DISCOVERY AND PROCEDURE BEFORE TRIAL

ABA STANDARD

PART I. GENERAL PRINCIPLES

1.1 PROCEDURAL NEEDS PRIOR TO TRIAL.

(a) PROCEDURES PRIOR TO TRIAL SHOULD SERVE THE FOLLOWING NEEDS:

(i) TO PROMOTE AN EXPEDITIOUS AS WELL AS FAIR DETERMINATION OF THE CHARGES, WHETHER BY PLEA OR TRIAL;

(ii) TO PROVIDE THE ACCUSED SUFFICIENT INFORMATION TO MAKE AN INFORMED PLEA;

(iii) TO PERMIT THOROUGH PREPARATION FOR TRIAL AND MINIMIZE SURPRISE AT TRIAL;

(iv) TO AVOID UNNECESSARY AND REPETITIOUS TRIALS BY EXPOSING ANY LATENT PROCEDURAL OR CONSTITUTIONAL ISSUES AND AFFORDING REMEDIES THEREFOR PRIOR TO TRIAL;

(v) TO REDUCE INTERRUPTIONS AND COMPLICATIONS OF TRIALS BY IDENTIFYING ISSUES COLLATERAL TO GUILT OR INNOCENCE, AND DETERMINING THEM PRIOR TO TRIAL; AND

(vi) TO EFFECT ECONOMIES IN TIME, MONEY, AND JUDICIAL AND PROFESSIONAL TALENTS BY MINIMIZING PAPERWORK, REPETITIOUS ASSERTIONS OF ISSUES, AND THE NUMBER OF SEPARATE HEARINGS.

(b) THESE NEEDS CAN BE SERVED BY (i) FULLER DISCOVERY, (ii) SIMPLER AND MORE EFFICIENT PROCEDURES, AND (iii) PROCEDURAL PRESSURES FOR EXPEDITING THE PROCESSING OF CASES.

1.2 SCOPE OF DISCOVERY.

IN ORDER TO PROVIDE ADEQUATE INFORMATION FOR INFORMED PLEAS, EXPEDITE TRIALS, MINIMIZE SURPRISE, AFFORD OPPORTUNITY FOR EFFECTIVE CROSS-EXAMINATION, AND MEET THE REQUIREMENTS OF DUE PROCESS, DISCOVERY PRIOR TO TRIAL SHOULD BE AS FULL AND FREE AS POSSIBLE CONSISTENT WITH PROTECTION OF PERSONS, EFFECTIVE LAW ENFORCEMENT, THE ADVERSARY SYSTEM, AND NATIONAL SECURITY.

1.3 PROCEDURAL CONCEPT.

EFFECTIVE PROCEDURE PRIOR TO TRIAL SHOULD NORMALLY ENCOMPASS THREE SUCCESSIVE STAGES:

(a) MEETINGS BETWEEN DEFENSE COUNSEL AND THE PROSECUTING ATTORNEY WHERE, WITHOUT COURT INTERVENTION, THEY WILL ENGAGE IN REQUIRED DISCOVERY, EXPLORE ADDITIONAL DISCRETIONARY DISCOVERY, CONDUCT INVESTIGATION AS NEEDED, AND ENTER UPON PLEA DISCUSSIONS;

(b) COURT HEARINGS WITH COUNSEL TO ENSURE THE PROPER CONDUCT OF REQUIRED DISCOVERY, RULE ON MATTERS OF DISCRETIONARY DISCOVERY, EXPOSE AND DETERMINE LATENT PROCEDURAL OR CONSTITUTIONAL ISSUES, AND OBVIATE CUMBERSOME MOTION PRACTICES; AND

(c) PREPARATION FOR TRIAL WHICH, IN CASES WHERE THE TRIAL IS LIKELY TO BE PROTRACTED OR UNUSUALLY COMPLICATED, SHOULD INCLUDE A PRETRIAL CONFERENCE.

1.4 RESPONSIBILITIES OF THE TRIAL COURT AND OF COUNSEL.

(a) TRIAL COURT. THE TRIAL COURT SHOULD, ON ITS OWN INITIATIVE, PROVIDE FOR THE EXERCISE OF DISCOVERY AUTOMATICALLY, WITHOUT THE FILING OF FORMAL REQUESTS OR SUPPORTING DOCUMENTS. THE COURT SHOULD SUPERVISE THE EXERCISE OF DISCOVERY TO THE EXTENT NECESSARY TO ENSURE THAT IT PROCEEDS PROPERLY, EXPEDITIOUSLY AND WITH A MINIMUM OF IMPOSITION ON THE TIME AND ENERGIES OF THE COURT, COUNSEL, AND PROSPECTIVE WITNESSES. IN ANY EVENT, THE COURT SHOULD ENCOURAGE EFFECTIVE AND TIMELY DISCOVERY CONDUCTED VOLUNTARILY AND INFORMALLY BETWEEN COUNSEL. THE COURT SHOULD TAKE THE INITIATIVE AT APPROPRIATE TIMES IN ENSURING THAT ANY LATENT PROCEDURAL OR CONSTITUTIONAL ISSUES ARE EXPOSED AND DETERMINED PRIOR TO TRIAL. TO THESE ENDS, THE COURT SHOULD PROVIDE APPROPRIATE CHECK-LIST FORMS, TIME SCHEDULES, AND HEARINGS; AND HEARINGS SHOULD BE CONSOLIDATED, IF POSSIBLE, WITH ANY OTHER HEARINGS TO BE HELD IN THE CASE PRIOR TO THE TRIAL.

(b) COUNSEL. PROSECUTION AND DEFENSE COUNSEL SHOULD TAKE THE INITIATIVE AND CONDUCT REQUIRED DISCOVERY WILLINGLY AND EXPEDITIOUSLY, WITH A MINIMUM OF IMPOSITION ON THE TIME AND ENERGIES OF THE COURT, COUNSEL, AND PROSPECTIVE WITNESSES. COUNSEL SHOULD BE ASTUTE AND DILIGENT IN DEFINING ISSUES WHICH CAN MOST EFFICIENTLY BE DISPOSED OF PRIOR TO TRIAL, AND SHOULD ENGAGE IN PLEA DISCUSSIONS IN AN EFFECTIVE AND TIMELY MANNER. ONLY THROUGH THE INITIATIVE AND COOPERATION OF COUNSEL IN EFFECTING THESE STANDARDS CAN CRIMINAL CASES BE FAIRLY AND TIMELY DISPOSED OF, AS JUSTICE REQUIRES.

1.5 APPLICABILITY.

THESE STANDARDS SHOULD BE APPLIED TO ALL SERIOUS CRIMINAL CASES.

KANSAS CODE

> This code is intended to provide for the just determination of every criminal proceeding. Its provisions shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. (K.S.A. 1971 Supp. 22-2103).

COMMENT

This is only a declaration of general principles. The only comparable Kansas law is the cited section applicable to the entire code of criminal procedure. Comparisons as to specific standards follow.

ABA STANDARD

PART II. DISCLOSURE TO ACCUSED.

2.1 PROSECUTOR'S OBLIGATIONS.

(a) EXCEPT AS IS OTHERWISE PROVIDED AS TO MATTERS NOT SUBJECT TO DISCLOSURE (SECTION 2.6) AND PROTECTIVE ORDERS (SECTION 4.4), THE PROSECUTING ATTORNEY SHALL DISCLOSE TO DEFENSE COUNSEL THE FOLLOWING MATERIAL AND INFORMATION WITHIN HIS POSSESSION OR CONTROL:

(i) THE NAMES AND ADDRESSES OF PERSONS WHOM THE PROSECUTING ATTORNEY INTENDS TO CALL AS WITNESSES AT THE HEARING OR TRIAL, TOGETHER WITH THEIR RELEVANT WRITTEN OR RECORDED STATEMENTS;

KANSAS CODE

The prosecuting attorney shall endorse the names of all witnesses known to him upon the information or indictment at the time of filing the same. He may endorse thereon the names of other witnesses as may afterward become known to him, at such times as the court may rule or otherwise prescribe. (K.S.A. 22-3201 (6) (1974)).

(1) In any criminal prosecution brought by the state of Kansas, no statement or report in the possession of the prosecution which was made by a state witness or prospective state witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination at the preliminary hearing or in the trial of the case.

(2) After a witness called by the state has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement (as hereinafter defined) of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be

delivered directly to the defendant for his examination and use.

(3) If the prosecution claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the prosecution to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire test of such statement shall be preserved by the prosecution and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(4) The term "statement" as used in subsections (2) and (3) of this section in relation to any witness called by the prosecution means -

(a) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement. (K.S.A. 1971 Supp. 22-3213).

COMMENT

The Kansas code conforms with the Standard as to supplying the names of intended witnesses. However, the time of disclosure of witnesses' statements is not the same.

The Kansas provision relating to the endorsement of names on the information is substantially the same as in the former statute provision K.S.A. 62-802. The trial court in its sound discretion may permit or deny the endorsement of additional witnesses at any time subsequent to the filing of the information, including during the trial. (State v. Campbell, 207 Kan. 152, 483 P.2d 495 (1971)). Failure to endorse names at the time of filing is a nonjurisdictional defect. (Barrett v. Hand, 181 Kan. 916, 317 P.2d 412 (1957)). The endorsement of additional names is not an amendment of the information, the information need not be reverified, the defendant is not entitled to rearraignment and it must be clearly shown that the court abused its discretion in permitting the endorsement and this abuse resulted in material prejudice before it constitutes reversible error. (State v. Mader, 196 Kan. 469, 412 P.2d 1001 (1966)). It is not error to permit a witness whose name is not endorsed on the information to testify in rebuttal. (State v. Bean, 181 Kan. 1044, 317 P.2d 480 (1957)).

The provision of the Kansas code as to disclosure of witnesses' statements is patterned after 18 U.S.C.A. section 3500, commonly referred to as the Jencks Act. See Note, Judicial Council, 1969, following K.S.A. 1971 Supp. 22-3213. The passage of the Jencks Act followed the case of Jencks v. United States, 353 U.S. 657 (1957), in which case it was held that the defense in a federal prosecution is entitled to obtain, for impeachment purposes, documents containing statements made by government witnesses to government agents where a sufficient foundation is established by the testimony of the witness that the statements are of the event and activity related in his testimony; that the defendant is not required to lay a preliminary foundation of inconsistency between trial testimony of the witness and his statements in the possession of the government in order to be entitled to the production of such statements; and that the trial judge is not to examine the statements to determine whether they contain matters which are inconsistent with the testimony of the witness before deciding whether the requested statements should be turned over to the defense in such case.

Under prior Kansas law, the production and inspection of witnesses' statements had been denied. In State v. Furthmyer, 128 Kan. 317, 277 Pac. 1019 (1929), the refusal to inspect copies of defendant's and witnesses' statements was upheld. The Kansas court also declared that a report compiled by a law enforcement agency in a criminal investigation

is quasi-private in character and that it was not error to deny defendant's motion to require the state to produce the same for inspection. (State v. Lemon, 203 Kan. 464, 454 P.2d 718 (1969)). This rule has been applied to statements taken by police officers and to statements of any witnesses not called at the preliminary examination, (State v. Young, 203 Kan. 296, 454 P.2d 724 (1969) and State v. Jones, 202 Kan. 31, 446 P.2d 85, (1968)) and to tape recordings of witnesses to a shooting. (State v. Metcalf, 203 Kan. 63, 452 P.2d 842 (1969)).

The request for examination of statements under 22-3213 must be directed to the trial court. (State v. Wigley, 210 Kan. 472, 502 P.2d 819 (1972).

ABA STANDARD

(ii) ANY WRITTEN OR RECORDED STATEMENTS AND THE SUBSTANCE OF ANY ORAL STATEMENTS MADE BY THE ACCUSED, OR MADE BY A CODEFENDANT IF THE TRIAL IS TO BE A JOINT ONE;

KANSAS CODE

> Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, which are or have been in the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney;
>
> Memoranda of any oral confession made by the defendant and a list of the witnesses to such confession, the existence of which is known, or by the exercise of due diligence may become known to the prosecuting attorney, (K.S.A. 22-3212 (1974) (1) (a) and (d)). See K.S.A. 22-3213 (1974) cited in 2.1 supra.

COMMENT

Except as to the statement made by a codefendant, Kansas law is the same as the Standard.

The requirement relating to a defendant is broader than for witnesses - as in K.S.A. 22-3213 (1974) in that the witnesses' statement may only be required to be produced at the trial, and

after a witness has been called to testify on direct examination, whereas inspection and copy of a statement of a defendant is permitted by pretrial motion.

In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court held that it was constitutional error, as a violation of the accused's right of cross-examination, to admit in evidence the confession of a codefendant in a joint trial, who does not testify, which confession inculpated the accused, and notwithstanding jury instructions that the codefendant's confession must be disregarded in determining the accused's guilt or innocence. Pretrial disclosure of a confession appears to be necessary in order to determine if a severance should be requested or if a codefendant's statement can be excised sufficiently to remove prejudicial and inadmissible statements. See Standard on Joinder and Severance, Sec. 2.3.

ABA STANDARD

(iii) THOSE PORTIONS OF GRAND JURY MINUTES CONTAINING TESTIMONY OF THE ACCUSED AND RELEVANT TESTIMONY OF PERSONS WHOM THE PROSECUTING ATTORNEY INTENDS TO CALL AS WITNESSES AT THE HEARING OR TRIAL.

KANSAS CODE

> Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant...recorded testimony of the defendant before a grand jury or at an inquisition. (K.S.A. 1971 Supp. 22-3212(1)(c)).
>
> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the prosecuting attorney for use in the performance of his duties. Otherwise a juror, attorney, interpreter, reporter or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule... (K.S.A. 1971 Supp. 22-3012).

COMMENT

The Kansas Code is the same as the Standard as related to the defendant and also extends the same rule as to inquisitions.

The Standard makes the same requirement as to statements of other witnesses as in subsection 2 (a) (i) and (ii), applicable to witnesses' statements in the form of grand jury testimony. In Dennis v. United States, 384 U.S. 855 (1966), the Supreme Court indicates a liberalized trend from the policy of grand jury secrecy to a rule that permits minutes to be selectively disclosed upon a showing of particularized need.

The testimony of a person before a grand jury who is subsequently called as a witness would be subject to disclosure as provided by K.S.A. 1971, Supp. 22-3213 under 2.1 above.

The new Kansas Code provision authorizes the disclosure of defendant's statements equivalent to the standard, but only when directed by the Court. Disclosure is consistent with an early Kansas case which held such may be done when it becomes necessary in the furtherance of justice or for the protection of public or individual rights. (State v. Campbell, 73 Kan. 688, 85 Pac. 784 (1906)). For further discussion, see, Annotation, Accused's Right to Inspection of Minutes of State Grand Jury, 20 A.L.R. 3rd 7.

ABA STANDARD

(iv) ANY REPORTS OR STATEMENTS OF EXPERTS, MADE IN CONNECTION WITH THE PARTICULAR CASE, INCLUDING RESULTS OF PHYSICAL OR MENTAL EXAMINATIONS AND OF SCIENTIFIC TESTS, EXPERIMENTS OR COMPARISONS.

KANSAS CODE

> Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant ... results or reports of physical or mental examination, and of scientific tests or experiments made in connection with the particular case, or copies thereof, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney. (K.S.A. 1971 Supp. 22-3212(1) (b)).

COMMENT

The Kansas code fully conforms to the Standard. State v. Lightle, 210 Kan. 415, 502 P.2d 834 (1972) states that a request by the defendant must be timely made under K.S.A. 1974 Supp. 3212.

ABA STANDARD

(v) ANY BOOKS, PAPERS, DOCUMENTS, PHOTOGRAPHS OR TANGIBLE OBJECTS, WHICH THE PROSECUTING ATTORNEY INTENDS TO USE IN THE HEARING OR TRIAL OR WHICH WERE OBTAINED FROM OR BELONG TO THE ACCUSED; AND

KANSAS CODE

> Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies, or portions thereof, which are or have been within the possession, custody or control of the prosecution upon a showing of materiality to the case and that the request is reasonable. Except as provided in subsections (1) (b) and (1) (d), this section does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by officers in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses (other than the defendant) except as may be provided by law. (K.S.A. 22-3212 (2) (1974)). See (1) (b) under 2.1 (a) (iv) and (1) (d) under 2.1 (a) (ii), supra.

COMMENT

The Kansas code conforms with the Standard in part, but is qualified to the extent that it precludes discovery or inspection of reports, or other internal government documents made by officers in connection with the investigation or prosecution of the case, or of witnesses' statements, other than defendant, except as may be provided by subsection (1) (b) referred to under 2.1 (a) (iv), supra, relating to reports or statements of experts, and (1) (d) referred to under 2.1 (a) (ii), supra, relating to disclosure of witnesses' statements during the trial.

ABA STANDARD

(vi) ANY RECORD OF PRIOR CRIMINAL CONVICTIONS OF PERSONS WHOM THE PROSECUTING ATTORNEY INTENDS TO CALL AS WITNESSES AT THE HEARING OR TRIAL.

KANSAS CODE

No comparable code provision.

COMMENT

There is no conformity with the Standard. The extent of use of a record of criminal conviction is otherwise limited by statute. There does not appear to be as great a need in Kansas for this requirement because of this statutory limitation.

The applicable rule of evidence (K.S.A. 60-421) provides that "Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility." In State v. Armstrong, 207 Kan. 681, 486 P.2d 1322 (1971), it was held to be error to ask a question as to convictions generally and that the examination must be limited to those crimes of inherent dishonesty specified in the statute, citing with approval Tucker v. Lower, 200 Kan. 1, 434 P.2d 320 (1967), in which it was held that drunkenness, reckless driving, allowing an unauthorized person to drive and having an open bottle in the car are not crimes involving dishonesty or false statement,and that larceny and receiving stolen property are in the classification of such crimes.

ABA STANDARD

(b) THE PROSECUTING ATTORNEY SHALL INFORM DEFENSE COUNSEL:
(i) WHETHER THERE IS ANY RELEVANT RECORDED GRAND JURY TESTIMONY WHICH HAS NOT BEEN TRANSCRIBED.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code does not conform to the Standard. As to the right of discovery of grand jury proceedings, see section 2.1 (a) (ii), Kansas code and comment cited supra.

ABA STANDARD

(ii) WHETHER THERE HAS BEEN ANY ELECTRONIC SURVEILLANCE (INCLUDING WIRETAPPING) OF CONVERSATIONS TO WHICH THE ACCUSED WAS A PARTY OR OF HIS PREMISES.

KANSAS CODE

See L. 1974, ch. 150.

COMMENT

Kansas law is in conformity with the Standard.

In Alderman v. United States, 394 U.S. 165 (1969), it was held that surveillance records as to which a petitioner had standing to object, under a claim of illegal search under Fourth Amendment protection, should be turned over to him without being screened in camera by the trial judge, and that the task was too complex and the margin for error too great to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the Government's case. See Standard, Electronic Surveillance.

ABA STANDARD

(c) EXCEPT AS IS OTHERWISE PROVIDED AS TO PROTECTIVE ORDERS (SECTION 4.4), THE PROSECUTING ATTORNEY SHALL DISCLOSE TO DEFENSE COUNSEL ANY MATERIAL OR INFORMATION WITHIN HIS POSSESSION OR CONTROL WHICH TENDS TO NEGATE THE GUILT OF THE ACCUSED AS TO THE OFFENSE CHARGED OR WOULD TEND TO REDUCE HIS PUNISHMENT THEREFOR.

(d) THE PROSECUTING ATTORNEY'S OBLIGATIONS UNDER THIS SECTION EXTEND TO MATERIAL AND INFORMATION IN THE POSSESSION OR CONTROL OF MEMBERS OF HIS STAFF AND OF ANY OTHERS WHO HAVE PARTICIPATED IN THE INVESTIGATION OR EVALUATION OF THE CASE AND WHO EITHER REGULARLY REPORT OR WITH REFERENCE TO THE PARTICULAR CASE HAVE REPORTED TO HIS OFFICE.

KANSAS CODE

> A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. (K.S.A. 1974 Supp. 7-125, DR 7-103 (b)).

COMMENT

Kansas requirement is in accord with the Standard (c). Although there is no specific recital as in Standard (d), reasonable interpretation of the code provision would appear to require that the obligation should extend to include knowledge of all persons who have participated in the investigation.

In Brady v. Maryland, 373 U.S. 83 (1963), it was held to be constitutionally required that the prosecution disclose evidence favorable to an accused where the evidence is material either to guilt or punishment.

ABA STANDARD

2.2 PROSECUTOR'S PERFORMANCE OF OBLIGATIONS.

(a) THE PROSECUTING ATTORNEY SHOULD PERFORM HIS OBLIGATIONS UNDER SECTION 2.1 AS SOON AS PRACTICABLE FOLLOWING THE FILING OF CHARGES AGAINST THE ACCUSED.

(b) THE PROSECUTING ATTORNEY MAY PERFORM THESE OBLIGATIONS IN ANY MANNER MUTUALLY AGREEABLE TO HIMSELF AND DEFENSE COUNSEL OR BY:

(i) NOTIFYING DEFENSE COUNSEL THAT MATERIAL AND INFORMATION, DESCRIBED IN GENERAL TERMS, MAY BE INSPECTED, OBTAINED, TESTED, COPIED OR PHOTOGRAPHED, DURING SPECIFIED, REASONABLE TIMES; AND

(ii) MAKING AVAILABLE TO DEFENSE COUNSEL AT THE TIME SPECIFIED SUCH MATERIAL AND INFORMATION, AND SUITABLE FACILITIES OR OTHER ARRANGEMENTS FOR INSPECTION, TESTING, COPYING AND PHOTOGRAPHING OF SUCH MATERIAL AND INFORMATION.

(c) THE PROSECUTING ATTORNEY SHOULD ENSURE THAT A FLOW OF INFORMATION IS MAINTAINED BETWEEN THE VARIOUS INVESTIGATIVE PERSONNEL AND HIS OFFICE SUFFICIENT TO PLACE WITHIN HIS POSSESSION OR CONTROL ALL MATERIAL AND INFORMATION RELEVANT TO THE ACCUSED AND THE OFFENSE CHARGED.

KANSAS CODE

See K.S.A. 22-3201 (6) (1974) and K.S.A 22-3212 (1974) cited under 2.1 supra; and K.S.A. 22-3212 (1) (a) and (d), and (b) and (c) and (2) (1974) cited under 2.1 (a) (ii), (iv), (iii) and (v) respectively supra.

COMMENT

The Kansas code differs from the Standard in that except as to endorsement of names of witnesses on the information and complaint, disclosure is compelled only upon motion of the defendant.

ABA STANDARD

2.3 ADDITIONAL DISCLOSURES UPON REQUEST AND SPECIFICATION.

EXCEPT AS IS OTHERWISE PROVIDED AS TO MATTERS NOT SUBJECT TO DISCLOSURE (SECTION 2.6) AND PROTECTIVE ORDERS (SECTION 4.4), THE PROSECUTING ATTORNEY SHALL, UPON REQUEST OF DEFENSE COUNSEL, DISCLOSE AND PERMIT INSPECTION, TESTING, COPYING AND PHOTOGRAPHING OF ANY RELEVANT MATERIAL AND INFORMATION REGARDING:

(a) SPECIFIED SEARCHES AND SEIZURES;

(b) THE ACQUISITION OF SPECIFIED STATEMENTS FROM THE ACCUSED; AND

(c) THE RELATIONSHIP, IF ANY, OF SPECIFIED PERSONS TO THE PROSECUTING AUTHORITY.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas does not conform with this Standard. Disclosure might be considered required under the obligation to disclose matters that would negate guilt. See 2.1 (c) above.

ABA STANDARD

2.4 MATERIAL HELD BY OTHER GOVERNMENTAL PERSONNEL.

UPON DEFENSE COUNSEL'S REQUEST AND DESIGNATION OF MATERIAL OR INFORMATION WHICH WOULD BE DISCOVERABLE IF IN THE POSSESSION OR CONTROL OF THE PROSECUTING ATTORNEY AND WHICH IS IN THE POSSESSION OR CONTROL OF OTHER GOVERNMENTAL PERSONNEL, THE PROSECUTING ATTORNEY SHALL USE DILIGENT GOOD FAITH EFFORTS TO CAUSE SUCH MATERIAL TO BE MADE AVAILABLE TO DEFENSE COUNSEL; AND IF THE PROSECUTING ATTORNEY'S EFFORTS ARE UNSUCCESSFUL AND SUCH MATERIAL OR OTHER GOVERNMENTAL PERSONNEL ARE SUBJECT TO THE JURISDICTION OF THE COURT, THE COURT SHALL ISSUE SUITABLE SUBPOENAS OR ORDERS TO CAUSE SUCH MATERIAL TO BE MADE AVAILABLE TO DEFENSE COUNSEL.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas does not conform with this Standard.

ABA STANDARD

2.5 DISCRETIONARY DISCLOSURES.

(a) UPON A SHOWING OF MATERIALITY TO THE PREPARATION OF THE DEFENSE, AND IF THE REQUEST IS REASONABLE, THE COURT IN ITS DISCRETION MAY REQUIRE DISCLOSURE TO DEFENSE COUNSEL OF RELEVANT MATERIAL AND INFORMATION NOT COVERED BY SECTIONS 2.1, 2.3 AND 2.4.

(b) THE COURT MAY DENY DISCLOSURE AUTHORIZED BY THIS SECTION IF IT FINDS THAT THERE IS A SUBSTANTIAL RISK TO ANY PERSON OF PHYSICAL HARM, INTIMIDATION, BRIBERY, ECONOMIC REPRISALS OR UNNECESSARY ANNOYANCE OR EMBARRASSMENT, RESULTING FROM SUCH DISCLOSURE, WHICH OUTWEIGHS ANY USEFULNESS OF THE DISCLOSURE TO DEFENSE COUNSEL.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas does not conform with this requirement. For the extent of authorized discovery, see in full, K.S.A. 1971 Supp. 22-3212, cited in part under 2.1(ii) to (v) inclusive, supra.

ABA STANDARD

2.6 MATTERS NOT SUBJECT TO DISCLOSURE.

(a) WORK PRODUCT. DISCLOSURE SHALL NOT BE REQUIRED OF LEGAL RESEARCH OR OF RECORDS, CORRESPONDENCE, REPORTS OR MEMORANDA TO THE EXTENT THAT THEY CONTAIN THE OPINIONS, THEORIES OR CONCLUSIONS OF THE PROSECUTING ATTORNEY OR MEMBERS OF HIS LEGAL STAFF.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas conforms with this Standard. This results from the fact that this Standard is stated negatively. There is no affirmative requirement for disclosure that would extend to the work product area. See K.S.A. 1971 Supp. 22-3212 (2) under 2.1 a(v) supra.

ABA STANDARD

(b) INFORMANTS. DISCLOSURE OF AN INFORMANT'S IDENTITY SHALL NOT BE REQUIRED WHERE HIS IDENTITY IS A PROSECUTION SECRET AND A FAILURE TO DISCLOSE WILL NOT INFRINGE THE CONSTITUTIONAL RIGHTS OF THE ACCUSED. DISCLOSURE SHALL NOT BE DENIED HEREUNDER OF THE IDENTITY OF WITNESSES TO BE PRODUCED AT A HEARING OR TRIAL.

KANSAS CODE

> A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this state or of the United States to a representative of the state or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues. (K.S.A. 60-436).

COMMENT

Kansas conforms with this Standard.

The rules of evidence are made applicable to criminal proceedings by K.S.A. 60-402.

In McCroy v. Illinois, 386 U.S. 300 (1967), the Supreme Court held, on a pretrial motion to suppress evidence, that the governmental privilege against disclosure of the identity of an informer

is well established, and constitutional provisions are not violated by refusal to disclose informant's identity, used as a basis for probable cause for arrest and search.

This case is cited and followed in State v. Robinson, 203 Kan. 304, 454 P2d 527 (1969) in which it was held that whether the identity of an informer should be disclosed rests in the sound discretion of the trial court. To the same effect is State v. Grider, 206 Kan. 537, 479 P2d 818, (1971).

ABA STANDARD

(c) NATIONAL SECURITY. DISCLOSURE SHALL NOT BE REQUIRED WHERE IT INVOLVES A SUBSTANTIAL RISK OF GRAVE PREJUDICE TO NATIONAL SECURITY AND A FAILURE TO DISCLOSE WILL NOT INFRINGE THE CONSTITUTIONAL RIGHTS OF THE ACCUSED. DISCLOSURE SHALL NOT THUS BE DENIED HEREUNDER REGARDING WITNESSES OR MATERIAL TO BE PRODUCED AT A HEARING OR TRIAL.

KANSAS CODE

> (a) As used in this section, "secret of state" means information not open or theretofore officially disclosed to the public involving the public security or concerning the military or naval organization or plans of the United States, or a state or territory, or concerning international relations.
>
> (b) A witness has a privilege to refuse to disclose a matter on the ground that it is a secret of state, and evidence of the matter is inadmissible, (1) if the judge finds that the matter is a secret of state, or (2) unless the chief officer of the department of government administering the subject matter which the secret concerns has consented that it be disclosed in the action. (K.S.A. 60-433).

COMMENT

The Kansas code conforms with this Standard.

The rules of evidence are made applicable to criminal proceedings by K.S.A. 60-402.

ABA STANDARD

PART III. DISCLOSURE TO PROSECUTION

3.1 THE PERSON OF THE ACCUSED.

(a) NOTWITHSTANDING THE INITIATION OF JUDICIAL PROCEEDINGS, AND SUBJECT TO CONSTITUTIONAL LIMITATIONS, A JUDICIAL OFFICER MAY REQUIRE THE ACCUSED TO:

(i) APPEAR IN A LINE-UP;

(ii) SPEAK FOR IDENTIFICATION BY WITNESS TO AN OFFENSE;

(iii) BE FINGERPRINTED;

(iv) POSE FOR PHOTOGRAPHS NOT INVOLVING REENACTMENT OF A SCENE;

(v) TRY ON ARTICLES OF CLOTHING;

(vi) PERMIT THE TAKING OF SPECIMENS OF MATERIAL UNDER HIS FINGERNAILS;

(vii) PERMIT THE TAKING OF SAMPLES OF HIS BLOOD, HAIR, AND OTHER MATERIALS OF HIS BODY WHICH INVOLVE NO UNREASONABLE INTRUSION THEREOF;

(viii) PROVIDE SPECIMENS OF HIS HANDWRITING; AND

(ix) SUBMIT TO A REASONABLE PHYSICAL OR MEDICAL INSPECTION OF HIS BODY.

(b) WHENEVER THE PERSONAL APPEARANCE OF THE ACCUSED IS REQUIRED FOR THE FOREGOING PURPOSES, REASONABLE NOTICE OF THE TIME AND PLACE OF SUCH APPEARANCE SHALL BE GIVEN BY THE PROSECUTING ATTORNEY TO THE ACCUSED AND HIS COUNSEL. PROVISION MAY BE MADE FOR APPEARANCES FOR SUCH PURPOSES IN AN ORDER ADMITTING THE ACCUSED TO BAIL OR PROVIDING FOR HIS RELEASE.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas law gives approval to decisions in substantial conformity with this Standard. Most of these disclosure requirements are referred to in Schmerber v. California, 384 U.S. 757 (1966). The Schmerber case is quoted from and followed in State v. Faidley, 202 Kan. 517, 450 P.2d 20 (1969), a case in which testimony was admitted of the heel-to-toe balance test which a suspect was required to perform on the highway.

(i) In Peterson v. State, 198 Kan. 26, 422 P2d 567, (1967), the trial court's ruling that defendant's constitutional rights were not violated when he was forced to appear in a line-up was upheld with the statement that the general rule is that the scope of the privilege of self-incrimination is limited to compulsory oral examination or the equivalent thereof.

(ii) The case of People v. Lopez, 60C 2d 223, 32 Cal. Rptr. 424, 384 P2d 16 in which it was held that defendants could be required to assume a certain pose for purposes of identification, or to speak for voice identification and that such were not within the constitutional privilege against self-incrimination, is cited with approval and followed in State v. Freeman, 195 Kan. 561, 408 P2d 612 (1965). In the Kansas case, the suspect in a police show-up was by the officers engaged in a conversation about his teeth, and it was held that the identification by the sound of his voice did not violate his constitutional rights.

(iii) No Kansas case.

(iv) No Kansas case.

(v) Use of boots, forcibly taken from defendant, with other evidence derived therefrom in comparison with heel print at the scene of crime was upheld in State v. Dodson, 207 Kan. 437, 485 P2d 1010 (1971).

(vi) No Kansas case.

(vii) There is cited and followed in State v. Walker, 199 Kan. 508, 430 P2d 246 (1967), the case of Schmerber v. California, 384 U.S. 757, 16 L Ed. 908, 86 S. Ct. 1826, reaffirming an earlier case which held the taking of blood from an unconscious defendant was constitutional, and declaring there was no violation of the privilege against self-incrimination, or a violation of search and seizure, to compel an accused to submit to a blood alcohol test despite his refusal, on the advice of counsel to take the test. It was said also that the taking of the blood alcohol test was not a denial of the right to counsel.

(viii) An accused who gave sample of handwriting at an abortive inquisition was held not to have been compelled to testify to the matter later used in the prosecution against her in State v. Hinkle, 178 Kan. 152, 269 P2d 465, (1954).

(b) Kansas practice follows this provision as inherent power of the court to require attendance for such purposes. The K.S.A. 1971 Supp. 22-2802 (1) bond release provisions include obligation.

to appear not later than the court day specified and "from time to time thereafter as the court may require."

ABA STANDARD

3.2 MEDICAL AND SCIENTIFIC REPORTS.

SUBJECT TO CONSTITUTIONAL LIMITATIONS, THE TRIAL COURT MAY REQUIRE THAT THE PROSECUTING ATTORNEY BE INFORMED OF AND PERMITTED TO INSPECT AND COPY OR PHOTOGRAPH ANY REPORTS OR STATEMENTS OF EXPERTS, MADE IN CONNECTION WITH THE PARTICULAR CASE, INCLUDING RESULTS OF PHYSICAL OR MENTAL EXAMINATIONS AND OF SCIENTIFIC TESTS, EXPERIMENTS OR COMPARISONS.

KANSAS CODE

> If the court grants relief sought by the defendant under subsection (1) (b) or subsection (2) of this section, it may, upon motion of the prosecution, condition its order by requiring that the defendant permit the attorney for the prosecution to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial, upon a showing of materiality to the case and that the request is reasonable. Except as to scientific or medical reports, this subsection does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution or defense witnesses, to the defendant, his agents or attorneys.
>
> An order of the court granting relief under this section shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.
>
> A motion under this section must be made no later than twenty (20) days after arraignment

or at such reasonable later time as the court may permit. The motion shall include all relief sought under this section. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice. (K.S.A. 1971 Supp. 22-3212 (3) (4) and (6)). See (1) (b) under 2.1 (a) (iv) and (2) under 2.1 (a) (v), supra.

COMMENT

The Kansas code conforms with the Standard. It makes clear the exclusion of the work product of defendant's attorney similar to that of the prosecution under 2.6 (a) above, and also internal defense documents of the defendant.

ABA STANDARD

3.3 NATURE OF DEFENSE.

SUBJECT TO CONSTITUTIONAL LIMITATIONS, THE TRIAL COURT MAY REQUIRE THAT THE PROSECUTING ATTORNEY BE INFORMED OF THE NATURE OF ANY DEFENSE WHICH DEFENSE COUNSEL INTENDS TO USE AT TRIAL AND THE NAMES AND ADDRESSES OF PERSONS WHOM DEFENSE COUNSEL INTENDS TO CALL AS WITNESSES IN SUPPORT THEREOF.

KANSAS CODE

In the trial of any criminal action where the complaint, indictment or information charges specifically the time and place of the crime alleged to have been committed, and the nature of the crime is such as necessitated the personal presence of the one who committed the crime, and the defendant proposes to offer evidence to the effect that he was at some other place at the time of the crime charged, he shall give notice in writing of that fact to the prosecuting attorney except that no such notice shall be required to allow testimony as to alibi, by the defendant himself, in his own defense. The notice shall state where defendant contends he was at the time of the crime, and shall have endorsed thereon the names of witnesses he proposes to use in support of such contention.

On due application, and for good cause shown, the court may permit defendant to endorse additional

names of witnesses on such notice, using the discretion with respect thereto applicable to allowing the prosecuting attorney to endorse names of additional witnesses on an information. The notice shall be served on the prosecuting attorney at least seven days before the commencement of the trial, and a copy thereof, with proof of such service, filed with the clerk of the court. For good cause shown the court may permit notice at a later date.

In the event the time and place of the crime are not specifically stated in the complaint, indictment or information, on application of defendant that the time and place be definitely stated in order to enable him to offer evidence in support of a contention that he was not present, and upon due notice thereof, the court shall direct the prosecuting attorney either to amend the complaint or information by stating the time and place of the crime, or to file a bill of particulars to the indictment or information stating the time and place of the crime; and thereafter defendant shall give the notice above provided if he proposes to offer evidence to the effect that he was at some other place at the time of the crime charged.

Unless the defendant gives the notice as above provided he shall not be permitted to offer evidence to the effect that he was at some other place at the time of the crime charged. In the event the time or place of the crime has not been specifically stated in the complaint, indictment or information, and the court directs it be amended, or a bill of particulars filed, as above provided, and the prosecuting attorney advises the court that he cannot safely do so on the facts as he has been informed concerning them; or if in the progress of the trial the evidence discloses a time or place of the crime other than alleged, but within the period of the statute of limitations applicable to the crime and within the territorial jurisdiction of the court, the action shall not abate or be discontinued for either of those

reasons, but defendant may, without having given the notice above mentioned, offer evidence tending to show he was at some other place at the time of the crime. (K.S.A. 1971 Supp. 22-3218).

Evidence of mental disease or defect excluding criminal responsibility is not admissible upon a trial unless the defendant serves upon the prosecuting attorney and files with the court a written notice of his intention to rely upon the defense of insanity. Such notice must be served and filed before trial and not more than thirty days after entry of the plea of not guilty to the information or indictment. For good cause shown the court may permit notice at a later date.

A defendant who files a notice of intention to rely on the defense of insanity thereby submits and consents to abide by such further orders as the court may make requiring the mental examination of the defendant and designating the place of examination and the physician or physicians by whom such examination shall be made. No order of the court respecting a mental examination shall preclude the defendant from procuring an examination by a physician of his own choosing. A report of each mental examination of the defendant shall be filed in the court and copies thereof shall be supplied to the defendant and the prosecuting attorney. (K.S.A. 1971 Supp. 22-3219).

COMMENT

The Kansas code is in conformity with the Standard only as to alibi and insanity. These appear to include most instances of special defense in which a defendant may be confronted with the necessity of proceeding with some affirmative evidence after the state's case in chief, except the claim of self defense. Of course, the burden of proof on the state is not changed.

In Williams v. Florida, 399 U.S. 79 (1970), the Supreme Court held that there was nothing in the Fifth Amendment privilege against self-incrimination that entitles a defendant to await the end of a state's case before announcing the nature of his defense and that the privilege is not violated by a requirement that the defendant

give notice of an alibi defense and disclose his alibi witnesses.

In State v. Sharp, 202 Kan. 644, 451 P.2d 137, (1969), under a statutory provision similar to the present code, it was held that evidence of alibi is not admissible in a criminal case unless notice has been served in compliance with statutory requirements, that the granting of permission for late serving of the notice was discretionary and that such discretion had not been abused. See also Jenkins v. State, 211 Kan. 596, 506 P.2d 1111 (1973).

The present code changes the case law as to the necessity of giving any notice to allow testimony as to alibi by the defendant himself, in his own defense, as was held in State v. Rider, 194 Kan. 398, 399 P.2d 564 (1965), to be required under the former code.

The insanity provision of the code changes the former case law that plea of insanity at the time of commission of the offense could be asserted at any time during trial (State v. Mendzlewski, 180 Kan. 11, 299 P.2d 598 (1956)).

ABA STANDARD

PART IV. REGULATION OF DISCOVERY

4.1 INVESTIGATIONS NOT TO BE IMPEDED.

EXCEPT AS IS OTHERWISE PROVIDED AS TO MATTERS NOT SUBJECT TO DISCLOSURE (SECTION 2.6) AND PROTECTIVE ORDERS (SECTION 4.4), NEITHER THE COUNSEL FOR THE PARTIES NOR OTHER PROSECUTION OR DEFENSE PERSONNEL SHALL ADVISE PERSONS HAVING RELEVANT MATERIAL OR INFORMATION (EXCEPT THE ACCUSED) TO REFRAIN FROM DISCUSSING THE CASE WITH OPPOSING COUNSEL OR SHOWING OPPOSING COUNSEL ANY RELEVANT MATERIAL, NOR SHALL THEY OTHERWISE IMPEDE OPPOSING COUNSEL'S INVESTIGATION OF THE CASE.

KANSAS CODE

> A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.
>
> A lawyer shall not advise or cause a person to secrete himself or leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein. (K.S.A. 1974 Supp. 7-125, DR 7-109).

COMMENT

The Kansas code conforms with this Standard, except as to specific reference to advising witnesses not to refrain from discussing case.

See Prosecution Function and Defense Function 3.1(c).

ABA STANDARD

4.2 CONTINUING DUTY TO DISCLOSE.

IF, SUBSEQUENT TO COMPLIANCE WITH THESE STANDARDS OR ORDERS PURSUANT THERETO, A PARTY DISCOVERS ADDITIONAL MATERIAL OR INFORMATION WHICH IS SUBJECT TO DISCLOSURE, HE SHALL PROMPTLY NOTIFY THE OTHER PARTY OR HIS COUNSEL OF THE EXISTENCE OF SUCH ADDITIONAL MATERIAL, AND IF THE ADDITIONAL MATERIAL OR INFORMATION IS DISCOVERED DURING TRIAL, THE COURT SHALL ALSO BE NOTIFIED.

KANSAS CODE

> If, subsequent to compliance with an order issued pursuant to this section, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under this section, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. (K.S.A. 1971 Supp. 22-3212 (7)).

COMMENT

Kansas conforms with the Standard.

ABA STANDARD

4.3 CUSTODY OF MATERIALS.

ANY MATERIALS FURNISHED TO AN ATTORNEY PURSUANT TO THESE STANDARDS SHALL REMAIN IN HIS EXCLUSIVE CUSTODY AND BE USED ONLY FOR THE PURPOSES OF CONDUCTING HIS SIDE OF THE CASE, AND SHALL BE SUBJECT TO SUCH OTHER TERMS AND CONDITIONS AS THE COURT MAY PROVIDE.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas does not conform with this Standard.

ABA STANDARD

4.4 PROTECTIVE ORDERS.

UPON A SHOWING OF CAUSE, THE COURT MAY AT ANY TIME ORDER THAT SPECIFIED DISCLOSURES BE RESTRICTED OR DEFERRED, OR MAKE SUCH OTHER ORDER AS IS APPROPRIATE, PROVIDED THAT ALL MATERIAL AND INFORMATION TO WHICH A PARTY IS ENTITLED MUST BE DISCLOSED IN TIME TO PERMIT HIS COUNSEL TO MAKE BENEFICIAL USE THEREOF.

4.5 EXCISION.

WHEN SOME PARTS OF CERTAIN MATERIAL ARE DISCOVERABLE UNDER THESE STANDARDS, AND OTHER PARTS NOT DISCOVERABLE, AS MUCH OF THE MATERIAL SHOULD BE DISCLOSED AS IS CONSISTENT WITH THE STANDARDS. EXCISION OF CERTAIN MATERIAL AND DISCLOSURE OF THE BALANCE IS PREFERABLE TO WITHHOLDING THE WHOLE. MATERIAL EXCISED PURSUANT TO JUDICIAL ORDER SHALL BE SEALED AND PRESERVED IN THE RECORDS OF THE COURT, TO BE MADE AVAILABLE TO THE APPELLATE COURT IN THE EVENT OF AN APPEAL.

4.6 IN CAMERA PROCEEDINGS.

UPON REQUEST OF ANY PERSON, THE COURT MAY PERMIT ANY SHOWING OF CAUSE FOR DENIAL OR REGULATION OF DISCLOSURES, OR PORTION OF SUCH SHOWING, TO BE MADE IN CAMERA. A RECORD SHALL BE MADE OF SUCH PROCEEDINGS. IF THE COURT ENTERS AN ORDER GRANTING RELIEF FOLLOWING A SHOWING IN CAMERA, THE ENTIRE RECORD OF SUCH SHOWING SHALL BE SEALED AND PRESERVED IN THE RECORDS OF THE COURT, TO BE MADE AVAILABLE TO THE APPELLATE COURT IN THE EVENT OF AN APPEAL.

KANSAS CODE

> Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred or make such other order as is appropriate. Upon motion by the prosecution the court may permit the prosecution to make such showing, in whole or in part, in the form of a written statement to be inspected privately by the court. If the court enters an order

granting relief following such a private showing, the entire test of the prosecution statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant. (K.S.A. 1971 Supp. 22-3212 (5)).

If the prosecution claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the prosecution to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the prosecution and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial. (K.S.A. 1971 Supp. 22-3213 (3)).

COMMENT

The Kansas code conforms with the Standard.

(4.5) Provision for excision was held to be consistent with due process requirements in Sells v. United States, 262 F2d 815 (10th Cir. 1958), cert. denied 360 U.S. 913 (1959), where the appellate court approved the trial court's excision of materials which did not relate to any issue presented at the trial and said,

"Without the excision, there was the danger of harm to individuals who were not on trial, who did not appear as witnesses, and who were in no way connected with the offense charged against Sells, (the defendant). The excision properly and reasonably protected such individuals and in no way prejudiced the defendant."

(4.6) In Taglianetti v. United States, 394 U.S. 316 (1969), the Supreme Court held that nothing in Alderman v. United States, 394 U.S. 165 (1969), supra 2.1 (b) (ii), requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance. In the particular case, the defendant was entitled to see a transcript of his own conversations and nothing else. The court said that under the cirsumstances presented it could not be held that "The task is too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court."

ABA STANDARD

4.7 SANCTIONS.

(a) IF AT ANY TIME DURING THE COURSE OF THE PROCEEDINGS IT IS BROUGHT TO THE ATTENTION OF THE COURT THAT A PARTY HAS FAILED TO COMPLY WITH AN APPLICABLE DISCOVERY RULE OR AN ORDER ISSUED PURSUANT THERETO, THE COURT MAY ORDER SUCH PARTY TO PERMIT THE DISCOVERY OF MATERIAL AND INFORMATION NOT PREVIOUSLY DISCLOSED, GRANT A CONTINUANCE, OR ENTER SUCH OTHER ORDER AS IT DEEMS JUST UNDER THE CIRCUMSTANCES.

(b) WILLFUL VIOLATION BY COUNSEL OF AN APPLICABLE DISCOVERY RULE OR AN ORDER ISSUED PURSUANT THERETO MAY SUBJECT COUNSEL TO APPROPRIATE SANCTIONS BY THE COURT.

KANSAS CODE

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this section or with an order issued pursuant to this section, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances. (K.S.A. 1971 Supp. 22-3212 (7)).

COMMENT

The Kansas code conforms with the Standard.

ABA STANDARD

PART V. PROCEDURE

5.1 GENERAL PROCEDURAL REQUIREMENTS.

(a) PROCEDURE PRIOR TO TRIAL SHOULD RECOGNIZE THE POSSIBLE NEED FOR THREE SUCCESSIVE STAGES: (i) AN EXPLORATORY STAGE, INITIATED BY COUNSEL AND CONDUCTED WITHOUT COURT SUPERVISION (SEE SECTION 5.2); (ii) AN OMNIBUS STAGE, SUPERVISED BY THE TRIAL COURT AND ENTAILING COURT APPEARANCES AS NECESSARY (SEE SECTION 5.3); AND (iii) A TRIAL PLANNING STAGE, ENTAILING PRE-TRIAL CONFERENCES AS NECESSARY (SEE SECTION 5.4). THE VARIOUS STAGES SHOULD BE ADAPTED TO THE NEEDS OF THE PARTICULAR CASE AND ELIMINATED OR COMBINED AS APPROPRIATE.

KANSAS CODE

See K.S.A. 1971 Supp. 22-3217 under 5.2 to 5.4 infra.

COMMENT

The Standard is only a general statement of principle, the details of which are specified in the numbered subsections.

ABA STANDARD

(b) ESSENTIAL TO THE PROPER EXPEDITING OR PROCEEDINGS PRIOR TO TRIAL ARE (i) EFFECTIVE JUDICIAL CALENDAR CONTROL, AND (ii) A REQUIREMENT (BY RULE OR STATUTE) THAT CRIMINAL CHARGES BE BROUGHT TO TRIAL OR OTHERWISE DISPOSED OF WITHIN A SPECIFIC TIME PERIOD RUNNING FROM A SPECIFIED EVENT.

KANSAS CODE

See Standards on Speedy Trial.

ABA STANDARD

5.2 EXPLORATORY STAGE AND SETTING OF OMNIBUS HEARING.

(a) PROCEDURES PRIOR TO TRIAL SHOULD NOT INTERFERE WITH BUT SHOULD AFFORD THE OPPORTUNITY FOR COUNSEL TO EXPEDITE A FAIR DISPOSITION OF THE CASE USING, WITHOUT COURT INTERVENTION, DISCOVERY, INVESTIGATION AND PLEA DISCUSSIONS, AS APPROPRIATE IN THE PARTICULAR CASE. WHEREVER SUCH OPPORTUNITY DOES NOT NOW EXIST, PROCEDURES SHOULD BE ADAPTED TO ENCOURAGE COUNSEL TO EXERCISE THEIR INITIATIVE IN THESE MATTERS.

(b) AT SUCH TIME AS A PLEA IS FIRST CALLED FOR IN THE COURT HAVING JURISDICTION TO TRY THE ACCUSED, IF A PLEA OF GUILTY IS NOT ENTERED, THE COURT SHALL THEN SET A TIME FOR AN OMNIBUS HEARING.

(c) THE TIME SET FOR THE OMNIBUS HEARING SHALL ALLOW SUFFICIENT TIME FOR COUNSEL TO (i) INITIATE AND COMPLETE DISCOVERY REQUIRED BY SECTIONS 2.1 AND 2.3, AND SUCH ADDITIONAL DISCOVERY AS IN THEIR JUDGMENT WILL EXPEDITE THE PROCEEDINGS; (ii) CONDUCT FURTHER INVESTIGATION OF THE CASE, AS NEEDED; AND (iii) CONTINUE PLEA DISCUSSIONS.

5.3 OMNIBUS HEARING.

(a) AT THE OMNIBUS HEARING, THE TRIAL COURT ON ITS OWN INITIATIVE, UTILIZING AN APPROPRIATE CHECK-LIST FORM, SHOULD:

(i) ENSURE THAT STANDARDS REGARDING PROVISION OF COUNSEL HAVE BEEN COMPLIED WITH;

(ii) ASCERTAIN WHETHER THE PARTIES HAVE COMPLETED THE DISCOVERY REQUIRED IN SECTIONS 2.1 AND 2.3, AND IF NOT, MAKE ORDERS APPROPRIATE TO EXPEDITE COMPLETION;

(iii) ASCERTAIN WHETHER THERE ARE REQUESTS FOR ADDITIONAL DISCLOSURES UNDER SECTIONS 2.4, 2.5 AND 3.2;

(iv) MAKE RULINGS ON ANY MOTIONS, DEMURRERS OR OTHER REQUESTS THEN PENDING, AND ASCERTAIN WHETHER ANY ADDITIONAL MOTIONS, DEMURRERS OR REQUESTS WILL BE MADE AT THE HEARING OR CONTINUED PORTIONS THEREOF;

(v) ASCERTAIN WHETHER THERE ARE ANY PROCEDURAL OR CONSTITUTIONAL ISSUES WHICH SHOULD BE CONSIDERED;

(vi) UPON AGREEMENT OF COUNSEL, OR UPON A FINDING THAT THE TRIAL IS LIKELY TO BE PROTRACTED OR OTHERWISE UNUSUALLY COMPLICATED, SET A TIME FOR A PRETRIAL CONFERENCE; AND

(vii) UPON THE ACCUSED'S REQUEST, PERMIT HIM TO CHANGE HIS PLEA.

(b) ALL MOTIONS, DEMURRERS AND OTHER REQUESTS PRIOR TO TRIAL SHOULD ORDINARILY BE RESERVED FOR AN PRESENTED ORALLY AT THE OMNIBUS HEARING UNLESS THE COURT OTHERWISE DIRECTS. FAILURE TO RAISE ANY PRIOR-TO-TRIAL ERROR OR ISSUE AT THIS TIME CONSTITUTES WAIVES OF SUCH ERROR OR ISSUE IF THE PARTY CONCERNED THEN HAS THE INFORMATION NECESSARY TO RAISE IT. CHECK-LIST FORMS SHOULD BE ESTABLISHED AND MADE AVAILABLE BY THE COURT AND UTILIZED AT THE HEARING TO ENSURE THAT ALL REQUESTS, ERRORS AND ISSUES ARE THEN CONSIDERED.

(c) ANY AND ALL ISSUES SHOULD BE RAISED EITHER BY COUNSEL OR BY THE COURT WITHOUT PRIOR NOTICE, AND IF APPROPRIATE, INFORMALLY DISPOSED OF. IF ADDITIONAL DISCOVERY, INVESTIGATION OR PREPARATION, OR EVIDENTIARY HEARING, OR FORMAL PRESENTATION IS NECESSARY FOR A FAIR AND ORDERLY DETERMINATION OF ANY ISSUE, THE OMNIBUS HEARING SHOULD BE CONTINUED FROM TIME TO TIME UNTIL ALL MATTERS RAISED ARE PROPERLY DISPOSED OF.

(d) A VERBATIM RECORD SHOULD BE MADE OF ALL PROCEEDINGS AT THE HEARING.

(e) STIPULATIONS BY ANY PARTY OR HIS COUNSEL SHOULD BE BINDING UPON THE PARTIES AT TRIAL UNLESS SET ASIDE OR MODIFIED BY THE COURT IN THE INTERESTS OF JUSTICE.

(f) AT THE CONCLUSION OF THE HEARING, A SUMMARY MEMORANDUM SHOULD BE MADE (DICTATED INTO THE RECORD OR WRITTEN ON AN APPROPRIATE COURT-ESTABLISHED FORM) INDICATING DISCLOSURES MADE, RULINGS AND ORDERS OF THE COURT, STIPULATIONS, AND ANY OTHER MATTERS DETERMINED OR PENDING.

5.4 PRETRIAL CONFERENCE.

(a) WHENEVER A TRIAL IS LIKELY TO BE PROTRACTED OR OTHERWISE UNUSUALLY COMPLICATED, OR UPON REQUEST BY AGREEMENT OF COUNSEL, THE TRIAL COURT MAY (IN ADDITION TO THE OMNIBUS HEARING) HOLD ONE OR MORE PRETRIAL CONFERENCES, WITH TRIAL COUNSEL PRESENT, TO CONSIDER SUCH MATTERS AS WILL PROMOTE A FAIR AND EXPEDITIOUS TRIAL. THE ACCUSED SHALL BE PRESENT UNLESS HE WAIVES THIS IN WRITING. MATTERS WHICH MIGHT USEFULLY BE CONSIDERED INCLUDE.

(i) MAKING STIPULATIONS AS TO FACTS ABOUT WHICH THERE CAN BE NO DISPUTE;
(ii) MARKING FOR IDENTIFICATION VARIOUS DOCUMENTS AND OTHER EXHIBITS OF THE PARTIES;
(iii) WAIVERS OF FOUNDATION AS TO SUCH DOCUMENTS;
(iv) EXCISION FROM ADMISSIBLE STATEMENTS OF MATERIAL PREJUDICIAL TO A CODEFENDANT;
(v) SEVERANCE OF DEFENDANTS OR OFFENSES;
(vi) SEATING ARRANGEMENTS FOR DEFENDANTS AND COUNSEL;
(vii) USE OF JURORS AND QUESTIONNAIRES;
(viii) CONDUCT OF VOIR DIRE;
(ix) NUMBER AND USE OF PEREMPTORY CHALLENGES;
(x) PROCEDURE ON OBJECTIONS WHERE THERE ARE MULTIPLE COUNSEL;
(xi) ORDER OF PRESENTATION OF EVIDENCE AND ARGUMENTS WHERE THERE ARE MULTIPLE DEFENDANTS:
(xii) ORDER OF CROSS-EXAMINATION WHERE THERE ARE MULTIPLE DEFENDANTS; AND
(xiii) TEMPORARY ABSENCE OF DEFENSE COUNSEL DURING TRIAL.

(b) CONFERENCES SHOULD BE RECORDED. AT THE CONCLUSION OF A CONFERENCE, A PRETRIAL ORDER, OR MEMORANDUM OF THE MATTERS AGREED UPON, SHOULD BE SIGNED BY COUNSEL, APPROVED BY THE COURT AND FILED, WHICH SHOULD BE BINDING UPON THE PARTIES AT TRIAL, ON APPEAL, AND IN

POST-CONVICTION PROCEEDINGS UNLESS SET ASIDE OR MODIFIED BY THE COURT IN THE INTERESTS OF JUSTICE. HOWEVER, ADMISSIONS BY AN ACCUSED IF PRESENT SHOULD BIND THE ACCUSED ONLY IF INCLUDED IN THE PRETRIAL ORDER AND SIGNED BY THE ACCUSED AS WELL AS HIS ATTORNEY.

KANSAS CODE

> At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney. This section shall not be invoked in the case of a defendant who is not represented by counsel. (K.S.A. 1971 Supp. 22-3217).

COMMENT

Although not as detailed as the Standard, it may be fairly said that there is substantial compliance with it.

The code permits all steps referred to in the Standard, and practice under the Civil Code pretrial provisions has developed a similar result. This same situation may be reasonably expected in criminal procedure.

Under the Civil Code, it has been held that pretrial proceedings should not take place until the discovery proceedings are completed. (Connell v. State Highway Commission, 192 Kan. 371, 388 P2d 637 (1964)). The District Judges' Association has adopted a recommended rule on civil pretrial procedure which has been adopted and followed in many of the judicial districts of the state, and is similar to the Standard plan for the Omnibus Hearing and Pretrial Conference. The trial court has the duty to make the pretrial order (Connell v. State Highway Commission, above), and it is the responsibility of both trial judge and counsel to see that a proper record is made of the pretrial conference and the results properly noted by judgment or order. (Van Welden v. Ramsay's, Inc., 199 Kan. 417, 430 P2d 298 (1967)).