

THE PROSECUTION FUNCTION

ABA STANDARD

PART I. GENERAL STANDARDS

1.1 THE FUNCTION OF THE PROSECUTOR

(a) THE OFFICE OF PROSECUTOR, AS THE CHIEF LAW ENFORCEMENT OFFICIAL OF HIS JURISDICTION, IS AN AGENCY OF THE EXECUTIVE BRANCH OF GOVERNMENT WHICH IS CHARGED WITH THE DUTY TO SEE THAT THE LAWS ARE FAITHFULLY EXECUTED AND ENFORCED IN ORDER TO MAINTAIN THE RULE OF LAW.

KANSAS CODE

It shall be the duty of the county attorney to appear in the several courts of their respective counties and to prosecute or defend on behalf of the people all suits, civil and criminal, arising under the laws of this state, in which the state or their county is a party or interested. (K.S.A. 19-702).

Every county attorney shall, when requested by any magistrate of his county, appear on behalf of the state before any such magistrate, and shall prosecute all complaints made in behalf of the state of which such magistrate shall have jurisdiction; and upon the like request shall appear before such magistrate and conduct any criminal examination which may be had before such magistrate, and shall also prosecute all civil suits before such magistrate in which the county is a party or interested. (K.S.A. 19-703).

COMMENT

Kansas has no code provision directly corresponding with the Standard. In Kansas the office of county attorney is not a constitutional office (See Kan. Const. art. 9, sec. 2 and Wall v. Harrison, 201 Kan. 598, 443 P.2d 266 (1968)). The duties of the county attorney are prescribed in numerous places in the Kansas statutes and are discussed in depth in Foley v. Ham, 102 Kan. 66, 169 Pac. 283 (1917) and cases cited therein.

ABA STANDARD

(b) THE PROSECUTOR IS BOTH AN ADMINISTRATOR OF JUSTICE AND AN ADVOCATE; HE MUST EXERCISE SOUND DISCRETION IN THE PERFORMANCE OF HIS FUNCTIONS.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas Supreme Court has upheld the "discretionary" functions of the county attorney in Kansas on numerous occasions. The county commissioners cannot control the county attorney in the prosecution of a criminal action. (Morril v. Douglas, 14 Kan. 293 (1875)). The county attorney may institute proceedings over the objection of the county commissioners. (Eble v. State, 77 Kan. 179, 93 Pac. 803 (1908)). The county attorney, when present at the preliminary hearing, has complete control of the prosecution and wide discretion. (Foley v. Ham, 102 Kan. 66, 169 Pac. 182 (1917)). The county attorney is an "independent" elected official. (Heinz v. Shawnee County, 136 Kan. 104, 12 P.2d 816 (1932)). See also State v. Kilpatrick, 201 Kan. 6, 439 P.2d 99 (1968).

ABA STANDARD

(c) THE DUTY OF THE PROSECUTOR IS TO SEEK JUSTICE, NOT MERELY TO CONVICT.

KANSAS CODE

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) 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. 1971 Supp. 7-125, DR 7-103).

COMMENT

The Kansas law appears to be in substantial compliance with the Standard. The Supreme Court has approved in principal the Ethical Considerations (hereafter referred to as E.C.) stated in the Code of Professional Responsibility (Supreme Court Rule No. 501, K.S.A. 1971 Supp. 7-125). For further discussion of the responsibility of the prosecutor, see E.C. 7-13.

ABA STANDARD

(d) IT IS THE DUTY OF THE PROSECUTOR TO KNOW AND BE GUIDED BY THE STANDARDS OF PROFESSIONAL CONDUCT AS DEFINED IN CODES AND CANONS OF THE LEGAL PROFESSION, AND IN THIS REPORT. THE PROSECUTOR SHOULD MAKE USE OF THE GUIDANCE AFFORDED BY AN ADVISORY COUNCIL OF THE KIND DESCRIBED IN THE ABA STANDARDS, THE DEFENSE FUNCTION, SECTION 1.3.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas appears to be in substantial compliance with the Standard. By rule of the Supreme Court, Kansas has adopted the Code of Professional Responsibility as adopted by the American Bar Association. (K.S.A. 1971 Supp. 7-125).

ABA STANDARD

(e) IN THIS REPORT THE TERM "UNPROFESSIONAL CONDUCT" DENOTES CONDUCT WHICH IS OR SHOULD BE MADE SUBJECT TO DISCIPLINARY SANCTIONS. WHERE OTHER TERMS ARE USED, THE STANDARD IS INTENDED AS A GUIDE TO HONORABLE PROFESSIONAL CONDUCT AND PERFORMANCE. THESE STANDARDS ARE NOT INTENDED AS CRITERIA FOR THE JUDICIAL EVALUATION OF ALLEGED MISCONDUCT OF THE PROSECUTOR TO DETERMINE THE VALIDITY OF A CONVICTION; THEY MAY OR MAY NOT BE RELEVANT IN SUCH JUDICIAL EVALUATION, DEPENDING UPON ALL THE CIRCUMSTANCES.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is in conformity with the Standard. See comment under 1.1(d) supra.

ABA STANDARD

1.2 CONFLICTS OF INTEREST

(a) A PROSECUTOR SHOULD AVOID THE APPEARANCE OR REALITY OF A CONFLICT OF INTEREST WITH RESPECT TO HIS OFFICIAL DUTIES. IN SOME INSTANCES, AS DEFINED IN THE CODE OF PROFESSIONAL RESPONSIBILITY, HIS FAILURE TO DO SO WILL CONSTITUTE UNPROFESSIONAL CONDUCT.

(b) A CONFLICT OF INTEREST MAY ARISE WHEN, FOR EXAMPLE,

(i) A LAW PARTNER OR OTHER LAWYER PROFESSIONALLY ASSOCIATED WITH THE PROSECUTOR OR A RELATIVE APPEARS AS, OR OF, COUNSEL FOR DEFENDANT;

(ii) A BUSINESS PARTNER OR ASSOCIATE OR A RELATIVE HAS ANY INTEREST IN A CRIMINAL CASE, EITHER AS A COMPLAINING WITNESS, A PARTY OR AS COUNSEL;

(iii) A FORMER CLIENT OR ASSOCIATE IS A DEFENDANT IN A CRIMINAL CASE.

KANSAS CODE

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105,

no partner or associate of his or his firm may accept or continue such employment. (K.S.A. 1971 Supp. 7-125, DR 5-103).

COMMENT

Since Kansas has adopted the Code of Professional Responsibility by Supreme Court rule, it appears that Kansas is in substantial compliance with the Standard.

ABA STANDARD

1.3 PUBLIC STATEMENTS.

(a) THE PROSECUTOR SHOULD NOT EXPLOIT HIS OFFICE BY MEANS OF PERSONAL PUBLICITY CONNECTED WITH A CASE BEFORE TRIAL, DURING TRIAL AND THEREAFTER.

(b) THE PROSECUTOR SHOULD COMPLY WITH THE ABA STANDARDS ON FAIR TRIAL AND FREE PRESS. IN SOME INSTANCES, AS DEFINED IN THE CODE OF PROFESSIONAL RESPONSIBILITY, HIS FAILURE TO DO SO WILL CONSTITUTE UNPROFESSIONAL CONDUCT.

KANSAS CODE

Trial publicity. (A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

- (1) Information contained in a public record.
- (2) That the investigation is in progress.
- (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
- (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
- (5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107 (B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

- (3) A request for assistance in obtaining evidence.
- (4) The identity of the victim of the crime.
- (5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
- (6) The identity of investigating and arresting officers or agencies and the length of the investigation.
- (7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
- (8) The nature, substance, or text of the charge.
- (9) Quotations from or references to public records of the court in the case.
- (10) The scheduling or result of any step in the judicial proceedings.
- (11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings. (K.S.A. 1971 Supp. 7-125, DR 7-107)

COMMENT

The Kansas code complies with the Standard.

ABA STANDARD

1.4 DUTY TO IMPROVE THE LAW.

IT IS AN IMPORTANT FUNCTION OF THE PROSECUTOR TO SEEK TO REFORM AND IMPROVE THE ADMINISTRATION OF CRIMINAL JUSTICE. WHEN INADEQUACIES OR INJUSTICES IN THE SUBSTANTIVE OR PROCEDURAL LAW COME TO HIS ATTENTION HE SHOULD STIMULATE EFFORTS FOR REMEDIAL ACTION.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is not in conformity. However, the county attorneys of Kansas do have an organization which is devoted to the reform and improvement of the administration of criminal justice.

ABA STANDARD

PART II. ORGANIZATION OF THE PROSECUTION FUNCTION

2.1 PROSECUTION AUTHORITY SHOULD BE VESTED IN A PUBLIC OFFICIAL.

THE PROSECUTION FUNCTION SHOULD BE PERFORMED BY A PUBLIC PROSECUTOR WHO IS A LAWYER SUBJECT TO THE STANDARDS OF PROFESSIONAL CONDUCT AND DISCIPLINE.

KANSAS CODE

See citations under 1.1 supra.

COMMENT

Kansas law is in conformity with the Standard.

ABA STANDARD

2.2 INTER-RELATIONSHIP OF PROSECUTION OFFICES WITHIN STATE.

(a) LOCAL AUTHORITY AND RESPONSIBILITY FOR PROSECUTION IS PROPERLY VESTED IN A DISTRICT, COUNTY OR CITY ATTORNEY. WHEREVER POSSIBLE, A UNIT OF PROSECUTION SHOULD BE DESIGNED ON THE BASIS OF POPULATION, CASE-LOAD AND OTHER RELEVANT FACTORS SUFFICIENT TO WARRANT AT LEAST ONE FULL-TIME PROSECUTOR AND THE SUPPORTING STAFF NECESSARY TO EFFECTIVE PROSECUTION.

KANSAS CODE

A county attorney shall be elected in each county organized for judicial purposes... (K.S.A. 19-701).

COMMENT

Kansas appears to be in partial conformance with the Standard. The prosecutor is elected in each county. However, the unit of prosecution is not based on population or caseload.

ABA STANDARD

(b) IN SOME STATES CONDITIONS SUCH AS GEOGRAPHICAL AREA AND POPULATION MAY MAKE IT APPROPRIATE TO CREATE A STATEWIDE SYSTEM OF PROSECUTION IN WHICH THE STATE ATTORNEY GENERAL IS THE CHIEF PROSECUTOR AND THE LOCAL PROSECUTORS ARE HIS DEPUTIES.

KANSAS CODE

No comparable code provision.

COMMENT

This Standard is only a suggestion of what may be appropriate in some areas. Kansas does not have a statewide system of prosecution under the Attorney General. Although the Attorney General has been said to be the chief law enforcement officer of the state (State v. Finch, 128 Kan. 665, 280 Pac. 910 (1929)), he has limited power to prosecute within a county (K.S.A. 75-702).

ABA STANDARD

(c) IN ALL STATES THERE SHOULD BE COORDINATION OF THE PROSECUTION POLICIES OF LOCAL PROSECUTION OFFICES TO IMPROVE THE ADMINISTRATION OF JUSTICE AND ASSURE THE MAXIMUM PRACTICABLE UNIFORMITY IN THE ENFORCEMENT OF THE CRIMINAL LAW THROUGHOUT THE STATE. A STATE COUNCIL OF PROSECUTORS SHOULD BE ESTABLISHED IN EACH STATE.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is not presently in conformity with this Standard. However, there is a County Attorney's Association which, as it progresses with its work, should achieve some degree of compliance.

ABA STANDARD

(d) IN CASES WHERE QUESTIONS OF LAW OF STATEWIDE INTEREST OR CONCERN ARISE WHICH MAY CREATE IMPORTANT PRECEDENTS, THE PROSECUTOR SHOULD CONSULT AND ADVISE WITH THE ATTORNEY GENERAL OF THE STATE.

KANSAS CODE

There is no comparable code provision, except in relation to appeals.

In all criminal matters and post conviction proceedings, copies of all briefs shall be served on the Attorney General of this state, and no brief shall be filed by or on behalf of the State of Kansas or any officer or agent thereof without the approval of the Attorney General or a member of his staff endorsed thereon. (S.Ct. Rule No. 18).

COMMENT

A county attorney in Kansas has wide discretion in conducting the prosecution of cases. Few statutes set out the relationship between the attorney general and a county attorney. Therefore, the degree of cooperation between the respective offices depends largely on the attitudes of the respective elective officials.

ABA STANDARD

(e) A CENTRAL POOL OF SUPPORTING RESOURCES AND MANPOWER, INCLUDING LABORATORIES, INVESTIGATORS, ACCOUNTANTS, SPECIAL COUNSEL AND OTHER EXPERTS, TO THE EXTENT NEEDED SHOULD BE MAINTAINED BY THE STATE GOVERNMENT AND SHOULD BE AVAILABLE TO ALL LOCAL PROSECUTORS.

KANSAS CODE

No comparable code provision.

COMMENT

Although there are no specific code provisions, Kansas is actually in compliance with this Standard. The legislature has created the Kansas Bureau of Investigation and placed it under the Attorney General (K.S.A. 75-711 , 75-712). In practice the KBI is available to all law enforcement agencies of the state and its subdivisions and to all prosecutors even though the statute only refers to the duty to perform services at the request of the Attorney General.

ABA STANDARD

2.3 ASSURING HIGH STANDARDS OF PROFESSIONAL SKILL.

(a) THE FUNCTION OF PUBLIC PROSECUTION REQUIRES HIGHLY DEVELOPED PROFESSIONAL SKILLS. THIS OBJECTIVE CAN BEST BE ACHIEVED BY PROMOTING CONTINUITY OF SERVICE AND BROAD EXPERIENCE IN ALL PHASES OF THE PROSECUTION FUNCTION.

KANSAS CODE

Except as otherwise provided by law a county attorney shall be elected in each county organized for judicial purposes, who shall hold his office for a term of two (2) years who shall, before he enters upon the duties of his office, execute a good and sufficient corporate surety bond to the state of Kansas...Provided, No person shall be eligible for the nomination or election to the office of county attorney of any county unless such person shall have been regularly admitted to practice law within the state of Kansas, and is at the time of his nomination and election a regularly qualified practicing attorney under said laws. (K.S.A. 19-701).

General elections and township elections shall be held biennially on the Tuesday succeeding the first Monday in November in the years bearing even numbers. All county and township officers shall hold their offices for a term of two years and until their successors are qualified...(Kan. Const. Art. 4, sec.2).

No person shall be eligible for nomination to the office of district attorney unless such person shall have been regularly admitted to practice law in the state of Kansas for five (5) years next preceding his nomination for such office: Provided, That an attorney who shall have been a county attorney, assistant county attorney or assistant district attorney for the three (3) years immediately preceding his nomination as district attorney shall be eligible for nomination. A person so qualified may become a candidate for election to the office of district attorney ... (Laws of 1972, Ch. 71, sec. 2.).

COMMENT

Kansas is not in full compliance with the Standard. The new district attorney provisions do set out experience qualifications but there are none for county attorneys.

ABA STANDARD

(b) WHEREVER FEASIBLE, THE OFFICES OF CHIEF PROSECUTOR AND HIS STAFF SHOULD BE FULL-TIME OCCUPATIONS.

KANSAS CODE

Each assistant and deputy district attorney shall have been regularly admitted to practice law within the state of Kansas prior to his appointment. Each district attorney and their assistant district attorneys shall devote full time to official duties and shall not engage in the civil practice of law, except as required in performing his official duties while serving as district attorney or assistant district attorney, and shall not refer any client or other person or any matter to any designated attorney or firm of attorneys. (Laws of 1972, Ch. 71, sec. 6(b)).

COMMENT

Kansas is not in compliance with the Standard. The code provision cited applies only to the district attorney and not to county attorneys.

ABA STANDARD

(c) PROFESSIONAL COMPETENCE SHOULD BE THE ONLY BASIS FOR SELECTION FOR PROSECUTORIAL OFFICE. PROSECUTORS SHOULD SELECT THEIR STAFFS ON THE BASIS OF PROFESSIONAL COMPETENCE WITHOUT REGARD TO PARTISAN POLITICAL INFLUENCE.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is not in conformity with the Standard.

ABA STANDARD

(d) EXCEPT WHEN SEEKING RE-ELECTION, A PROSECUTOR WHO IS A CANDIDATE FOR ELECTIVE OFFICE SHOULD RESIGN, OR AT LEAST OBTAIN LEAVE OF ABSENCE DURING THE PERIOD OF A POLITICAL CAMPAIGN, AND SHOULD DO SO AS SOON AS HE ANNOUNCES HIS CANDIDACY.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is not in conformity with the Standard.

ABA STANDARD

(e) IN ORDER TO ACHIEVE THE OBJECTIVE OF PROFESSIONALISM AND TO ENCOURAGE COMPETENT LAWYERS TO ACCEPT SUCH OFFICES, COMPENSATION FOR PROSECUTORS AND THEIR STAFFS SHOULD BE COMMENSURATE WITH THE HIGH RESPONSIBILITIES OF THE OFFICE AND COMPARABLE TO THE COMPENSATION OF THEIR PEERS IN THE PRIVATE SECTOR.

KANSAS CODE

Each of the district attorneys elected under this act receive an annual salary set by statute. (K.S.A. 22a-105 (1974)).

COMMENT

Kansas is not in conformity with the Standard as it relates to county attorneys, but is in conformity as to district attorneys. Traditionally in Kansas, the salary of the county attorney has been established by the legislature on the basis of population and without regard to the needs of the county.

ABA STANDARD

(f) WHERE THE PROSECUTOR IS AN ELECTED OFFICIAL, IT IS DESIRABLE THAT THE STATUTES PROVIDING FOR ELECTION REQUIRE THAT THE CANDIDATES RUN WITHOUT PARTY DESIGNATION.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is not in conformity. Prosecutors in Kansas are elected on a ticket bearing party designation.

ABA STANDARD

2.4 SPECIAL ASSISTANTS, INVESTIGATIVE RESOURCES, EXPERTS.

(a) FUNDS SHOULD BE PROVIDED TO ENABLE A PROSECUTOR TO APPOINT SPECIAL ASSISTANTS FROM AMONG THE TRIAL BAR EXPERIENCED IN CRIMINAL CASES, AS NEEDED FOR THE PROSECUTION OF A PARTICULAR CASE OR TO ASSIST GENERALLY.

KANSAS CODE

The board of county commissioners of any county having a population of not more than one hundred thousand (100,000) may allow to the office

of the county attorney of such county such reasonable sums for salaries and compensation which will permit said county attorney to appoint such deputies and assistants as are necessary to properly expedite the business of his office... (K.S.A. 19-706 (1974)).

That when, in the judgment of the board of county commissioners of any county in this state, it becomes necessary or expedient, the said board of county commissioners may employ an additional attorney at law to assist the county attorney of its county in any specific investigation, prosecution or any civil or criminal matter involving the duties of said county attorney, and the said board of county commissioners may pay such attorney so employed reasonable compensation for his services... (K.S.A. 19-723 (1974)).

COMMENT

Kansas is not in conformity with the Standard since the budgets of the prosecutors, whether a county attorney or district attorney, are still controlled by the County Commissioners.

ABA STANDARD

(b) FUNDS SHOULD BE PROVIDED TO THE PROSECUTOR FOR THE EMPLOYMENT OF A REGULAR STAFF OR PROFESSIONAL INVESTIGATIVE PERSONNEL AND OTHER NECESSARY SUPPORTING PERSONNEL, UNDER HIS DIRECT CONTROL, TO THE EXTENT WARRANTED BY THE RESPONSIBILITIES AND SCOPE OF HIS OFFICE; HE SHOULD ALSO BE PROVIDED WITH FUNDS FOR THE EMPLOYMENT OF QUALIFIED EXPERTS AS NEEDED FOR PARTICULAR CASES.

KANSAS CODE

Within the limits of appropriations therefor, the district attorney shall appoint such assistant district attorneys, deputy district attorneys and other stenographic, investigative and clerical hire as may be necessary to carry out the functions of the district attorney's office in such judicial district, and he shall determine the annual compensation of each assistant district attorney and other persons appointed pursuant to this subsection. The county commissioners shall determine and allow such reasonable sums from funds of the county for the compensation of assistants, deputies and other expenses of such office as may be necessary to carry out the function of such office. (Laws of 1972, Ch. 71, sec. 6(a)).

Notwithstanding any of the provisions of this act the district attorney, with the approval of the board of county commissioners, may appoint and employ special counsel when necessary to assist the district attorney in the discharge of his duties... (Laws of 1972, Ch. 71, sec. 6(d)).

COMMENT

Kansas is not in conformity as the county commissioners control the budget.

ABA STANDARD

2.5 PROSECUTOR'S HANDBOOK; POLICY GUIDELINES AND PROCEDURES.

(a) EACH PROSECUTOR'S OFFICE SHOULD DEVELOP A STATEMENT OF (i) GENERAL POLICIES TO GUIDE THE EXERCISE OF PROSECUTORIAL DISCRETION AND (ii) PROCEDURES OF THE OFFICE. THE OBJECTIVES OF THESE POLICIES AS TO DISCRETION AND PROCEDURES SHOULD BE TO ACHIEVE A FAIR, EFFICIENT AND EFFECTIVE ENFORCEMENT OF THE CRIMINAL LAW.

(b) IN THE INTEREST OF CONTINUITY AND CLARITY, SUCH STATEMENT OF POLICIES AND PROCEDURES SHOULD BE MAINTAINED IN A HANDBOOK OF INTERNAL POLICIES OF THE OFFICE.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is not in conformity. Under our present system it would be practically impossible to establish such a guideline since there is little or no continuity in the office.

ABA STANDARD

2.6 TRAINING PROGRAMS.

TRAINING PROGRAMS SHOULD BE ESTABLISHED WITHIN THE PROSECUTOR'S OFFICE FOR NEW PERSONNEL AND FOR CONTINUING EDUCATION OF HIS STAFF. CONTINUING EDUCATION PROGRAMS FOR PROSECUTORS SHOULD BE SUBSTANTIALLY EXPANDED AND PUBLIC FUNDS SHOULD BE PROVIDED TO ENABLE PROSECUTORS TO ATTEND SUCH PROGRAMS.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is not in conformity with the Standard.

ABA STANDARD

2.7 RELATIONS WITH THE POLICE.

(a) THE PROSECUTOR SHOULD PROVIDE LEGAL ADVICE TO THE POLICE CONCERNING POLICE FUNCTIONS AND DUTIES IN CRIMINAL MATTERS.

(b) THE PROSECUTOR SHOULD COOPERATE WITH POLICE IN THE PERFORMANCE OF THEIR FUNCTION IN ACCORDANCE WITH LAW.

KANSAS CODE

"The county attorney shall without fee or reward, give opinions and advice to the board

of County Commissioners and other civil officers of their respective counties, when requested by such board or officers, upon all matters in which the county is interested, or relating to the duties of such board or officers, in which the state or county may have an interest. (K.S.A. 19-704).

COMMENT

The Kansas code is not in conformance with the Standard. The county attorney has no statutory duty to the police and the police have no statutory duty to him. The extent to which compliance with the Standard is achieved depends upon the willingness of the respective officials and departments to cooperate to achieve better law enforcement.

ABA STANDARD

2.8 RELATIONS WITH THE COURTS AND THE BAR.

(a) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR INTENTIONALLY TO MISREPRESENT MATTERS OF FACT OR LAW TO THE COURT.

KANSAS CODE

(A) In his representation of a client, a lawyer shall not...

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false. (K.S.A. 1971 Supp. 7-125, DR 7-102 (3-6)).

COMMENT

The Kansas code is in substantial compliance with the Standard.

ABA STANDARD

(b) A PROSECUTOR'S DUTIES NECESSARILY INVOLVE FREQUENT AND REGULAR OFFICIAL CONTACTS WITH THE JUDGE OR JUDGES OF HIS JURISDICTION. IN SUCH CONTACTS HE SHOULD CAREFULLY STRIVE TO PRESERVE THE APPEARANCE AS WELL AS THE REALITY OF THE CORRECT RELATIONSHIP WHICH PROFESSIONAL TRADITIONS AND CANONS REQUIRE BETWEEN ADVOCATES AND JUDGES.

KANSAS CODE

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not: ...

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal. (K.S.A. 1971 Supp. 7-125, DR 7-106(C)(6)).

(A) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law. (K.S.A. 1971 Supp. 7-125, DR 7-110).

COMMENT

The Kansas code is in substantial conformance with the philosophy of the Standard.

ABA STANDARD

(c) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR TO ENGAGE IN UNAUTHORIZED EX PARTE DISCUSSIONS WITH OR SUBMISSION OF MATERIAL TO A JUDGE RELATING TO A PARTICULAR CASE WHICH IS OR MAY COME BEFORE HIM.

KANSAS CODE

See K.S.A. 1971 Supp. 7-125, DR 7-110
cited under 2.8(b) supra.

COMMENT

Kansas is in substantial compliance with the Standard.

ABA STANDARD

(d) IN HIS NECESSARILY FREQUENT CONTACTS WITH OTHER MEMBERS OF THE BAR, THE PROSECUTOR SHOULD STRIVE TO AVOID THE APPEARANCE AS WELL AS THE REALITY OF ANY RELATIONSHIP WHICH WOULD TEND TO CAST DOUBT ON THE INDEPENDENCE AND INTEGRITY OF HIS OFFICE.

KANSAS CODE

No comparable code provision.

COMMENT

By the Code of Professional Responsibility, Kansas seems to be in general compliance with the Standard.

ABA STANDARD

2.9 PROMPT DISPOSITION OF CRIMINAL CHARGES.

(a) A PROSECUTOR SHOULD NOT INTENTIONALLY USE PROCEDURAL DEVICES FOR DELAY FOR WHICH THERE IS NO LEGITIMATE BASIS.

KANSAS CODE

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another. (K.S.A. 1971 Supp. 7-125, DR 7-102(A)(1)).

COMMENT

The Kansas provision seems to be in substantial compliance with the Standard. There are also many constitutional and statutory provisions in Kansas which guarantee a speedy trial for a person charged with a crime. See the Standard on Speedy Trial.

ABA STANDARD

(b) THE PROSECUTION FUNCTION SHOULD BE SO ORGANIZED AND SUPPORTED WITH STAFF AND FACILITIES AS TO ENABLE IT TO DISPOSE OF ALL CRIMINAL CHARGES PROMPTLY. THE PROSECUTOR SHOULD BE PUNCTUAL IN ATTENDANCE IN COURT AND IN THE SUBMISSION OF ALL MOTIONS, BRIEFS AND OTHER PAPERS. HE SHOULD EMPHASIZE TO ALL WITNESSES THE IMPORTANCE OF PUNCTUALITY IN ATTENDANCE IN COURT.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in conformance with this Standard. The prosecutor's office is dependent upon the Board of County Commissioners for funding. Chapter 71, section 6 of the Laws of 1972 relates to the duty of the county commissioners to make funds available to the office of the district attorney. However, the law is not a directive.

ABA STANDARD

(c) IT IS UNPROFESSIONAL CONDUCT INTENTIONALLY TO MISREPRESENT FACTS OR OTHERWISE MISLEAD THE COURT IN ORDER TO OBTAIN A CONTINUANCE.

KANSAS CODE

(A). A lawyer shall not:
... (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
(K.S.A. 1971 Supp. 7-125, DR 1-102 (4)).

COMMENT

Kansas appears to be in compliance with the Standard.

ABA STANDARD

2.10 SUPERSESSON AND SUBSTITUTION OF PROSECUTOR.

(a) PROCEDURES SHOULD BE ESTABLISHED BY APPROPRIATE LEGISLATION TO THE END THAT THE GOVERNOR OR OTHER ELECTED STATE OFFICIAL IS EMPOWERED BY LAW TO SUSPEND AND SUPERSEDE A LOCAL PROSECUTOR UPON MAKING A PUBLIC FINDING, AFTER REASONABLE NOTICE AND HEARING, THAT HE IS INCAPABLE OF FULFILLING THE DUTIES OF HIS OFFICE.

KANSAS CODE

In the absence, sickness or disability of both the county attorney and his deputy any court before whom it is his duty to appear may appoint an attorney to act as county attorney by order to be entered upon the minutes of the court. (K.S.A. 19-711).

COMMENT

Kansas is not in conformance with the Standard. The quoted law provides only for special counsel in special circumstances and does not provide for the suspension or removal from office of the elected official.

ABA STANDARD

(b) THE GOVERNOR OR OTHER ELECTED STATE OFFICIAL SHOULD BE EM-POWERED BY LAW TO SUBSTITUTE SPECIAL COUNSEL IN THE PLACE OF THE LOCAL PROSECUTOR IN A PARTICULAR CASE, OR CATEGORY OF CASES, UPON MAKING A PUBLIC FINDING THAT THIS IS REQUIRED FOR THE PROTECTION OF THE PUBLIC INTEREST.

KANSAS CODE

(1) "That when, in the judgment of the board of county commissioners of any county in this state, it becomes necessary or expedient, the said board of county commissioners may employ an additional attorney at law to assist the county attorney in any specific investigation, prosecution, or any civil or criminal matters." (K.S.A. 19-724).

(2) "That the governor of the state of Kansas is ... authorized ... to employ special attorneys with the powers of assistant attorneys general... to make investigations and to secure evidence relative to the violation of the ... criminal laws of this state and assist in the prosecution thereof ...". (K.S.A. 75-116).

(3) "The attorney general ... when required by the governor or either branch of the legislature (shall) appear for the state and prosecute or defend, in any ... court ... in any cause ... civil or criminal" (K.S.A. 75-702).

COMMENT

Kansas appears to be in conformance both by code and court decision. Whenever required by the governor to appear and prosecute criminal proceedings in any county, the attorney general becomes prosecuting attorney of that county in those proceedings. (State v. Bowles, 70 Kan. 821, 79 Pac. 726 (1905)). The provisions of 75-702 are mandatory upon order of the governor. (State ex rel v. Dawson, 86 Kan. 180, 119 Pac. 360 (1911)). The attorney general may supersede the county attorney in the Supreme Court in cases involving state or public interest. (State ex rel v. Kansas City, 186 Kan. 190, 350 P.2d 37 (1960)).

The attorney general possesses the powers that attached to the office at Common Law. This includes the power to supersede the local prosecutor under certain circumstances. (State v. Finch, cited supra at 2.2 (b)).

ABA STANDARD

PART III. INVESTIGATION FOR PROSECUTION DECISION.

3.1 INVESTIGATIVE FUNCTION OF PROSECUTOR.

(a) A PROSECUTOR, AS THE CHIEF LAW ENFORCEMENT OFFICIAL OF HIS JURISDICTION, ORDINARILY RELIES ON POLICE AND OTHER INVESTIGATIVE AGENCIES FOR INVESTIGATION OF ALLEGED CRIMINAL ACTS, BUT HE HAS AN AFFIRMATIVE RESPONSIBILITY TO INVESTIGATE SUSPECTED ILLEGAL ACTIVITY WHEN IT IS NOT ADEQUATELY DEALT WITH BY OTHER AGENCIES.

KANSAS CODE

(1) If the attorney general, an assistant attorney general, or the county attorney of any county is informed or has knowledge of any alleged violation of the laws of Kansas, he may apply to a judge of the district court to conduct an inquisition. An application for an inquisition shall be in writing, verified under oath, setting forth the alleged violation of law. Upon the filing of the application, the judge with whom it is filed shall, on the written praecipe of the attorney general, assistant attorney general or county attorney, issue a subpoena for the witnesses named in such praecipe commanding them to appear and testify concerning the matters under investigation. Such subpoenas shall be served and returned as subpoenas for witnesses in criminal cases in the district court. (K.S.A. 1971 Supp. 22-3101 (1)).

COMMENT

Kansas is not in conformity. Kansas law gives the prosecuting attorney the authority to investigate suspected illegal activity. However, the power is discretionary with the prosecutor, but once instituted the court apparently must proceed and no discretion is vested in the court.

(b) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR KNOWINGLY TO USE ILLEGAL MEANS TO OBTAIN EVIDENCE OR TO EMPLOY OR INSTRUCT OR ENCOURAGE OTHERS TO USE SUCH MEANS.

KANSAS CODE

(A) A lawyer shall not: ...

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
(K.S.A. 1971 Supp. 7-125, DR 1-102(A)(3)(4)).

COMMENT

The Kansas code appears to be in compliance with the Standard.

ABA STANDARD

(c) A PROSECUTOR SHOULD NOT DISCOURAGE OR OBSTRUCT COMMUNICATION BETWEEN PROSPECTIVE WITNESSES AND DEFENSE COUNSEL. IT IS UNPROFESSIONAL CONDUCT FOR THE PROSECUTOR TO ADVISE ANY PERSON OR CAUSE ANY PERSON TO BE ADVISED TO DECLINE TO GIVE TO THE DEFENSE INFORMATION WHICH HE HAS THE RIGHT TO GIVE.

KANSAS CODE

(A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce. (K.S.A. 1971 Supp. 7-125, DR 7-109(A)).

COMMENT

Kansas appears to be in conformity with the Standard. However, the Standard and the Kansas code are both so indefinite as to that which should or must be revealed that it is very difficult to apply the Standard to the code.

ABA STANDARD

(d) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR TO SECURE THE ATTENDANCE OF PERSONS FOR INTERVIEWS BY USE OF ANY COMMUNICATION WHICH HAS THE APPEARANCE OR COLOR OF A SUBPOENA OR SIMILAR JUDICIAL PROCESS UNLESS HE IS AUTHORIZED BY LAW TO DO SO.

KANSAS CODE

See K.S.A. 1971 Supp. 7-125, DR 1-102
(A) (4) cited under 3.1(b) supra.

COMMENT

Kansas appears to be in conformity with the Standard. There is a statutory provision making it a crime to simulate legal process (K.S.A. 1971 Supp. 21-3820) but it applies only to collection cases.

ABA STANDARD

(e) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR TO PROMISE NOT TO PROSECUTE FOR PROSPECTIVE CRIMINAL ACTIVITY, EXCEPT WHERE SUCH ACTIVITY IS PART OF AN OFFICIALLY SUPERVISED INVESTIGATIVE AND ENFORCEMENT PROGRAM.

KANSAS CODE

No person called as a witness at an inquisition shall be required to make any statement which will incriminate him. The attorney general, assistant attorney general or county attorney may, on behalf of the state, grant any person called as a witness at an inquisition immunity from prosecution or punishment on account of any transaction or matter about which such person shall be compelled to testify and such testimony shall not be used against such person in any prosecution for a crime under the laws of Kansas or any municipal ordinance. After being granted immunity from prosecution or punishment, as herein provided, no person shall be excused from testifying on the ground that his testimony may incriminate him. (K.S.A. 1971 Supp. 22-3102).

The county or district attorney or the attorney general may at any time, on behalf of the state, grant in writing to any person immunity from prosecution or punishment on account of any transaction or matter contained in any statement or about which such person shall be compelled to testify and such statement or testimony shall not be used against such person in any prosecution for a crime under the laws of Kansas or any municipal ordinance. After being granted immunity from prosecution or punishment, as herein provided, no person shall be excused from testifying on the ground that his testimony may incriminate him. He shall not be granted immunity from prosecution for perjury or false statement or any other crime committed in giving such evidence. (Laws of 1972, Ch. 122, par. 2).

COMMENT

Kansas is in conformity with the Standard. However, Kansas goes further and a prosecutor has practically unlimited power to grant immunity. (Laws of 1972, Chapter 122).

ABA STANDARD

(f) WHENEVER FEASIBLE, THE PROSECUTOR SHOULD AVOID INTERVIEWING A PROSPECTIVE WITNESS EXCEPT IN THE PRESENCE OF A THIRD PERSON UNLESS THE PROSECUTOR IS PREPARED TO FOREGO IMPEACHMENT OF THE WITNESS BY THE PROSECUTOR'S OWN TESTIMONY AS TO WHAT THE WITNESS STATED IN THE INTERVIEW OR TO SEEK LEAVE TO WITHDRAW FROM THE CASE IN ORDER TO PRESENT HIS IMPEACHING TESTIMONY.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is not in conformity with the Standard. See K.S.A. 1971 Supp. 7-125, DR 5-102 relating to the duty and obligation of a lawyer to withdraw if it becomes apparent that he will be a witness in the case.

ABA STANDARD

3.2 RELATIONS WITH PROSPECTIVE WITNESSES.

(a) IT IS UNPROFESSIONAL CONDUCT TO COMPENSATE A WITNESS, OTHER THAN AN EXPERT, FOR GIVING TESTIMONY, BUT IT IS NOT IMPROPER TO REIMBURSE AN ORDINARY WITNESS FOR THE REASONABLE EXPENSES OF ATTENDANCE UPON COURT, INCLUDING TRANSPORTATION AND LOSS OF INCOME, PROVIDED THERE IS NO ATTEMPT TO CONCEAL THE FACT OF REIMBURSEMENT.

KANSAS CODE

(C) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for his loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness. (K.S.A. 1971 Supp. 7-121, DR 7-109 (C)).

COMMENT

The Kansas code appears to be in conformity with the Standard. But, note that the Kansas code apparently applies only to "contingent" fees to a witness while the exceptions apparently apply in all instances. The DR does not go as far as the Standard which prohibits all payment to "witnesses" and is not limited to "contingent" witness fees.

ABA STANDARD

(b) IN INTERVIEWING A PROSPECTIVE WITNESS IT IS PROPER BUT NOT MANDATORY FOR THE PROSECUTOR OR HIS INVESTIGATOR TO CAUTION THE WITNESS CONCERNING POSSIBLE SELF-INCRIMINATION AND HIS POSSIBLE NEED FOR COUNSEL.

KANSAS CODE

No comparable code provision.

COMMENT

In practice there is reasonable compliance with this Standard due to the decisions of the Supreme Court of the United States in Miranda v. Arizona, 384 U.S. 436 (1966) and Escobedo v. Illinois 378 U.S. 478 (1964).

ABA STANDARD

3.3 RELATIONS WITH EXPERT WITNESSES.

(a) A PROSECUTOR WHO ENGAGES AN EXPERT FOR AN OPINION SHOULD RESPECT THE INDEPENDENCE OF THE EXPERT AND SHOULD NOT SEEK TO DICTATE THE FORMATION OF THE EXPERT'S OPINION ON THE SUBJECT. TO THE EXTENT NECESSARY, THE PROSECUTOR SHOULD EXPLAIN TO THE EXPERT HIS ROLE IN THE TRIAL AS AN IMPARTIAL EXPERT CALLED TO AID THE FACT-FINDERS AND THE MANNER IN WHICH THE EXAMINATION OF WITNESSES IS CONDUCTED.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is not in conformance with the Standard.

ABA STANDARD

(b) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR TO PAY AN EXCESSIVE FEE FOR THE PURPOSE OF INFLUENCING THE EXPERT'S TESTIMONY OR TO FIX THE AMOUNT OF THE FEE CONTINGENT UPON THE TESTIMONY HE WILL GIVE OR THE RESULT IN THE CASE.

KANSAS CODE

See K.S.A. 1971 Supp. 7-125, DR 7-109 (C)
cited under 3.2 (a) above.

COMMENT

The Kansas code is in conformity with the Standard.

ABA STANDARD

3.4 DECISION TO CHARGE.

(a) THE DECISION TO INSTITUTE CRIMINAL PROCEEDINGS SHOULD BE INITIALLY AND PRIMARILY THE RESPONSIBILITY OF THE PROSECUTOR.

KANSAS CODE

Unless otherwise provided by law, a prosecution shall be commenced by filing a complaint with a magistrate. A copy of the complaint shall forthwith be supplied to the county attorney of the county and a copy thereof shall be furnished to the defendant or his attorney upon request. (K.S.A. 1971 Supp. 22-2301).

COMMENT

The Kansas provision is not in conformity with the Standard. A criminal proceeding may be instituted without the knowledge or consent (and even over the opposition) of the prosecutor. However, the county attorney has full charge of the prosecution and may dismiss a case in his discretion. (State ex rel v. Coffeyville, 123 Kan. 774, 256 Pac. 804 (1927)).

ABA STANDARD

(b) THE PROSECUTOR SHOULD ESTABLISH STANDARDS AND PROCEDURES FOR EVALUATING COMPLAINTS TO DETERMINE WHETHER CRIMINAL PROCEEDINGS SHOULD BE INSTITUTED.

KANSAS CODE

No comparable code provision.

COMMENT

In practice in Kansas the county attorney does establish standards for evaluating complaints to determine if criminal proceedings should be instituted.

ABA STANDARD

(c) WHERE THE LAW PERMITS A CITIZEN TO COMPLAIN DIRECTLY TO A JUDICIAL OFFICER OR THE GRAND JURY, THE CITIZEN COMPLAINANT SHOULD BE REQUIRED TO PRESENT HIS COMPLAINT FOR PRIOR APPROVAL TO THE PROSECUTOR AND THE PROSECUTOR'S ACTION OR RECOMMENDATION THEREON SHOULD BE COMMUNICATED TO THE JUDICIAL OFFICER OR GRAND JURY.

KANSAS CODE

See citation under 3.4(a) supra of
K.S.A. 1971 Supp. 22-2301.

COMMENT

Kansas is not in conformity with the Standard.

ABA STANDARD

3.5 RELATIONS WITH GRAND JURY.

(a) WHERE THE PROSECUTOR IS AUTHORIZED TO ACT AS LEGAL ADVISER TO THE GRAND JURY HE MAY APPROPRIATELY EXPLAIN THE LAW AND EXPRESS HIS OPINION ON THE LEGAL SIGNIFICANCE OF THE EVIDENCE BUT HE SHOULD GIVE DUE DEFERENCE TO ITS STATUS AS AN INDEPENDENT LEGAL BODY.

KANSAS CODE

(1) When requested by any grand jury it shall be the duty of the prosecuting attorney to attend sessions thereof for the purpose of examining witnesses or giving the grand jury advice upon any legal matter.

(2) The prosecuting attorney shall, upon his request, be permitted to appear before the grand jury for the purpose of giving information relative to any matter cognizable by

the grand jury, and may be permitted to interrogate witnesses if the grand jury deems it necessary. (K.S.A. 1971 Supp. 22-3007(1)(2)).

COMMENT

The Kansas code is in substantial compliance with the Standard. By K.S.A. 1971 Supp. 22-3005, it is provided that the court charges the jury as to the law.

ABA STANDARD

(b) THE PROSECUTOR SHOULD NOT MAKE STATEMENTS OR ARGUMENT IN AN EFFORT TO INFLUENCE GRAND JURY ACTION IN A MANNER WHICH WOULD BE IMPERMISSIBLE AT TRIAL BEFORE A PETIT JURY.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is not in conformity with this Standard.

ABA STANDARD

(c) THE PROSECUTOR'S COMMUNICATIONS AND PRESENTATIONS TO THE GRAND JURY SHOULD BE ON THE RECORD.

KANSAS CODE

The grand jury shall employ a certified shorthand reporter who shall make a stenographic record of all testimony and other proceedings before the grand jury. (K.S.A. 1971 Supp. 22-3006(2)).

COMMENT

Kansas is in compliance with the Standard.

ABA STANDARD

3.6 QUALITY AND SCOPE OF EVIDENCE BEFORE GRAND JURY.

(a) A PROSECUTOR SHOULD PRESENT TO THE GRAND JURY ONLY EVIDENCE WHICH HE BELIEVES WOULD BE ADMISSIBLE AT TRIAL. HOWEVER, IN APPROPRIATE CASES THE PROSECUTOR MAY PRESENT WITNESSES TO SUMMARIZE ADMISSIBLE EVIDENCE AVAILABLE TO HIM WHICH HE BELIEVES HE WILL BE ABLE TO PRESENT AT TRIAL.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in conformity.

ABA STANDARD

(b) THE PROSECUTOR SHOULD DISCLOSE TO THE GRAND JURY ANY EVIDENCE WHICH HE KNOWS WILL TEND TO NEGATE GUILT.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in conformity.

ABA STANDARD

(c) A PROSECUTOR SHOULD RECOMMEND THAT THE GRAND JURY NOT INDICT IF HE BELIEVES THE EVIDENCE PRESENTED DOES NOT WARRANT AN INDICTMENT UNDER GOVERNING LAW.

KANSAS CODE

See K.S.A. 1971 Supp. 7-125, DR 7-103(A) cited under 1.1(c) supra.

COMMENT

The Kansas code is in conformity with the Standard.

ABA STANDARD

(d) IF THE PROSECUTOR BELIEVES THAT A WITNESS IS A POTENTIAL DEFENDANT HE SHOULD NOT SEEK TO COMPEL HIS TESTIMONY BEFORE THE GRAND JURY WITHOUT INFORMING HIM THAT HE MAY BE CHARGED AND THAT HE SHOULD SEEK INDEPENDENT LEGAL ADVICE CONCERNING HIS RIGHTS.

KANSAS CODE

(1) Any person called to testify before a grand jury must be informed that he has a right to be advised by counsel and that he may not be required to make any statement which will incriminate him. Upon a request by such person for counsel, no further examination of the witness shall take place until counsel is present. In the event that counsel of the witness' choice is not available, he shall be required to obtain other counsel within three (3) days in order that the work of the grand jury may proceed. If such person is indigent and unable to obtain the services of counsel, the court shall appoint counsel to assist him who shall be compensated as counsel appointed for indigent defendants in the district court.

(2) Counsel for any witness may be present while the witness is testifying and may interpose objections on behalf of the witness. He shall not be permitted to examine or cross-examine his client or any other witness before the grand jury. (K.S.A. 1971 Supp. 22-3009).

COMMENT

Kansas is in full compliance with the Standard. However, the duty is not necessarily that of the prosecutor, but rather that of the grand jury itself.

ABA STANDARD

(e) THE PROSECUTOR SHOULD NOT COMPEL THE APPEARANCE OF A WITNESS BEFORE THE GRAND JURY WHOSE ACTIVITIES ARE THE SUBJECT OF THE INQUIRY IF THE WITNESS STATES IN ADVANCE THAT IF CALLED HE WILL EXERCISE HIS CONSTITUTIONAL PRIVILEGE NOT TO TESTIFY, UNLESS THE PROSECUTOR INTENDS TO SEEK A GRANT OF IMMUNITY ACCORDING TO THE LAW.

KANSAS CODE

No witness before a grand jury shall be required to incriminate himself. The district judge may, if he determines that the interests of justice require, grant any witness before the grand jury immunity from prosecution or punishment on account of any matter concerning which he shall be compelled to testify. Prior to any such grant of immunity, notice shall be given to the prosecuting attorney whose recommendations on the matter of the grant of immunity shall be heard by the judge before the grant of immunity is made. (K.S.A. 1971 Supp. 22-3008(4)).

COMMENT

Kansas is not in full conformity. The Kansas code is very liberal in the power of the prosecutor to grant immunity. But, the prosecutor may call a witness without a prior grant of immunity.

ABA STANDARD

3.7 QUALITY AND SCOPE OF EVIDENCE FOR INFORMATIONS.

WHERE THE PROSECUTOR IS EMPOWERED TO CHARGE BY INFORMATION, HIS DECISIONS SHOULD BE GOVERNED BY THE PRINCIPLES EMBODIED IN SECTION 3.6, supra.

KANSAS CODE

When an indictment is returned, as provided by by section 22-3011, a prosecution shall be deemed to have been begun. In misdemeanor cases a prosecution may be begun by filing an information in the district court. Such information shall be verified positively or shall be accompanied by affidavits stating the facts constituting the crime charged. When an information is filed under this section further proceedings shall be had only after the judge has determined from the

information, or from an affidavit or affidavits filed with the information or from other evidence that there is probable cause to believe both that a crime has been committed and that the defendant has committed it. (K.S.A. 1971 Supp. 22-2303 (1)).

When a defendant is bound over to the district court, the prosecuting attorney shall file an information in the office of the clerk of the district court, charging the crime for which the defendant was bound over. (K.S.A. 1971 Supp. 22-2905 (2)).

COMMENT

Kansas code permits the filing of an information in the district court on misdemeanor cases as above provided and in felony cases after the preliminary examination. The responsibility of the prosecutor in determining if the information should be filed is the same as his duty as related under 3.6 above.

ABA STANDARD

3.8 DISCRETION AS TO NON-CRIMINAL DISPOSITION.

(a) THE PROSECUTOR SHOULD EXPLORE THE AVAILABILITY OF NON-CRIMINAL DISPOSITION, INCLUDING PROGRAMS OF REHABILITATION, FORMAL OR INFORMAL, IN DECIDING WHETHER TO PRESS CRIMINAL CHARGES; ESPECIALLY IN THE CASE OF A FIRST OFFENDER, THE NATURE OF THE OFFENSE MAY WARRANT NON-CRIMINAL DISPOSITION.

(b) PROSECUTORS SHOULD BE FAMILIAR WITH THE RESOURCES OF SOCIAL AGENCIES WHICH CAN ASSIST IN THE EVALUATION OF CASES FOR DIVERSION FROM THE CRIMINAL PROCESS.

KANSAS CODE

No comparable code provision.

COMMENT

In Kansas the county attorney is vested with wide discretion in the filing and the handling of criminal cases. The extent of compliance with the Standard depends upon the county attorney.

ABA STANDARD

3.9 DISCRETION IN THE CHARGING DECISION.

(a) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR TO INSTITUTE OR CAUSE TO BE INSTITUTED CRIMINAL CHARGES WHEN HE KNOWS THAT THE CHARGES ARE NOT SUPPORTED BY PROBABLE CAUSE.

KANSAS CODE

See K.S.A. 1971 Supp. 7-125, 7-103(A) cited at 1.1(c) supra.

COMMENT

Kansas is in full compliance with the Standard.

ABA STANDARD

(b) THE PROSECUTOR IS NOT OBLIGED TO PRESENT ALL CHARGES WHICH THE EVIDENCE MIGHT SUPPORT. THE PROSECUTOR MAY IN SOME CIRCUMSTANCES AND FOR GOOD CAUSE CONSISTENT WITH THE PUBLIC INTEREST DECLINE TO PROSECUTE, NOTWITHSTANDING THAT EVIDENCE MAY EXIST WHICH WOULD SUPPORT A CONVICTION. ILLUSTRATIVE OF FACTORS WHICH THE PROSECUTOR MAY PROPERLY CONSIDER IN EXERCISING HIS DISCRETION ARE:

- (i) THE PROSECUTOR'S REASONABLE DOUBT THAT THE ACCUSED IS IN FACT GUILTY;
- (ii) THE EXTENT OF THE HARM CAUSED BY THE OFFENSE;
- (iii) THE DISPROPORTION OF THE AUTHORIZED PUNISHMENT IN RELATION TO THE PARTICULAR OFFENSE OR THE OFFENDER;
- (iv) POSSIBLE IMPROPER MOTIVES OF A COMPLAINANT;
- (v) RELUCTANCE OF THE VICTIM TO TESTIFY;
- (vi) COOPERATION OF THE ACCUSED IN THE APPREHENSION OR CONVICTION OF OTHERS;
- (vii) AVAILABILITY AND LIKELIHOOD OF PROSECUTION BY ANOTHER JURISDICTION.

KANSAS CODE

No comparable code provision.

COMMENT

In practice, Kansas is in conformity. Kansas case law has long recognized the wide discretion allotted the county attorney with respect to the institution of criminal charges. (State v. Trinkle, 70 Kan. 396, 78 Pac. 854 (1904)).

ABA STANDARD

(c) IN MAKING THE DECISION TO PROSECUTE, THE PROSECUTOR SHOULD GIVE NO WEIGHT TO THE PERSONAL OR POLITICAL ADVANTAGES OR DISADVANTAGES WHICH MIGHT BE INVOLVED OR TO A DESIRE TO ENHANCE HIS RECORD OF CONVICTIONS.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in conformity with the Standard.

ABA STANDARD

(d) IN CASES WHICH INVOLVE A SERIOUS THREAT TO THE COMMUNITY, THE PROSECUTOR SHOULD NOT BE DETERRED FROM PROSECUTION BY THE FACT THAT IN HIS JURISDICTION JURIES HAVE TENDED TO ACQUIT PERSONS ACCUSED OF THE PARTICULAR KIND OF CRIMINAL ACT IN QUESTION.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in conformity with the Standard.

ABA STANDARD

(e) THE PROSECUTOR SHOULD NOT BRING OR SEEK CHARGES GREATER IN NUMBER OR DEGREE THAN HE CAN REASONABLY SUPPORT WITH EVIDENCE AT TRIAL.

KANSAS COMMENT

See K.S.A. 1971 Supp. 7-125, DR 7-103(A) cited supra at 1.1(c).

COMMENT

Kansas is in conformity with the Standard.

ABA STANDARD

3.10 ROLE IN FIRST APPEARANCE AND PRELIMINARY HEARING.

(a) IF THE PROSECUTOR IS PRESENT AT THE FIRST APPEARANCE (HOWEVER DENOMINATED) OF THE ACCUSED BEFORE A JUDICIAL OFFICER, HE SHOULD CO-OPERATE IN OBTAINING COUNSEL FOR THE ACCUSED. HE SHOULD COOPERATE IN GOOD FAITH IN ARRANGEMENTS FOR RELEASE UNDER THE PREVAILING SYSTEM FOR PRETRIAL RELEASE.

KANSAS CODE

No comparable code provision.

COMMENT

The code provision does not comply with the Standard. In Kansas the duty to appoint counsel rests with the magistrate. (K.S.A. 1971 Supp. 22-4503).

ABA STANDARD

(b) THE PROSECUTOR SHOULD NOT ENCOURAGE AN UNCOUNSELLED ACCUSED TO WAIVE PRELIMINARY HEARING.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in conformity.

ABA STANDARD

(c) THE PROSECUTOR SHOULD NOT SEEK A CONTINUANCE SOLELY FOR THE PURPOSE OF MOOTING THE PRELIMINARY HEARING BY SECURING AN INDICTMENT.

KANSAS CODE

No comparable code provision.

COMMENT

The Standard is not applicable to Kansas procedures.

ABA STANDARD

(d) EXCEPT FOR GOOD CAUSE, THE PROSECUTOR SHOULD NOT SEEK DELAY IN THE PRELIMINARY HEARING AFTER AN ARREST HAS BEEN MADE IF THE ACCUSED IS IN CUSTODY.

KANSAS CODE

The preliminary examination shall be held before a magistrate of a county in which venue for the prosecution lies within ten days after the arrest of the defendant. Either the state or the defendant shall, upon request, be granted a continuance of not more than 15 days. Further continuances may be granted only for good cause shown. (K.S.A. 1971 Supp. 22-2902 (2)).

COMMENT

Kansas is in conformance with the Standard.

ABA STANDARD

(e) THE PROSECUTOR SHOULD ORDINARILY BE PRESENT AT A PRELIMINARY HEARING WHERE SUCH HEARING IS REQUIRED BY LAW.

KANSAS CODE

"It shall be the duty of the county attorney to appear in the several courts of their respective counties and prosecute ... on behalf of the people ..." (K.S.A. 19-702).

COMMENT

Kansas is in full compliance with the Standard. There is nothing in the new criminal code on this duty of the county attorney to be present at a preliminary hearing. By K.S.A. 19-703, the county attorney needs to be present before a magistrate to conduct "any criminal examination" upon request of the magistrate. However, despite the apparent discrepancy, Kansas is in compliance.

ABA STANDARD

3.11 DISCLOSURE OF EVIDENCE BY THE PROSECUTOR.

(a) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR TO FAIL TO MAKE TIMELY DISCLOSURE TO THE DEFENSE OF THE EXISTENCE OF EVIDENCE, KNOWN TO HIM, SUPPORTING THE INNOCENCE OF THE DEFENDANT. HE SHOULD DISCLOSE EVIDENCE WHICH WOULD TEND TO NEGATE THE GUILT OF THE ACCUSED OR MITIGATE THE DEGREE OF THE OFFENSE OR REDUCE THE PUNISHMENT AT THE EARLIEST FEASIBLE OPPORTUNITY.

KANSAS CODE

See K.S.A. 1974 Supp. 7-125, DR 7-103 (B) cited at 1.1 (c) supra.

COMMENT

Kansas is in conformity with the Standard. A prosecutor is under a positive duty to disclose exculpatory evidence to the defendant independent of a court order. (State v. Hill, 211 Kan. 287; 507 P.2d 342 (1973)).

ABA STANDARD

(b) THE PROSECUTOR SHOULD COMPLY IN GOOD FAITH WITH DISCOVERY PROCEDURES UNDER THE APPLICABLE LAW.

KANSAS CODE

No comparable code provision.

COMMENT

Under the general powers of a court to enforce its orders and under the disciplinary rules, Kansas appears to be in compliance with the Standard. Sanctions are provided for failure to disclose under K.S.A. 22-3212 (7). See Discovery and Procedures Before Trial. See also State v. Jones, 209 Kan. 526, 498 P.2d 65 (1972). See also, State v. Sullivan, 210 Kan. 842; 504 P.2d 190 (1972), as to sanctions which court can apply to a prosecutor who fails to comply with a discovery order.

ABA STANDARD

(c) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR INTENTIONALLY TO AVOID PURSUIT OF EVIDENCE BECAUSE HE BELIEVES IT WILL DAMAGE THE PROSECUTION'S CASE OR AID THE ACCUSED.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is not in compliance with the Standard. Under DR7-103(B) above quoted, the prosecutor has a duty to disclose evidence which negates guilt. But, we have nothing with respect to a prosecutor's duty to search for evidence that may negate guilt, or to stop an investigation so that such evidence will not be discovered.

ABA STANDARD

PART IV. PLEA DISCUSSIONS.

4.1 AVAILABILITY FOR PLEA DISCUSSIONS.

(a) THE PROSECUTOR SHOULD MAKE KNOWN A GENERAL POLICY OF WILLINGNESS TO CONSULT WITH DEFENSE COUNSEL CONCERNING DISPOSITION OF CHARGES BY PLEA.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is not in conformance with the Standard.

ABA STANDARD

(b) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR TO ENGAGE IN PLEA DISCUSSIONS DIRECTLY WITH AN ACCUSED WHO IS REPRESENTED BY COUNSEL,

EXCEPT WITH COUNSEL'S APPROVAL. IF THE ACCUSED REFUSE TO BE REPRESENTED BY COUNSEL, THE PROSECUTOR MAY PROPERLY DISCUSS DISPOSITION OF THE CHARGES DIRECTLY WITH THE ACCUSED; THE PROSECUTOR WOULD BE WELL ADVISED, HOWEVER, TO REQUEST THAT A LAWYER BE DESIGNATED BY THE COURT OR SOME APPROPRIATE CENTRAL AGENCY, SUCH AS A LEGAL AID OR DEFENDER OFFICE OR BAR ASSOCIATION, TO BE PRESENT AT SUCH DISCUSSIONS.

KANSAS CODE

No comparable code provision.

COMMENT

While there is no direct code provision and no direct disciplinary rule, it would be unprofessional conduct for a lawyer (prosecutor) to by-pass counsel and deal directly with the accused. So, by implication and in practice, Kansas is in conformance with the Standard.

ABA STANDARD

(c) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR KNOWINGLY TO MAKE FALSE STATEMENTS OR REPRESENTATIONS IN THE COURSE OF PLEA DISCUSSIONS WITH DEFENSE COUNSEL OR THE ACCUSED.

KANSAS CODE

See K.S.A. 1971 Supp. 7-125, DR 7-102 (A)
(5) cited at 2.8 (a) supra.

COMMENT

Kansas is in compliance with the Standard.

ABA STANDARD

4.2 PLEA DISPOSITION WHEN ACCUSED MAINTAINS INNOCENCE.

A PROSECUTOR MAY NOT PROPERLY PARTICIPATE IN A DISPOSITION BY PLEA OF GUILTY IF HE IS AWARE THAT THE ACCUSED PERSISTS IN DENYING GUILT OR THE FACTUAL BASIS FOR THE PLEA, WITHOUT DISCLOSURE TO THE COURT.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in compliance with the Standard.

ABA STANDARD

4.3 FULFILLMENT OF PLEA DISCUSSIONS.

(a) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR TO MAKE ANY PROMISE OR COMMITMENT CONCERNING THE SENTENCE WITH WILL BE IMPOSED OR CONCERNING A SUSPENSION OF SENTENCE; HE MAY PROPERLY ADVISE THE DEFENSE WHAT POSITION HE WILL TAKE CONCERNING DISPOSITION.

(b) A PROSECUTOR SHOULD AVOID IMPLYING A GREATER POWER TO INFLUENCE THE DISPOSITION OF A CASE THAN HE POSSESSES.

(c) IF THE PROSECUTOR FINDS HE IS UNABLE TO FULFILL AN UNDERSTANDING PREVIOUSLY AGREED UPON IN PLEA DISCUSSIONS, HE SHOULD GIVE NOTICE PROMPTLY TO THE DEFENDANT AND COOPERATE IN SECURING LEAVE OF THE COURT FOR THE DEFENDANT TO WITHDRAW ANY PLEA AND TAKE OTHER STEPS APPROPRIATE TO RESTORE THE DEFENDANT TO THE POSITION HE WAS IN BEFORE THE UNDERSTANDING WAS REACHED OR PLEA MADE.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in conformance with the Standard. However, Kansas does have a provision allowing a plea of guilty or nolo contendere to be withdrawn any time before sentence is imposed if the court finds that manifest injustice would occur if the plea were allowed to stand. (K.S.A. 1971 Supp. 22-2210(7)). In Machibroda v. U.S., 368 U.S. 487(196), the court held that a plea of guilty induced by promises beyond the power of the prosecutor to fulfill is "involuntary" and may be withdrawn at any time.

ABA STANDARD

4.4 RECORD OF REASONS FOR NOLLE PROSEQUI DISPOSITION.

WHENEVER FELONY CRIMINAL CHARGES ARE DISMISSED BY WAY OF NOLLE PROSEQUI (OF ITS EQUIVALENT), THE PROSECUTOR SHOULD MAKE A RECORD OF THE REASONS FOR THE ACTION.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is not in conformance with the Standard.

ABA STANDARD

PART V. THE TRIAL

5.1 CALENDAR CONTROL.

CONTROL OVER THE TRIAL CALENDAR SHOULD BE VESTED IN THE COURT. THE PROSECUTING ATTORNEY SHOULD BE REQUIRED TO FILE WITH THE COURT AS A PUBLIC RECORD PERIODIC REPORTS SETTING FORTH THE REASONS FOR DELAY AS TO EACH CASE FOR WHICH HE HAS NOT REQUESTED TRIAL WITHIN A PRESCRIBED TIME FOLLOWING CHARGING. THE PROSECUTING ATTORNEY SHOULD ALSO ADVISE THE COURT OF FACTS RELEVANT IN DETERMINING THE ORDER OF CASES ON THE CALENDAR.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas is not in compliance with the Standard. In practice the control of the calendar is vested in the court. See Speedy Trial.

ABA STANDARD

5.2 COURTROOM DECORUM.

(a) THE PROSECUTOR SHOULD SUPPORT THE AUTHORITY OF THE COURT AND THE DIGNITY OF THE TRIAL COURTROOM BY STRICT ADHERENCE TO THE RULES OF DECORUM AND BY MANIFESTING AN ATTITUDE OF PROFESSIONAL RESPECT TOWARD THE JUDGE, OPPOSING COUNSEL, WITNESSES, DEFENDANTS, JURORS AND OTHERS IN THE COURTROOM.

(b) WHEN COURT IS IN SESSION THE PROSECUTOR SHOULD ADDRESS THE COURT, NOT OPPOSING COUNSEL, ON ALL MATTERS RELATING TO THE CASE.

(c) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR TO ENGAGE IN BEHAVIOR OR TACTICS PURPOSEFULLY CALCULATED TO IRRITATE OR ANNOY THE COURT OR OPPOSING COUNSEL.

(d) A PROSECUTOR SHOULD COMPLY PROMPTLY WITH ALL ORDERS AND DIRECTIVES OF THE COURT, BUT HE HAS A DUTY TO HAVE THE RECORD REFLECT ADVERSE RULINGS OR JUDICIAL CONDUCT WHICH HE CONSIDERS PREJUDICIAL. HE HAS A RIGHT TO MAKE RESPECTFUL REQUESTS FOR RECONSIDERATION OF ADVERSE RULINGS.

(e) A PROSECUTOR SHOULD BE PUNCTUAL IN ALL COURT APPEARANCES.

(f) PROSECUTORS SHOULD TAKE LEADERSHIP IN DEVELOPING, WITH THE COOPERATION OF THE COURTS AND THE BAR, A CODE OF DECORUM AND PROFESSIONAL ETIQUETTE FOR COURTROOM CONDUCT.

KANSAS CODE

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence. (K.S.A. 1971 Supp. 7-125, DR 7-106 (C), (6) and (7)).

COMMENT

In practice, Kansas is in substantial compliance with the Standard.

ABA STANDARD

5.3 SELECTION OF JURORS.

(a) THE PROSECUTOR SHOULD PREPARE HIMSELF PRIOR TO TRIAL TO DISCHARGE EFFECTIVELY HIS FUNCTION IN THE SELECTION OF THE JURY AND THE EXERCISE OF CHALLENGES FOR CAUSE AND PEREMPTORY CHALLENGES.

KANSAS CODE

(A) A lawyer shall not ...
(2) Handle a legal matter without preparation adequate in the circumstances.
(K.S.A. 1971 Supp. 7-125, DR 6-101 (A) (2)).

COMMENT

Kansas is in compliance with the Standard. It is the duty of a lawyer (prosecutor) to adequately prepare himself and this would include the selection of the jury.

ABA STANDARD

(b) IN THOSE CASES WHERE IT APPEARS NECESSARY TO CONDUCT A PRE-TRIAL INVESTIGATION OF THE BACKGROUND OF JURORS THE PROSECUTOR SHOULD RESTRICT HIMSELF TO INVESTIGATORY METHODS WHICH WILL NOT HARASS OR UN-DULY EMBARRASS POTENTIAL JURORS OR INVADE THEIR PRIVACY AND, WHEN-EVER POSSIBLE, HE SHOULD RESTRICT HIS INVESTIGATION TO RECORDS AND SOURCES OF INFORMATION ALREADY IN EXISTENCE.

KANSAS CODE

A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror. (K.S.A. 1971 Supp. 7-125, DR 7-108 (E)).

COMMENT

Kansas is in conformity with the Standard.

ABA STANDARD

(c) IN JURISDICTIONS WHERE LAWYERS ARE PERMITTED TO PERSONALLY QUESTION JURORS ON VOIR DIRE, THE OPPORTUNITY TO QUESTION JURORS SHOULD BE USED SOLELY TO OBTAIN INFORMATION FOR THE INTELLIGENT EXERCISE OF CHALLENGES. A PROSECUTOR SHOULD NOT INTENTIONALLY USE THE VOIR DIRE TO PRESENT FACTUAL MATTER WHICH HE KNOWS WILL NOT BE ADMISSIBLE AT TRIAL OR TO ARGUE HIS CASE TO THE JURY.

KANSAS CODE

The prosecuting attorney and the defendant or his attorney shall conduct the examination of prospective jurors. The court may conduct an additional examination. The court may limit the examination by the defendant, his attorney or the prosecuting attorney if the court believes such examination to be harassment, is causing unnecessary delay or serves no useful purpose. (K.S.A. 1971 Supp. 22-3408(3)).

COMMENT

Kansas is in conformity with the Standard.

ABA STANDARD

5.4 RELATIONS WITH JURY.

(a) IT IS UNPROFESSIONAL CONDUCT FOR THE PROSECUTOR TO COMMUNICATE PRIVATELY WITH PERSONS SUMMONED FOR JURY DUTY OR IMPANELED AS JURORS CONCERNING THE CASE PRIOR TO OR DURING THE TRIAL. THE PROSECUTOR SHOULD AVOID THE REALITY OR APPEARANCE OF ANY SUCH IMPROPER COMMUNICATIONS.

KANSAS CODE

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case: (1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury. (2) A lawyer who is not connected therewith shall not communicate with a juror concerning the case. (K.S.A. 1971 Supp. 7-125, DR 7-108).

COMMENT

Kansas is in compliance with the Standard.

ABA STANDARD

(b) THE PROSECUTOR SHOULD TREAT JURORS WITH DEFERENCE AND RESPECT, AVOIDING THE REALITY OR APPEARANCE OF CURRYING FAVOR BY A SHOW OF UNDUE SOLICITUDE FOR THEIR COMFORT OR CONVENIENCE.

KANSAS CODE

No comparable code provision.

COMMENT

Although there is no code provision, Kansas is in substantial conformity due to local court rules and customs. The county attorney in arguing a case should not appeal to prejudices or self-interest of jurors. (State v. Majors, 182 Kan. 644, 323 P.2d 917 (1958)).

ABA STANDARD

(c) AFTER VERDICT, THE PROSECUTOR SHOULD NOT MAKE COMMENTS TO OR ASK QUESTIONS OF A JUROR FOR THE PURPOSE OF HARASSING OR EMBARRASSING THE JUROR IN ANY WAY WHICH WILL TEND TO INFLUENCE JUDGMENT IN FUTURE JURY SERVICE.

KANSAS CODE

After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that

jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service. (K.S.A. 1971 Supp. 7-125, DR 7-108(D)).

COMMENT

Kansas is in conformance with the Standard.

ABA STANDARD

5.5 OPENING STATEMENT.

IN HIS OPENING STATEMENT THE PROSECUTOR SHOULD CONFINE HIS REMARKS TO EVIDENCE HE INTENDS TO OFFER WHICH HE BELIEVES IN GOOD FAITH WILL BE AVAILABLE AND ADMISSIBLE AND A BRIEF STATEMENT OF THE ISSUES IN THE CASE. IT IS UNPROFESSIONAL CONDUCT TO ALLUDE TO ANY EVIDENCE UNLESS THERE IS A GOOD FAITH AND REASONABLE BASIS FOR BELIEVING THAT SUCH EVIDENCE WILL BE TENDERED AND ADMITTED IN EVIDENCE.

KANSAS CODE

In appearing in his professional capacity before a tribunal, a lawyer shall not:
(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
(K.S.A. 1971 Supp. 7-125, DR 7-106(C)(1)).

COMMENT

Since the disciplinary rules apply to all lawyers before all courts at all stages of the proceedings, it would appear that Kansas is in full compliance with the Standard. A reference in the prosecution's opening statement to evidence which is not admissible is error. (State v. Stephenson, 191 Kan. 424, 381 P.2d 335 (1963)).

ABA STANDARD

5.6 PRESENTATION OF EVIDENCE.

(a) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR KNOWINGLY TO OFFER FALSE EVIDENCE, WHETHER BY DOCUMENTS, TANGIBLE EVIDENCE, OR THE TESTIMONY OF WITNESSES, OR FAIL TO SEEK WITHDRAWAL THEREOF UPON DISCOVERY OF ITS FALSITY.

KANSAS CODE

(A) In his representation of a client,
a lawyer shall not:

(4) Knowingly use perjured testimony or false evidence.

(B) A lawyer who receives information
clearly establishing that:

(1) His client has, in the course
of the representation, perpetrated a
fraud upon a person or tribunal shall
promptly call upon his client to rectify
the same, and if his client refuses or is
unable to do so, he shall reveal the
fraud to the affected person or tribunal.
(K.S.A. 1971 Supp. 7-125, DR 7-102).

COMMENT

The Kansas code is in conformity with the Standard.

ABA STANDARD

(b) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR KNOWINGLY AND
FOR THE PURPOSE OF BRINGING INADMISSIBLE MATTER TO THE ATTENTION OF
THE JUDGE OR JURY TO OFFER INADMISSIBLE EVIDENCE, ASK LEGALLY OBJEC-
TIONABLE QUESTIONS, OR MAKE OTHER IMPERMISSIBLE COMMENTS OR ARGUMENTS
IN THE PRESENCE OF THE JUDGE OR JURY.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in compliance.

ABA STANDARD

(c) IT IS UNPROFESSIONAL CONDUCT FOR A PROSECUTOR TO PERMIT ANY

TANGIBLE EVIDENCE TO BE DISPLAYED IN THE VIEW OF THE JUDGE OR JURY WHICH WOULD TEND TO PREJUDICE FAIR CONSIDERATION BY THE JUDGE OR JURY UNTIL SUCH TIME AS A GOOD FAITH TENDER OF SUCH EVIDENCE IS MADE.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in conformity with the Standard.

ABA STANDARD

(d) IT IS UNPROFESSIONAL CONDUCT TO TENDER TANGIBLE EVIDENCE IN THE VIEW OF THE JUDGE OR JURY IF IT WOULD TEND TO PREJUDICE FAIR CONSIDERATION BY THE JUDGE OR JURY UNLESS THERE IS A REASONABLE BASIS FOR ITS ADMISSION IN EVIDENCE. WHEN THERE IS ANY DOUBT ABOUT THE ADMISSIBILITY OF SUCH EVIDENCE IT SHOULD BE TENDERED BY AN OFFER OF PROOF AND A RULING OBTAINED.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in conformance with the Standard.

ABA STANDARD

5.7 EXAMINATION OF WITNESSES.

(a) THE INTERROGATION OF ALL WITNESSES SHOULD BE CONDUCTED FAIRLY, OBJECTIVELY AND WITH DUE REGARD FOR THE DIGNITY AND LEGITIMATE PRIVACY OF THE WITNESS, AND WITHOUT SEEKING TO INTIMIDATE OR HUMILIATE THE WITNESS UNNECESSARILY. PROPER CROSS-EXAMINATION CAN BE CONDUCTED WITHOUT VIOLATING RULES OF DECORUM.

KANSAS CODE

(C) A lawyer shall not:

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person. (K.S.A. 1971 Supp. 7-125, DR 7-106(C)(2)).

COMMENT

The Kansas code is in conformity with the Standard.

ABA STANDARD

(b) THE PROSECUTOR'S BELIEF THAT THE WITNESS IS TELLING THE TRUTH DOES NOT NECESSARILY PRECLUDE APPROPRIATE CROSS-EXAMINATION IN ALL CIRCUMSTANCES, BUT MAY AFFECT THE METHOD AND SCOPE OF CROSS-EXAMINATION. HE SHOULD NOT MISUSE THE POWER OF CROSS-EXAMINATION OR IMPEACHMENT TO DISCREDIT OR UNDERMINE A WITNESS IF HE KNOWS THE WITNESS IS TESTIFYING TRUTHFULLY.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in conformity with the Standard.

ABA STANDARD

(c) A PROSECUTOR SHOULD NOT CALL A WITNESS WHO HE KNOWS WILL CLAIM A VALID PRIVILEGE NOT TO TESTIFY, FOR THE PURPOSE OF IMPRESSING UPON THE JURY THE FACT OF THE CLAIM OF PRIVILEGE. IN SOME INSTANCES, AS DEFINED IN THE CODE OF PROFESSIONAL RESPONSIBILITY, DOING SO WILL CONSTITUTE UNPROFESSIONAL CONDUCT.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in conformity.

ABA STANDARD

(d) IT IS UNPROFESSIONAL CONDUCT TO ASK A QUESTION WHICH IMPLIES THE EXISTENCE OF A FACTUAL PREDICATE WHICH THE EXAMINER KNOWS HE CANNOT SUPPORT BY EVIDENCE.

KANSAS CODE

See K.S.A. 1971 Supp. 7-125, DR 7-106(C) (1) cited supra at 5.5.

COMMENT

The Kansas code is in conformity. Questions asked or intimating that defendant has been guilty of specific acts of misconduct where unsupported by evidence is misconduct on the part of the prosecuting attorney. (State v. Hinton, 206 Kan. 500, 479 P.2d 910 (1970)).

ABA STANDARD

5.8 ARGUMENT TO THE JURY.

(a) THE PROSECUTOR MAY ARGUE ALL REASONABLE INFERENCES FROM EVIDENCE IN THE RECORD. IT IS UNPROFESSIONAL CONDUCT FOR THE PROSECUTOR INTENTIONALLY TO MISSTATE THE EVIDENCE OR MISLEAD THE JURY AS TO THE INFERENCES IT MAY DRAW.

(b) IT IS UNPROFESSIONAL CONDUCT FOR THE PROSECUTOR TO EXPRESS HIS PERSONAL BELIEF OR OPINION AS TO THE TRUTH OR FALSITY OF ANY TESTIMONY OR EVIDENCE OR THE GUILT OF THE DEFENDANT.

KANSAS CODE

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(K.S.A. 1971 Supp. 7-125, DR 7-106 (C) (3)

(4)).

COMMENT

The Kansas code is in conformity with the Standard. In arguments of counsel to the jury, reasonable latitude is allowed in discussing evidence and inferences which may be drawn from it. (State v. Potts, 205 Kan. 47, 468 P.2d 78 (1970)). (State v. Johnson, 210 Kan. 288, 502 P.2d 802 (1972)). (State v. Newman, 213 Kan. 178 (181), 515 P.2d 814 (1973)).

ABA STANDARD

(c) THE PROSECUTOR SHOULD NOT USE ARGUMENTS CALCULATED TO INFLAME THE PASSIONS OR PREJUDICES OF THE JURY.

(d) THE PROSECUTOR SHOULD REFRAIN FROM ARGUMENT WHICH WOULD DIVERT THE JURY FROM ITS DUTY TO DECIDE THE CASE ON THE EVIDENCE, BY INJECTING ISSUES BROADER THAN THE GUILT OR INNOCENCE OF THE ACCUSED UNDER THE CONTROLLING LAW, OR BY MAKING PREDICTIONS OF THE CONSEQUENCES OF THE JURY'S VERDICT.

KANSAS CODE

No comparable code provision.

COMMENT

Even though there is no code provision, Kansas, in practice, is probably in conformity with the Standard.

ABA STANDARD

5.9 FACTS OUTSIDE THE RECORD.

IT IS UNPROFESSIONAL CONDUCT FOR THE PROSECUTOR INTENTIONALLY TO REFER TO OR ARGUE ON THE BASIS OF FACTS OUTSIDE THE RECORD WHETHER AT TRIAL OR ON APPEAL, UNLESS SUCH FACTS ARE MATTERS OF COMMON PUBLIC KNOWLEDGE BASED ON ORDINARY HUMAN EXPERIENCE OR MATTERS OF WHICH THE COURT MAY TAKE JUDICIAL NOTICE.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in compliance. However, the case law

1974 Supplement

has said that in summing up, a prosecuting attorney may not introduce or comment on facts outside the evidence ... (State v. Lopez, 182 Kan. 46, 318 P.2d 662 (1958)).

ABA STANDARD

5.10 COMMENTS BY PROSECUTOR AFTER VERDICT.

THE PROSECUTOR SHOULD NOT MAKE PUBLIC COMMENTS CRITICAL OF A VERDICT, WHETHER RENDERED BY JUDGE OR JURY.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in conformity with the Standard.

ABA STANDARD

PART VI. SENTENCING

6.1 ROLE IN SENTENCING.

(a) THE PROSECUTOR SHOULD NOT MAKE THE SEVERITY OF SENTENCES THE INDEX OF HIS EFFECTIVENESS. TO THE EXTENT THAT HE BECOMES INVOLVED IN THE SENTENCING PROCESS, HE SHOULD SEEK TO ASSURE THAT A FAIR AND INFORMED JUDGMENT IS MADE ON THE SENTENCE AND TO AVOID UNFAIR SENTENCE DISPARITIES.

(b) WHERE SENTENCE IS FIXED BY THE JUDGE WITHOUT JURY PARTICIPATION, THE PROSECUTOR ORDINARILY SHOULD NOT MAKE ANY SPECIFIC RECOMMENDATION AS TO THE APPROPRIATE SENTENCE, UNLESS HIS RECOMMENDATION IS REQUESTED BY THE COURT OR HE HAS AGREED TO MAKE A RECOMMENDATION AS THE RESULT OF PLEA DISCUSSIONS.

(c) WHERE SENTENCE IS FIXED BY THE JURY, THE PROSECUTOR SHOULD PRESENT EVIDENCE ON THE ISSUE WITHIN THE LIMITS PERMITTED IN THE JURISDICTION, BUT HE SHOULD AVOID INTRODUCING EVIDENCE BEARING ON SENTENCE WHICH WILL PREJUDICE THE JURY'S DETERMINATION OF THE ISSUE OF GUILT.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in conformity with the Standard. However, in practice the court may ask the prosecutor for his recommendations.

ABA STANDARD

6.2 INFORMATION RELEVANT TO SENTENCING.

(a) THE PROSECUTOR SHOULD ASSIST THE COURT IN BASING ITS SENTENCE ON COMPLETE AND ACCURATE INFORMATION FOR USE IN THE PRESENTENCE REPORT. HE SHOULD DISCLOSE TO THE COURT ANY INFORMATION IN HIS FILES RELEVANT TO THE SENTENCE. IF INCOMPLETENESS OF INACCURATENESS IN THE PRESENTENCE REPORT COMES TO HIS ATTENTION, HE SHOULD TAKE STEPS TO PRESENT THE COMPLETE AND CORRECT INFORMATION TO THE COURT AND TO DEFENSE COUNSEL.

(b) THE PROSECUTOR SHOULD DISCLOSE TO THE DEFENSE AND TO THE COURT AT OR PRIOR TO THE SENTENCING PROCEEDING ALL INFORMATION IN HIS FILES WHICH IS RELEVANT TO THE SENTENCING ISSUE.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code is not in compliance. The code does provide for a presentence investigation and report (K.S.A. 1971 Supp. 21-4604 and 21-4605) but there is no provision relating to the duty of the prosecutor.

