

PRETRIAL MOTION PRACTICE*

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CRIMINAL PRE-TRIAL MOTION PRACTICE

I. INTRODUCTION

Pretrial motion practice is an essential part of the effective representation of persons accused of crimes. This article will discuss the types of issues which may be raised by pretrial motion; those issues which must be raised by pretrial motion to avoid waiver; how to draft an effective motion; when and how to present evidence in support of pretrial motions, and the strategic and tactical ways in which motion practice can enhance overall advocacy. Space and time considerations limit the scope of this article to practice in Missouri state courts.

II. ISSUES WHICH MAY BE RAISED

In Missouri, there is virtually no limit on the issues which may be raised by pretrial motion. "Any defense or objection which is capable of determination without trial of the general issue may be raised before trial by motion." Rule 24.04(b)1. Such permissive motions might relate to pretrial release or conditions of pretrial confinement, discovery issues, change of venue or change of judge, joinder or severance considerations, funding for the defense of indigents and the admissibility of evidence at trial. A very thorough discussion of these types of motions and others by Robert Duncan may be found in Chapter 12 of *Missouri Criminal Practice*, Third Edition. (MO Bar 1996). This article will discuss only a few of these motions.

A. MOTIONS IN LIMINE

Motions which seek to limit or restrict the introduction of evidence at trial (other than motions to suppress evidence, which are discussed below) are commonly styled "Motions in Limine." The Latin phrase "*in limine*" means "on the threshold," or "at the outset." If an attorney waits to object until the damaging testimony is adduced at trial, even a proper ruling does not alleviate the harm. The jury has heard the evidence; you cannot unring a bell. A motion in limine, therefore, is essential to prevent the state from referring to the inadmissible evidence in the first place. Such a motion should also seek to preclude the state from referring to the challenged evidence during opening statement or voir dire examination. If the court sustains such a motion in limine, or if the court indicates a likelihood that it will sustain such a motion, the state would be hard put to claim that it would be acting in good faith to refer to such evidence during opening statement.

Many judges will preliminarily sustain motions in limine, subject to giving the state an opportunity to reargue the admissibility of the evidence during the trial when the state

feels sufficient facts have been shown to make the evidence admissible. Should the court sustain or conditionally sustain such a motion in limine, defense counsel needs to be alert for possible violations by the prosecution. If defense counsel has successfully moved in limine to exclude certain evidence, it can certainly be argued that the introduction of such evidence in violation of the court's ruling should warrant the drastic remedy of a mistrial. If the violation is particularly egregious, it may even amount to prosecutorial misconduct precluding a retrial after the declaration of a mistrial. Examples of this type of evidence might include offenses not charged, hearsay testimony inculcating the accused, prior bad acts of the defendant, the defendant's assertion of his right to remain silent, and the like. In Missouri, if the court overrules a motion in limine, nothing is preserved for review. The defense attorney must object when the evidence is adduced at trial even though the motion in limine has been overruled. Such an objection, however, may incorporate by reference the grounds set forth in the motion in limine. By contrast, the newly enacted Federal Rule of Evidence 103(a)(2) provides that "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error on appeal." The import of this rule is that a well-crafted motion in limine, in federal court, will preserve evidentiary issues for appeal, without further objection.

B. DISCOVERY MOTIONS

Routine discovery in Missouri criminal cases may be had by written request without the necessity of a pretrial motion. Rule 25.03. Such a request should be made no later than 20 days after circuit court arraignment; and the state should comply within 10 days after service of the request. Rule 25.02. However, a pretrial motion is appropriate to seek discovery of material not covered by Rule 25.03. Rule 25.04. Such a motion may also be used to obtain disclosure of discoverable material in the possession or control of governmental personnel other than the state. Rule 25.04(c). Should the state claim that certain matters are not subject to disclosure under the provisions of Rule 25.10, a pretrial motion is the proper means to litigate such discoverability. These issues are generally encountered in drug cases involving confidential informants. See, e.g., *Roviaro v. United States*, 353 U.S. 53 (1957) and *State v. Davis*, 450 S.W.2d 168 (Mo. 1970). Defendant should also use a pretrial motion to compel disclosure of any plea bargains or other consideration given state's witnesses in return for their testimony. In capital cases, a written request is necessary to compel disclosure of aggravating circumstances and evidence the state intends to adduce at the penalty phase of the trial. It is the author's practice to include such a request in the general request for discovery under Rule 25.03 in all first degree murder cases.

C. MOTIONS FOR FUNDS

Pretrial motions for funds to retain defense experts can be a fruitful area of litigation for public defenders and for private counsel appointed to defend indigents. The quality of representation received by an accused should not be determined solely by his ability to pay. To prevail upon a claim that the state is constitutionally required to fund a particular aspect of the defense, a defendant must not only show that he is indigent, but also must show that under the circumstances of the case at bar, the assistance sought is one of the basic tools of an adequate defense. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68 (1985). If the testimony of a particular kind of expert - whether it be in the field of psychiatry, ballistics comparison, forensic odontology, or whatever - is reasonably necessary to an adequate defense of the case, and if the defendant cannot obtain that testimony due to his indigence, it would seem that the state is required to provide such assistance by the due process clause of the Fourteenth Amendment. A motion on these grounds should also cite the equal protection clause of the Fourteenth Amendment and the Sixth Amendment guarantee of the effective assistance of counsel.

III. ISSUES WHICH MUST BE RAISED

Although there is virtually no limit on the type of issue which may be raised by a pretrial motion, there are several matters which **MUST** be raised by pretrial motion to avoid waiver. These include defenses and objections based on defects of the institution of the prosecution, nonjurisdictional defects in the charging document, motion for change of venue or change of judge and motions to suppress. Rule 24.04(b)2, Rule 24.05. objections based upon a claimed violation of the United States Constitution must be raised at the earliest opportunity to avoid waiver. Generally, this means by way of a pretrial motion. A motion for bill of particulars should be made before arraignment or within 10 days after arraignment; however, the court may permit a later filing of such a motion. Rule 23.04. To preserve a claim that he was denied his Sixth Amendment right to a speedy trial, a defendant must not only request a speedy trial, but must also move to dismiss on the grounds that such speedy trial has been denied. See, *State v. Harper*, 473 S.W.2d 419 (Mo. banc 1971), Section 545.780, RSMo 1986.

A. DEFECTS IN THE CHARGING DOCUMENT

Indictments and informations, the pleadings which form the bases of criminal cases, are frequently defective. Defense counsel should peruse these documents carefully at the first opportunity. The language of the charging document should be compared not only with the appropriate section of MISSOURI APPROVED CHARGES - CRIMINAL, (Mo Bar 1979), but also with the statutory provisions which define the charged offense. If the indictment or information omits an element contained in the

charge book, or if either the pleading or the charge book omits an element set forth in the statute, counsel must determine whether that omission is so crucial that the charge as laid does not apprise the defendant of the nature and cause of the accusation U.S. Constitution, Amendments VI and XIV; Missouri Constitution, Article I, Section 18(a). Counsel must also determine if the pleading is sufficient to serve as a bar to future prosecution for the same offense. *State v. Taylor*, 498 S.W.2d 664 (Mo. App. 1973). The test of sufficiency is whether the charging document contains all essential elements of the offense as defined by statute and clearly apprises defendant of the facts constituting the offense. *State v. Gilmore*, 650 S.W.2d 627 (Mo. banc 1983)¹. If the charging document does not meet these basic requirements, no pretrial motion should be filed. The failure of the indictment or information to allege an essential element of the offense has been held to deprive the court of jurisdiction to proceed in the case. This type of defect may be raised for the first time in a motion for new trial or on appeal. However, defects in the charging document which do not amount to failure to charge an offense or failure to confer jurisdiction must be raised by pretrial motion.

Pretrial motions prior to first appearance by a defendant have sometimes been allowed. See *United States v. Tucor International, Inc.*, Case No. CR-92-425 DLJ, Northern District of California, Order of October 20, 1997. And, sometimes such motions are successful.

B. MOTION FOR BILL OF PARTICULARS

If the charging document is sufficient to charge an offense, but not sufficiently particular to enable the accused to prepare his defense, the remedy is a Motion for Bill of Particulars. Rule 23.04. Such a motion should be made within 10 days of arraignment. It is good practice to prepare a proposed order directing the filing of a bill of particulars setting forth the specific information requested by the defense and giving the state a reasonable but definite time in which to file such a bill of particulars.

C. MOTIONS TO SUPPRESS

¹But it is important to note that if a defendant raises a claim that the indictment or information is insufficient for the first time after the verdict, it will be deemed insufficient only if it is so defective that it does not, by any reasonable construction, charge the defendant with the offense of which the defendant was convicted, or the substantial rights of the defendant to prepare a defense and plead former jeopardy in the event of an acquittal are prejudiced. *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo. banc 1992).

Motions to suppress must be made prior to trial. Volumes have been written concerning the grounds for such motions, and an extended discussion of those grounds is beyond the scope of the instant article. Motions may be made to suppress physical evidence, statements of the accused, the fruits of electronic surveillance, in-court identification of the accused, testimony regarding an out-of-court identification of the accused, photographs of the accused taken after an illegal arrest, and any other evidence which was obtained through unlawful police activity. Motions to suppress should always include citations of state and federal constitutional grounds relied upon for relief. Excellent discussions of these issues may be found in Chapters 9 (by Ellen Y. Suni), 10 (by Gerald M. Handley) and 11 (by Donna Aronoff Smith and Robert S. Adler) of MISSOURI CRIMINAL PRACTICE - Third Edition. (Mo Bar 1996).

D. CHANGE OF VENUE AND CHANGE OF JUDGE

A motion for change of judge as a matter of right must be filed no later than 10 days after arraignment in a felony case if the trial judge is designated at arraignment. Otherwise, the motion must be filed no later than 10 days after counsel is notified of the designation of the trial judge, unless that designation is less than 10 days prior to trial, in which case the motion must be filed prior to the commencement of any proceeding on the record. Rule 32.07. All parties must be served with a copy of the application for change of judge and a notice of the time when the application for change of judge and a notice of the time when the application will be presented to the court. A motion for change of venue as a matter of right in a felony case must be filed not later than 10 days after arraignment. Again, a copy of the application and notice of the time when it will be presented to the court must be served on all parties. Rule 32.03. The change of venue is automatic for counties of 75,000 inhabitants or less. In larger counties, the defendant must allege that the inhabitants of the county are prejudiced against him or that the state has an undue influence over the inhabitants of the county. Rule 32.06. A defendant who desires both a change of venue and change of judge must join both requests in a single application. Rule 32.08.

IV. DRAFTING PRETRIAL MOTIONS

Just as different attorneys have different styles in the courtroom, individual style is also appropriate in drafting pretrial motions. However, there are certain elements which should be present in all pretrial motions. Over the years, most attorneys have developed a group “standard” or “form” motions. While the use of these form motions can make the drafting quicker and easier, each motion must be tailored to the individual case. In Missouri, motions must plead the essential facts warranting relief requested. Motions which do not allege facts, but merely conclusions, do not preserve issues for review. For this reason, the author prefers to think in terms of stylistic elements of all

motions rather than in terms of a form motion to suppress identification, a form motion for bill of particulars, etc. All motions should contain the following elements: the caption, the “headline,” the introduction, the lead, the factual basis, the legal basis, and the prayer for relief.

A. THE CAPTION

The caption identifies the motion as a pleading in a particular case. It should have the court, the style of the cause, case number and any other identifying information which is customary in that jurisdiction.

B. THE “HEADLINE”

The “headline” is the title of the motion. It can be as simple and direct as “Motion to Suppress Statements of Defendant” or it can be emotional and argumentative, like “Motion to Suppress Unreliable Statements Illegally Obtained from the Accused Through Tactics of Coercion and Unlawful Inducements.” The purpose of the “headline” is to attract the court’s attention and to predispose the court to favorably consider the subject matter of the motion. Headlines are used by journalists, but headlines in the *Wall Street Journal* are quite different from headlines in the *National Enquirer*. In selecting a headline, consider not only your personal style, but also the impact it will have on a particular judge.

C. THE INTRODUCTION

The introduction tells the court what the motion is all about. Customarily, this paragraph starts out “Comes now John Doe, . . .” The introduction tells the court at the outset the relief requested; what you are asking the court to do. Strictly speaking, it is this paragraph which is the actual motion, with the remainder of the pleading being the grounds for the motion. The introduction should be simple, direct, and should avoid boilerplate language. Once again, individual style is important. Many attorneys prefer to refer to the client as “the accused” rather than “the defendant,” feeling that the former phrase is more sensitive to the presumption of innocence.

D. THE LEAD

The lead is a journalistic concept. Most people confronted with a lengthy document read only the first few paragraphs. The lead, therefore, should briefly set forth the most compelling arguments in favor of the motion. It should be powerfully written to secure the reader’s attention and tempt him to continue reading.

E. THE FACTUAL BASIS

The factual basis is an important part of every pretrial motion. If you are requesting an evidentiary hearing, your motion should set forth the facts which you will prove at the hearing which will entitle you to the relief requested. If no evidentiary hearing is contemplated, the motion should set forth the facts which are undisputed or known to the court which warrant the relief you request. It should be plainly written, and should state the facts in a light favorable to the accused.

F. THE LEGAL BASIS

The legal basis is important not only from the point of view of persuading the trial court to grant you the relief requested, but also from the point of view of preserving issues for later review. Appellate courts frown upon legal theories not presented or presented in different form to the trial court. This part of the motion should not only cite relevant case law and statutory provisions, but should also raise federal and state constitutional provisions supporting your position. If the legal issues are involved or the legal theory upon which you rely is complex, you might consider separating this part of the motion into a separate pleading entitled "Suggestions in Support of (name the motion)."

G. THE PRAYER FOR RELIEF

The prayer for relief, like the introduction, tells the court what you are asking for. The prayer should be as specific as possible with regard to the relief requested, but also should contain a general prayer for "such other and further relief that is just and appropriate under the circumstances." If the primary purpose of your motion is to preserve issues for later review, your prayer should include at least 3 separate remedies; one which it would be error to deny, one which should be granted in the sound exercise of discretion, and one which probably will not be granted in the current state of the law. Praying for this type of tiered relief will not only allow you to take advantage of the current state of the law, but will also preserve issues in developing areas of the law. Of course, unless the facts underlying your motion are undisputed, you should include a request for an evidentiary hearing in your prayer for relief.

V. HEARINGS ON PRETRIAL MOTIONS - TIMING

Once appropriate pretrial motions have been drafted and filed, they should not be forgotten. Very few motions are self-proving. It is almost always in the interest of the defendant to secure hearings and rulings on such motions prior to trial. Rule 24.04(b)4 gives the right to a pretrial hearing on motions "unless the court orders that the hearing

and determination thereof be deferred until the trial.” Defense counsel must familiarize himself with local practice regarding scheduling and noticing up hearings on such motions. Considerations in scheduling hearings include not only personal convenience, but also the availability of witnesses and courtesy to opposing counsel. Beware, however, of the temptation to delay such hearings until the eve of trial, hoping that the case might go away. Of course, many criminal cases are settled, but the proper use of pretrial motions is generally an aid to such settlement. The resolution of pretrial issues early in the case through effective motion practice will save far more time and effort in trial preparation than delaying the hearing of pretrial motions will save in those cases which do settle. Pretrial hearings can be used to develop testimony which is relevant and probative at trial. The hearing needs to be held enough in advance of the trial that a transcript of the testimony can be prepared and available for impeachment should the trial testimony differ from the motion testimony.

VI. HEARINGS ON PRETRIAL MOTIONS - EVIDENTIARY HEARINGS

The presentation of evidence at a hearing on pretrial motions is subject to the same rules as any other contested hearing. In most instances, the movant has the burden of going forward with the evidence to establish the factual basis for the motion. There is a significant exception to this rule, which applies to motions to suppress. If the motion to suppress is based upon a search, the burden is upon the state to go forward with evidence and to persuade the court that the search was legal. Section 542.296 RSMo. 1986. Motions to suppress statements based on *Miranda v. Arizona*, 384 U.S. 436 (1966) and its progeny likewise place on the state the burden of going forward and the risk of non-persuasion. *State v. Craig*, 642 S.W.2d 98 (Mo. banc 1982). If an allegedly unlawful arrest is the basis of the motion to suppress, the movant has the burden of showing that there was no arrest warrant. The burden then falls upon the state to justify the warrantless arrest. Of course, an accused would have the burden of showing that an arrest pursuant to a warrant was nonetheless unlawful. Counsel should be prepared to examine and cross-examine the witnesses at the motion hearing to establish the factual grounds alleged in the motion. If the defendant does have the burden of going forward with the evidence, the defendant should have subpoenaed the appropriate witnesses to ensure their presence. It is risky to rely on a prosecutor's assurance that the witnesses will be produced unless, through past dealings with this particular prosecutor, you know that such reliance is well placed.

VII. TACTICAL CONSIDERATIONS

Tactical considerations are fundamental to pretrial motion practice. It is the defense counsel's view of how certain evidence might impede his trial tactics or might further the trial tactics of the prosecution that leads counsel to file a motion in limine to

exclude that evidence. Trial tactics determine what additional discovery should be sought by motion, what type of expert testimony is needed and whether the state can be compelled to provide the necessary funds, what evidence should be suppressed and what evidence, although arguably illegally obtained, actually exculpates the accused. Of course, not all tactical decisions made during the pendency of a criminal case are directly geared toward securing acquittal at trial. It is also the function of defense counsel to properly preserve issues for appellate review; pretrial motions must be part of an overall tactical scheme. Such tactical decisions are not always straightforward. For example, many times an accused will have made a statement to the police which is somewhat incriminatory, but which can be used to support defense counsel's theory of the case. Counsel must make a tactical decision as to whether litigating and losing a motion to suppress that statement will, through a process of "reverse psychology," make the statement more likely to adduce the statement at trial. In an even subtler situation, where the likelihood of conviction is great with or without the illegally obtained evidence, counsel might litigate the motion to suppress sufficiently to preserve the issues, but refrain from persuading the court to bar the evidence, thus preserving the accused an issue on appeal. In the context of plea negotiations, the mere filing of a motion to suppress may be a tactical advantage if counsel for the state is over-worked, under-motivated or otherwise unable or unwilling to research and litigate the merits of the motion. Just as there is no real limit on the issues which may be raised by pretrial motions, the only limit on the tactical uses of such motions is the creativity of defense counsel.

VIII. THE STRATEGIC ROLE OF PRETRIAL MOTIONS

Pretrial motions play an important strategic role in the overall representation of an accused person. Defense counsel must communicate with and persuade not only the jury, but also the court, the prosecutor, the accused, sometimes the complaining witness or his family, and in a high publicity case, the media. These "triers of facts" may be reached through pretrial motions. If the court is not familiar with defense counsel, a well-drafted pretrial motion followed by a well-presented evidentiary hearing will gain counsel the respect of the court. In fact, pretrial motions which demonstrate to the court counsel's ability to adequately preserve issues for appellate review might even tinge that respect with fear - fear of reversal. If the prosecution can likewise be led to feel that a conviction, even if obtained, may not stand, a favorable settlement is likely.

In a high publicity case, defense counsel is often frustrated by the extensive media coverage of the police viewpoint, and the ethical constraints which limit counsel's ability to respond. See Rule 4-3.6. However, matters set forth in pretrial motions filed with the court are public records, and may be disclosed by counsel. Rule 4-3.6(c)(2). A circus atmosphere sometimes surrounds the reporting of highly publicized crimes.

An aggressive and effective pretrial motion practice, if it is also publicized, may shift the thrust of public opinion away from the gory details of the crime and towards a reaffirmation of the presumption of innocence which is so fundamental to our legal system.

Pretrial motions can facilitate negotiated settlements. In fact, if the parties are at impasse, a pretrial motion hearing may provide an opportunity to ascertain the court's view of the appropriate disposition. Moreover, an accused person who sees his attorney filing and litigating pretrial motions, who perceives his attorney as someone who is going to court and fighting for him on these issues, is very likely to follow the advice of that attorney. The effective use of pretrial motions can build a rapport with the client which will ultimately work towards the client's best interest.

IX. PRESERVATION OF ISSUES

It is important to remember that pretrial motions alone are not sufficient to preserve issues for appellate review. The evidence which is the subject of the pretrial motion must also be objected to when it is first adduced at trial. Likewise, the overruling of a pretrial motion and trial objection must be assigned as grounds for relief in the Motion for New Trial in order to be properly reserved for appellate review. Trial objections and Motion for New Trial points should reiterate the legal grounds for relief set forth in the pretrial motions, including any federal or state constitutional grounds.

X. OTHER MISCELLANEOUS MOTIONS

For an excellent discussion pertaining to other miscellaneous motions that can be made in criminal cases, see Duncan, Robert G., Chapter 12 – *Miscellaneous Motions (Other than to Suppress), Proceedings, and Writs*, printed in MISSOURI CRIMINAL PRACTICE - Third Edition. (Mo Bar 1996). Such motions can include motions for reduction or setting of bail (Rules 33.05; 33.06); motions to disclose terms of plea agreement of a co-defendant; motions made pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), requiring disclosure of any evidence or information in the possession of the State which may tend to bear on the defendant's innocence, or mitigation of punishment; motions for disclosure of an informant's identity; motions to quash the jury panel or to challenge the array; applications for continuance; motion for disqualification of the prosecutor; demands for sequestration of the jury; motions for "gag" orders; and other miscellaneous prosecution motions, including dismissals or *nolle prosequi*; forfeiture motions, etc.

XI. CONCLUSION

Advocacy is the art of persuasion. Effective advocacy includes not only persuasion of a jury during closing argument, but persuasion of all the decision makers throughout the pendency of a case. The proper use of pretrial motions helps defense counsel advocate his client's interest at every stage of the proceedings, leading to the optimum result.

CIVIL PRE-TRIAL MOTION PRACTICE

I. MOTIONS TO DISMISS AND/OR FOR JUDGMENT ON THE PLEADINGS FOR FAILURE TO STATE A CLAIM

Motions to dismiss for failure to state a claim are governed, in federal courts, by Fed. R. Civ. P. 12(b)(6). Motions for judgment on the pleadings for failure to state a claim are governed by Fed. R. Civ. P. 12(c). "Although Rule 12(c) differs in some particulars from Rule 12(b)(6), the standard applied is virtually identical." *Moran v. Peralta Community College District*, 825 F.Supp. 89, 893 (N.D. Cal. 1993). See also *Cornwell v. Joseph*, 7 F. Supp. 2nd 1106 (S.D. Cal. 1998) (when motion for judgment on the pleadings is used to raise defense of failure to state a claim, motion for judgment on the pleadings faces the same test as a motion to dismiss for failure to state a claim under Rule 12(b)(6)); *Irish Lesbian and Gay Organization v. Giuliani*, 143 F.3d 638 (2nd Cir. 1998) (test for evaluating motion for judgment on the pleadings under Rule 12(c) is the same as that applicable to motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6)); *Sheppard v. Beerman*, 18 F.3d 147 (2nd Cir. 1994) (same); *Craigs, Inc. v. General Elec. Capital Corp.*, 12 F.3d 686 (7th Cir. 1993) (same); *United States v. Wood*, 925 F.2d 1580 (7th Cir. 1991) (same); *Ross v. State of Alabama*, 893 F.Supp. 1545 (M.D. Ala. 1995) (same); *Lindsey v. Admiral Ins. Co.*, 804 F.Supp. 47 (N.D. Cal. 1992) (same).

A motion to dismiss and/or for judgment on the pleadings is directed solely to the sufficiency of the allegations in the complaint, and is properly granted when it appears, beyond doubt, that the plaintiff could prove no set of facts entitling it to relief, and the court must construe the complaint in favor of the plaintiff, accepting as true all material allegations. See *Ash Creek Min. Co. v. Lujan*, 969 F.2d 868 (10th Cir. 1992). See also *Tobin v. City of Peoria, Ill.*, 939 F.Supp. 628 (C.D. Ill. 1996) (in ruling on motion to dismiss, court considers whether relief is possible under any set of facts that could be established consistent with the allegations in the complaint, and will dismiss claim only if it is beyond doubt that no set of facts alleged in the complaint would entitle the plaintiff to relief).

If such a motion is filed by a defendant prior to defendant's filing of an answer to the complaint, it is properly couched as a motion to dismiss for failure to state a claim under Rule 12(b)(6). See, e.g., *United Parcel Service, Inc. v. International Broth. Of Teamsters, AFL-CIO*, 859 F.Supp. 590 (D. D.C. 1994). Such a motion should likely be coupled with a motion for more definite statement under Rule 12(e). The practical effect of such a combined motion is to delay the necessity of defendant's filing of answer to plaintiff's complaint until 10 days after either (1) the court denies the motion or postpones its disposition until the trial on the merits; or (2) the court's grant of a motion for more definite statement. If a motion challenging plaintiff's failure to state a claim is filed by the defendant after the filing of defendant's answer, then it is appropriately styled a motion for judgment on the pleadings pursuant to Rule 12(c).

A motion to dismiss or for judgment on the pleadings for failure to state a claim must be distinguished, procedurally, from a motion for summary judgment. A motion to dismiss or for judgment on the pleadings for failure to state a claim is directed solely at the sufficiency of the facts pled by the plaintiff in its complaint. It makes no reference to evidence or other matters external to the pleadings. By contrast, on a motion for summary judgment, the court is required to consider evidentiary materials external to the pleadings, such as depositions, answers to interrogatories, admissions, and affidavits submitted by the parties. Rules 12(b) &(c) expressly provide that if motions to dismiss or for judgment on the pleadings ask the court to consider matters external to the pleadings, the motion is to be treated as one for summary judgment under Rule 56.

Nearly identical principles apply in Missouri Courts to motions to dismiss and for judgement on the pleadings for failure to state a claim See Mo. R. Civ. P. 55.27(a) & (b).

II. MOTIONS FOR SUMMARY JUDGMENT

A. In Federal Courts

In federal courts, summary judgment is governed by Federal Rule of Civil Procedure 56(a), if the motion is made by a claimant, and 56(b), if the motion is made by a defendant. Rule 56(c) sets forth the burden that must be sustained in order to secure a summary judgment, providing that "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

With respect to the first required showing – that there is no genuine issue of material fact – the movant bears the initial burden of showing the absence of a genuine

issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “Material” facts are those “that might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Once the moving party has sustained this burden, then the burden shifts to the non-moving party to come forward with specific facts, supported by admissible evidence, showing that there is a genuine issue for trial on elements essential to the non-moving party’s case. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

As a practical matter, in showing that no genuine issue of material fact exists, the movant must submit admissible evidence in order to sustain this burden. See *Duluth News-Tribune v. Mesabi Pub. Co.*, 84 F.3d 1093, 1098 (8th Cir. 1996). Thus, for example, if the moving party attempts to demonstrate that no genuine issue of material fact exists by submitting letters, documents, or other evidence that constitutes inadmissible hearsay, or that lacks foundation, summary judgment is inappropriate. See, e.g., *Fajardo Shopping Ctr., S.E. v. Sun alliance Ins. Co. of P.R. Inc.*, 167 F.3d 1, 9 (1st Cir. 1999) (letter was inadmissible hearsay, and therefore could not be considered on motion for summary judgment); *St. Paul Mercury Ins. Co. v. Williamson*, 986 F.Supp. 409, 423-24 (W.D. La. 1997) (holding that documents which are inadmissible for lack of authentication cannot be used to secure summary judgment).

Moreover, in assessing whether a genuine issue of material fact exists, the court is required to view the facts and evidence in a light most favorable to the non-moving party, and to give that party the benefit of all reasonable inferences from the evidence. See, e.g., *Christopher v. Adams Mark Hotels*, 137 F.3d 1069, 1070 (8th Cir. 1998). But, the non-moving party cannot defeat a summary judgment claim by relying on conclusory statements, or claims that the moving party’s evidence is not credible. See *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996). Rather, the non-moving party’s opposition must be supported with evidence from which a reasonable inference can be drawn, without speculation, that a material factual dispute exists. See *Frieze v. Boatmen’s Bank of Belton*, 950 F.2d 538, 541 (8th Cir. 1991).

B. In Missouri Courts

Missouri Supreme Court Rule 74.04 governs summary judgments in Missouri. Rule 74.04 requires a carefully crafted motion for summary judgment, providing that moving parties shall “state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue, with specific references to the pleadings, discovery or affidavits that demonstrate the lack of a genuine issue as to such facts.” A motion which fails to satisfy these requirements is defective, see, e.g., *Midwest Precision Casting Co. v. Microdyne, Inc.*, 965 S.W.2d

393, 394-96 (Mo. App. 1998), and an “incorporation by reference of a memorandum of law does not negate the requirements which are necessary for a properly drafted motion for summary judgment.” *Finley v. St. John’s Mercy Med. Ctr.*, 903 S.W.2d 670, 672-73 (Mo. App. 1995).

Apart from these highly rigorous pleading requirements, the standard for summary judgment in Missouri courts largely mirrors that employed by federal courts. Rule 74.04(c)(3) requires a court to enter summary judgment “forthwith” if the motion and the non-moving party’s response “show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Again, as in federal court, Missouri courts require that only evidence that is admissible at trial can sustain or avoid summary judgment. See *Muegler v. Berndsen*, 964 S.W.2d 459, 463 (Mo. App. 1998).

Recently, in *New Prime, Inc. v. Professional Logistics Management, Co.*, 28 S.W.3d 898 (Mo. App. S.D. 2000), the Southern District ruled that reply suggestions or memoranda could not be considered in support of the movant’s motion for summary judgment under the terms of Rule 74.04(c). In light of this decision, the Missouri Bar Civil Practice and Procedure Committee intends to consider whether to recommend a change or amendment to Rule 74.04(c).

III. MOTIONS IN LIMINE

Motions in limine serve a valuable purpose in civil as well as criminal trial settings. Timely use of a motion in limine can ensure that no reference whatsoever to damaging or unfavorable evidence is adduced at trial.

Generally speaking, the same principles set forth in Section II(A) of the discussion of criminal pre-trial motions above apply to motions in limine in criminal cases. In civil cases, virtually any evidentiary issue can be raised via a motion in limine, including, but not limited to, 1) impermissible references to insurance coverage; 2) impermissible references to net worth or claims for punitive damages; 3) exclusion of character or “other act” evidence, including other accidents; 4) subsequent remedial measures; 5) evidence of statements made to facilitate settlement; 6) improper expert opinions; 7) hearsay issues; 8) prior convictions; 9) “unfairly prejudicial” evidence; 10) lay opinions, and other such inadmissible evidence.

Again, it should be noted that, in Missouri courts, a trial court’s ruling denying a motion in limine preserves nothing for appellate review. A contemporaneous objection must be made to the challenged evidence when its admission is sought at trial. In the absence of such a contemporaneous objection, the claim of error can be reviewed only

for plain error affecting substantial rights of the appellant. Under the newly amended Federal Rule of Evidence 103, however, a pre-trial ruling on a motion in limine is sufficient to preserve the issue raised in the motion in limine for appellate review.

IV. MOTIONS FOR PROTECTIVE ORDERS IN DISCOVERY

Protective orders may be sought with respect to discovery in both federal and Missouri courts. In federal courts, Fed. R. Civ. P. 26 governs requests for protective orders, while Mo. R. Civ. P. 56.01 controls in Missouri courts. A motion for a protective order is calculated to relieve a party, in some fashion, from discovery requests that seek privileged or confidential matters, trade secrets, embarrassing or irrelevant matters such as sexual history, or burdensome or harrassing discovery requests, upon “good cause shown.” The term “good cause” has been, and will typically be, the subject of much litigation, but generally speaking, the moving party must state cause with particularity, and the court will only find good cause “based on particular actual demonstration of potential harm, not on conclusory statements.” *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986).

Once “good cause” is established, and a rationale for entering a protective order has been found, the court has wide latitude, in its discretion, to fashion a proper remedy “which justice requires under Rule 26(c). The non-exhaustive list of remedies set forth in the rule itself include: 1) that the disclosure or discovery not be had; 2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of time or place; 3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; 4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; 5) that the discovery be conducted with no one present except persons designated by the court; 6) that a deposition, after being sealed, be opened only by order of the court; 7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and 8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

V. OTHER MISCELLANEOUS MOTIONS IN CIVIL CASES

There exist many other important and useful motions in civil cases, including motions to sever a party or count (Fed. R. Civ. P. 3(i) and 21); motions to consolidate (Fed. R. Civ. P. 42); motions to dismiss a party (Fed. R. Civ. P. 21; Mo. R. Civ. P. 52.13); motions to join a party (Fed. R. Civ. P. 19; Mo. R. Civ. P. 52.04); motions to amend pleadings (Fed. R. Civ. P. 15; Mo. R. Civ. P. 55.33); motions to compel discovery (Fed. R. Civ. P. 37; Mo. R. Civ. P. 61.01); motions to strike pleadings (Fed. R. Civ. P.

12(f); Mo. R. Civ. P. 55.27(e)); motions for jury trial (Fed. R. Civ. P. 38); motions for sanctions (Fed. R. Civ. P. 11; Mo. R. Civ. P. 61.01); motion for more definite statement (Fed. R. Civ. P. 12(e); Mo. R. Civ. P. 55.27(d); motion for interpleader (Fed. R. Civ. P. 22; Mo. R. Civ. P. 52.07); motion to intervene (Fed. R. Civ. P. 24; Mo. R. Civ. P. 52.12); motion for default judgment (Fed. R. Civ. P. 55(a); Mo. R. Civ. P. 74.05).