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September 26, 2024

H. Thomas Byron III, Secretary  
Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
One Columbus Circle, NE, Room 7-300  
Washington, D.C. 20544

**Subject:** Proposed Amendment to Federal Rule of Civil Procedure 12(f)

Dear Mr. Byron,

**Introduction**

I am writing to propose an important amendment to Federal Rule of Civil Procedure 12(f), aimed at addressing a critical gap in the current rule's application. Specifically, I propose that Rule 12(f) be extended to cover not only pleadings but also briefs and other filings that accompany motions. While the current rule provides courts with a mechanism to strike irrelevant or scandalous content from pleadings, it does not extend to briefs or memoranda, where such improper content often appears. This creates a significant loophole that allows parties to introduce damaging, inflammatory, or irrelevant material in briefs, which cannot be addressed under the current rule. The proposed amendment would close this gap and ensure consistency in the removal of inappropriate content across all filings, thereby enhancing the fairness and integrity of court proceedings.

**The current text of Rule 12(f) reads:**

"Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:"

**I propose that the rule be amended as follows:**

"Motion to Strike. The court may strike from a pleading **and supporting brief(s) or memorandum** an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:"

**Rationale for the Proposed Amendment**

Currently, Rule 12(f) provides a mechanism for courts to strike improper content from pleadings, but it does not extend to briefs and other supporting filings. As case law confirms, Rule 12(f) is limited to material in "pleadings" as defined under Rule 7(a), which excludes motions, briefs, and memoranda. Consequently, while courts may address inappropriate or improper content within a pleading, they lack a procedural vehicle to strike such content from briefs. This limitation has

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practical implications, particularly when briefs include unsubstantiated accusations against opposing counsel or other scandalous material.

For instance, in Searcy v. Soc. Sec. Admin., 956 F.2d 278 (10th Cir. 1992), the court affirmed that a motion to strike could not be applied to a motion to dismiss, citing that Rule 12(f) applies only to pleadings.

“Generally, therefore, motions, briefs, and memoranda may not be attacked by a motion to strike. See Searcy v. Soc. Sec. Admin., 956 F.2d 278, 1992 WL 43490, \*1, \*4 (10th Cir. March 2, 1992) (affirming, “for substantially the same reasons set forth” in the attached Magistrate Judge’s Report and Recommendation the recommendation that a motion to strike the defendant’s motion to dismiss should be denied because **“there is no provision in the Federal Rules of Civil Procedure for motions to strike motions and memoranda”**) (unpublished); Applied Capital, Inc. v. Gibson, No. Civ. 05-98 JB/ACT, 2007 WL 5685131, \*7 \*18 (D.N.M. Sep 27, 2007) (Browning, J.) (citing Searcy v. Soc. Sec. Admin., 956 F.2d 278 (10th Cir. 1992), and refusing to strike motion to dismiss because **“[m]otions to strike are reserved for striking pleadings”**); Coleman v. City of Pagedale, No. 4:06-CV-1376 ERW, 2008 WL 161897, \*4 (E.D.Mo. Jan. 15, 2008) (holding that a sur-reply and memorandum were not pleadings and could not be attacked with a motion to strike); 2 James Moore, Milton I. Shadur updates Mary P. Squiers, MOORE’S FEDERAL PRACTICE § 12.37[2] (3rd ed. 2008) (“Only material included in a ‘pleading’ may be the subject of a motion to strike, and courts have been unwilling to construe the term broadly. **Motions, briefs, or memoranda, objections, or affidavits may not be attacked by the motion to strike.**”). Ysais v. New Mexico Judicial Standard Com’n, 616 F. Supp. 2d 1176 (D.N.M. 2009)

Similarly, courts in cases like Wilson v. City of Des Moines, 338 F. Supp. 2d 1008 (S.D. Iowa 2004) and Coleman v. City of Pagedale, 2008 WL 161897 (E.D. Mo. Jan. 15, 2008) have consistently held that motions to strike are improper when directed toward non-pleading materials such as briefs and memoranda.

“[t]he Court could also deny the motion to strike as improper. Rule 12(f) of the Federal Rules of Civil Procedure provides that a “court may order stricken from any **pleading** any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed.R.Civ.P. 12(f). According to the language of Rule 12(f), motions to strike apply only to pleadings and not to motions. See Knight v. United States, 845 F.Supp. 1372, 1374 (D.Ariz.1993); Krass v. Thomson-CGR Med. Corp., 665 F.Supp. 844, 847 (N.D.Cal.1987). Pleadings include complaints, answers, replies to counterclaims, answers to cross-claims, third-party complaints, and third-party answers. See Fed.R.Civ.P. 7(a); see also Knight, 845 F.Supp. at 1374 n. 5 (discussing what constitutes a pleading as defined in Fed.R.Civ.P. 7).”emphasis added Wilson v. City of Des Moines, 338 F.Supp.2d 1008 (S.D. Iowa 2004)

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“As is evident from the language of this rule, motions to strike may only be directed toward "material contained in pleadings." Williams ex rel. McIntosh v. City of Beverly Hills, Mo., 2007 WL 2792490, at \*2 (E.D. Mo. September 24, 2007)” Coleman v. City of Pagedale, Case No. 4:06CV01376 ERW (E.D. Mo. Jan. 15, 2008)

This limitation creates a problematic scenario in litigation where one party might attack the character or integrity of opposing counsel in a brief. If the allegations are clearly baseless, there is no procedural mechanism to strike them, leaving the attacked party with no legal recourse. The absolute privilege defense of defamation, which typically applies in defamation cases related to judicial proceedings, further insulates attorneys from making unfounded accusations, leaving the attacked attorney without a remedy. Moreover, courts often hesitate to use their inherent authority to strike such material, compounding the issue.

As recognized by various courts, motions to strike are "viewed with disfavor" due to concerns about their potential use as dilatory tactics. However, courts have also acknowledged that these motions serve the important function of removing unnecessary and prejudicial material from the record. For example, in Operating Engineers Local 324 Health Care Plan v. G & W Construction Co., 783 F.3d 1045 (6th Cir. 2015), the court emphasized the reluctance to strike pleadings except in extreme circumstances.

“A motion to strike is well-taken when “it is clear that the matter to be stricken could have no possible bearing on the subject matter of litigation.” LeDuc v. Kentucky Central Life Ins. Co., 814 F.Supp. 820, 830 (N.D. Cal. 1992). Impertinent allegations are those that are not responsive or relevant to issues involved in the action and which could not be admitted as evidence in the litigation. Fantasy, Inc., 984 F.2d at 1527. “Scandalous” within the meaning of Rule 12(f) includes allegations that cast a cruelly derogatory light on a party or other person. Talbot v. Robert Mathews Distributing Co., 961 F.2d 654, 665 (7th Cir. 1992).” McGee v. Airport Little League Baseball, Inc., 2:21-cv-1654 DAD DB PS (E.D. Cal. Feb 06, 2023).

An extension of Rule 12(f) to include supporting briefs would provide a fair mechanism to address situations where one party uses filings to make inflammatory or irrelevant accusations that have no bearing on the merits of the case. Additionally, it would reduce the likelihood of distracting from legitimate issues and allow for an efficient resolution of cases.

### **The Case for This Amendment**

Courts already have broad discretion under Rule 12(f) to strike content in pleadings, but its narrow scope does not account for the reality that briefs, motions, and memoranda are often where the most inflammatory or inappropriate content appears. As courts such as the Northern District of California in Lofton v. Verizon Wireless (Vaw) LLC, Case No.: 13-cv-5665 YGR (N.D. Cal. May 23, 2014) have noted, the goal of Rule 12(f) is to minimize litigation and eliminate spurious issues.

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Extending the rule's application to briefs would serve this same goal.

Finally, courts are currently left with little guidance on how to handle inflammatory material in briefs. Without a rule-based remedy, such material is often left unaddressed, creating potential for injustice, harm to reputations, and undue delay.

**Example of Extreme Conduct: the proposed change would cure**

An accusation of fraudulent or unethical conduct against another member of the bar is a serious charge, carrying potential consequences that extend beyond the legal dispute. As the court observed in Williams v. Florida Health Sciences Center, Inc., No. 8:05-CV-68-T-23, 2007 WL 641328, at \*3 (M.D. Fla. 2007), such accusations require a heightened degree of caution: "Launching allegations of fraud against opposing counsel without reasonable inquiry as to their truth is unprofessional and unethical behavior, not to mention offensive and damaging to reputable attorneys."

When accusations of misconduct or fraud against opposing counsel are made in pleadings or briefs without sufficient basis or relevance to the legal controversy, they can inflict lasting damage on the reputation of the accused attorney and erode the integrity of the court. In Nat'l Viatical, Inc. v. Universal Settlements Int'l, Inc., File No. 1:11-CV-1226 (W.D. Mich. Aug 27, 2012), the court agreed that baseless accusations against counsel that had no relevance to the substantive issues of the case could not be allowed to stand. The court held that such allegations, when unsupported, "only serve to damage the reputation of the attorneys and the decorum of court proceedings."

Given the gravity of this type of extreme conduct, the proposed amendment to Rule 12(f) seeks to provide courts with a procedural mechanism to address these inappropriate allegations when they appear in briefs or other filings. An accusation of fraudulent conduct against opposing counsel, if not properly substantiated or relevant to the underlying legal matters, should be subject to being struck from the record. This would ensure that accusations of this nature cannot be used as tools of harassment or to undermine the professionalism of legal practice.

Allowing unsupported and inflammatory claims to remain in the record—particularly when aimed at counsel—causes reputational harm and diverts the court's attention from the merits of the case. Striking such material from both pleadings and supporting briefs would uphold the dignity of court proceedings and protect the professional standing of attorneys, ensuring that accusations of fraud and misconduct are appropriately addressed within the confines of the law and the rules of professional responsibility.

**Rule 12(f) fundamental paradox**

There is a fundamental paradox in the current framework of Rule 12(f): while an unsupported or inappropriate accusation against opposing counsel can be stricken from a pleading, the same accusation can be allowed to remain unchallenged if it appears in a supporting brief. This creates an

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illogical inconsistency in the administration of justice. The purpose of striking irrelevant, redundant, or scandalous material from pleadings is to protect the integrity of the judicial process and ensure that only pertinent matters are before the court. Allowing the same harmful or defamatory content to persist in briefs, which are equally a part of the court's record, undermines this objective. It defies logic to strike inflammatory or unsubstantiated claims from one document while permitting them to stand unaltered in another that serves the same function. This inconsistency allows the potential for reputational harm to linger without remedy and distorts the intended balance of fairness and decorum in legal proceedings. If the purpose of Rule 12(f) is to protect against prejudice, this protection should logically extend to both pleadings and briefs.

### **Preventing Strategic Use of Inflammatory Content**

Without the proposed amendment to Rule 12(f), litigants may exploit a significant loophole by using briefs and other filings as a strategic vehicle to introduce improper content that would otherwise be stricken from a pleading. This allows parties to circumvent the intent of Rule 12(f), which aims to eliminate redundant, immaterial, impertinent, or scandalous material from court proceedings. While such content can be easily stricken from pleadings, placing the same inflammatory or defamatory allegations within briefs enables litigants to lodge damaging accusations without immediate recourse. By presenting these claims in briefs, parties can subtly introduce irrelevant or prejudicial matters that may influence the court's perception, even if they are ultimately unrelated to the substantive legal issues. This tactic undermines the fairness of the proceedings and damages the reputation of opposing counsel or parties, as such inflammatory material can remain part of the public court record without challenge. The proposed amendment would close this loophole by extending Rule 12(f) to cover briefs, ensuring that improper material is not used as a litigation strategy to harm opposing parties and undermine the integrity of the judicial process.

The proposed amendment to Rule 12(f) would also provide courts with a valuable tool for managing *pro se* litigants, who, without formal legal training, may inadvertently or intentionally include scandalous, irrelevant, or defamatory material in their briefs. Courts often face difficulties in addressing such content from *pro se* parties, who may not fully understand the boundaries of appropriate legal argumentation. By extending the scope of Rule 12(f) to briefs, courts would have a clear and efficient means to strike improper material from *pro se* filings, protecting the opposing party from unfair prejudice while preserving the decorum of the proceedings. This procedural safeguard would allow courts to maintain focus on the merits of the case, reduce the likelihood of abusive litigation tactics, and ensure that all parties, including *pro se* litigants, adhere to the same standards of professional conduct in their submissions.

### **Conclusion**

The proposed amendment to Rule 12(f) would eliminate a critical inconsistency in how courts handle improper content in filings. By extending the rule to cover briefs and memoranda, the courts would be equipped to strike inflammatory, scandalous, or irrelevant material wherever it appears,

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rather than limiting this remedy to pleadings. This change is essential to preventing strategic misuse of briefs as a vehicle for unsubstantiated accusations and to ensuring that all parties—including *pro se* litigants—adhere to the standards of professional conduct. Ultimately, this amendment would promote fairness, protect reputations, and uphold the dignity of the judicial process, allowing courts to focus on the merits of the case rather than being sidetracked by improper content. Thank you for your consideration of this important proposal.

I appreciate your consideration of this important matter and look forward to any opportunity to further discuss this proposal.

Sincerely,

*Joshua S. Goodrich*

Joshua S. Goodrich, J.D., LL.M.