the custody case, citing the fact that the litigation was over, among other reasons. The three dissenting judges would have reached the right to counsel issue and held that the Maryland Constitution required the provision of the right to counsel in civil cases of this nature.)

The first workshop focused on the legal theories used in the two cases and included a discussion of state and federal constitutional law, the American with

Disabilities Act and state civil rights statutory claims, international law and the provisions of the Maryland constitution. The Maryland constitutional argument is somewhat unique though possibly relevant to other states that were one of the original 13 colonies. When Maryland became a state it adopted all English law that was effective on July 4, 1776 which included a provision on right to counsel in civil cases. Participating in that session were Deborah Perluss, Northwest Justice Project; Deborah Gardner, Public Justice Center; Wilhelm Joseph, Legal Aid Bureau; and Lisa Brodoff and Raven Lidman, professors at Seattle University School of Law.

The second workshop focused on what the civil legal assistance community should do to advance the right to counsel in civil cases. Joining the members of the first panel were Mary Schneider, Legal Services of Northwest Minnesota and Alan Houseman, CLASP. A broad agenda of activities was discussed including: creating support, brief bank, clearinghouse and training capacities with Web sites and e-mail lists; preparing scholarly articles; undertaking new research on the positive outcomes achieved by lawyers for clients; national and international conferences; building broad based coalitions; and developing media strategies. ■

