

AMENDMENTS

TO ORCP 21

promulgated by

COUNCIL ON COURT PROCEDURES

1980 to 2024

RULE 21

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY
PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE
PLEADINGS

A. How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counter-claim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through

(7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits.

B. Motion for judgment on the pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.

C. Preliminary hearings. The defenses specifically denominated (1) through (9) in section A. of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section B. of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

D. Motion to make more definite and certain. Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules upon motion by a party within 10 days after service of the pleading, or upon the court's own initiative at any time, the court may require the pleading to be made definite and certain by amendment when the allegations of a pleading are so indefinite or

uncertain that the precise nature of the charge, defense, or reply is not apparent. If the motion is granted and the order of the court is not obeyed within 10 days after service of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

E. Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: (1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading.

F. Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G.(2) of this rule on any of the grounds there stated.

G. Waiver or preservation of certain defenses.

G.(1) A defense of lack of jurisdiction over the person, that a plaintiff has not legal capacity to sue, that there is another action pending between the same parties for the same cause, insufficiency of summons or process, insufficiency of service of summons or process, or that the party asserting the claim is not the real party in interest, is waived (a) if omitted from a motion in the circumstances described in section F. of this rule, or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 23 A. to be made as a matter of course; provided, however, the defenses denominated (2) and (5) of section A. of this rule shall not be raised by amendment.

G.(2) A defense of failure to state ultimate facts constituting a claim, a defense that the action has not been commenced within the time limited by statute, a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B. or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule 23 B. in light of any evidence that may have been received.

G.(3) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.

COMMENT

While the Council wished to retain fact pleading, it also wanted to curb excessive use of motions for purposes of harassment and delay. The legislature has already moved in this direction by providing that the pleadings not go to the jury. See, ORCP 59. Retention of fact pleading does not automatically mean retention of existing motion practice. This rule is designed to reduce the time spent on motions through simplification of procedure and a preclusion rule that requires assertion of all grounds for dismissal under this rule, which are raisable by motion, in a single motion. Although the structure of this rule is based upon Federal Rule 12, much of the language used was drawn from ORS sections or drafted to fit Oregon practice.

Section 21 A. covers the form of asserting defenses to an opponent's claim. At the pleader's option, these may be asserted in the answer or in a motion to dismiss. The motion to dismiss performs the function of the former demurrer or plea in abatement. Specific grounds for the motion, (1) through (7), do not go to the merits and are a matter for determination by the court either on the face of a pleading or based upon factual material submitted to the court. Grounds (8) and (9) go to the merits and the court can only decide if a party has pled properly. If a party wishes to assert facts showing lack of merit, this must be in the form of a summary judgment motion or at trial. Whatever form is used to assert the defenses, under the last sentence of section 21 A. and under section 21 C., the court has the flexibility to dispose of the matter in the most efficient manner. This rule eliminates the concept of special appearance and motions to quash. An objection of personal jurisdiction is treated as any other defense and is waivable only under the provisions of section 21 G. If a motion to dismiss is made on the ground of lack of a real party in interest, the court should follow the procedure set out in ORCP 26 before granting the motion.

The grounds for motion to strike and motion to make more definite and certain in sections 21 D. and E. come from ORS 16.090, 16.100, and 16.110, and not from the federal rule. Note, the motion to strike is used to challenge the sufficiency of a defense or new matter asserted in a reply to avoid a defense, and replaces the former demurrer to an answer or a reply. The motion to strike is also the proper procedure to assert failure to state claims or defenses separately.

The consolidation and waiver rules of sections 21 F. and G. are modeled upon the federal rule. The consolidation requirement applies to any motion made under this rule; this would include motions under 21 A., B., D., and E., but not

summary judgment or other motions outside this rule. Special treatment is given to defenses related to personal jurisdiction and summons or process; under section 21 G.(1), they may not be asserted for the first time in an amended pleading.

RULE 21

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY
PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE
PLEADINGS

F. Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G. [(2)] (3) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

COMMENT

When Rule 21 G. was revised by the 1979 Legislature, the cross reference in Rule 21 F. was not changed.

DEFENSES AND OBJECTIONS;
HOW PRESENTED; BY
PLEADING OR MOTION;
MOTION FOR JUDGMENT ON
THE PLEADINGS

RULE 21

A. How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with

particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. When a motion to dismiss has been granted, judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25.

COMMENT

To cure any ambiguity in the ability of the court to allow leave to amend after a motion to dismiss has been granted, Rule 21 A. will be amended to specifically refer to leave to amend under ORCP 25. The amendment would also make it clear that judgment may be entered if leave to amend is not granted.

DEFENSES AND OBJECTIONS;
HOW PRESENTED; BY PLEADING OR MOTION;
MOTION FOR JUDGMENT ON THE PLEADINGS

RULE 21

E. Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: (1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading. [If, on a motion under this section, the facts supporting the motion do not appear on the face of the pleading or defense and matters outside the pleading or defense, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such motion if such facts are not materially disputed or may defer such determination until further discovery or until the trial on the merits.]

COMMENT

The amendment to Rule 21 E. deletes language allowing the court to go beyond the face of the pleading on a motion to strike. Under the amended rule, motions to strike will be determined on the face of the pleading. When it is necessary or desirable to go beyond the face of a pleading in a manner envisioned by the language being deleted by the amendment, reference should be made to Rule 47.

**DEFENSES AND OBJECTIONS; HOW PRESENTED;
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JUDGMENT ON THE PLEADINGS
RULE 21**

A How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counter-claim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the

pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. [*When a motion to dismiss has been granted, judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25.*] If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of defense (3), the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry of judgment pursuant to subsection B(3) of Rule 54.

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COMMENT

The new sentence at the end of section A describes the options available to the court upon dismissal of a complaint pursuant to subsection A(3). When it appears that subsequent disposition of a prior action pending between the same parties might not preclude further proceedings in the action in which the complaint is dismissed on that ground, the court should consider whether, in the interest of justice, that action should be ordered stayed in lieu of entry of judgment of dismissal. One appropriate reason for ordering a stay rather than a judgment of dismissal would be to avoid the action becoming time-barred in the event disposition of the prior pending action does not fully adjudicate the merits. Another reason would be to avoid the result necessitated in *Weller v. Weller*, 164 Or App 25, 988 P2d 921 (1999). While stayed an action is not subject to dismissal pursuant to subsection B(3) of Rule 54.

1 **DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION**
2 **FOR JUDGMENT ON THE PLEADINGS**

3 **RULE 21**

4 **A How presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a
5 complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading
6 thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss:
7 (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is
8 another action pending between the same parties for the same cause, (4) that plaintiff has not the legal
9 capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or
10 process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party
11 under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading
12 shows that the action has not been commenced within the time limited by statute. A motion to dismiss
13 making any of these defenses shall be made before pleading if a further pleading is permitted. The
14 grounds upon which any of the enumerated defenses are based shall be stated specifically and with
15 particularity in the responsive pleading or motion. No defense or objection is waived by being joined with
16 one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss
17 asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the
18 pleading and matters outside the pleading, including affidavits, declarations and other evidence, are
19 presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations
20 and other evidence, and the court may determine the existence or nonexistence of the facts supporting
21 such defense or may defer such determination until further discovery or until trial on the merits. If the
22 court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave
23 to file an amended complaint. If the court grants the motion to dismiss on the basis of defense (3), the
24 court may enter judgment in favor of the moving party, stay the proceeding, or defer entry of judgment
25 [*pursuant to subsection B(3) of Rule 54*].

26 * * * * *

1 **DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION;**

2 **MOTION FOR JUDGMENT ON THE PLEADINGS**

3 **RULE 21**

4 **[A How presented.** *Every defense, in law or fact, to a claim for relief in any pleading,*
5 *whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the*
6 *responsive pleading thereto, except that the following defenses may at the option of the*
7 *pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of*
8 *jurisdiction over the person, (3) that there is another action pending between the same parties*
9 *for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of*
10 *summons or process or insufficiency of service of summons or process, (6) that the party*
11 *asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8)*
12 *failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows*
13 *that the action has not been commenced within the time limited by statute. A motion to dismiss*
14 *making any of these defenses shall be made before pleading if a further pleading is permitted.*
15 *The grounds upon which any of the enumerated defenses are based shall be stated specifically*
16 *and with particularity in the responsive pleading or motion. No defense or objection is waived*
17 *by being joined with one or more other defenses or objections in a responsive pleading or*
18 *motion. If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such*
19 *defenses do not appear on the face of the pleading and matters outside the pleading, including*
20 *affidavits, declarations and other evidence, are presented to the court, all parties shall be given*
21 *a reasonable opportunity to present affidavits, declarations and other evidence, and the court*
22 *may determine the existence or nonexistence of the facts supporting such defense or may defer*
23 *such determination until further discovery or until trial on the merits. If the court grants a*
24 *motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to*
25 *file an amended complaint. If the court grants the motion to dismiss on the basis of defense (3),*
26 *the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry*

1 *of judgment.]*

2 **A Defenses. Every defense, in law or fact, to a claim for relief in any pleading, whether a**
3 **complaint, counterclaim, cross-claim, or third party claim must be asserted in the responsive**
4 **pleading thereto, with the exception of the defenses enumerated in paragraph A(1)(a)**
5 **through paragraph A(1)(i) of this rule.**

6 **A(1) The following defenses may, at the option of the pleader, be made by motion to**
7 **dismiss:**

8 **A(1)(a) lack of jurisdiction over the subject matter;**

9 **A(1)(b) lack of jurisdiction over the person;**

10 **A(1)(c) that there is another action pending between the same parties for the same**
11 **cause;**

12 **A(1)(d) that plaintiff has not the legal capacity to sue;**

13 **A(1)(e) insufficiency of summons or process or insufficiency of service of summons or**
14 **process;**

15 **A(1)(f) that the party asserting the claim is not the real party in interest;**

16 **A(1)(g) failure to join a party under Rule 29;**

17 **A(1)(h) failure to state ultimate facts sufficient to constitute a claim; and**

18 **A(1)(i) that the pleading shows that the action has not been commenced within the**
19 **time limited by statute.**

20 **A(2) How presented.**

21 **A(2)(a) Generally. A motion to dismiss asserting any of the defenses enumerated in**
22 **paragraph A(1)(a) through paragraph A(1)(i) of this rule must be filed before pleading if a**
23 **further pleading is permitted. No defense or objection is waived by being joined with one or**
24 **more other defenses or objections in a responsive pleading or motion.**

25 **A(2)(b) Factual basis. The grounds on which any of the enumerated defenses are based**
26 **must be stated specifically and with particularity in the responsive pleading or motion. If, on**

1 a motion to dismiss asserting the defenses enumerated in paragraph A(1)(a) through
2 paragraph A(1)(g) of this rule, the facts constituting the asserted defenses do not appear on
3 the face of the pleading and matters outside the pleading (including affidavits, declarations,
4 and other evidence) are presented to the court, all parties will be given a reasonable
5 opportunity to present affidavits, declarations, and other evidence, and the court may
6 determine the existence or nonexistence of the facts supporting the asserted defenses or
7 may defer any determination until further discovery or until trial on the merits.

8 A(2)(c) Remedies available. If the court grants a motion to dismiss, the court may enter
9 judgment in favor of the moving party or grant leave to file an amended complaint. If the
10 court grants the motion to dismiss on the basis of a defense described in paragraph A(1)(c) of
11 this rule, the court may enter judgment in favor of the moving party, stay the proceeding, or
12 defer entry of judgment.

13 **B Motion for judgment on the pleadings.** After the pleadings are closed, but within such
14 time as not to delay the trial, any party may move for judgment on the pleadings.

15 **C Preliminary hearings.** The defenses specifically [*denominated (1) through (9) in section*
16 *A of this rule,*] enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule,
17 whether made in a pleading or by motion, and the motion for judgment on the pleadings
18 mentioned in section B of this rule [*shall*] **must** be heard and determined before trial on
19 [*application*] **the motion** of any party, unless the court orders that the hearing and
20 determination thereof be deferred until the trial.

21 **D Motion to make more definite and certain.** [*Upon*] **On** motion made by a party before
22 responding to a pleading[,] or, if no responsive pleading is permitted by these rules, [*upon*] **on**
23 motion by a party within 10 days after service of the pleading, or [*upon*] **on** the court's own
24 initiative at any time, the court may require the pleading to be made definite and certain by
25 amendment when the allegations of a pleading are so indefinite or uncertain that the precise
26 nature of the [*charge*] **claim**, defense, or reply is not apparent. If the motion is granted and the

1 | order of the court is not obeyed within 10 days after service of the order, or within such other
2 | time as the court may fix, the court may strike the pleading to which the motion was directed
3 | or make [such] **any** order [as] it deems just.

4 | **E Motion to strike.** [Upon] **On** motion made by a party before responding to a pleading
5 | or, if no responsive pleading is permitted by these rules, [upon] **on** motion made by a party
6 | within 10 days after the service of the pleading [upon] **on** such party or [upon] **on** the court's
7 | own initiative at any time, the court may order stricken: [(1) any sham, frivolous, or irrelevant
8 | pleading or defense or any pleading containing more than one claim or defense not separately
9 | stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter
10 | inserted in a pleading.]

11 | **E(1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing**
12 | **more than one claim or defense not separately stated;**

13 | **E(2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter**
14 | **inserted in a pleading; or**

15 | **E(3) any response to an amended pleading, or part thereof, that raises new issues,**
16 | **when justice so requires.**

17 | **F Consolidation of defenses in motion.** A party who makes a motion under this rule may
18 | join with it any other motions herein provided for and then available to the party. If a party
19 | makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the
20 | person or insufficiency of summons or process or insufficiency of service of summons or
21 | process, but omits therefrom any defense or objection then available to the party [which] **that**
22 | this rule permits to be raised by motion, the party [shall not] **cannot** thereafter make a motion
23 | based on the defense or objection so omitted, except a motion as provided in subsection G(3)
24 | of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack
25 | of jurisdiction over the person or insufficiency of summons or process or insufficiency of service
26 | of summons or process without consolidation of defenses required by this section.

1 **G Waiver or preservation of certain defenses.**

2 G(1) A defense of lack of jurisdiction over the person, that there is another action
3 pending between the same parties for the same cause, insufficiency of summons or process, or
4 insufficiency of service of summons or process, is waived under either of the following
5 *[circumstances: (a) if the defense is omitted from a motion in the circumstances described in*
6 *section F of this rule, or (b) if the defense is neither made by motion under this rule nor included*
7 *in a responsive pleading. The defenses referred to in this subsection shall not be raised by*
8 *amendment.] **circumstances, and cannot be raised by amendment:***

9 **G(1)(a) if the defense is omitted from a motion in the circumstances described in**
10 **section F of this rule; or**

11 **G(1)(b) if the defense is neither made by motion under this rule nor included in a**
12 **responsive pleading.**

13 G(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting
14 the claim is not the real party in interest, or that the action has not been commenced within
15 the time limited by statute, is waived if it is neither made by motion under this rule nor
16 included in a responsive pleading or an amendment thereof. Leave of court to amend a
17 pleading to assert the defenses referred to in this subsection [*shall*] **will** only be granted [*upon*]
18 **on** a showing by the party seeking to amend that [*such*] **the** party did not know and reasonably
19 could not have known of the existence of the defense, or that other circumstances make denial
20 of leave to amend unjust.

21 G(3) A defense of failure to state ultimate facts constituting a claim, a defense of failure
22 to join a party indispensable under Rule 29, and an objection of failure to state a legal defense
23 to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any
24 pleading permitted or ordered under Rule 13 B, [*or*] by motion for judgment on the pleadings,
25 or at the trial on the merits. The objection or defense, if made at trial, [*shall*] **will** be disposed of
26 as provided in Rule 23 B in light of any evidence that may have been received.

1 G(4) If it appears by motion of the parties or otherwise that the court lacks jurisdiction
2 over the subject matter, the court [*shall*] **must** dismiss the action.

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2019-2021 BIENNIUM STAFF COMMENT TO RULE 21

Note: This staff comment is provided as a convenience to those who read the Oregon Rules of Civil Procedure and have a general question as to the impetus for a particular amendment during the 2019-2021 biennium. Language in this comment was circulated to members of the Council on Court Procedures, but was not voted on or approved by the Council. This comment is neither legislative history for purposes of construction, as in statutory construction, to determine the intent of the Council in making any amendment, nor does it establish the meaning of any rule that has been amended. For the purpose of construing the Oregon Rules of Civil Procedure, the only authoritative legislative history is found in the Council's minutes of its deliberations. The Council's minutes can be found at www.counciloncourtprocedures.org. If the Legislative Assembly amended a rule, the legislative history for the Legislature's amendment can be found at www.oregonlegislature.gov.

It is not uncommon for a party, usually a plaintiff, to amend the party's pleading shortly prior to trial, once discovery is completed and the issues have sometimes narrowed and come into clearer focus. Such amendments often update the amount of damages sought. It is then incumbent on the opposing party to respond to the amended pleading. A concern was raised that the amending party can be at a disadvantage when the response to the amended pleading does not simply respond as necessary to the new or modified allegations in the amended pleading but, instead, raises defenses that were not previously raised, sometimes even denying liability for the first time. Either the trial must be postponed, or the amending party is proceeding to trial on new issues. There may be a request to re-open discovery and expert witnesses may need to be rescheduled. As provided in Rule 21, the amending party is required to obtain consent from the opposing party or from the court to file the amended pleading; the opposing party is entitled to file a responsive pleading and may do so without the need for obtaining consent from the amending party or the court.

The amendment adding subsection E(3), is intended to give the court authority to strike any part of the response to the amended pleading that raises new issues that will unfairly prejudice the amending party or that will delay the trial. The new language in section E allowing motions to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires . . ." incorporates the factors to be considered in allowing amendments expressed in *Ramsey v. Thompson*, 162 Or App 139 (1999), *rev den*, 329 Or 589 (2000). The right to amend "shall be freely given when justice so requires." ORCP 23 A. The same should be true for a response to an amendment. However, if the response to an amendment raises new issues, the most significant factor in determining whether the response should be stricken will generally be the amount of time from the filing of the new pleading until the scheduled start of the trial.

The more visible change to Rule 21 is a reorganization of section A, which was previously one long block of text that included quasi-subsections (1) through (9) that were inconsistent with the manner in which the rules are organized. That monolith is now broken into two subsections, and those subsections are further broken into correctly formatted paragraphs, enabling improved citation to that part of the section that is relevant. Lead lines are added to

read in a more logical sequence. The amendments to section A are not meant to affect the meaning or operation of the section.

Section C was amended to make the references to the defenses in section A correspond with the new organization of section A. Also, the word “shall” was replaced with “must” in keeping with modern drafting standards. The word “application” was replaced with “motion,” as a request for relief from the court is a motion.

Changes in section D include moving a comma and adding three commas to improve readability. The word “upon” is replaced with “on” three times to improve language usage. The word “charge” is replaced with “claim,” as we have claims (*see* Rule 18), not charges in civil litigation. Finally, the use of the word “such” in the last sentence is avoided, as that word is overused in stilted legal prose and is often imprecise.

Section E also contained quasi-subsections that were not formatted in a manner consistent with the rules. The subsections are now formatted consistently and, of course, the new basis for a motion to strike, as discussed in the opening two paragraphs of this comment, is added. Also, the word “upon” is replaced four times with the more standard usage term “on.”

Section F Includes a grammar-influenced substitution of the word “that” for “which,” as well as a substitution of “cannot” for “shall not” in keeping with modern drafting conventions.

Section G again contained quasi-subsections not formatted in a manner consistent with the rules, and reformatting the subsections required deleting the sentence prohibiting raising the enumerated defenses by amendment. Instead, the bar to raising these defenses by amendment is included in a sentence preceding the subsections. The word “shall” is replaced by “will” on two occasions and by the word “must” on one occasion in keeping with modern drafting conventions. The word “upon” is replaced with the more standard word, “on.” The word “such” is replaced with a more precise “the” and two commas are added and the disjunctive “or” is deleted to improve readability.

The amendments, other than the addition of subsection E(3), are technical changes in part to improve clarity and consistency within the rules and are not meant to affect the meaning or the operation of Rule 21.