

Chapter 4

Conducting Effective Motion Practice

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I. PRACTICAL TIPS FOR IMPROVED COMMUNICATION WITH THE COURT

- ◆ Ask the court for what you want.
- ◆ Tell the court why you are entitled to win.
- ◆ Use plain English.
- ◆ Be concise (don't waste the court's time with unnecessary information).
- ◆ Maintain credibility by not overstating your position.

II. SPECIFIC MOTIONS

A. Motions Addressed to the Pleadings

B. *Read the Rules!*

1. State Court

a. **ORCP 21A, Motions to Dismiss.** Under Rule 21A, every defense to any claim in any pleading (whether a complaint, counterclaim, crossclaim, or third-party claim) *shall* be asserted in a responsive pleading, except that the following nine defenses may be made in a motion to dismiss: (i) lack of jurisdiction over the subject matter, (ii) lack of jurisdiction over the person, (iii) there is another action pending between the same parties for the same cause of action, (iv) the plaintiff does not have the legal capacity to sue, (v) insufficiency of the summons or process or service of summons or process, (vi) real party in interest, (vii) failure to join a party under Rule 29, (viii) failure to state ultimate facts, or (ix) statute of limitations.

It is important to note that a motion to dismiss raising any of the issues identified above must be made before pleading. However, none of these defenses or objections is waived by being joined with one or more defenses or objections in a responsive pleading or motion. Also, if a motion to dismiss asserting one of the defenses identified in (i) through (vii) above is made against a complaint in which the facts constituting such a defense do not appear on the face of the pleading, and matters outside of the pleading are brought to the court, all parties will be given a reasonable opportunity to present affidavits, declarations, and other evidence to the court, and the court may determine the existence or nonexistence of the facts supporting any such defense or may defer such determination until further discovery or until trial on the merits.

b. **ORCP 21B, Motion for Judgment on the Pleadings.** A motion for judgment on the pleadings can be brought after an answer has been filed seeking dismissal of a case where “the pleadings show that defendant has no cause of action or that plaintiff has a complete defense.” *Rexius Forest By-Products, Inc. v. A&R Lumber Sales, Inc.*, 112 Or App 114, 117 (1992) (citations omitted). Although motions for judgment on the pleadings are not favored, they can be an appropriate tool in the right case.

c. **ORCP 21D, Motion to Make More Definite and Certain.** Where a complaint contains allegations that are so indefinite or uncertain that the precise nature of the claim is not apparent, Rule 21D is appropriate. This motion must be made before responding to the pleading or, if no responsive pleading is permitted by the rules, within ten days after service of the pleading, or upon the court's initiative at any time the court may require the pleading to be made more definite and certain.

d. **ORCP 21E, Motion to Strike.** Where a pleading contains sham or frivolous allegations, an ORCP 21E motion to strike may be made seeking to strike those allegations, or, if no responsive pleading is permitted by the rules, within ten days after service of the pleading, or upon the court's initiative at any time the court may strike any sham or frivolous allegations in any pleading.

e. **ORCP 21G, Waiver or Preservation of Certain Defenses.** It is extremely important to read ORCP 21G any time you are responding to a pleading. ORCP 21D sets out those defenses that are waived if not raised in an initial response.

2. Federal Court

a. FRCP 12B, Motions to Dismiss. Under Federal Rules of Civil Procedure 12B, the following defenses must be asserted in either a responsive pleading or by motion before a responsive pleading is filed: (i) lack of subject matter jurisdiction, (ii) lack of personal jurisdiction, (iii) improper venue, (iv) insufficient process, (v) insufficient service of process, (vi) failure to state a claim upon which relief can be granted, and (vii) failure to join a party under FRCP 19.

b. FRCP 12C, Motion for Judgment on the Pleadings. As in state court, a party may move in federal court after the pleadings are closed, but early enough not to delay trial, for judgment on the pleadings.

c. FRCP 12D, Result of Presenting Matters Outside of the Pleadings. If a party brings a motion to dismiss under Rule 12B(6), or a motion for judgment on the pleadings under Rule 12C, and presents matters outside of the pleadings to the court, the motion must be treated as one for summary judgment under Rule 56.

d. FRCP 12E, Motion for More Definite Statement. The federal rules allow a party to move for a more definite statement of a pleading to which a response is allowed where the pleading is so vague or ambiguous that the responding party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects in the pleading and the details requested in a new pleading. There are serious penalties for failure to file a more definite statement where so ordered, including striking the pleading or issue or other appropriate orders as the court deems appropriate.

e. FRCP 12F, Motion to Strike. FRCP 12F allows a party to ask the court to strike from a pleading any “insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” The court may act on its own initiative or on a motion made by a party either before responding to the pleading or, if a response is now allowed, within 21 days after being served.

f. FRCP 12G and 12H, Waiving Defenses. It is very important to read Rules 12G and 12H to make sure that you do not waive any defenses either by not joining a defense in any motion or answer that you file or by failing to raise the defense or file a motion in the first instance.

III. DISCOVERY MOTIONS—MOTIONS TO COMPEL

A. State Court

1. ORCP 46 permits motions to compel (against parties and nonparties):
 - ◆ Responses to discovery requests (ORCP 43);
 - ◆ Inspection (ORCP 43);
 - ◆ Physical or mental examination (ORCP 44);
 - ◆ Treating physician or psychologist’s report (ORCP 44);
 - ◆ Answers to requests for admission (ORCP 45);
 - ◆ Attendance at deposition (ORCP 39);
 - ◆ Answers to deposition questions (ORCP 39¹),

¹ORCP 39 E provides an important tool for practitioners. Pursuant to that rule, “At any time during the taking of a deposition, upon motion and a showing by a party or a deponent that the deposition is being conducted or hindered in bad faith, or in a manner not consistent with these rules, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order the officer conducting the examination to cease forth-with from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36. . . . Upon demand of the moving party or deponent, the parties shall suspend the taking of the deposition for the time necessary to make a motion under this subsection.”

◆ Answers to corporate representative deposition questions (ORCP 39(c)(6); ORCP 39); Responses to third-party subpoenas;

2. ORCP 36C permits an order limiting discovery to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

◆ That the discovery not be had;

◆ That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

◆ That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

◆ That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;

◆ That discovery be conducted with no one present except persons designated by the court;

◆ That a deposition after being sealed be opened only by order of the court;

◆ That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

◆ That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or

◆ That to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

B. Federal Court

1. FRCP 37 permits motions to compel:

◆ Disclosures required by Rule 26 (a):

◇ Initial disclosures, FRCP 26(a)(1),

◇ Expert witness reports, FRCP 26(a)(2),

◇ Pretrial disclosures, FRCP 26(a)(3);

◆ Responses to Discovery Requests (FRCP 34);

◆ Inspection (FRCP 34);

◆ Physical or mental examination (FRCP 35);

◆ Answers to requests for admission (FRCP 36);

◆ Attendance at deposition (FRCP 30);

◆ Answers to deposition questions (FRCP 30²); and

◆ Answers to corporate representative deposition questions (FRCP 30(b)(6); ORCP 39).

2. FRCP 26(c) permits protective orders from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

◆ Forbidding the disclosure of discovery;

◆ Specifying terms, including time and place, for the discovery;

²FRCP 30(d)(3) provides an important tool for practitioners. Pursuant to that rule, “At any time during the taking of a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.”

- ◆ Forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
 - ◆ Designating the persons who may be present while the discovery is conducted;
 - ◆ Requiring that a deposition be sealed and opened only on court order;
 - ◆ Requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specific way;³
 - ◆ Requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.
3. FRCP 45 addresses third-party subpoenas:
- ◆ Move to quash under FRCP 45(c)(3);
 - ◆ Move for contempt under FRCP 45(e).

IV. MOTIONS FOR SUMMARY JUDGMENT

A. State Court—ORCP 47

◆ Parties may “move, with or without supporting affidavits or declarations for a summary judgment in that party’s favor upon all or any part thereof.” Plaintiff must wait 20 days after complaint is filed. Defendants may file “at any time.” (ORCP 47B.)

◆ “The court shall grant the motion *if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.*” (ORCP 47C (emphasis added).)

◆ Adverse party has the burden of proof on any issue that party would have the burden of proof that trial.

Adverse party may satisfy its burden of proof by submitting an attorney declaration or affidavit indicating that “an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact.” (ORCP 47D and 47 E (emphasis added).)

B. Federal Court—FRCP 56

◆ A party may move for full or partial summary judgment. The “court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” (FRCP 56(a).)

◆ Unless otherwise ordered, a party may file a summary judgment motion any time until 30 days after the close of discovery (but most cases will prescribe a specific summary judgment deadline) (FRCP 56(b)).

◆ Must cite to specific particular facts in the record to support summary judgment motion, and court need not consider materials that are not cited, although it is free to do so. (FRCP 56(c).)

◆ Court may delay ruling on motion for summary judgment to permit discovery upon proper showing. (FRCP 56(d).)

³See Oregon District Court’s website for model protective orders here: <http://www.ord.uscourts.gov/index.php/component/phocadownload/category/54-forms-of-protective-order>.

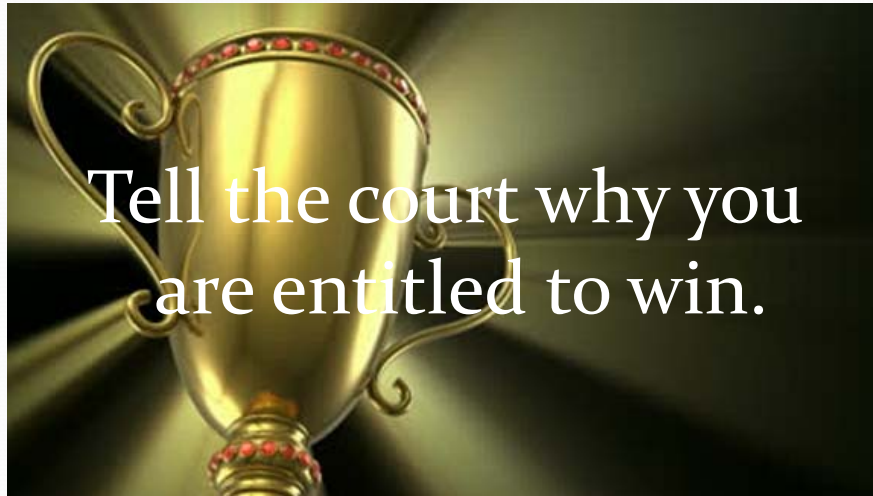
Fundamentals of Oregon Civil Trial Procedure: Conducting Effective Motion Practice

Presented by Laura Caldera Taylor
Shareholder, Bullivant Houser Bailey PC

Practical Tips for Improved Communication with the Court



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Specific Motions

- Motions Addressed To The Pleadings

READ THE RULES!

- State Court
- Federal Court

Discovery Motions

- Motions to Compel
 - State Court
 - Federal Court

Motions for Summary Judgment

- State Court
- Federal Court

