

Summary Report on the Findings of the *Virginia Self-Represented Litigant Study*

John E. Whitfield

April 4, 2018

Introduction

I'm pleased to present to the Supreme Court of Virginia the final report from a just completed study of Virginia's courts, the ***Virginia Self-Represented Litigant Study***. It is a ground-breaking study of Virginia's civil courts' case management databases, focusing on unrepresented litigants – the first such study ever in Virginia, and perhaps only the second in the entire country. The study was undertaken by the National Center for State Courts (NCSC) with funding from a Technology Initiative grant (TIG) from the Legal Services Corporation (LSC) to my legal aid organization, Blue Ridge Legal Services (BRLS), for this purpose.

Background

This report has been 5 years in the making, with the creation of the Virginia Access to Justice Commission (VAJC) as the primary catalyst. When the Virginia Access to Justice Commission was in its planning stages in 2013, we discovered that there were no data on the pervasiveness of unrepresented litigants in Virginia's courts. In fact, the court's databases didn't uniformly track the representational status of parties, so there was no way to find this out. The Commission saw the clear need for such data to provide benchmarks for the Commission's work.

As a first step, the Commission sought the help of the Court, Karl Hade, and the Office of the Executive Secretary (OES), in adding the necessary fields to allow for this to be tracked. This was accomplished in 2014 by making the representation fields in the databases mandatory in all courts.

After working for over 2 years to develop this concept, we applied for a grant in 2015 from the LSC to fund the study, with the support of the VAJC, the OES, the Virginia legal aid community, and the National Center for State Courts. The grant was awarded in late 2015, to commence January 1, 2016.

The NCSC ran into some difficulties getting access to circuit court data; they ultimately were able to examine the data from 33 circuit courts, representing 38% of the statewide circuit court caseload. On the other hand, they were able to work with a complete, comprehensive database of all GD courts and J&DR courts. It included a year's worth of data – April 1, 2015 through March 31, 2016. However, the J&DR court data has problems in sorting out the representational status of the parties, so NCSC narrowed its focus to adult cases in the J&DR courts for this study.

Ultimately, the NCSC released five separate reports in its study. Three reports, completed in April 2017, were descriptive analyses of the circuit court, general district court, and J&DR district court data, respectively. The final two reports, including an analysis of case outcomes and their relationship to representational status of the parties, and a summary of suggested management reports for future use by the courts, were completed in December 2017. All five of these reports can be reviewed and downloaded at <http://brls.org/the-virginia-self-represented-litigant-study/>.

Key Findings

The Outcomes Report contained a number of significant findings, outlined below.

- ❖ **The vast majority of civil cases include at least one unrepresented party.** The traditional adversarial model of the court, in which both parties have legal representation, occurs in only
 - 1 percent of General District Court cases,
 - 6 percent of Adult Juvenile & Domestic Relations Court cases, and
 - 38 percent of Circuit Court cases.

Even if all default judgments and “not founds”, etc., are excluded, both parties have representation in only 2% of the cases in General District Court.

- ❖ **Poverty is associated with not being represented in court by a lawyer.** The greater the extent of poverty in a locality, the less likely it is that parties will have an attorney.
- ❖ **Plaintiffs prevail in the overwhelming majority of cases where the court enters judgment for one party or the other,** no matter the court, the case

category, or the representation profile. However, if viewed through the prism of whether the plaintiff obtained a judgment, compared to cases where the plaintiff did not obtain a judgment, a different picture emerges, where plaintiffs recover judgments in just slightly over half of the cases closed during the year.

- ❖ **Both plaintiffs and defendants have substantially higher success rates when represented than when they are unrepresented.** The representation status of the parties, and the resulting potential for imbalance of power when only one is represented, is significant. Plaintiffs obtain judgment in over 60% of the cases where plaintiffs are represented, and defendants are not. In contrast, Plaintiffs obtain judgment in less than 20% of the cases where defendants are represented, and plaintiffs are not. See the accompanying graphs.

However, the courts' dispositional codes have some ambiguities in them. For instance, a "dismissed" case may be the result of the defendant paying a debt in full, a settlement negotiated, or the court dismissing the plaintiff's claim at trial after hearing the plaintiff's evidence. Likewise, the amount of recovery *vis-à-vis* the amount sought is not currently captured. A judgment for plaintiff for \$100 is counted as a judgment for plaintiff, even if the plaintiff had sued for \$10,000,000 and defendant successfully knocked that down to a nominal \$100.

Import of these Findings¹

To the extent our civil justice system presumes the presence of counsel (in requirements for pleadings, rules of procedure and evidence, *etc.*) to fairly and effectively try cases, that reliance is too often seriously misplaced, creating a dysfunctional system for the many litigants who don't have access to representation. Poverty, and the concomitant inability to retain counsel, creates a significant barrier to successful outcomes for unrepresented poor litigants in Virginia's courts, notwithstanding the best efforts of our judges to treat all litigants fairly.

¹ These observations are mine –not the National Center for State Courts', nor the Virginia Access to Justice Commission's, nor Blue Ridge Legal Services'.

If we want to try to address the structural Access to Justice problems whose existence this report confirms, I believe we need to pursue a broad three-pronged approach to close this Justice Gap:

1. We need to increase availability of counsel for those low-income litigants who have valid claims to dispute, particularly where opposing party has counsel, through increased funding for legal aid; and through
2. increased participation in pro bono work by Virginia's private lawyers.
3. At the same time, we need to re-think our court processes, recognizing that unrepresented litigants are now more often the rule than the exception to the rule - particularly in the lower trial courts:
 - Expand small claims dockets and their equivalent
 - adopt simplified forms using plain language
 - relax rules of procedure and evidence, at least in those cases where all parties are unrepresented, and
 - reform procedural traps for the unwary, unrepresented litigant, such as the affirmative defense of the statute of limitation which is waived if not raised, *etc.*²

Future Refinement and Study

This was the first attempt at such a study in Virginia. The NCSC has included in its work product a summary of management reports and recommendations to the OES for its review and implementation. My hope is that this study can now be updated on an annual basis by OES, improving the quality of the data and analysis while providing the Virginia Access to Justice Commission, and the Court, timely benchmark data on our progress in closing the Justice Gap.

² This could be accomplished either by making the timeliness of filing (i.e., the statute of limitations) an element of the plaintiff's case rather than an affirmative defense that is waived if not raised, or explicitly authorizing judges to raise the issue *sua sponte*.

National Center for State Courts

Outcomes of Civil Cases in General District Court,
Juvenile & Domestic Relations Court, and Circuit Court

Virginia Self-Represented Litigant Study:

VIRGINIA SELF-REPRESENTED LITIGANT STUDY:

Outcomes of Civil Cases in General District Court,
Juvenile & Domestic Relations Court, and Circuit Court

Produced by the National Center for State Courts

Funded by a Technology Initiative Grant from the *Legal Services Corporation* to *Blue Ridge Legal Services*, with the support and assistance of:

- the *Office of the Executive Secretary of the Supreme Court of Virginia* and
- the *Virginia Access to Justice Commission*

VIRGINIA SELF-REPRESENTED
LITIGANT STUDY:
Outcomes of Civil Cases in General District Court,
Juvenile & Domestic Relations Court, and Circuit Court

A ground-breaking study of Virginia's civil courts' case management databases focusing on unrepresented litigants – the first such study ever in Virginia, and perhaps only the second in the entire country.

VIRGINIA SELF-REPRESENTED
LITIGANT STUDY:
Outcomes of Civil Cases in General District Court,
Juvenile & Domestic Relations Court, and Circuit Court

Background

Five years in the making, with the creation of the Virginia Access to Justice Commission as the primary catalyst.

VIRGINIA SELF-REPRESENTED
LITIGANT STUDY:
Outcomes of Civil Cases in General District Court,
Juvenile & Domestic Relations Court, and Circuit Court

Key Findings

- ❖ The pervasiveness of unrepresented litigants in Virginia's civil justice system
- ❖ Correlation between poverty and lack of representation
- ❖ Effect of lack of representation on case outcomes

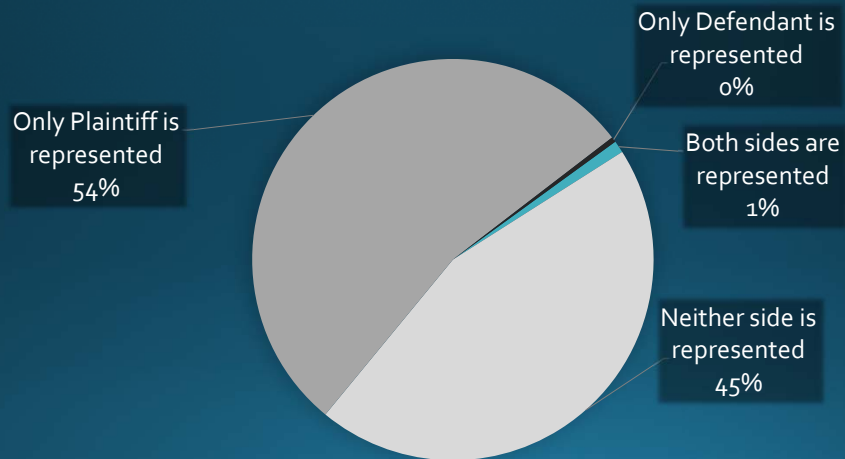
VIRGINIA SELF-REPRESENTED
LITIGANT STUDY:
Outcomes of Civil Cases in General District Court,
Juvenile & Domestic Relations Court, and Circuit Court

The ***vast majority*** of civil cases include at least one unrepresented party. The traditional adversarial model of the court, in which ***both*** parties have legal representation, occurs in only

- ❖ 1% of General District Court cases,
- ❖ 6% of Adult Juvenile & Domestic Relations Court cases, and
- ❖ 38% of Circuit Court cases.

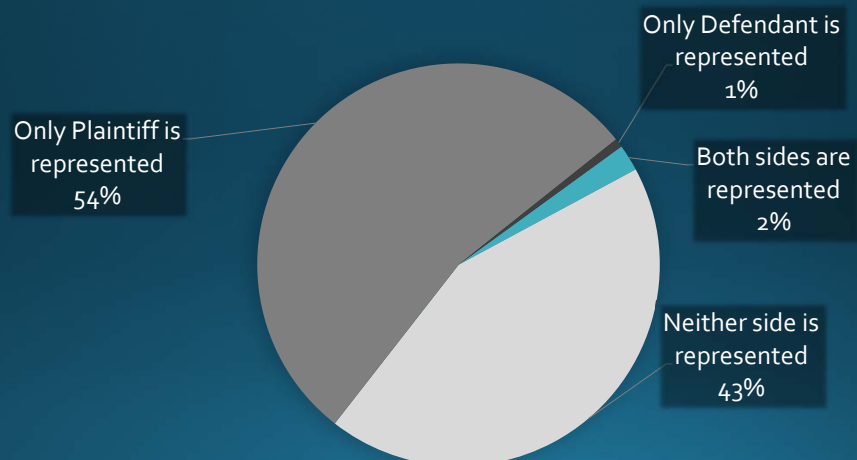
Representation in Virginia's General District Courts

All Civil Cases, 2016



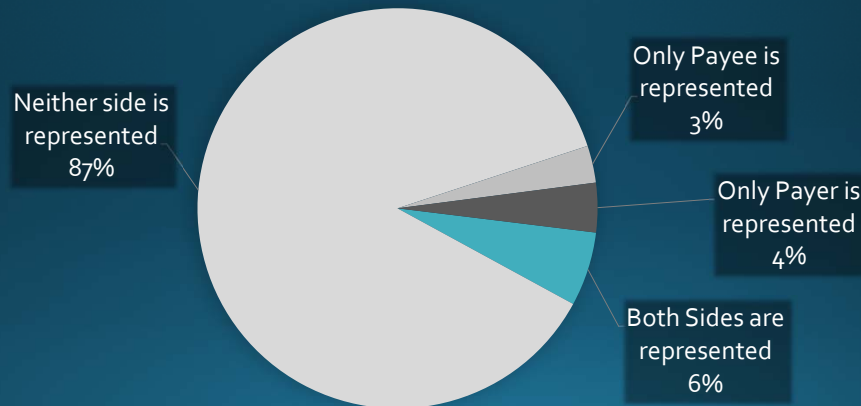
Representation in Virginia's General District Courts

All Civil Cases excluding all defaults and "not founds", etc., 2016



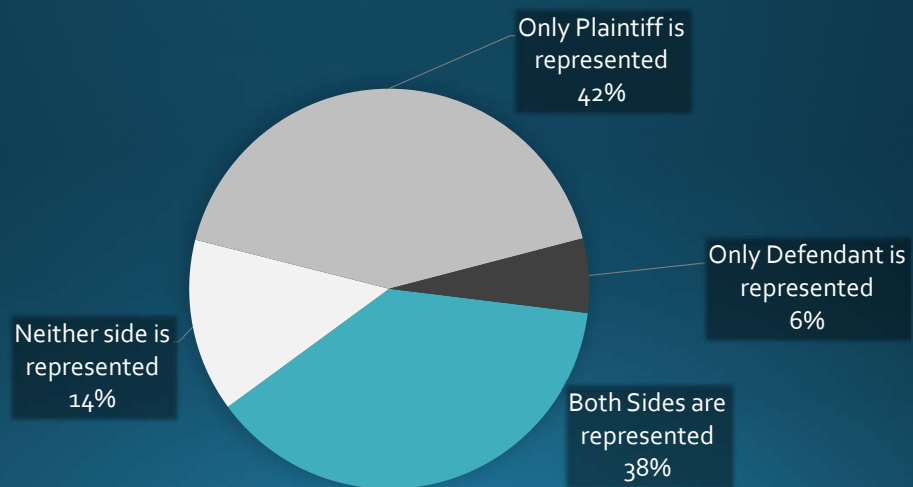
Representation in Virginia's J&DR District Courts

Adult Cases, 2016



Representation in Virginia's Circuit Courts

All Civil Cases, 2016



VIRGINIA SELF-REPRESENTED
LITIGANT STUDY:
Outcomes of Civil Cases in General District Court,
Juvenile & Domestic Relations Court, and Circuit Court

Poverty is associated with not being represented in court by a lawyer. The Study found that the greater the extent of poverty in a locality, the less likely it is that parties will have an attorney.

VIRGINIA SELF-REPRESENTED
LITIGANT STUDY:
Outcomes of Civil Cases in General District Court,
Juvenile & Domestic Relations Court, and Circuit Court

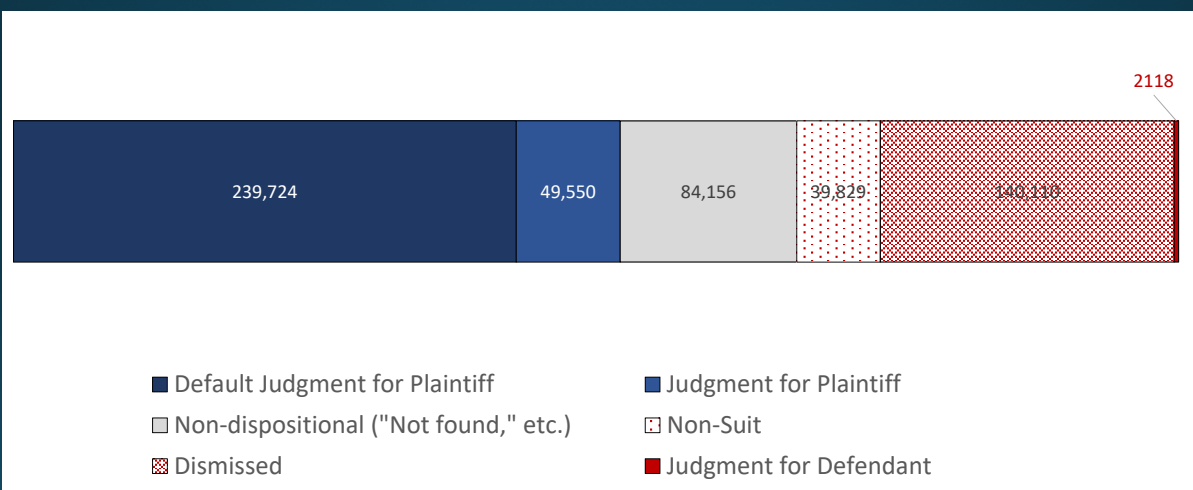
Plaintiffs/Payees prevail in the overwhelming majority of cases where the court enters judgment for one party or the other, no matter the court, the case category, or the representation profile. A closer look reveals some different patterns.

VIRGINIA SELF-REPRESENTED
LITIGANT STUDY:
Outcomes of Civil Cases in General District Court,
Juvenile & Domestic Relations Court, and Circuit Court

Both plaintiffs and defendants have substantially higher success rates when represented than when they are unrepresented. The representation status of the parties, and the resulting potential for imbalance of power when only one is represented, is significant.

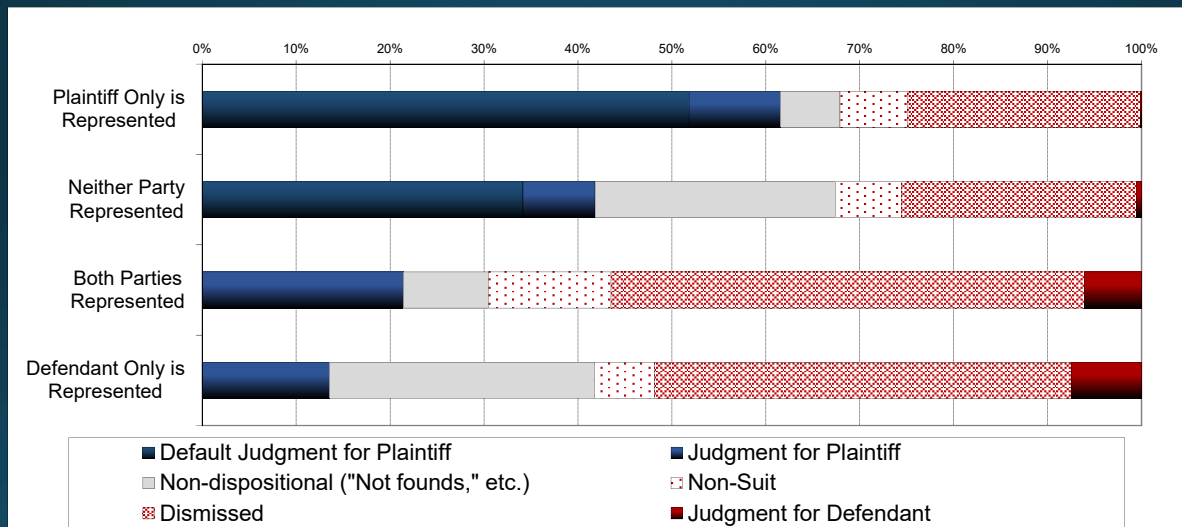
Case Outcomes in General District Courts

All Civil Cases, 2016



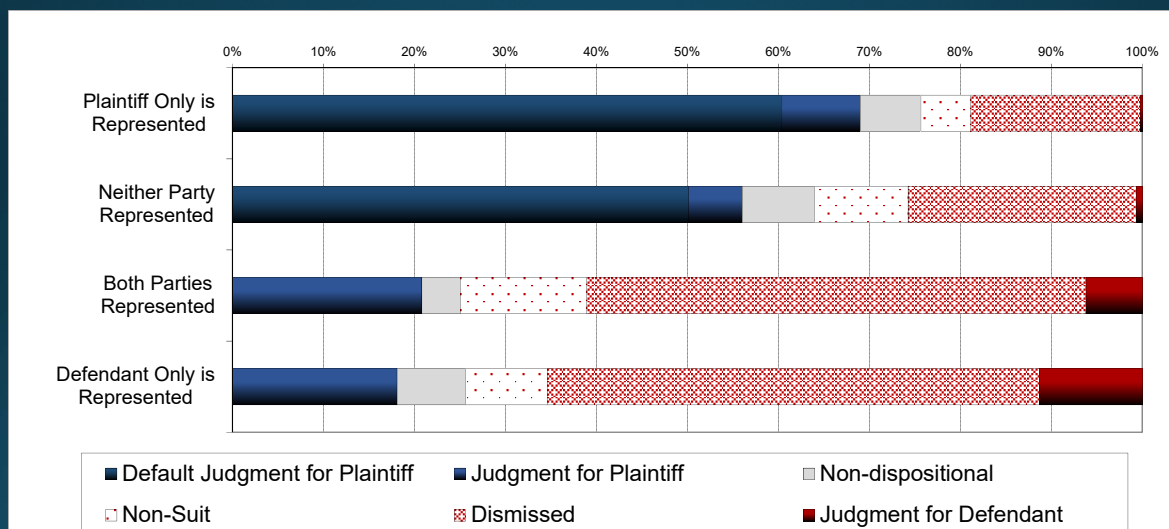
Case Outcomes in General District Courts

All Civil Cases, 2016, by Representation Status



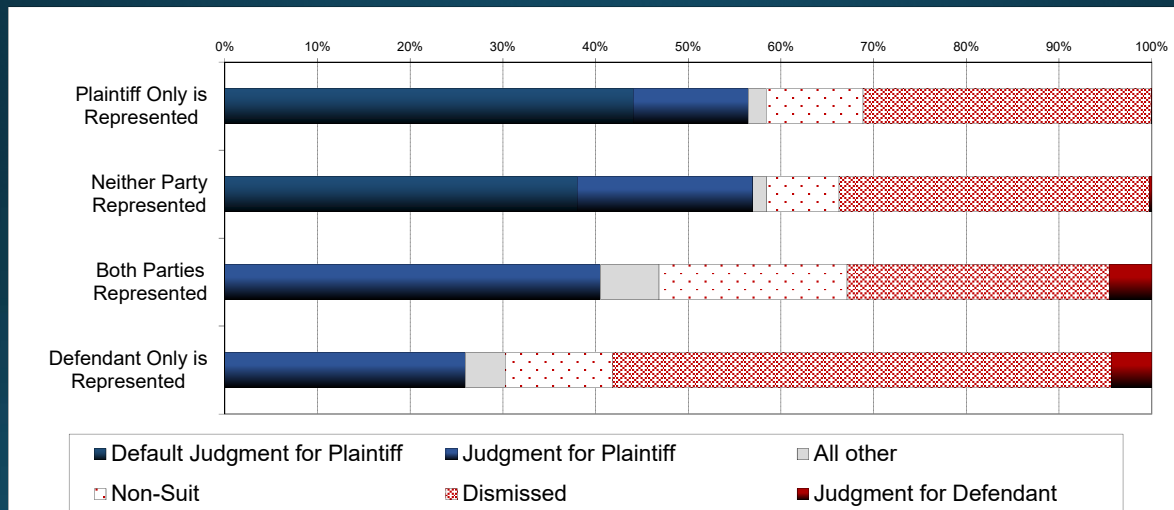
Case Outcomes in General District Courts

Warrants in Debt, 2016, by Representation Status



Case Outcomes in General District Courts

Unlawful Detainers, 2016, by Representation Status



Import of these Findings?

My observations:

- ❖ To the extent our civil justice system presumes the presence of counsel (in pleadings, rules of procedure and evidence, etc.) to fairly and effectively try cases, that reliance is too often seriously misplaced, creating a dysfunctional system for the many litigants who don't have access to representation.

Import of these Findings?

My observations:

- ❖ Poverty, and the concomitant inability to retain counsel, creates a significant barrier to successful outcomes for unrepresented poor litigants in Virginia's courts, notwithstanding the best efforts of our judges to treat all litigants fairly.

Import of these Findings?

My observations:

- ❖ If we want to try to address the structural Access to Justice problems whose existence this report confirms, I believe we need to pursue a three-pronged approach to close this Justice Gap:

Import of these Findings? My observations:

1. Re-think our court processes, recognizing that unrepresented litigants are now more often the rule than the exception to the rule - particularly in the lower trial courts:
 - Expand small claims dockets and their equivalent
 - adopt simplified forms with plain language
 - relax rules of procedure and evidence in those cases where all parties are unrepresented, and
 - reform procedural traps for the unrepresented litigant, such as the affirmative defense of the statute of limitation which is waived if not raised, etc.

Import of these Findings? My observations:

Increase availability of counsel for those low-income litigants who have valid claims to dispute, where opposing party has counsel, through

2. increased funding for legal aid
and
3. increased participation in pro bono work by the bar.

VIRGINIA SELF-REPRESENTED
LITIGANT STUDY:
Outcomes of Civil Cases in General District Court,
Juvenile & Domestic Relations Court, and Circuit Court

Future Refinement and Study

This was the first attempt at such a study in Virginia. The NCSC has included in its work product a summary of management reports and recommendations to the OES for its review and implementation. Our hope is that this study can now be updated on an annual basis by OES, improving the quality of the data and analysis while providing the Virginia Access to Justice Commission, and the Court, timely benchmark data on our progress in closing the Justice Gap.

VIRGINIA SELF-REPRESENTED
LITIGANT STUDY:
Outcomes of Civil Cases in General District Court,
Juvenile & Domestic Relations Court, and Circuit Court

The NCSC's full Study, including five reports, can be accessed at:

<http://brls.org/the-virginia-self-represented-litigant-study/>

For further information:

John E. Whitfield
Co-Chair, Virginia Access to Justice Commission
Executive Director, Blue Ridge Legal Services, Inc.
jwhitfield@brls.org