Self-Represented Litigants Study Responses

I was disappointed to see John Whitfield's article on self-represented parties make such elementary mistakes in analysis. In particular, Mr. Whitfield erred in assuming that where two circumstances coincide, one must be the cause of the other.

Specifically, the article recites that in general district court civil cases, the rate at which plaintiffs are awarded judgments jumps from an average of 52 percent of the time across all situations, to 60 percent in cases where the plaintiff has a lawyer but the defendant does not. When representation is reversed — when plaintiffs are pro se but defendants are represented — dismissal rates rise from a 15 percent average (across all cases) to 25 percent. Mr. Whitfield's analysis was, "Representational status has a clear impact on case outcomes, particularly when only one side or the other is represented."

I realize that in Mr. Whitfield's position, he sees unaddressed needs where ever he looks, and thus, he may be predisposed to jump to his conclusion as he seeks to advocate for more legal aid funding. Regrettably, however, he has fallen prey to a common mistake in statistical analysis, inferring too much from a spurious correlation.

Simple non-payment collections cases predominate on the civil dockets of our general district courts. Anyone familiar with those courts knows that the same people who simply cannot pay their creditors, also cannot pay a lawyer. Thus, there is always going to be a strong correlation between not having a lawyer and suffering a judgment. But this does not prove that the inability to hire a lawyer results in losing cases that should be won; the court is supposed to enforce the law, after all, and when debtors fail to pay justly due debts, plaintiffs are entitled to judgments, irrespective of whether the defendant has a lawyer present.

Moreover, a rational debtor might well conclude that expending a substantial portion of his or her meager resources on a lawyer, when no change in outcome could reasonably be anticipated, would be a poor financial decision. Again, the fact that such a debtor would make this sound decision is not cause for alarm.

The jump from 15 percent to 25 percent dismissal rates for represented versus unrepresented plaintiffs likewise correlates with several root causes that any experienced practitioner has seen in real life, but that would not support Mr. Whitfield's desired conclusion. On behalf of our profession, I should surely hope that a represented plaintiff would be far more likely to have carefully reviewed the merits of a case before filing it; would have brought only causes of action believed to have merit; and would bring a case only when any further efforts at conciliation appear

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futile. Pro se parties often do none of this type of case screening, leaving that work to be done by the presiding judges. Indeed, some pro se plaintiffs are people who have been turned away by lawyers they consulted, but who persist in filing vexatious cases nonetheless, in the only way left to them.

In other situations, plaintiffs in small dollar cases may well conclude that their interests are better served by risking defeat in court than by incurring fees that could exceed any hoped-for judgment amount. Mr. Whitfield may lament that some of these low-value cases may be lost due to lack of skilled presentation, but it has been my observation that our judges take extra pains to assure that pro se parties' cases are fully and fairly heard. My fear would be that if we started subsidizing legal representation for the very smallest of cases, we would likely bankrupt the republic.

But for now, the more important point is that the data cited by Mr. Whitfield are unsurprising and offer nothing to support his desire for additional legal aid funding. We can all agree that those in poverty should receive our help, though to what extent remains subject to fair debate. But spending money where it would do no good is something we should all seek to avoid.

Sincerely,
Bradley P. Marrs
Richmond

Whitfield Responds

Brad Marrs correctly points out that causation is not necessarily established because two events coincide. Notwithstanding the National Center for State Courts' study's limitations, I stand by the salient points made in my article:

1. Our courts are awash with unrepresented litigants floundering in a system that was largely designed for attorneys;
2. Areas of high poverty see a concomitant high rate of unrepresented parties; and
3. Parties with representation fare much better in our courts than those without representation.

The confluence of these three conditions means that Virginians living in poverty are severely disadvantaged when they go to court, unless they can get representation from legal aid or pro bono attorneys. Mr. Marrs warns against providing counsel in cases without mer-

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it or in cases where very small amounts of money are at stake. I wholeheartedly agree. However, this does not negate the need for adequate funding for Virginia's legal aid programs, when we are currently able to meet less than 20 percent of the civil legal needs of low-income Virginians with our existing resources.

Yours truly,
John E. Whitfield

VSB Fee Dispute Resolution

The VSB **Fee Dispute Resolution Program** is well outlined in the June 2018 *Virginia Lawyer*. The program is an excellent example of one pro-bono bar service that is indeed a win-win for all parties — client and attorney. I write to offer a minor clarification regarding the volunteers serving as mediators. Supreme Court-certified and VSB-trained NON-lawyers also serve as program mediators. Based on my decade of experience serving as an occasional volunteer co-mediator in 17th and 19th Circuit cases I can also say "without reservation that the fee dispute program works."

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(retired Fairfax County court administrator)

Letters

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