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Rebecca A. Womeldorf, Esq.
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Dear Ms. Womeldorf:

I write to invite the attention of the appropriate Advisory Committee to a problem inhabiting Rule 12(a)(2) of the Federal Rules of Civil Procedure and to offer a suggestion for an improvement.

The Situation which Brought the Problem to my Attention

On April 8, 2019, I filed in the Northern District of Illinois an action seeking the IRS's compliance with the Freedom of Information Act (*Hartnett v. IRS*, Case No. 1:19-cv-2350 (N.D. Illinois)). We prepared the summonses using the 30-day time within which the IRS must appear and defend provided in FOIA, at 5 U.S.C. § 552(a)(4)(C), and electronically submitted the summonses to the Clerk for authentication. Initially, the Operations Department personnel at the Clerk's office refused to issue the summonses with the 30-day deadline to appear and defend, pointing to 1) the 60-day limit provided for in Rule 12(a)(2), and 2) The Computer, which permits one of two entries, 60 days for federal government defendants or 21 days for non-federal defendants, but no other. Fortunately for us, the Clerk's office personnel with whom we dealt were bright, patient, thoughtful and willing to listen. They agreed that 30 days was correct and promptly found a way to issue the summonses.

The Problem

Rule 12(a)(2) prescribes only one time within which federal defendants must appear and defend: 60 days. FOIA, at 5 U.S.C. § 552(a)(4)(C) provides that "Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown." In this

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situation, Rule 12(a)(2)'s one-size-fits-all 60-day deadline is incorrect.

The Scope of the Problem

I don't have a sense of how many exceptions to the 60-day answer deadline Congress has authorized. Nor do I have a sense of how often the problem arises even under the FOIA exception. Anecdotally, the Operations Manager at the Clerk's Office in Chicago told me that in his ten years he had not encountered this problem before, and neither had his colleagues with even greater experience. Perhaps that's simply an artifact of underreporting. Maybe plaintiffs just endure the 60-day-period; maybe plaintiffs accept the 60-day period for starters and later move to amend the summons under Rule 4(a)(2) to pick up the shortened answer date; or maybe there's some other work-around.

No matter how widespread the problem, Rule 12(a)(2) can be improved, and some amount of unnecessary delay or expense can be avoided by making a small change.

A Proposed Solution

Whether the mismatch between Rule 12(a)(2) and other law is limited to the FOIA situation, or arises in other contexts also, a Rule 12 solution is pretty easy: borrow the lead-in language from Rule 12(a)(1), "Unless another time is specified by . . . a federal statute" and tack it onto Rule 12(a)(2), either at the beginning or the end so that it would read:

Unless another time is specified by a federal statute, the United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

OR

The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney, unless another time is specified by a federal statute.

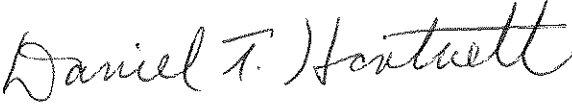
Should the Advisory Committee deem it appropriate to recommend altering Rule 12(a)(2), it would also be appropriate to recommend adjustment of the software used by the Clerks' offices to accommodate both the 60-day answer deadline and such shorter deadlines as are allowed by law.

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Thank you very much for considering my thoughts on this topic.

Very truly yours,

CLARK HILL PLC

A handwritten signature in cursive script that reads "Daniel T. Hartnett". The signature is written in black ink and is positioned centrally on the page.

DANIEL T. HARTNETT

DTH/sr