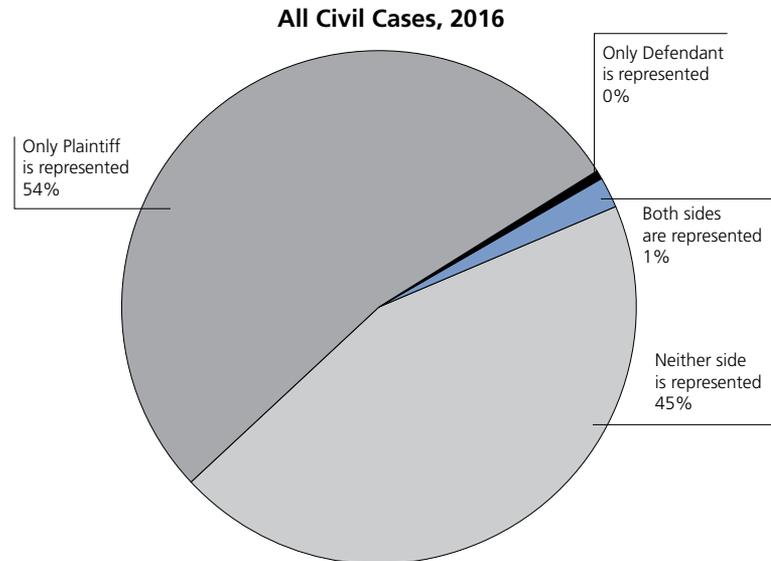


The Sobering Findings of the Virginia Self-Represented Litigants Study

by John E. Whitfield

Representation in Virginia's General District Courts



A few months ago, the National Center for State Courts published the *Virginia Self-Represented Litigants Study*, a ground-breaking study of Virginia's civil courts' case management databases focusing on unrepresented litigants. It was the first such study ever in Virginia, and perhaps only the second in the entire country. (Missouri completed a similar study in 2015.) The study was undertaken with funding from a technology initiative grant from the Legal Services Corporation (LSC) to my legal aid organization, Blue Ridge Legal Services (BRLS), for this purpose.

Background

This report has been five years in the making, with the creation of the Virginia Access to Justice Commission (VAJC) as its primary catalyst. The VAJC was created in 2013 by

then Chief Justice Cynthia Kinser of the Supreme Court of Virginia to help the judiciary fulfill its mission of providing an independent, accessible, responsive forum for the just resolution of disputes, with a particular focus on the civil legal needs of low-income Virginians. Early on in our deliberations, we learned that there existed no hard data on the pervasiveness of unrepresented litigants in Virginia's courts. The court system's databases did not uniformly track the representational status of parties, so there was no way to determine the numbers of unrepresented litigants in the court system. The commission saw the obvious need for such data, to provide benchmarks for our work.

As a first step, the commission sought the help of Karl Hade, the executive secretary of the Supreme Court of Virginia, in adding the necessary fields in the database programs to allow for representation to be uniformly tracked. This was accomplished in 2014 by making the representation fields in the databases mandatory in all courts. After working for two years to develop and refine the study concept, Blue Ridge Legal Services applied for a technology initiative grant in 2015 from the

national Legal Services Corporation (LSC) to fund the study, with the support of the VAJC, the Office of the Executive Secretary, the Virginia legal aid community, and the National Center for State Courts (NCSC). The grant was awarded in late 2015.

The NCSC initially ran into some difficulties getting access to circuit court data; they ultimately were able to examine the data from just 33 circuit courts, representing 38 percent of the statewide circuit court caseload. On the other hand, they were able to work with a complete, comprehensive database of all General District courts and Juvenile & Domestic Relations District courts. The database included a full year's worth of data — from April 1, 2015, through March 31, 2016. However, the J&DR court data presented some 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 as part of 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 key findings of the study focused on three aspects:

- The pervasiveness of unrepresented litigants in Virginia's civil justice system;
- The association between poverty and the lack of representation; and
- The impact of the lack of representation on case outcomes.

Pervasiveness of Unrepresented Litigants in Virginia's Courts

The data revealing the pervasiveness of unrepresented litigants was startling, particularly in the lower courts. The vast majority of civil cases in Virginia's courts involved at least one unrepresented party. The traditional court model, in which both parties have legal representation, occurred in only one

percent of general district court cases. Even if all default judgments and “not founds,” etc., were excluded, both parties were represented in only two percent of the remaining cases in Virginia's general district courts. In 54 percent of the cases, only the plaintiffs were represented, while neither side had counsel in another 43 percent of the cases. In the J&DR courts, neither party had representation in 87 percent of the cases, and only six percent of adult cases involved counsel representing both sides. For a court system designed around a presumption of the presence of counsel, the exception to the rule is in fact the case, resulting in a dysfunctional system for most unrepresented litigants.

In contrast, 38 percent of circuit court cases had counsel representing both parties. Only the plaintiffs were represented in 42 percent of the circuit court cases, while neither party had counsel in 14 percent of the circuit court cases. It should be noted that many of the cases where only the plaintiff had counsel were undoubtedly uncontested matters (e.g., no fault divorces) where there was likely no detriment to the defendant resulting from the lack of representation. (It would be useful to drill down and look at the data after screening out the uncontested matters — something for a future study to undertake.)

The Association between Poverty and the Lack of Representation

The second area of inquiry was the association, if any, between poverty and representational status of the parties in Virginia's courts. Of course, the courts' databases have no data on the income of individual litigants, so in order to examine this, NCSC ranked all

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of Virginia's localities by their poverty rate and grouped them accordingly. Then they compared those groupings with the rate of representation in the cases of the corresponding courts. They found that the greater extent

of poverty in a locality, the more likely it is that parties would be unrepresented.

The Effect of the Lack of Representation by Counsel on Case Outcomes

Third, the study looked at the relationship between representational status and case outcomes. Not surprisingly, both plaintiffs and defendants have substantially higher success rates when represented than when they are unrepresented—reassuring information for members of the bar. Of course, that is why people hire lawyers, if they can possibly afford to do so: they KNOW they need a lawyer in order to increase their odds of winning. More disturbingly, the study’s results reveal that the impact of the representation status of the parties—and the resulting potential for imbalance of power when only one side is represented—is significant. This reflects similar findings in other more limited studies from other states; in this respect, Virginia is not unique.

Looking at case outcomes in all civil cases in Virginia general district courts in 2016, we find that plaintiffs obtained judgments in 52 percent of the roughly 555,000 cases disposed of during the year, either through default judgments or contested judgments. Conversely, they did not obtain judgments in the remaining 48 percent of the cases. These cases were disposed of in a number of ways: 7 percent were non-suited; 15 percent were closed for non-dispositional reasons (e.g., “not found,” change of venue, etc.); 0.4 percent were judgments for defendants; and 25 percent were dismissed. It should be noted that “dismissed” can potentially cover a wide range of circumstances; a case might be “dismissed” because the defendant paid the alleged debt, or because the parties “settled

and agreed” the case. A case might also be “dismissed” at the close of the plaintiff’s case, when the judge rules the plaintiff has not proved its case. The one common characteristic of all of these possibilities is simply that the plaintiff did not obtain a judgment against the defendant. **See the accompanying graph showing the breakdown of civil cases’ outcomes in Virginia’s general district courts in 2016.**

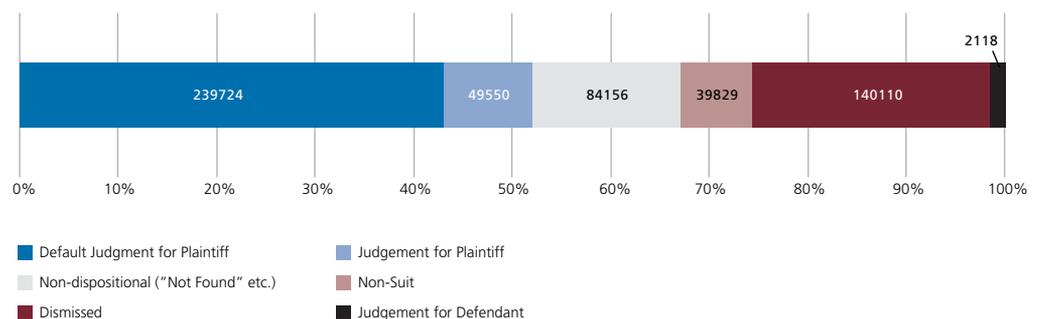
Next, the study analyzed the same outcome data but broke it out by the representational status of the parties. There are generally four possibilities:

- only plaintiff is represented;
- neither party is represented;
- both parties are represented; or
- only defendant is represented.

When the case outcomes are compared among these four groupings, the study found significant differences in outcomes depending on the representational status of the parties. For example, plaintiffs obtained judgments in over 60 percent of the cases where plaintiffs were represented and defendants were not. In contrast, they obtained judgment in only about 15 percent of the cases where defendants were represented and plaintiffs were not.

When there was a level playing field—either both parties were represented, or neither was represented—the outcomes fell in between the two extremes. When both sides had lawyers, plaintiffs won in about 55 percent of the cases, while they won in just over 20 percent when neither party had a lawyer. In short, one’s chances of winning in court were much better if represented, especially if the other side was not.

**Case Outcomes in Virginia’s General District Courts
All Civil Cases, 2016**



The Import of these Findings

In a nutshell, these are the important findings in the study:

- Our lower courts, in particular, are awash with unrepresented litigants;
- Poverty is correlated with lack of representation, and localities with high poverty rates have concomitantly high rates of unrepresented litigants; and
- Representational status has a clear impact on case outcomes, particularly when only one side or the other is represented.

To the extent our civil justice system presumes the presence of counsel to fairly and effectively try cases (in pleadings, rules of procedure and evidence, etc.), that reliance is too often seriously misplaced — creating a dysfunctional system for the many litigants who don't have access to representation. With our lower courts awash with unrepresented litigants, we have a system that is frustrating both for our judges and for most litigants.

Moreover, 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. Judges — particularly our lower trial court judges — are continually struggling with the tension between the conflicting goals of remaining impartial and not bending the rules to help out a struggling unrepresented litigant, versus arriving at a just result for the parties, notwithstanding their inability to retain counsel.

A Prescription

If we are to try to address these serious structural access to justice problems — the existence of which this report confirms — we need to pursue a multi-pronged approach. On one hand, 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, by:

- Expanding small claims dockets and their equivalent;
- Adopting simplified forms using plain language, not legalese;
- Relaxing rules of procedure and evidence in those cases where both parties are unrepresented; and
- Reforming unfair procedural traps for the unrepresented litigant, such as the affirma-

tive defense of the statute of limitations, which is waived if not raised. (How many judges have seen, on the face of the documents, that the statute of limitations has run, but feel they are duty bound to leave it alone if the unrepresented litigant fails to utter the magic words?)

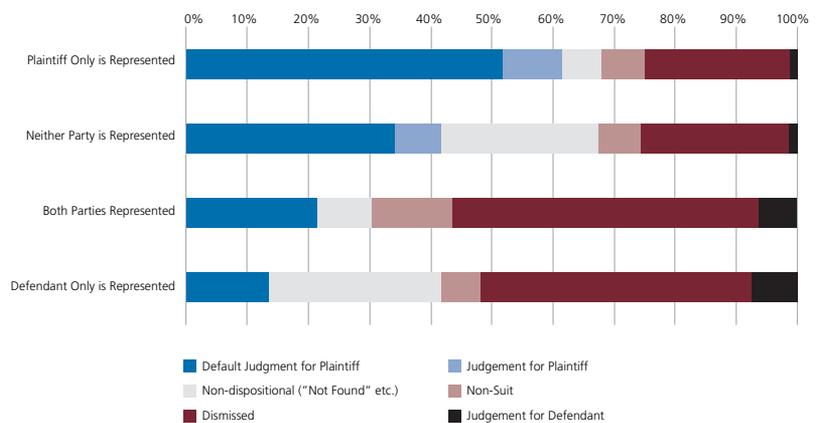
At the same time, we need to increase the availability of counsel for those low-income litigants who have valid claims to dispute, particularly where opposing party has counsel, through:

- Additional funding for legal aid programs so they have the capacity to represent more clients; and
- A universal commitment by the bar to undertake pro bono work for low-income litigants.

Only by attacking this invidious problem from all angles will we be able to make the promise of “Equal Justice Under Law” a reality for low-income Virginians in Virginia's civil courts.

Case Outcomes in Virginia's General District Courts

All Civil Cases, 2016, by Representational Status



John E. Whitfield has served as the executive director and general counsel of Blue Ridge Legal Services since 1989. Prior to becoming the executive director, he served as law clerk, staff attorney, and supervising attorney since joining the organization in 1980. He is co-chair of the Virginia Access to Justice Commission. He was the 1998 recipient of the Virginia State Bar's Legal Aid Award and he was inducted as a Fellow of the Virginia Law Foundation in 2009.