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October 17, 2020

Advisory Committee on Civil Rules
Honorable Dennis R. Dow, Jr., Chair

Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544
BY ELECTRONIC MAIL: *rulescommittee_secretary@ao.uscourts.gov*

Re: Rule 12(a) shortened summonses / Rule 5(d) *pro se* electronic filing

Dear Judge Dow and members of the Committee:

In light of the uncertainty[1] of the Committee at yesterday's meeting on how to proceed with the proposal to clarify Rule 12(a) in the context of statutes setting a reduced answer time, I wanted to advise the Committee that the problems raised in Daniel Hartnett's 19-CV-O suggestion are not unique to him nor to the Northern District of Illinois, and appear to be commonly encountered by FOIA litigants. As much of the Committee's discussion appeared to be premised on whether this was a problem worth fixing, and how often it occurred, I hope this narrative is useful.

I filed a FOIA action in D. Massachusetts[2] in early 2020, and in reviewing the rules and statute, immediately had to grapple with this problem.
I analyzed recent FOIA litigation in my district and found:

1. FOIA litigants issued 60-day summonses and did not press the issue; DOJ did not respond in accordance with the shortened timeframe of the statute. *E.g.* 19-cv-10916.
2. FOIA litigants were issued 60-day summonses and did not press the issue, and DOJ **did** timely answer within 30 days of service. *E.g.* 19-cv-10690.
3. FOIA litigant sought 30-day answer deadline by motion filed simultaneous with the complaint. Motion was not timely adjudicated, but DOJ answered within 35-days of filing (date of service is unclear). 19-cv-12564.

[1] "The *status quo* was affirmed by an equally divided Committee." I laughed out loud.

[2] One aspect of confusion is that different districts handle the issuing of summonses differently. In some districts, such as my own, summonses are issued immediately or within minutes of the filing of the complaint. In other districts, a plaintiff submits proposed summonses to the Court, which then reviews and issues them, typically a day or two later. Anecdotally, I understand that Districts that deal in a higher volume of FOIA cases (*e.g.* D.D.C.) have more effective procedures for obtaining 30-day summonses.

4. FOIA litigant sought 30-day answer deadline by motion 23 days after filing. Motion granted the same day; DOJ timely answered 29 days after service. 19-cv-12539.
5. FOIA litigant moved, 15 days after filing, to re-issue a 30-day summons. Motion allowed; DOJ moved for an extension of time to answer 35 days after service of the initial 60-day summons. 19-cv-12440.

In light of this landscape, it seemed clear that either re-issuing the summons or attempting to convince the Clerk's Office to issue a shorter summons (similar to Daniel Hartnett's experience, staff declined to do so initially) would likely take days, delaying 30 days to 35 or 40 or more. Instead I moved, simultaneously with filing of the complaint, to set a 30-day answer deadline, and notified defendants with a cover letter accompanying service of the summons, complaint, and motion.

Result: motion denied without prejudice, as it "requests an order directing respondents to follow the requirements of a federal statute." DOJ then timely moved for an extension of time to answer, 29 days after service of the initial 60-day summons.

Conclusion: The interplay between the Rule and the FOIA statute is confusing to Clerks' staff, and attempting to make statutory arguments to intake/operations staff is unlikely to work smoothly. There is judicial economy in avoiding motions to re-set CMECF to account for statutory deadlines, and the result of that motion practice is uncertain anyhow. All would benefit from a Rule 12 clarification leading to better uniformity.

In the alternative, perhaps the operational issue could be referred to CACM?

Unrelatedly, on the topic of *pro se* electronic filing, Rule 5(d)(3): I recently became aware that some districts by standing order unconditionally bar non-attorney *pro se* litigants from even seeking electronic filing privileges and routinely deny their motions, a sharp contrast from the prevailing practice nationwide. N.D. Ga. Standing Order 19-01 ¶5; LR App.H I(A)(2), III(A). *See Perdum v. Wells Fargo Home Mortg.*, No. 17-cv-972-SCJ-JCF, ECF No. 61 (N.D. Ga., April 12, 2018) (collecting cases). *See also Oliver v. Cnty. of Chatham*, 2017 U.S. Dist. LEXIS 90362, No. 4:17-cv-101-WTM-BKE (S.D. Ga., June 13, 2017).

The Committee might recommend language in Rule 5 discouraging such blanket bans, and perhaps even that leave should be freely given (such courts have found a "good cause" standard is not met, although it is unclear why. *Oliver* at *1). It seems an easier lift than removing the motion requirement, and goes to administrative fairness.

Very truly yours,

/s/ John A. Hawkinson
John A. Hawkinson

Postscript: I thank the Committee and its staff for allowing public video access to Friday's meeting. It was educational.

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April 16, 2021

Advisory Committee on Civil Rules
Honorable Dennis R. Dow, Jr., Chair

Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544
BY ELECTRONIC MAIL: *rulescommittee_secretary@ao.uscourts.gov*

Re: Rule 12(a) shortened summonses in FOIA cases

Dear Judge Dow and members of the Committee:

I write to supplement my letter of Oct. 17, 2020 (20-CV-EE) regarding the practical ramifications of Daniel Hartnett's 19-CV-O suggested change to Rule 12's answer time language as applied to Freedom of Information Act (FOIA) cases.

I thought it would be a fun research project, so I solicited an academic partner (Rebecca Fordon of UCLA School of Law) and we applied for a PACER Fee Exemption to study whether the Department of Justice typically responds within the FOIA statute's 30-day requirement, looking at 2018 through 2021. Although that analysis is not yet complete[1], I have some preliminary results for the Committee's consideration.

It is indeed common for 60-day summonses to be issued in FOIA cases, and DOJ does not have a practice of replying within the statutory 30 days.

Of the 2,536 FOIA actions filed after Jan. 1, 2018 in the 87 district courts that we reviewed, 66% of cases received responses[2] outside 30 days, the time required under the FOIA statute. The mean time was 42.1 days and the median time was 30 days. For those within 30 days, the mean was 22.4 days and the median was 24 days. For those exceeding 30 days, the mean was 62.1 days and the median was 48 days.

[1] Our automated preliminary analysis of Nature of Suit 895 cases — FOIA — excludes those where the plaintiff sought *in forma pauperis* status, and does not attempt to determine whether the Department of Justice filed a motion to extend its answer time prior to the expiration of the 30 day period. It does not attempt to account for the government shutdown of early 2019, and it may double-count cases that are transferred between districts. In some cases, the docket text may not clearly identify the date of service, in which case the analysis software estimates service took place 20 days after filing, the average from the remainder of the corpus (1480 cases).

[2] We count answers, Rule 12(b) motions to dismiss, and Rule 56 summary judgment motions. But we also count stipulations and joint motions, as they more-often-than-not appear to represent meaningful engagement in the case by the parties, unlike rote motions to extend the time for filing an answer.

The districts omitted from our analysis due to the lack of a fee waiver[3] would have contributed merely 35 cases as of Dec. 31, 2020, according to the FJC's Integrated Database (IDB), or 1.36% of the study corpus.

E.D.N.Y.	17 cases	0.66%
S.D. Texas	11 cases	0.43%
D. Wyoming	3 cases	0.12%
N.D. Alabama	2 cases	0.08%
D. Guam	1 case	0.04%
S.D. Iowa	1 case	0.04%

It's worth noting that much of this varies based on district. Although most districts lack a practical mechanism for obtaining 30-day summonses in FOIA actions, the District of Columbia has such a mechanism, and it represents 62% of the corpus (1569 cases before exclusions). Unsurprisingly, its mean and median are nearly the same as the overall corpus — its mean was 40.2 days and its median 31 days. Looking at all districts *other than D.D.C.*, the mean time to answer was 46.0 days and the median was 30 days.

A handful of U.S. Attorney's offices appear to have a practice of responding within 30 days in FOIA actions, despite receiving 60-day summons. They seem to be a small minority.

The minutes suggest the Committee's interest in other statutes that might specify an answer time. I was able to find one such[4].

I anticipate having a more final analysis and report over the summer, which I will make available to the Committee. This work was originally intended to be complete prior to the April Agenda Book deadline, however it slipped.[5]

At the October meeting, the Committee appeared to be wrestling with the question of whether the problem of Rule 12's language conflicting with statutes was a problem in practice. After reviewing hundreds of FOIA dockets by eye and thousands with automation, I can confirm there is a real problem. All but a few districts issue the standard 60-day summons, and DOJ frequently hews to the date in the summons, not the date in the statute.

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[3] It is now apparent that lack of the fee waiver is no real obstacle to including these dockets, given their small numbers.

[4] 16 USC § 1855(f)(3)(A), part of the Magnuson-Stevens Fishery Conservation and Management Act, specifies 45 days for the Secretary of Commerce to respond to § 1855(f)(1) petitions, which appear to be filed in the district court in at least some instances. To my inexpert eye, it only involves official-capacity defendants, so does not implicate Rule 12(a)(3).

[5] The multi-court fee exemption process is not efficient, and I failed to accurately predict how long it would take. Our application was filed with the AOUSC on Nov. 11, 2020 and the AO distributed it to all district courts on Dec. 4, 2020 with the recommendation that it be approved. We were approved by approximately 32 courts within the first week, 7 during January, and 2 during February. Some courts never received the AOUSC's recommendation, and others lost track of the request. After numerous individual follow-up inquiries, our exemption was granted in 87 of the 94 district courts, the most recent in early April. None have been denied, per se.

If the Committee has any questions regarding this work, I would be pleased to answer them. I will also be present during the April 23 virtual meeting; although members of the public are directed by the AO not to raise our virtual hands, I will be available if the Committee wishes to hear from me.

Very truly yours,

/s/ John A. Hawkinson
John A. Hawkinson

encl: Appendix: summary of FOIA answer times, broken down by district.

cc: Rebecca L. Fordon, Daniel T. Hartnett

16 April 2021

Preliminary analysis of FOIA case (NOS 895) response times across 87 courts, excluding *in forma pauperis* cases. This version makes no attempt to account for motions to extend the time for answers.. The clock is stopped by an answer, a motion to dismiss (Rule 12), a motion for summary judgment (Rule 56), a joint filing, or a stipulation. Cases whose date of service precedes date of filing likely reflect transfered cases, and have been removed. Where date of service is unavailable in CMECF, it is presumed to be 20 days from filing. This analysis is preliminary and subejct to revision.

Court	**Count**	**Mean days**	**Median days**	**Minimum days**	**Maximum days**	
ALL	2115	42.14	30	0	974	
<=30	1064	22.44	24	0	30	
>30	1051	62.08	48	31	974	
NOT dcd	724	45.94	30	0	974	
akd	5	57.6	56	18	106	
azd	10	34.2	30.5	10	77	
cacd	34	29.85	24	3	116	
caed	7	28	29	7	50	
cand	108	24.19	19	2	163	
casd	15	55.33	34	13	212	
cod	25	57.56	30	10	485	
ctd	4	23.25	22	20	29	
dcd	1391	40.16	31	0	704	
ded	1	33	33	33	33	
flmd	10	47.9	33	11	120	
flsd	20	87.25	43	14	709	
gamd	1	43	43	43	43	
gand	19	64.11	59	2	125	
hid	1	105	105	105	105	
iand	1	46	46	46	46	
idd	8	30.38	28	13	65	
ilnd	19	121.58	74	16	974	
ilsd	2	22.5	22.5	14	31	
insd	3	35	26	1	78	
ksd	1	35	35	35	35	
kyed	1	21	21	21	21	
kywd	1	128	128	128	128	
laed	3	23	21	17	31	
lawd	1	77	77	77	77	

Court	Count	Mean days	Median days	Minimum days	Maximum days	
mad	19	51.58	45	6	116	
mdd	21	110	61	33	581	
med	4	34.5	32	21	53	
mied	6	35.83	36	22	50	
miwd	9	42.78	38	15	133	
mnd	12	32.08	17	0	99	
mowd	5	129.4	125	0	318	
msnd	1	127	127	127	127	
mssd	2	70.5	70.5	41	100	
mtd	7	18.57	15	13	37	
nced	3	115.33	62	33	251	
ndd	2	35.5	35.5	28	43	
nhd	1	210	210	210	210	
njd	8	66.5	55.5	26	117	
nmd	7	34.14	35	7	69	
nvd	1	30	30	30	30	
nynd	2	60	60	60	60	
nysd	150	39.41	32	1	283	
nywd	8	36.38	32.5	14	70	
ohnd	3	40	37	21	62	
ohsd	2	88.5	88.5	31	146	
ord	18	45	31.5	13	193	
paed	7	57.14	19	11	222	
pawd	5	64.6	63	17	106	
rid	1	42	42	42	42	
scd	8	41.25	30	15	84	
sdd	2	70	70	23	117	
tned	3	36.67	19	14	77	
tnmd	1	67	67	67	67	
txed	3	72.33	91	35	91	
txnd	17	35.82	37	17	61	
txwd	9	28	27	2	60	
utd	3	32.67	29	29	40	
vaed	14	45.71	33.5	14	109	
vawd	5	20	14	13	43	
vtd	4	59	46.5	21	122	
waed	1	13	13	13	13	
wawd	45	34.04	19	11	163	
wied	2	58	58	29	87	
wvnd	2	67	67	15	119	
wvsd	1	64	64	64	64	

From: John Hawkinson
Sent: Tuesday, October 5, 2021 4:45 PM
To: Edward Cooper; Rick Marcus; Catherine T Struve
Subject: A note on pro se filing and absolute bars to it

Hi, Reporters: I hope this finds you well.

In light of the conversation at today's meeting about pro se e-filing (again!), I wanted to highlight my comment to the Civil Committee that appeared at the end my 20-CV-EE suggestion from October 2020 and may have been overlooked (it hasn't been orally discussed):

> I recently became aware that some districts by standing order unconditionally bar non-attorney *pro se* litigants from even seeking electronic filing privileges and routinely deny their motions, a sharp contrast from the prevailing practice nationwide. N.D. Ga. Standing Order 19-01 ¶5; LR App.H I(A)(2), III(A). *See Perdum v. Wells Fargo Home Mortg*., No. 17-cv-972-SCJ-JCF, ECFNo. 61 (N.D. Ga., April 12, 2018) (collecting cases). See also *Oliver v. Cnty. of Chatham*, 2017 U.S. Dist. LEXIS 90362, No. 4:17-cv-101-WTM-BKE (S.D. Ga., June 13, 2017).

I don't have citations to hand, but I think this is also an issue in S.D. Fla. Certainly that district has the related problem of denying ECF filing privileges to *pro hac vice* attorneys, which feels like a similar issue of hostility from the Court to those who aren't members of the bar (and provokes rather intense feelings on the part of attorneys who are forced to go through their local counsel to make routine filings and how this disadvantages them in rapidfire non-dispositive motion practice).

My feeling on this is that while a rule change to flip the default to by-default permit pro so electronic filing might encounter all kinds of issues (though probably not as many as feared by some), local practices that effectively bar it, even from sophisticated litigants who seek it by motion are a real problem.

My interest here is as a sophisticated (can I self-describe in that way?) pro se litigant in a district that permits it by motion that is routinely granted (and not unduly burdensome) who marvels at how other districts seem to throw up roadblocks that are impenetrable. It'd seem a little different if the roadbloc were more penetrable — that is, a speed bump. (On the flipside, my neighboring district to the north, D. New Hampshire, makes it even easier by supplying a form for pro se litigants to fill out, rather than having a motion requirement devoid of clear guidance.)

Maybe this issue is so small that a tweak to Rule 5(d)(3)(B)(i) rule to add "the court should freely give leave when justice so requires" (ala Rule 15(a)(2)) isn't a change the Committee would feel comfortable putting forward without a more significant change to the rule. Although I think small changes can be quite valuable paths forward on difficult issues. Or maybe this speaks to a political tension where the Committee wouldn't want to be seen as calling out the three districts above (probably there are more?), in which case I don't really know what to do, or who has meaningful jurisdiction. (I suppose litigants could take it to the Eleventh Circuit, but who would have the energy to do that?)

Thanks for listening. I'd be happy to (again) submit this as a formal suggestion to the Committee, but I thought that since I'd raised it a year ago and it hadn't really entered the Committee's discussion, that it

would be reasonable to send an email. I hope that doesn't feel too ex parte or otherwise violative of protocol :)

Thank you.

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From: John Hawkinson
To: Catherine T Struve
Cc: Edward Cooper; Rick Marcus; RulesCommittee Secretary; Reagan, Tim (FJC); Giffin, Carly (FJC); Germano, Roy (FJC)
Subject: Re: A note on pro se filing and absolute bars to it
Date: Thursday, September 15, 2022 10:57:14 AM

[+cc the FJC crew, although guessing at Ms. Giffin & Mr. Germano's addresses.]

Hi, Cathie: I failed to see your (excellent!) Aug. 14 memo (in the BK agenda book) in a timely fashion, but I did want to offer a few quick comments. Sorry this comes during today's meeting, I've edited it down; the more detailed version below the line you should skip today.

1. As the FJC study notes, "skipped" case numbers appear when attorneys initiate cases, so *pro se* case initiation doesn't create a new problem, it may merely affect the magnitude of an existing one.
2. Clerks' interpretations of service requirements often don't matter, both because of the burden on litigants who try to comply with the rule as-written, and because in practice no one objects to minor defects in Rule 5 service.
3. Alternative electronic filing mechanisms don't give the same time/deadline benefits to pro se litigants that true ECF filing does.

Thanks.

In more detail (and I imagine the more robust discussion of your memo may take place at other committee meetings than today's):

1. On the ancillary issue of case-initiating filings by pro se litigants: Although I don't think that's an issue that the rules should really take up one way or the other, the principle argument against strikes me as a bit flawed. You fairly characterize it as "*A prime concern, here, is the difficulty that can ensue if a person uses CM/ECF to mistakenly create a new record with a new case number*."

But my experience, as a news reporter who follows cases in CM/ECF and spends a lot of time poking at the margins and looking for new cases, is that this already happens all the time with attorneys. It's not infrequent that they screw up the case-initiating filing and new case numbers are created that then lead to "skipped" case numbers. Around here (D.Mass) the clerk's office cleans those up within a few days. Nobody should be assuming that those missing numbers are sealed cases (and sealed cases, when queried for, generally show up as "*The case you specified is SEALED and you are not authorized to see it*," (D. Mass); "*SEALED v. SEALED; Case is not available to the public.*" (D.D.C.); etc., although the text varies from district to district and maybe some do not distinguish sealed cases).
So, allowing pro se case initiation might reasonably lead to a change in the magnitude of this problem, but it would not create one that does not already exist.

2. In Section 2, you spend some time on service, and on what courts may say they require. But it's important to be aware (as doubtless the REA committees are always are!) that both: (1) litigants will read the rule and, if inexperienced, will do the safe thing and construe any ambiguity against themselves; so even if Clerk's offices consider a *pro se* filing to be served by the Clerk's office upon their own scanning and filing of it into CM/ECF, a prudent litigant may still feel obligated to go through the process of serving by US Mail or attempting to negotiate written consent for email service.

And (2) this is the sort of rule that may be routinely violated without consequence in the absence of objection, and almost no one objects to Rule 5 service issues (unlike the occasional Rule 4 service dispute).

Where I've had to deal with Rule 5 service as a news reporter (e.g. seeking to unseal documents or remove FRCP 5.2(c) immigration case restrictions) rather than as a plaintiff, it's been extremely difficult to get the written permission for electronic service that the rule requires, so the result is paper service.

3. On the question of substitutes for CM/ECF, my perspective as a pro se litigant is that I'd like the ability to file at 5:59pm for a 6pm deadline, just like everyone else (or 11:59pm for a midnight). It doesn't seem fair to opposing counsel that they won't see the document until the next day when the clerk's office staff comes in (and I don't want to frustrate or burden opposing counsel, which email service might do), and it would prejudice against me if the result was a return to the "mailbox rule" where opposing counsel's deadlines were extended because I made use of an alternative electronic filing system. And that kind of mailbox rule/deadline extension is what I expect courts would do.

I realize this is hardly the dominant consideration, and for many people it may not matter, and an alternative electronic filing mechanism is better than no electronic filing mechanism.

(This also igores the question of whether a *pro se* litigant is better positioned to select the proper ECF event(s), "free text," attachment names, &c. Whether the litigant or the clerk's staff is better equipped to do that probably depends a lot, and experienced litigants would rather do it themselves, and clerks' offices would be better positioned to do it for inexperienced ones.)

Thank you again!

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