THE FUNCTION OF THE TRIAL JUDGE

ABA STANDARD

PART I. BASIC DUTIES

1.1 GENERAL RESPONSIBILITY OF THE TRIAL JUDGE.

(a) THE TRIAL JUDGE HAS THE RESPONSIBILITY FOR SAFEGUARDING BOTH THE RIGHTS OF THE ACCUSED AND THE INTERESTS OF THE PUBLIC IN THE ADMINISTRATION OF CRIMINAL JUSTICE. THE ADVERSARY NATURE OF THE PROCEEDINGS DOES NOT RELIEVE THE TRIAL JUDGE OF THE OBLIGATION OF RAISING ON HIS OWN INITIATIVE, AT ALL APPROPRIATE TIMES AND IN AN APPROPRIATE MANNER, MATTERS WHICH MAY SIGNIFICANTLY PROMOTE A JUST DETERMINATION OF THE TRIAL. THE ONLY PURPOSE OF A CRIMINAL TRIAL IS TO DETERMINE WHETHER THE PROSECUTION HAS ESTABLISHED THE GUILT OF THE ACCUSED AS REQUIRED BY LAW, AND THE TRIAL JUDGE SHOULD NOT ALLOW THE PROCEEDINGS TO BE USED FOR ANY OTHER PURPOSE.

(b) THE TRIAL JUDGE SHOULD REQUIRE THAT EVERY PROCEEDING BEFORE HIM BE CONDUCTED WITH UNHURRIED AND QUIET DIGNITY AND SHOULD AIM TO ESTABLISH SUCH PHYSICAL SURROUNDINGS AS ARE APPROPRIATE TO THE ADMINISTRATION OF JUSTICE. HE SHOULD GIVE EACH CASE INDIVIDUAL TREATMENT: AND HIS DECISIONS SHOULD BE BASED ON THE PARTICULAR FACTS OF THAT CASE. HE SHOULD CONDUCT THE PROCEEDINGS IN CLEAR AND EASILY UNDERSTANDABLE LANGUAGE, USING INTERPRETERS WHEN NECESSARY.

(c) THE TRIAL JUDGE SHOULD BE SENSITIVE TO THE IMPORTANT ROLES OF THE PROSECUTOR AND DEFENSE COUNSEL; AND HIS CONDUCT TOWARDS THEM SHOULD MANIFEST PROFESSIONAL RESPECT AND BE COURTEOUS AND FAIR.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas law is in conformity with this Standard. The position of a trial judge certainly is not that of a mere "umpire" or "moderator of a town meeting" and under proper circumstances he may resort to appropriate means and steps so as to bring out the truth and all of the facts concerning the matter at issue. (State v. Bean, 179 Kan. 373, 295 P.2d 600 (1956)).

In State v. Wheeler, 195 Kan. 184, 403 P.2d 1015 (1965), a claim that when the district court examined the defendant it assumed the position of advocate, thereby creating prejudice to his substantial rights by spoken word, facial expression and tone of voice was denied as unsupported. There was quoted with approval from State v. Keehn, 85 Kan. 765, 118 Pac. 851 (1911) the following:

> "The purpose of a trial in a criminal case is to ascertain the truth of the matters charged against the defendant, and it is a part of the business of the trial judge to see that this end is attained. He is a vital and integral factor in the discovery and elucidation of the facts, and whenever in his judgment the attorneys are not accomplishing the full development of the truth it is not only his right but it is his duty to examine and cross-examine the witnesses ..."
>
> "... The judge will always have a personality of his own which he cannot disguise or conceal. But the only tact he need display is sincerity, and so long as he is sincere he need feel no timidity in the discharging of his public duty because of the possible tone or inflection of his voice or the play of his features."

A trial judge in this state may not comment on the weight of the evidence. (State v. Johnson, 201 Kan. 126, 439 P.2d 86 (1968)).

ABA STANDARD

1.2 OBLIGATION OF THE TRIAL JUDGE.

THE TRIAL JUDGE SHOULD BE FAMILIAR WITH AND ADHERE TO THE CANONS OF ETHICS APPLICABLE TO THE JUDICIARY, THE CODE OF PROFESSIONAL RESPONSIBILITY APPLICABLE TO THE LEGAL PROFESSION, AND STANDARDS CONCERNING THE PROPER ADMINISTRATION OF CRIMINAL JUSTICE.

KANSAS CODE

See Rules of the Supreme Court of Kansas relating to Judicial Conduct. Rules 601 to 629.

COMMENT

Kansas practice is in conformity with this Standard. It was held in State v. Pruett, 213 Kan. 249, 515 P.2d 1051 (1973) that the judge should be free of mind, disinterested in the conclusion, impartial as to the parties and independent.

ABA STANDARD

1.3 APPEARANCE AND DEMEANOR OF THE JUDGE.

THE TRIAL JUDGE SHOULD REFLECT THE DIGNITY OF HIS OFFICE AND ENHANCE PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE BY HIS PERSONAL APPEARANCE AND DEMEANOR. THE WEARING OF THE JUDICIAL ROBE IN THE COURTROOM WILL CONTRIBUTE TO THESE GOALS.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is in substantial compliance with this Standard.

"23. When upon the Bench in any county seat or city having a population of 3,000 or more the Judge shall wear a robe, and in all county seats having a lesser population it is recommended that the Judge wear a robe while conducting jury trials and at any other sessions deemed appropriate by him." (Uniform Court Formality Details, 19 JBK 205).

ABA STANDARD

1.4 OBLIGATION TO USE JUDICIAL TIME EFFECTIVELY.

THE TRIAL JUDGE HAS THE OBLIGATION TO AVOID DELAYS, CONTINUANCES AND EXTENDED RECESSES, EXCEPT FOR GOOD CAUSE. IN THE MATTER OF PUNCTUALITY, THE OBSERVANCE OF SCHEDULED COURT HOURS, AND THE USE OF WORKING TIME, THE TRIAL JUDGE SHOULD BE AN EXEMPLAR FOR ALL OTHER PERSONS ENGAGED IN THE CRIMINAL CASE. HE SHOULD REQUIRE PUNCTUALITY AND OPTIMUM USE OF WORKING TIME FROM ALL SUCH PERSONS.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is in substantial conformity with the Standard. Under American Bar Association Code of Judicial Conduct, a judge should give priority to his duties of office over his other activities and "dispose promptly of the business of the court." (Canon 3 A (5)).

> "28. The court should ... function as an agency of the state for the prompt and impartial administration of justice, rather than a mere moderator among contesting litigants." (Uniform Court Formality Details, 19 JBK 208).

ABA STANDARD

1.5 DUTY TO MAINTAIN IMPARTIALITY.

THE TRIAL JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES, AND SHOULD CONDUCT HIMSELF AT ALL TIMES IN A MANNER THAT PROMOTES PUBLIC CONFIDENCE IN THE INTEGRITY AND IMPARTIALITY OF THE JUDICIARY. HE SHOULD NOT ALLOW HIS FAMILY, SOCIAL OR OTHER RELATIONSHIPS TO INFLUENCE HIS JUDICIAL CONDUCT OR JUDGMENT.

KANSAS CODE

No comparable code provisions.

COMMENT

Kansas practice is in conformity with the Standard. Kansas Supreme Court Rule 601-629. See State v. Pruitt, cited supra, 1.2.

ABA STANDARD

1.6 DUTY TO PREVENT EX PARTE DISCUSSIONS OF A PENDING CASE.

THE TRIAL JUDGE SHOULD INSIST THAT NEITHER THE PROSECUTOR NOR THE DEFENSE COUNSEL NOR ANY OTHER PERSON DISCUSS A PENDING CASE WITH HIM EX PARTE, EXCEPT AFTER ADEQUATE NOTICE TO ALL OTHER PARTIES AND WHEN AUTHORIZED BY LAW OR IN ACCORDANCE WITH APPROVED PRACTICE.

KANSAS CODE

No comparable code provision.

COMMENT

The intent of both Kansas code and decision law is in conformity with this Standard. See Canon 3A (4), Code of Judicial Conduct.

ABA STANDARD

1.7 CIRCUMSTANCES REQUIRING RECUSATION.

THE TRIAL JUDGE SHOULD RECUSE HIMSELF WHENEVER HE HAS ANY DOUBT AS TO HIS ABILITY TO PRESIDE IMPARTIALLY IN A CRIMINAL CASE OR WHENEVER HE BELIEVES HIS IMPARTIALITY CAN REASONABLY BE QUESTIONED.

KANSAS CODE

> (a) If either party to any action in a district court files an affidavit alleging any of the grounds specified in subsection (b) the administrative judge shall at once transfer the action to another division of the court if there is more than one division, or shall request a judge of another judicial district be assigned to preside in such cause. If an affidavit be filed in a district court in which there is but one division or judge, then such judge shall at once notify the departmental justice for such district and request the appointment of another judge to hear such action.
>
> (b) Grounds which may be alleged as provided in subsection (a) for change of judge are:
>
> (1) That the judge has been engaged as counsel in the action prior to the appointment or election as judge.
>
> (2) That the judge is otherwise interested in the action.
>
> (3) That the judge is of kin of or related to either party to the action.
>
> (4) That the judge is a material witness in the action.
>
> (5) That the party filing the affidavit has cause to believe and does believe that on account of the personal bias, prejudice, or interest of the judge

he cannot obtain a fair and impartial trial. Such affidavit shall state the facts and the reasons for the belief that bias, prejudice or an interest exists.

(c) In any affidavit filed pursuant to this section, the recital of previous rulings or decisions by a court concerning the legal sufficiency of any prior affidavits filed by counsel for a party in any judicial proceeding, or filed by said counsel's law firm, pursuant to this section, shall not be deemed legally sufficient for any belief that bias or prejudice exists. (K.S.A. 20-311 d (c) (1974)).

COMMENT

Kansas law is in conformity with the Standard. In the case of In re Estate of Hupp, 178 Kan. 672, 291 P.2d 428 (1955), it was held that where conditions and circumstances surrounding litigation are of such a nature they might cast doubt and question as to the fairness and impartiality of any judgment the trial judge may pronounce such judge should disqualify himself.

The mere belief on the part of a judge that the accused is guilty is not enough in itself to require a disqualification. The question is not whether the trial judge believes the accused guilty, but whether the trial judge can give him a fair trial. (State v. Hendrix, 188 Kan. 558, 363 P.2d 522 (1961)).

Guides for application of the Code provision are stated in Hulme v. Woleslagel, 208 Kan. 385, 493 P.2d 541 (1972), as follows:

"...(2) the enactment in question does not provide mandatory disqualification upon the filing of an affidavit of recusation upon the ground of bias or prejudice but requires a hearing as to the legal sufficiency of the affidavit - not as to the fact of the bias or prejudice alleged;

(3) the affidavit must contain facts and reasons which give fair support for the belief that on account of the bias or prejudice of the judge the affiant cannot obtain a fair trial;

(4) upon the filing of such an affidavit the administrative judge shall at once transfer the action to another judge for a hearing as to the legal sufficiency of the affidavit;

(5) a judge, with or without an affidavit of bias or prejudice being filed or request for change made, may always, on his own motion, recuse himself in a particular case;

(6) an affidavit to disqualify a judge for bias or prejudice must be made by the party litigant rather than by his attorney;

(7) bias of prejudice on the part of the judge toward an attorney may be ground for the judge's disqualification;...

(9) when the ruling of a trial court turns on documentary evidence this court can examine the documents and determine their meaning and effect;

(10) previous adverse rulings of a trial judge, although numerous and erroneous, where they are subject to review, are not ordinarily and alone sufficient to show such bias or prejudice as would disqualify him as judge;

(11) judicial suggestions or admonition to counsel for improvement are not sufficient to disqualify the judge on the ground of bias or prejudice;...

(13) the enactment is not unconstitutional as violative of the separation of powers' doctrine."

ABA STANDARD

PART II. FACILITIES AND STAFF

2.1 NECESSITY TO PROVIDE JUDICIAL MANPOWER.

A SUFFICIENT NUMBER OF TRIAL JUDGES SHOULD BE PROVIDED FOR EACH JUDICIAL DISTRICT TO ASSURE THE PROMPT AND FAIR ADMINISTRATION OF JUSTICE.

KANSAS CODE

Whenever the supreme court shall determine that in order to effectively expedite the business of the district court in any judicial district in this state, the need exists for an additional judge and an additional division of such court, the supreme court shall so certify to the secretary of state. On or before April 15, 1972, and on the same day each two years thereafter the supreme court shall examine the need for more or less divisions of the district court in such judicial districts. Upon certification of an additional judge and an additional division of such court which shall be designated as the next numbered division, the first judge of such new division shall be elected in the even-numbered year in which the division is determined to be necessary and said judge shall take office in January of the following year. No judge of a new division shall be appointed pending the first election to fill such office. (Sec. 1, Ch. 98, 1972 Session Laws of Kansas).

COMMENT

Kansas law is in conformity with the Standard. Pursuant to this cited authority, the Supreme Court of Kansas, by order dated March 27, 1972, found a need for an additional judge and division in each of the districts of Douglas, Sedgwick, Shawnee and Wyandotte, which put in motion the necessary procedure for selection of such judges to take office in January, 1973. Under the Judicial Reapportionment Act of 1968, one division in the state will be abolished in January, 1973, (K.S.A. 1971 Supp. 4-220) which will then result in a total of sixty four district court trial judges in the state. Other reductions will be effected in future years by operation of the reapportionment act. Section 2 of the cited 1972 Act also authorizes elimination of any division and judge by the Supreme Court, where the facts warrant such action. The 1972 Act permits flexibility and the addition or reduction of divisions and judges according to work requirements.

ABA STANDARDS

2.2 ADEQUACY OF COURTROOM FACILITIES AND SUPPORTING STAFF.
THE TRIAL JUDGE SHOULD BE PROVIDED WITH COURT FACILITIES WHICH ARE DIGNIFIED AND FUNCTIONAL, AND ADEQUATE TO DISCHARGE HIS RESPONSIBILITIES. THERE SHOULD BE ADEQUATE SUPPORTING STAFF TO ASSURE THE PROMPT AND FAIR ADMINISTRATION OF JUSTICE.

KANSAS CODE

Code provisions are made for court reporters, clerks, bailiffs and probation officers.

COMMENT

Kansas is in substantial conformity with the Standard. The quality of court facilities varies among the counties of the state depending on the age and maintenance of the court houses. In general, provision for supporting staff is adequate. There is no provision for secretarial assistance for the judges, other than by use of the court reporters, whose duties in many areas require their full time. This problem has been approached in some districts by the use of women bailiffs who also perform secretarial duties.

ABA STANDARD

2.3 TRIAL COURT'S OBLIGATION TO SEEK OR COMPEL ADEQUATE SUPPORT.

(a) THE TRIAL COURT HAS AN OBLIGATION TO SEEK THE COOPERATION OF THE EXECUTIVE AND LEGISLATIVE DEPARTMENTS TO PROVIDE JUDICIAL MANPOWER, SUPPORTING STAFF, PHYSICAL FACILITIES, AND BUDGET ADEQUATE TO ATTAIN THE OBJECTIVES SET FORTH IN SECTION 2.2.

(b) THE TRIAL COURT SHOULD BE FAMILIAR WITH THE NATURE AND EXTENT OF THE INHERENT POWER OF THE JUDICIARY TO COMPEL OTHER AGENCIES OF GOVERNMENT TO PROVIDE FOR STAFF, FACILITIES, AND FUNDS TO ATTAIN THESE OBJECTIVES. WHERE THE COOPERATION UNDER SUBSECTION (a) IS SOUGHT AND NOT OBTAINED, THE TRIAL COURT SHOULD EXERCISE THIS INHERENT POWER.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is in reasonable conformity with the Standard. The District Judges' Association through its legislative committee pursues efforts to make improvements in this area. Seeking support for the courts is properly considered a necessary part of his judicial activities (Canon 4, Code of Judicial Conduct). Although there is no record of any decision in Kansas, it has been determined elsewhere that courts have inherent power to order payment of the necessary and reasonable expenses for the performance of its functions. Authorities are collected in Carrigan, "Outline on Inherent Powers of Trial Courts to Provide Needed Court Personnel, Facilities and Equipment." (National College of State Trial Judges, 1970).

ABA STANDARD

2.4 DUTY TO HAVE STAFF PROPERLY TRAINED.

THE TRIAL JUDGE HAS THE DUTY TO HAVE THE COURTROOM PERSONNEL PROPERLY INSTRUCTED IN THE PERFORMANCE OF THEIR DUTIES, AND TO SUPPORT THEM IN THE PROPER EXERCISE OF THEIR AUTHORITY.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice conforms with this Standard. In addition to necessary administration efficiency contemplated by this Standard, there is included responsibility for instruction and information that staff should not do what the judge may not do, such as ex parte discussions with parties or counsel, bailiff or others in private conversation with jurors, and the like.

ABA STANDARD

2.5 JUDGE'S DUTY CONCERNING RECORD OF JUDICIAL PROCEEDINGS.

THE TRIAL JUDGE HAS A DUTY TO SEE THAT THE REPORTER MAKES A TRUE, COMPLETE, AND ACCURATE RECORD OF ALL PROCEEDINGS. HE SHOULD AT ALL TIMES RESPECT THE PROFESSIONAL INDEPENDENCE OF THE REPORTER, BUT MAY CHALLENGE THE ACCURACY OF THE REPORTER'S RECORD OF THE PROCEEDINGS. THE TRIAL JUDGE SHOULD NOT CHANGE THE TRANSCRIPT WITHOUT NOTICE TO THE PROSECUTION, THE DEFENSE, AND THE REPORTER, WITH OPPORTUNITY TO BE HEARD. THE TRIAL JUDGE SHOULD TAKE STEPS TO INSURE THAT THE REPORTER'S OBLIGATION TO FURNISH TRANSCRIPTS OF COURT PROCEEDINGS IS PROMPTLY MET.

KANSAS CODE

> It shall be the duty of the official reporter to attend upon the sessions of the court, or divisions thereof, of which he is reporter, at each term, when required by the judge thereof, and to take full stenographic notes of the evidence and of oral proceedings in such cases tried before said court or division as the judge thereof shall direct ... Upon the request of any person interested, and payment or tender of his fees therefor, as provided herein, said reporter shall furnish a transcript of all or any part of said testimony or oral proceedings so taken ... (K.S.A. 20-903).
>
> ... Whenever an official court reporter for a district court is required to prepare a transcript of any trial or proceeding in a district court, the transcript shall be completed and filed within sixty (60) days after the official court reporter receives the the request for the transcript, provided

that attorneys of record interested in any such transcript may extend said time by agreement. If the transcript is not completed and filed within such time or any extension thereof, the person making the request may certify this fact to the departmental justice for the district in which the case was tried, who shall immediately proceed to order a hearing for the purpose of determining whether there is cause to revoke the certificate of the said official court reporter. (K.S.A. 1971 Supp. 20-906).

In the event no stenographic report of the evidence or proceedings at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on the appellee who may serve objections or proposed amendments thereto within ten (10) days after service upon him. Thereupon, the statement, with objections or proposed amendments, shall be submitted to the judge of the district court for settlement and approval and as settled and approved shall be included in the record on appeal. (K.S.A. 1971 Supp. 60-2701, S. Ct. Rule No. 6 (m)).

COMMENT

Kansas is in conformity with the Standard, except that there is no provision for procedure for making a change in the transcript. In State v. Guffey, 205 Kan. 9, 468 P.2d 254 (1970) it was held that though not mandatory, it was the better practice to record oral arguments and other oral proceedings had in the absence of the jury. In State v. Brown, 198 Kan. 473, 426 P.2d 129 (1967), where the voir dire examination and closing argument were not recorded and no request made to require the taking of the same, it was held that there was a failure to show the substantial rights of the defendant were prejudiced by such failure to record the proceedings.

The inability of the state to provide a full transcript of the trial proceedings does not entitle the defendant to a new trial per se. Before prejudice to substantial rights can successfully be claimed defendant must make a good-faith effort to obtain a secondary portion as provided in

Rule No. 6 (m), supra. (State v. Jefferson, 204 Kan. 50, 460 P.2d 610 (1969).

In a proceedings under K.S.A. 60-1507, where the notes of the reporter who recorded the trial could not be located and the reporter, judge and defense attorney were all deceased, it was held in Miller v. State, 204 Kan. 223, 460 P.2d 501 (1969) that the resulting failure to furnish a transcript was not an unconstitutional discrimination, but the result of such fortuitous circumstance and denial of relief was upheld.

ABA STANDARD

PART III. PRETRIAL DUTIES

3.1 ISSUANCE OR REVIEW OF WARRANTS.

WHENEVER A TRIAL JUDGE IS CALLED UPON TO ISSUE A WARRANT FOR ARREST OR FOR SEARCH, OR TO REVIEW THE ISSUANCE OF SUCH A WARRANT OR THE EXECUTION THEREOF, HE SHOULD CAREFULLY OBSERVE CONSTITUTIONAL AND STATUTORY NORMS AND NOT PERMIT THESE PROCEDURES TO BECOME MECHANICAL OR PERFUNCTORY. WHERE THE TRIAL COURT HAS SUPERVISORY JURISDICTION OVER OTHER JUDICIAL OFFICERS WHO PERFORM THESE FUNCTIONS, THE COURT SHOULD INSURE THAT THIS STANDARD IS OBSERVED.

KANSAS CODE

> If the magistrate finds from the complaint, or from an affidavit or affidavits filed with the complaint 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, a warrant for the arrest of the defendant shall issue . . . (K.S.A. 1971 Supp. 22-2302).
>
> . . . 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.

(2) When a prosecution is begun by the filing of an indictment or information, upon which the judge has made a finding of probable cause as provided in subsection (1) of this section, a warrant for the arrest of the defendant shall issue forthwith unless otherwise directed by the court. The warrant may be signed by the clerk of the court, but shall be in the same form, executed and returned in the same manner as other warrants ... (K.S.A. 22-2303 (1974)).

(a) A search warrant shall be issued only upon the written statement of any person under oath or affirmation which states facts sufficient to show probable cause that a crime has been or is being committed and which particularly describes a person, place or means of conveyance to be searched and things to be seized, and if the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, the magistrate may issue a search warrant for the seizure of the following.

(1) Any things which have been used in the commission of a crime, or any contraband or any property which constitutes or may be considered a part of the evidence, fruits or instrumentalities of a crime under the laws of this state, any other state or of the United States. The term "fruits" as used in this act shall be interpreted to include any property into which the thing or things unlawfully taken or possessed may have been converted.

(2) Any person who has been kidnapped in violation of the laws of this state, or who has been kidnapped in another jurisdiction and is now concealed within this state, or any human fetus or human corpse.

(b) Before ruling on a request for a search warrant, the magistrate may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce: Provided, That such proceeding shall be taken down by a court reporter or recording equipment and made part of the application for a search warrant. (K.S.A. 22-2502 (1974)).

COMMENT

Kansas law is in conformity with the Standard. Cherished rights to freedom and privacy are permissibly invaded only on the assumption that "detached scrutiny by a neutral magistrate" has been exercized. (Katz v. United States, 389 U.S. 347 (1967)).

Before a search warrant may validly be issued, there must have been placed before the magistrate sufficient facts to enable him to make an intelligent and independent determination that probable cause exists. There must be sufficient affirmative allegations to provide a rational basis upon which the magistrate can make a judicious determination of probable cause. (State v. McMillin, 206 Kan. 3, 476 P.2d 612, (1970)).

In an early case, State v. Carey, 56 Kan. 84, 42 Pac. 371 (1895) it was held that a complaint supported by the oath of the complainant satisfied the constitutional requirements of probable cause, and authorized the magistrate to issue the warrant without the calling of other witnesses. See also Horton v. Bimrod, 61 Kan. 13, 58 Pac. 558 (1889) where in a municipal court the complaints upon which the warrants were issued were sworn to positively and not on information and belief, the court said, "The verifications being positive in form, the requirements of the bill of rights were wholly satisfied." The case of State v. Carey, supra, distinguishes the earlier case of State v. Gleason, 32 Kan. 245, 4 Pac. 363 (1884), one in which the prosecution of a misdemeanor was commenced as an original action in the district court by means of information as the procedure required. (See State v. McCombs, 164 Kan. 334, 188 P.2d 922 (1948)). It was held that an information not positively verified, and on nothing but hearsay and belief was not sufficient to authorize the issuance of a warrant for arrest. In case of an information being positively verified in a misdemeanor case, it must be presumed that the verifier had actual knowledge of the facts contained therein. (State v. Cook, 193 Kan. 541, 393 P.2d 1017 (1964)).

ABA STANDARD

3.2 INQUIRIES CONCERNING JAIL POPULATION.

THE TRIAL JUDGE SHOULD PERIODICALLY MAKE CAREFUL INQUIRY CONCERNING PERSONS HELD IN JAIL AWAITING FORMAL CHARGE, TRIAL OR SENTENCE. HE SHOULD TAKE APPROPRIATE CORRECTIVE ACTION WHEN REQUIRED.

KANSAS CODE

> The sheriff of each county must keep a true and exact calendar of all prisoners committed to the county jail ... (K.S.A. 19-1904 (1974)).
>
> At the opening of each term of the district or criminal court within his county, the sheriff must return a copy of such calendar, under his hand, to the judge of such court ... (K.S.A. 19-1905 (1974)).

COMMENT

Kansas law is in conformitv with the Standard. In practice, compliancewith this requirement is not uniform throughout the state. Provisions for prompt preliminary examination after arrest, and arraignment after being bound over, and early trial after arraignment for one confined (See Speedy Trial), make this inquiry important, but in addition, these circumstances themselves alert the court to the pending action.

ABA STANDARD

3.3 RULING ON PRETRIAL RELEASE.

WHENEVER THE TRAIL JUDGE IS CALLED UPON TO MAKE A DECISION CONCERNING RELEASE ON BAIL, HE SHOULD FIRST GIVE CONSIDERATION TO THE LAW'S PREFERENCE FOR RELEASE OF DEFENDANTS PENDING DETERMINATION OF THE ACCUSATION OF GUILT. WHEN THE TRIAL JUDGE DECIDES TO ORDER RELEASE OF THE ACCUSED, HE SHOULD SET THE CONDITIONS OF RELEASE TO MEET THE SPECIAL CIRCUMSTANCES RELATING TO THE ACCUSED AND SHOULD BE GUIDED BY ABA STANDARDS, PRETRIAL RELEASE, SEC. 5.1.

KANSAS CODE

See K.S.A. 22-2802 (1) (1974) under Pretrial Release 5.1.

COMMENT

See Comment on Pretrial Release 1.1 and 5.1.

ABA STANDARD

3.4 PROTECTING THE ACCUSED'S RIGHT TO COUNSEL.

(a) THE TRIAL JUDGE SHOULD INQUIRE WHETHER THE ACCUSED IS REPRESENTED BY COUNSEL AT THE EARLIEST TIME AN ACCUSED APPEARS BEFORE HIM. IF AN ACCUSED IS UNREPRESENTED, THE TRIAL JUDGE SHOULD INQUIRE INTO THE ELIGIBILITY OF THE ACCUSED FOR ASSIGNED COUNSEL, AND IF ELIGIBILITY IS FOUND, ASSIGN COUNSEL TO REPRESENT HIM IN ACCORDANCE WITH ABA STANDARDS, PROVIDING DEFENSE SERVICES, SECTIONS 6.1, 6.2 AND 6.3.

(b) WHENEVER TWO OR MORE DEFENDANTS WHO HAVE BEEN JOINTLY CHARGED, OR WHOSE CASES HAVE BEEN CONSOLIDATED, ARE REPRESENTED BY THE SAME ATTORNEY, THE TRIAL JUDGE SHOULD INQUIRE INTO POTENTIAL CONFLICTS WHICH MAY JEOPARDIZE THE RIGHT OF EACH DEFENDANT TO THE FIDELITY OF HIS COUNSEL.

KANSAS CODE

See K.S.A. 22-4503 (1974), 22-4510 (1974), 22-4511 (1974) and 22-4504 (1974), Providing Defense Services under 6.1, 6.2 and 6.3.

COMMENT

See Comment under Providing Defense Services 6.1, 6.2 and 6.3.

ABA STANDARD

3.5 ATTORNEYS FROM OTHER JURISDICTIONS.

IF AN ATTORNEY WHO IS NOT ADMITTED TO PRACTICE IN THE JURISDICTION OF THE COURT PETITIONS FOR PERMISSION TO REPRESENT A DEFENDANT, THE TRIAL JUDGE MAY

(a) DENY SUCH PERMISSION IF THE ATTORNEY HAS BEEN HELD IN CONTEMPT OF COURT OR OTHERWISE FORMALLY DISCIPLINED FOR COURTROOM MISCONDUCT, OR IF IT APPEARS BY RELIABLE EVIDENCE THAT HE HAS ENGAGED IN COURTROOM MISCONDUCT SUFFICIENT TO WARRANT DISCIPLINARY ACTION;

(b) GRANT SUCH PERMISSION ON CONDITION THAT

(i) THE PETITIONING ATTORNEY ASSOCIATE WITH HIM AS CO-COUNSEL A LOCAL ATTORNEY ADMITTED TO PRACTICE IN THE JURISDICTION,

(ii) THE LOCAL ATTORNEY WILL ASSUME FULL RESPONSIBILITY FOR THE DEFENSE IF THE PETITIONING ATTORNEY BECOMES UNABLE OR UNWILLING TO PERFORM HIS DUTIES, AND

(iii) THE DEFENDANT CONSENTS TO THE FOREGOING CONDITIONS.

KANSAS CODE

Any regularly admitted practicing attorney in the courts of record of another state or territory, having professional business in the courts or before any board, department, commission or other administrative tribunal or agency, of this state, may, on motion be admitted to practice for the purpose of said business only, in any of said courts, tribunals or agencies, upon taking the oath as aforesaid and upon it being made to appear by a written showing filed therein, that he has associated and personally appearing with him in the action, hearing or proceeding an attorney who is a resident of and duly and regularly admitted to practice in the courts of record of this state, upon whom service may be had in all matters connected with said action, hearing or proceeding, with the same effect as if personally made on such foreign attorney, within this state, and such foreign attorney shall thereupon be and become subject to the order of, and amenable to disciplinary action by the courts, agencies or tribunals of this state: Provided, That in all actions before a court of record, said associate attorney shall be a resident of

and maintain his law office within the judicial district in which said action is filed or pending. No such court, agency or tribunal shall entertain any action, matter, hearing or proceeding while the same is begun, carried on or maintained in violation of the provisions of this section: Provided, Nothing in this section shall be construed to prohibit any party from appearing before any of said courts, tribunals or agencies, in his own proper person and on his own behalf. (K.S.A. 7-104).

COMMENT

Kansas law and practice is in substantial conformity with the Standard.

In State v. Daegele, 193 Kan. 314, 393 P.2d 978 (1964), in which a non-resident lawyer obtained by family members and represented a defendant at the preliminary examination, the defendant's contention that the attorney had no "standing" to represent him and inferentially contending that the examination amounted to a nullity, was held to be without merit and was not sustained.

Appearance by defendant with a non-resident lawyer retained by members of defendant's family, and who did not request appointment of a licensed attorney pursuant to K.S.A. 7-104, supra, in a first-degree murder prosecution, waived the right, if any, to representation by an attorney residing in and licensed to practice law in this state. (Blakesley v. State, 199 Kan. 128, 427 P.2d 497, (1967)).

ABA STANDARD

3.6 PRETRIAL PROCEDURES.

THE TRIAL COURT SHOULD ESTABLISH, BY COURT RULE OR OTHERWISE, EFFICIENT PROCEDURES FOR DEALING WITH PRETRIAL MATTERS AS RECOMMENDED IN ABA STANDARDS, DISCOVERY AND PROCEDURE BEFORE TRIAL, INCLUDING SUCH FEATURES AS:

(i) BROAD DISCOVERY TO BE CONDUCTED BETWEEN THE PROSECUTOR AND DEFENSE COUNSEL WITHOUT THE NEED FOR APPLICATION TO THE COURT;

(ii) SUBMISSION OF MOTIONS WITHOUT PAPERS, AT LEAST INITIALLY, AT A SINGLE HEARING, USING A CHECK LIST OR SIMILAR MEANS TO ASSURE THAT ALL ISSUES HAVE BEEN RAISED AS EARLY AS POSSIBLE IN THE PROCEEDINGS, AND REQUIRING SUBMISSION THEREAFTER ONLY OF SUCH PAPERS AS THE COURT DEEMS NECESSARY OR HELPFUL.

KANSAS CODE

See K.S.A. 1971 Supp. 22-3217 under
Discovery and Procedure Before Trial, 5.2.

COMMENT

Kansas is in substantial conformity with the Standard. See Comment under Discovery and Procedure Before Trial, 5.2, the Prosecution Function 2.11 and the Defense Function, 4.5.

ABA STANDARD

3.7 PREJUDICIAL PUBLICITY.

(a) THE TRIAL COURT SHOULD ADOPT A RULE PROHIBITING COURT PERSONNEL FROM DISCLOSING TO ANY PERSON WITHOUT AUTHORIZATION BY THE COURT, INFORMATION RELATING TO A PENDING CRIMINAL CASE THAT IS NOT PART OF THE PUBLIC RECORDS OF THE COURT.

(b) THE TRIAL JUDGE SHOULD REFRAIN FROM MAKING PUBLIC COMMENT ON A PENDING CASE OR ANY COMMENT THAT MAY TEND TO INTERFERE WITH THE RIGHT OF ANY PARTY TO A FAIR TRIAL AND SHOULD OTHERWISE BE FAMILIAR WITH ABA STANDARDS, FAIR TRIAL AND FREE PRESS, AND IMPLEMENT THEM AS REQUIRED.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is in substantial conformity with this Standard. Occasions for the application of this Standard do not frequently occur. Detailed Standards are set forth in ABA Standards, Fair Trial and Free Press (Approved draft, 1968) not included as a part of this comparison project. See also Canon 3 A (6), Code of Judicial Conduct.

ABA STANDARD

3.8 RESPONSIBILITY FOR THE CRIMINAL DOCKET.

(a) THE TRIAL COURT HAS THE ULTIMATE RESPONSIBILITY FOR PROPER MANAGEMENT OF THE CRIMINAL CALENDAR AND SHOULD TAKE MEASURES TO INSURE THAT CASES ARE LISTED ON THE CALENDAR AND DISPOSED OF AS PROMPTLY AS CIRCUMSTANCES PERMIT.

(b) WHENEVER FEASIBLE, THERE SHOULD BE INDIVIDUAL DOCKETS FOR EACH TRIAL JUDGE, WITH THE JUDGE HAVING CONTINUING RESPONSIBILITY FOR CASES ON HIS DOCKET FROM THE FILING OF THE INDICTMENT OR INFORMATION.

(c) WHENEVER FEASIBLE, THE TRIAL JUDGE SHOULD GIVE PREFERENCE TO THE TRIAL OF CRIMINAL CASES OVER CIVIL CASES, AND TO THE TRIAL OF DEFENDANTS IN CUSTODY AND DEFENDANTS WHOSE PRETRIAL LIBERTY IS REASONABLY BELIEVED TO PRESENT UNUSUAL RISKS OVER OTHER CRIMINAL CASES.

KANSAS CODE

See K.S.A. 20-318 (1974), K.S.A. 60-2702, S. Ct. Rule No. 119, under Speedy Trial 1.2.

COMMENT

Kansas is in conformity with this Standard. See Comment under Speedy Trial, 1.2.

ABA STANDARD

3.9 ORDERING SEVERANCE ON JUDGE'S OWN MOTION.

THE TRIAL JUDGE SHOULD ORDER SEVERANCE OF OFFENSES OR DEFENDANTS BEFORE TRIAL ON HIS OWN MOTION WHENEVER IT APPEARS REASONABLY REQUIRED TO INSURE THE FAIRNESS OF THE TRIAL OR ITS ORDERLY PROGRESS, IF A SEVERANCE COULD BE OBTAINED ON MOTION OF A DEFENDANT OR THE PROSECUTOR.

KANSAS CODE

When two or more defendants are jointly charged with any crime, the court may order a separate trial for any one defendant when requested by such defendant or by the prosecuting attorney. (K.S.A. 22-3204 (1974)).

COMMENT

Kansas practice is in conformity with the Standard. See Joinder and Severance 3.1 (b). See State v. Roselli, 109 Kan. 33, 41, (1921).

ABA STANDARD

PART IV. ACCEPTING PLEAS AND WAIVERS.

4.1 ROLE OF THE JUDGE IN PLEA DISCUSSIONS AND PLEA AGREEMENTS.

(a) THE TRIAL JUDGE SHOULD NOT BE INVOLVED WITH PLEA DISCUSSIONS BEFORE THE PARTIES HAVE REACHED AN AGREEMENT OTHER THAN TO FACILITATE FULFILLMENT OF THE OBLIGATION OF THE PROSECUTOR AND DEFENSE COUNSEL TO EXPLORE WITH EACH OTHER THE POSSIBILITY OF DISPOSITION WITHOUT TRIAL.

(b) THE TRIAL JUDGE SHOULD NOT ACCEPT A PLEA OF GUILTY OR NOLO CONTENDERE WITHOUT FIRST INQUIRING WHETHER THERE IS A PLEA AGREEMENT AND, IF THERE IS ONE, REQUIRING THAT IT BE DISCLOSED ON THE RECORD.

(c) IF THE PLEA AGREEMENT CONTEMPLATES THE GRANTING OF CHARGE OR SENTENCE CONCESSIONS BY THE TRIAL JUDGE, HE SHOULD:

(i) UNLESS HE THEN AND THERE GRANTS SUCH CONCESSIONS, INFORM THE DEFENDANT AS TO THE ROLE OF THE JUDGE WITH RESPECT TO SUCH AGREEMENTS, AS PROVIDED IN THE FOLLOWING SUBPARAGRAPHS;

(ii) GIVE THE AGREEMENT DUE CONSIDERATION, BUT NOTWITHSTANDING ITS EXISTENCE REACH AN INDEPENDENT DECISION ON WHETHER TO GRANT CHARGE OR SENTENCE CONCESSIONS; AND

(iii) PERMIT WITHDRAWAL OF THE PLEA (OR, IF IT HAS NOT YET BEEN ACCEPTED, WITHDRAWAL OF THE TENDER OF THE PLEA) IN ANY CASE IN WHICH THE JUDGE DETERMINES NOT TO GRANT THE CHARGE OR SENTENCE CONCESSIONS CONTEMPLATED BY THE AGREEMENT.

(d) THE TRIAL JUDGE MAY DECLINE TO GIVE CONSIDERATION TO A PLEA AGREEMENT UNTIL AFTER COMPLETION OF A PRESENTENCE INVESTIGATION OR MAY, IN ACCORDANCE WITH ABA STANDARDS, PLEAS OF GUILTY SEC. 3.3 (b), INDICATE HIS CONDITIONAL CONCURRENCE PRIOR THERETO.

KANSAS CODE

> A plea of guilty or nolo contendere, for good cause shown and within the discretion of the court, may be withdrawn at any time before sentence is adjudged. To correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea. (K.S.A. 22-3210 (7) (1974)).

COMMENT

Kansas law and practice is in substantial compliance with the Standard. The propriety of plea discussions and plea agreements was first recognized in State v. Byrd, 203 Kan. 45, 453 P.2d 22 (1969), where the procedures,

standards and guides for the same are fully outlined. By implication, the language sustains that the trial judge should not be involved with the discussions leading to a possible agreement.

In State v. Caldwell, 208 Kan. 674, 493 P. 2d 235 (1972) the Standards relating to Pleas of Guilty were given the court's stamp of approval and reference was made to the fact that disclosure of a negotiated plea was contemplated. The court further said:

> "Where plea discussion has resulted in a plea agreement, we believe bringing the matter into the open at the time the plea is entered will go far in producing a determination acceptable to all that the plea was voluntarily and intelligently made. Disclosure in open court will provide additional assurance that proper safeguards have been observed once a plea of guilty has been accepted and, at the same time, tend to dispel much of the sinister aspect heretofore attached to the practice by reason of its cloak of secrecy. We recommend such disclosure."

In White v. State, 203 Kan. 687, 455 P. 2d 562 (1969) it was said that all plea discussions and agreements should be based upon an understanding that such agreements are not binding upon the trial judge, and that even though a guilty plea is received, as a result of a prior agreement, nevertheless, the judge is free to reach his own independent decision on whether to approve any concession upon which the agreement was premised.

It was also held that granting permission to a withdrawal of a plea of guilty is a matter within the sound discretion of the court. If the ends of justice will be served by permitting the withdrawal, and manifest injustice to the defendant would result from refusal, permission to withdraw the plea should be granted.

For additional comment as to function of "plea bargaining," as to alternatives of sentences, see Weigel v. State, 207 Kan. 614, 485 P.2d 1347 (1971).

See citation and Comment under 4.2, infra.

See Pleas of Guilty, VII-6, 1.5 and 1.6.

ABA STANDARD

4.2 ACCEPTANCE OF PLEAS OF GUILTY OR NOLO CONTENDERE.

(a) WHETHER OR NOT THE PLEA IS TENDERED AS A RESULT OF A PLEA AGREEMENT, THE TRIAL JUDGE SHOULD NOT ACCEPT A PLEA OF GUILTY OR NOLO CONTENDERE FROM A DEFENDANT WITHOUT FIRST ADDRESSING THE DEFENDANT PERSONALLY AND DETERMINING THAT

(i) THE DEFENDANT UNDERSTANDS THE NATURE OF THE CHARGE;

(ii) THE DEFENDANT UNDERSTANDS THAT, BY PLEADING GUILTY OR NOLO CONTENDERE, HE WAIVES CERTAIN CONSTITUTIONAL RIGHTS, PRIMARILY HIS RIGHT TO PERSIST IN A PLEA OF NOT GUILTY AND REMAIN SILENT, HIS RIGHT TO A TRIAL BY JURY AND HIS RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM;

(iii) THE PLEA IS VOLUNTARY; AND

(iv) UNLESS THE TRIAL JUDGE'S CONCURRENCE IN A PLEA AGREEMENT PRIOR TO ACCEPTANCE OF THE PLEA RENDERS IT UNNECESSARY, THE DEFENDANT UNDERSTANDS THE MAXIMUM POSSIBLE SENTENCE ON THE CHARGE (INCLUDING THAT POSSIBLE FROM CONSECUTIVE SENTENCES), THE MANDATORY MINIMUM SENTENCE, IF ANY, ON THE CHARGE, AND, WHEN APPLICABLE, THAT A DIFFERENT OR ADDITIONAL PUNISHMENT IS AUTHORIZED BY REASON OF A PREVIOUS CONVICTION OR OTHER FACTORS WHICH MAY BE ESTABLISHED, AFTER HIS PLEA, IN THE PRESENT ACTION.

KANSAS CODE

Before or during trial a plea of guilty of nolo contendere may be accepted when:

(1) The defendant or his counsel enters such plea in open court; and

(2) In felony cases the court has informed the defendant of the consequences of his plea and of the maximum penalty provided by law which may be imposed upon acceptance of such plea; and

(3) In felony cases the court has addressed the defendant personally and determined that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea; and

(6) In misdemeanor cases the court may allow the defendant to appear and plead by counsel. (K.S.A. 22-3210 (1), (2), (3) and (6) (1974)).

COMMENT

Kansas law and practice is in substantial conformity with the Standard.

In Johnson v. State, 208 Kan. 862, 494 P.2d 1018 (1972) it was held that "The Standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action open to the accused." See Pleas of Guilty, VII-6, 1.5 and 1.6.

ABA STANDARD

(b) NOTWITHSTANDING THE ACCEPTANCE OF A PLEA OF GUILTY, THE TRIAL JUDGE SHOULD NOT ENTER A JUDGMENT UPON SUCH PLEA WITHOUT MAKING SUCH INQUIRY AS MAY SATISFY HIM THAT THERE IS A FACTUAL BASIS FOR THE PLEA.

KANSAS CODE

"... A plea ... may be accepted when:
The court is satisfied that there is a factual basis for the plea." (K.S.A. 22-3210 (4) (1974)).

COMMENT

Circumstances of dialogue between the accused with court and counsel, including admitting the crimes and plea of guilty constitute a factual basis for accepting the plea as declared in State v. Reid, 204 Kan. 418, 463 P.2d 1020 (1970).

Inability to recall and admit acts constituting the crime was rejected by the court as a valid claim that a plea of guilty was not freely, knowingly and understandingly made in Jones v. State, 207 Kan. 622, 485 P.2d 1349 (1971) in which case North Carolina v. Alford, 400 U.S. 25 (1970) was cited with approval as follows:

"... Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilty, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime. Nor can we perceive any material difference between a plea which refuses to admit commission of the criminal act (nolo contendere) and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." See Pleas of Guilty, VII-6, 1.5 and 1.6.

ABA STANDARD

(c) IN ADDITION TO COMPLYING WITH THE FOREGOING STANDARDS, THE TRIAL JUDGE SHOULD BE AWARE OF AND COMPLY WITH LOCAL REQUIREMENTS. IF THE PLEA IS NOT ACCEPTED, THE JUDGE SHOULD STATE THE REASONS. THE JUDGE SHOULD REQUIRE A VERBATIM RECORD OF THE PROCEEDINGS TO BE MADE AND PRESERVED.

KANSAS CODE

In felony cases the defendant must appear and plead personally and a record of all proceedings at the plea and entry of judgment thereon shall be made and a transcript thereof shall be prepared and filed with the other papers in the case. (K.S.A. 22-3210 (5) (1974)).

COMMENT

Kansas law conforms with the Standard except there is no code requirement that the court state the reasons for not accepting the plea, although it appears that such practice would naturally follow when making such refusal.

Under the former code, the failure of the court reporter to take notes and make and file a record of the arraignment and plea was in Tibbett v. Hand, 185 Kan. 770, 347 P.2d 353 (1959), held to be merely an irregularity, where the record otherwise showed that essential requirements had been complied with and followed.

ABA STANDARD

4.3 WAIVER OF RIGHT TO TRIAL BY JURY.

THE TRIAL JUDGE SHOULD NOT ACCEPT A WAIVER OF RIGHT TO TRIAL BY JURY UNLESS THE DEFENDANT AFTER BEING ADVISED BY THE COURT OF THIS RIGHT, PERSONALLY WAIVES HIS RIGHT TO TRIAL BY JURY, EITHER IN WRITING OR IN OPEN COURT FOR THE RECORD.

KANSAS CODE

See K.S.A. 22-3403 (1) (1974), 22-3404 (2) and (5) (1974) under Trial by Jury, 1.2.

COMMENT

Kansas is in substantial conformity with this requirement. See Comment under Trial by Jury, 1.2.

ABA STANDARD

PART V. PROCEDURES DURING TRIAL

5.1 CONDUCT OF VOIR DIRE EXAMINATION OF JURORS.

THE JUDGE SHOULD INITIATE THE VOIR DIRE EXAMINATION BY IDENTIFYING THE PARTIES AND THEIR RESPECTIVE COUNSEL AND BY REFERRING TO THE CHARGE AGAINST THE ACCUSED, AND BY PUTTING TO THE PROSPECTIVE JURORS QUESTIONS TOUCHING THEIR QUALIFICATIONS TO SERVE AS JURORS IN THE CASE. THE JUDGE SHOULD ALSO PERMIT SUCH ADDITIONAL QUESTIONS BY THE DEFENDANT OR HIS ATTORNEY AND THE PROSECUTOR AS HE DEEMS REASONABLE AND PROPER.

KANSAS CODE

See K.S.A. 1971 Supp. 22-3408 (3) under Trial By Jury, 2.4.

COMMENT

The Kansas code and practice is in substantial conformity with this Standard. See Comment under Trial by Jury, 2.4.

In Bartlett v. Heersche, 204 Kansas. 392, 462 P.2d 392 (1969) it was said:

> "In the selection of a jury panel the trial judge is under an obligation to see that a fair and impartial jury is selected. In doing so counsel should not be permitted to convert jurors to their cause by voir dire examination. If reasonable restraints placed upon counsel by the trial court are abused to such an extent that opposing counsel is repeatedly required to object, the court in the exercise of its power of discretion should resort to the federal practice in a particular case and select the jury panel without the aid of counsel for either party."

ABA STANDARD

5.2 CONTROL OVER AND RELATIONS WITH THE JURY.

(a) THE TRIAL JUDGE SHOULD TAKE APPROPRIATE STEPS RANGING FROM ADMONISHING THE JURORS TO SEQUESTRATION OF THEM DURING TRIAL, TO INSURE THAT THE JURORS WILL NOT BE EXPOSED TO SOURCES OF INFORMATION OR OPINION, OR SUBJECT TO INFLUENCES, WHICH MIGHT TEND TO AFFECT THEIR ABILITY TO RENDER AN IMPARTIAL VERDICT ON THE EVIDENCE PRESENTED IN COURT.

KANSAS CODE

When the case is finally submitted to the jury, they shall retire for deliberation. They must be kept together in some convenient place under charge of a duly sworn officer until they agree upon a verdict, or be discharged by the court, subject to the discretion of the court to permit them to separate temporarily at night, and at their meals. The officer having them under his charge shall not allow any communications to be made to them, or make any himself, unless by order of the court; and before their verdict is rendered he shall not communicate to any person the state of their deliberations, or the verdict agreed upon. No person other than members of the jury shall be present in the jury room during deliberations.

If the jury is permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or allow themselves to be addressed by any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them, and that such admonition shall apply to every subsequent separation of the jury. (K.S.A. 1971 Supp. 22-3420 (1) and (2)).

COMMENT

Kansas law and practice is in conformity with the Standard. In State v. Wilson, 188 Kan. 67, 360 P.2d 1092 (1961) it was said:

"Out of an abundance of caution, it is better practice not to permit a jury to separate during the trial of a capital case, but the court's allowance of such a separation does not constitute reversible error, unless it is established that it tended to prevent a fair and due consideration of the case."

Error was declared in the failure to order the jury kept together in State v. Netherton, 128 Kan. 564, 279 Pac. 19 (1929) where a newspaper article commented on the evidence of the previous day, to the prejudice of the defendant, and questions asked by the county attorney showed the existence of a highly inflamed prejudice and bitter feeling in the county against the defendant.

ABA STANDARD

(b) THE TRIAL JUDGE SHOULD REQUIRE A RECORD TO BE KEPT OF ALL COMMUNICATIONS RECEIVED BY HIM FROM A JUROR OR THE JURY AFTER THE JURY HAS BEEN SWORN, AND HE SHOULD NOT COMMUNICATE WITH A JUROR OR THE JURY ON ANY ASPECT OF THE CASE ITSELF (AS DISTINGUISHED FROM MATTERS RELATING TO PHYSICAL COMFORTS AND THE LIKE), EXCEPT AFTER NOTICE TO ALL PARTIES AND REASONABLE OPPORTUNITY FOR THEM TO BE PRESENT.

KANSAS CODE

> After the jury has retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in the case, they may request the officer to conduct them to the court, where the information on the point of the law shall be given, or the evidence shall be read or exhibited to them in the presence of the defendant, unless he voluntarily absents himself, and his counsel and after notice to the prosecuting attorney. (K.S.A. 1971 Supp. 22-2420 (3)).

COMMENT

Kansas law is in conformity with this Standard. ".... All (the trial judge's) communications with the jury ought to be in open court." (Howard v. Miller, 207 Kan. 246, 485 P. 2d 199 (1971)). See Comment under Trial by Jury, 5.2 and 3.

ABA STANDARD

5.3 CUSTODY AND RESTRAINT OF DEFENDANT AND WITNESS.

(a) THE TRIAL JUDGE SHOULD NOT PERMIT A DEFENDANT OR WITNESS TO APPEAR AT TRIAL IN THE DISTINCTIVE ATTIRE OF A PRISONER.

(b) THE TRIAL JUDGE SHOULD NOT PERMIT A DEFENDANT OR WITNESS TO BE SUBJECTED TO PHYSICAL RESTRAINT TO BE REASONABLY NECESSARY TO MAINTAIN ORDER OR PROVIDE FOR THE SAFETY OF PERSONS. IF THE JUDGE ORDERS SUCH RESTRAINT,

(i) HE SHOULD ENTER INTO THE RECORD THE REASONS THEREFOR, AND

(ii) HE SHOULD INSTRUCT THE JURORS THAT SUCH RESTRAINT IS NOT TO BE CONSIDERED IN WEIGHING EVIDENCE OR DETERMINING THE ISSUE OF GUILT.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas law and practice is in conformity with subsection (a). See State v. Franklin, under 6.10 infra.

In State v. Yurk, 203 Kan. 629, 456 P.2d 11 (1969) the court said, "Generally speaking, the rule is that freedom from hand cuffs during the trial of a criminal case is an important component of a fair and impartial trial."

ABA STANDARD

5.4 DUTY TO PROTECT WITNESSES.

(a) THE TRIAL JUDGE SHOULD PERMIT FULL AND PROPER EXAMINATION AND CROSS-EXAMINATION OF WITNESSES, BUT SHOULD REQUIRE THE INTERROGATION TO BE CONDUCTED FAIRLY AND OBJECTIVELY AND WITH DUE REGARD FOR THE DIGNITY AND LEGITIMATE PRIVACY OF THE WITNESSES AND WITHOUT SEEKING TO INTIMIDATE OR HUMILIATE THEM UNNECESSARILY.

KANSAS CODE

> Subject to sections 60-421 and 60-422, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility. (K.S.A. 60-420).

COMMENT

Kansas law and practice is in conformity with the Standard. In State v. Pierson, 202 Kan. 297, 448 P.2d 30 (1968) a case in which the inquiry related to the witness' relationship with a female employee, our court said:

> "Generally speaking, the extent to which cross-examination of a witness may be allowed rests largely in the sound discretion of the district court and its ruling will not be disturbed unless abuse of discretion is affirmatively made to appear."

See Prosecution Function, 5.7, and Defense Function, 7.6.

ABA STANDARD

(b) THE TRIAL JUDGE SHOULD NOT PERMIT EXAMINATION OR CROSS-EXAMINATION OF WITNESSES AT THE WITNESS STAND, BUT SHOULD REQUIRE COUNSEL TO EXAMINE FROM COUNSEL TABLE OR THE LECTERN OR OTHER DESIGNATED LOCATION, EXCEPT AS PERMISSION IS GRANTED FOR COUNSEL TO PRESENT A DOCUMENT OR AN OBJECT TO THE WITNESS FOR OBSERVATION OR INSPECTION.

KANSAS CODE

> ". . . Unless the judge specifically prescribes otherwise, an attorney must stand when interrogating a witness and should refrain from moving about except as may be necessary for the presentation of exhibits or other assistance to the Court. . ." (K.S.A. 60-2702, S. Ct. Rule No. 117).

COMMENT

Kansas practice is in conformity with the Standard:

> "Lawyers shall stand at the counsel table while examining witnesses, except when handling exhibits, but exceptions to standing may be made in the court's discretion, on account of advanced age, physical disability or unusually long or technical examination." (Uniform Court Formality Details, 19 JBK 205).

Local rules permit and direct examination to be made from a lectern, when such is a part of the court room furniture.

ABA STANDARD

5.5 DUTY TO CONTROL LENGTH AND SCOPE OF EXAMINATION.

THE TRIAL JUDGE SHOULD PERMIT REASONABLE LATITUDE TO COUNSEL IN THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES, BUT SHOULD NOT PERMIT UNREASONABLE REPETITION OR PERMIT COUNSEL TO PURSUE CLEARLY IRRELEVANT LINES OF INQUIRY.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is in conformity with this Standard. See Comment under 5.4, supra.

ABA STANDARD

5.6 RIGHT OF JUDGE TO GIVE ASSISTANCE TO THE JURY DURING TRIAL.

(a) THE TRIAL JUDGE SHOULD NOT EXPRESS OR OTHERWISE INDICATE TO THE JURY HIS PERSONAL OPINION WHETHER THE DEFENDANT IS GUILTY OR EXPRESS AN OPINION THAT CERTAIN TESTIMONY IS WORTHY OR UNWORTHY OF BELIEF.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas law and practice is in conformity with this Standard. See Comment under Trial by Jury, 4.7.

> "At times during the trial, the court has ruled upon the admissibility of evidence. You must not concern yourself with those rulings. I have not meant to indicate any opinion as to the facts or as to what your verdict should be by any ruling that I have made or anything that I have said or done. (PIK 51.05).

The above instruction, appropriate in every case, coupled with the language: "It is for you to determine the weight and credit to be given the testimony of each witness," found in PIK 51.01, should make clear that the court is not involved in the fact finding process.

ABA STANDARD

(b) WHEN NECESSARY TO THE JURORS' PROPER UNDERSTANDING OF THE PROCEEDINGS, THE JUDGE MAY INTERVENE DURING THE TAKING OF EVIDENCE TO EXPLAIN A PRINCIPLE OF LAW OR THE APPLICABILITY OF THE EVIDENCE TO THE ISSUES. THIS SHOULD BE DONE ONLY WHEN THE JURORS COULD NOT BE EFFECTIVELY ADVISED BY POSTPONING THE EXPLANATION TO THE TIME OF GIVING FINAL INSTRUCTIONS.

KANSAS CODE

See K.S.A. 1971 Supp. 22-3414 (3) under Trial by Jury, 4.6 (d).

COMMENT

Kansas law and practice is in conformity with the Standard.

ABA STANDARD

5.7 DUTY OF JUDGE ON COUNSEL'S OBJECTIONS AND REQUESTS FOR RULINGS.

THE TRIAL JUDGE SHOULD RESPECT THE OBLIGATION OF COUNSEL TO PRESENT OBJECTIONS TO PROCEDURES AND TO ADMISSIBILITY OF EVIDENCE, TO REQUEST RULINGS ON MOTIONS, TO MAKE OFFERS OF PROOF, AND TO HAVE THE RECORD SHOW ADVERSE RULINGS AND REFLECT CONDUCT OF THE JUDGE WHICH COUNSEL CONSIDERS PREJUDICIAL. COUNSEL SHOULD BE PERMITTED TO STATE SUCCINCTLY THE GROUNDS OF HIS OBJECTIONS OR REQUESTS: BUT THE JUDGE SHOULD NEVERTHELESS CONTROL THE LENGTH AND MANNER OF ARGUMENT.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is in conformity with this Standard. See The Prosecution Function, 5.5 - 5.9 and The Defense Function, 7.4 - 7.9.

ABA STANDARD

5.8 DUTY OF JUDGE TO RESPECT COUNSEL'S OBLIGATIONS.

THE TRIAL JUDGE SHOULD RESPECT THE OBLIGATIONS OF COUNSEL TO REFRAIN FROM SPEAKING ON PRIVILEGED MATTERS, AND SHOULD AVOID PUTTING HIM IN A POSITION WHERE HIS ADHERENCE TO THE OBLIGATION, SUCH AS BY A REFUSAL TO ANSWER, MAY TEND TO PREJUDICE HIS CLIENT. UNLESS THE PRIVILEGE IS WAIVED, THE TRIAL JUDGE SHOULD NOT REQUEST COUNSEL TO COMMENT ON EVIDENCE OR OTHER MATTERS WHERE HIS KNOWLEDGE IS LIKELY TO BE GAINED FROM PRIVILEGED COMMUNICATIONS.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is in conformity with this Standard.

ABA STANDARD

5.9 REQUESTS FOR CONFERENCES OUTSIDE HEARING OF THE JURY.

THE TRIAL JUDGE SHOULD BE ALERT TO THE DISTRACTING EFFECT ON THE JURY DURING THE TAKING OF EVIDENCE OF FREQUENT CONFERENCES BETWEEN COUNSEL AND THE JUDGE OUT OF THE HEARING OF THE JURY, AND SHOULD POSTPONE THE REQUESTED CONFERENCE TO THE NEXT RECESS EXCEPT WHEN AN IMMEDIATE CONFERENCE APPEARS NECESSARY TO AVOID PREJUDICE.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is in conformity with the Standard.

ABA STANDARD

5.10 FINAL ARGUMENT TO THE JURY.

THE TRIAL JUDGE SHOULD NOT PERMIT COUNSEL DURING THE CLOSING ARGUMENT TO THE JURY TO

(i) EXPRESS HIS PERSONAL OPINIONS AS TO THE TRUTH OR FALSITY OF ANY TESTIMONY OR EVIDENCE ON THE GUILT OR INNOCENCE OF THE DEFENDANT,

(ii) MAKE ARGUMENTS ON THE BASIS OF MATTERS OUTSIDE THE RECORD, UNLESS THEY ARE MATTERS OF COMMON PUBLIC KNOWLEDGE OR OF WHICH THE COURT MAY TAKE JUDICIAL NOTICE, OR

(iii) MAKE ARGUMENTS CALCULATED TO INFLAME THE PASSIONS OR PREJUDICES OF THE JURY.

KANSAS CODE

See K.S.A. 1974 Supp. 7-125, DR 7-106 (C) (3) and (4) under Prosecution Function 5.8 and Defense Function 7.8 (b).

COMMENT

Kansas law and practice is in conformity with the Standard. Statements expressing prosecutor's personal belief in merits of case are to be deplored as constituting conduct beyond the scope of legitimate argument. (Devine v. United States, 403 F. 2d 93 (1968)).

Counsel is allowed considerable latitude in discussing the evidence and drawing reasonable inferences therefrom, but he may not introduce or comment on facts clearly outside the evidence. (State v. Granger, 200 Kan. 515, 438 P.2d 455 (1968), a case in which county attorney read from the contents of a witness' prior written statement not in evidence).

In State v. Wilson, cited supra at 5.2 (a) the court quotes with approval and follows the early case of State v. Baker, 57 Kan. 541, 46 Pac. 947 (1896) that in argument, abusive and improper language calculated to create prejudice against the defendant compels a new trial, where after objection made, the court failed to check counsel and to instruct the jury to disregard his remarks. See Smith v. Blakely, 213 Kan. 91, 515 P.2d 1062 (1973).

ABA STANDARD

5.11 REQUESTS FOR JURY INSTRUCTIONS, AND INSTRUCTIONS.

(a) THE TRIAL JUDGE SHOULD AFFORD COUNSEL OPPORTUNITY TO OBJECT TO ANY REQUESTS FOR JURY INSTRUCTIONS TENDERED BY ANOTHER PARTY OR PREPARED AT THE DIRECTION OF THE JUDGE. HE SHOULD ADVISE COUNSEL BEFORE THE ARGUMENTS TO THE JURY WHAT REQUESTED INSTRUCTIONS HE PROPOSES TO GIVE OR NOT GIVE. AFTER THE JURY HAS BEEN INSTRUCTED AND BEFORE IT BEGINS ITS DELIBERATIONS, ALL OBJECTIONS TO INSTRUCTIONS GIVEN OR REFUSED SHOULD BE PLACED ON THE RECORD.

(b) THE COURT MAY RECALL THE JURY AFTER THEY HAVE RETIRED AND GIVE THEM ADDITIONAL INSTRUCTIONS IN ORDER:

(i) TO CORRECT OR WITHDRAW AN ERRONEOUS INSTRUCTION;

(ii) TO CLARIFY AN AMBIGUOUS INSTRUCTION; OR

(iii) TO INFORM THE JURY ON A POINT OF LAW WHICH SHOULD HAVE BEEN COVERED IN THE ORIGINAL INSTRUCTIONS.

KANSAS CODE

See K.S.A. 22-3414 (3) (1974) Trial by Jury 4.6, K.S.A. 22-3420 (3) (1974) under Trial by Jury 5.3.

COMMENT

Kansas law and practice is in conformity with this Standard. See Comments under Trial by Jury, 4.6 and 5.3.

In a criminal action it is the duty of the trial court to instruct the jury on the law applicable to the theories of both the prosecution and the accused so far as they are supported by any competent evidence. (State v. Hamrick, 206 Kan. 543, 479 P. 2d 854, (1971)).

When the trial court submits all of its instructions to counsel for both sides and the defendant neither requests additional instructions nor objects to those prepared by the court on a specific subject, the defendant cannot complain of the substance of those instructions on appeal. (State v. Potts, 205 Kan. 42, 468 P. 2d 74, (1970)).

ABA STANDARD

5.12 ASSISTANCE DURING JURY DELIBERATIONS.

(a) THE TRIAL JUDGE SHOULD PROVIDE ASSISTANCE TO THE JURY DURING DELIBERATION BY PERMITTING MATERIALS TO BE TAKEN TO THE JURY ROOM AND RESPONDING TO REQUESTS TO REVIEW EVIDENCE AND FOR ADDITIONAL INSTRUCTIONS, UNDER APPROPRIATE SAFEGUARDS AS PROVIDED IN ABA STANDARDS, TRIAL BY JURY SECTIONS 5.1, 5.2 AND 5.3.

KANSAS CODE

See K.S.A. 1971 Supp. 22-3420 (3) under Trial By Jury, 5.2 and 5.3.

COMMENT

Kansas is in conformity with this Standard. See Comment under Trial by Jury, 5.2 and 5.3.

ABA STANDARD

(b) IN DEALING WITH WHAT APPEARS TO BE A DEADLOCKED JURY, THE TRIAL JUDGE SHOULD AVOID INSTRUCTIONS WHICH IMPLY THAT A MAJORITY VIEW IS THE CORRECT ONE, BY COMPLYING WITH ABA STANDARDS, TRIAL BY JURY SEC. 5.4.

KANSAS CODE

No comparable code provision.

KANSAS CODE

See K.S.A. 1971 Supp. 7-125, DR 7-106 (C)(3) and (4) under Prosecution Function 5.8 and Defense Function 7.8 (b).

COMMENT

Kansas law and practice is in conformity with the Standard. Statements expressing prosecutor's personal belief in merits of case are to be deplored as constituting conduct beyond the scope of legitimate argument. (Devine v. United States, 403 F.2nd 93 (1968)).

Counsel is allowed considerable latitude in discussing the evidence and drawing reasonable inferences therefrom, but he may not introduce or comment on facts clearly outside the evidence. (State v. Granger, 200 Kan. 515, 438 P.2d 455 (1968), a case in which county attorney read from the contents of a witness' prior written statement not in evidence).

In State v. Wilson, 188 Kan. 67, 360 P.2d 1092 (1961) the court quotes with approval and follows the early case of State v. Baker, 57 Kan. 541, 46 Pac. 947 (1896) that in argument, abusive and improper language calculated to create prejudice against the defendant compels a new trial, where after objection made, the court failed to check counsel and to instruct the jury to disregard his remarks.

ABA STANDARD

5.11 REQUESTS FOR JURY INSTRUCTIONS, AND INSTRUCTIONS.

(a) THE TRIAL JUDGE SHOULD AFFORD COUNSEL OPPORTUNITY TO OBJECT TO ANY REQUESTS FOR JURY INSTRUCTIONS TENDERED BY ANOTHER PARTY OR PREPARED AT THE DIRECTION OF THE JUDGE. HE SHOULD ADVISE COUNSEL BEFORE THE ARGUMENTS TO THE JURY WHAT REQUESTED INSTRUCTIONS HE PROPOSES TO GIVE OR NOT GIVE. AFTER THE JURY HAS BEEN INSTRUCTED AND BEFORE IT BEGINS ITS DELIBERATIONS, ALL OBJECTIONS TO INSTRUCTIONS GIVEN OR REFUSED SHOULD BE PLACED ON THE RECORD.

(b) THE COURT MAY RECALL THE JURY AFTER THEY HAVE RETIRED AND GIVE THEM ADDITIONAL INSTRUCTIONS IN ORDER:

(i) TO CORRECT OR WITHDRAW AN ERRONEOUS INSTRUCTION;

(ii) TO CLARIFY AN AMBIGUOUS INSTRUCTION; OR

(iii) TO INFORM THE JURY ON A POINT OF LAW WHICH SHOULD HAVE BEEN COVERED IN THE ORIGINAL INSTRUCTIONS.

KANSAS CODE

See K.S.A. 1971 22-3414 (3) Trial by Jury 4.6, 22-3420 (3) under Trial by Jury 5.3.

COMMENT

Kansas law and practice is in conformity with this Standard. See Comments under Trial by Jury, 4.6 and 5.3.

In a criminal action it is the duty of the trial court to instruct the jury on the law applicable to the theories of both the prosecution and the accused so far as they are supported by any competent evidence. (State v. Hamrick, 206 Kan. 543, 479 P. 2d 854, (1971)).

When the trial court submits all of its instructions to counsel for both sides and the defendant neither requests additional instructions nor objects to those prepared by the court on a specific subject, the defendant cannot complain of the substance of those instructions on appeal. (State v. Potts, 205 Kan. 42, 468 P. 2d 74, (1970)).

ABA STANDARD

5.12 ASSISTANCE DURING JURY DELIBERATIONS.

(a) THE TRIAL JUDGE SHOULD PROVIDE ASSISTANCE TO THE JURY DURING DELIBERATION BY PERMITTING MATERIALS TO BE TAKEN TO THE JURY ROOM AND RESPONDING TO REQUESTS TO REVIEW EVIDENCE AND FOR ADDITIONAL INSTRUCTIONS, UNDER APPROPRIATE SAFEGUARDS AS PROVIDED IN ABA STANDARDS, TRIAL BY JURY SECTIONS 5.1, 5.2 AND 5.3.

KANSAS CODE

See K.S.A. 1971 Supp. 22-3420 (3) under Trial By Jury, 5.2 and 5.3.

COMMENT

Kansas is in conformity with this Standard. See Comment under Trial by Jury, 5.2 and 5.3.

ABA STANDARD

(b) IN DEALING WITH WHAT APPEARS TO BE A DEADLOCKED JURY, THE TRIAL JUDGE SHOULD AVOID INSTRUCTIONS WHICH IMPLY THAT A MAJORITY VIEW IS THE CORRECT ONE, BY COMPLYING WITH ABA STANDARDS, TRIAL BY JURY SEC. 5.4.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas law is in substantial conformity with this Standard. See Comment under Trial by Jury, 5.4.

ABA STANDARD

5.13 JUDICIAL COMMENT ON VERDICT.

WHILE IT IS APPROPRIATE FOR THE TRIAL JUDGE TO THANK JURORS AT THE CONCLUSION OF A TRIAL FOR THEIR PUBLIC SERVICE, SUCH COMMENTS SHOULD NOT INCLUDE PRAISE OR CRITICISM OF THEIR VERDICT.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice indicates a conformity with the Standard. Comments to the jury are generally limited to the orientation time. See Trial by Jury, 3.1.

ABA STANDARD

PART VI. MAINTAINING DECORUM OF COURTROOM

6.1 SPECIAL RULES FOR ORDER IN THE COURTROOM.

THE TRIAL JUDGE, EITHER BEFORE A CRIMINAL TRIAL OR AT ITS BEGINNING, SHOULD PRESCRIBE AND MAKE KNOWN THE GROUND RULES RELATING TO CONDUCT WHICH THE PARTIES, THE PROSECUTOR, THE DEFENSE COUNSEL, THE WITNESSES, AND OTHERS WILL BE EXPECTED TO FOLLOW IN THE COURTROOM, AND WHICH ARE NOT SET FORTH IN THE CODE OF CRIMINAL PROCEDURE OR IN THE PUBLISHED RULES OF COURT.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is in substantial conformity with this Standard. The practice varies, depending on the judge involved or the complexity

or nature of the case. Except in unusual cases, such as those involving multiple counsel, multiple defendants, or unusual number of witnesses, existing code provisions should adequately cover the situation.

ABA STANDARD

6.2 COLLOQUY BETWEEN COUNSEL.

THE TRIAL JUDGE SHOULD MAKE KNOWN BEFORE TRIAL THAT NO COLLOQUY, ARGUMENT, OR DISCUSSION DIRECTLY BETWEEN COUNSEL IN THE PRESENCE OF THE JUDGE OR JURY WILL BE PERMITTED, EXCEPT THAT IF A BRIEF CONFERENCE BETWEEN COUNSEL MIGHT TEND TO EXPEDITE THE TRIAL THE JUDGE WILL GRANT THEM LEAVE TO CONFER.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is in substantial conformity with this Standard. While correct procedure standards are that all objections and requests are addressed to the court, direct exchanges between counsel frequently serve to expedite matters and should be permitted if they do not result in lack of decorum, or remove the control of the trial from the court.

ABA STANDARD

6.3 JUDGE'S USE OF HIS POWERS TO MAINTAIN ORDER.

THE TRIAL JUDGE HAS THE OBLIGATION TO USE HIS JUDICIAL POWER TO PREVENT DISTRACTIONS FROM AND DISRUPTIONS OF THE TRIAL. IF THE JUDGE DETERMINES TO IMPOSE SANCTIONS FOR MISCONDUCT AFFECTING THE TRIAL, HE SHOULD ORDINARILY IMPOSE THE LEAST SEVERE SANCTION APPROPRIATE TO CORRECT THE ABUSE AND TO DETER REPETITION. IN WEIGHING THE SEVERITY OF A POSSIBLE SANCTION FOR DISRUPTIVE COURTROOM CONDUCT TO BE APPLIED DURING THE TRIAL, THE JUDGE SHOULD CONSIDER THE RISK OF FURTHER DISRUPTION, DELAY OR PREJUDICE THAT MIGHT RESULT FROM THE CHARACTER OF THE SANCTION OR THE TIME OF ITS IMPOSITION.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is in substantial conformity with this Standard. The trial judge should be alert to the fact that an appropriately severe sanction may be self-defeating, because it will being "discredit to the court as certainly as the conduct it penalizes." (Sacher v. United States, 343 U.S. 1 (1952)). The appropriate use of a sanction requires consideration of its effect on the orderly conduct of the trial, such as, for example, removal of a defense lawyer, which may frustrate prosecution of the case and give success to the purpose of his wilfull obstruction.

ABA STANDARD

6.4 JUDGE'S RESPONSIBILITY FOR SELF-RESTRAINT.

THE TRIAL JUDGE SHOULD BE THE EXEMPLAR OF DIGNITY AND IMPARTIALITY. HE SHOULD EXERCISE RESTRAINT OVER HIS CONDUCT AND UTTERANCES. HE SHOULD SUPPRESS HIS PERSONAL PREDILECTIONS, AND CONTROL HIS TEMPER AND EMOTIONS. HE SHOULD NOT PERMIT ANY PERSON IN THE COURTROOM TO EMBROIL HIM IN CONFLICT, AND HE SHOULD OTHERWISE AVOID CONDUCT ON HIS PART WHICH TENDS TO DEMEAN THE PROCEEDINGS OR TO UNDERMINE HIS AUTHORITY IN THE COURT-ROOM. WHEN IT BECOMES NECESSARY DURING THE TRIAL FOR HIM TO COMMENT UPON THE CONDUCT OF WITNESSES, SPECTATORS, COUNSEL, OR OTHERS, OR UPON THE TESTIMONY, HE SHOULD DO SO IN A FIRM, DIGNIFIED AND RESTRAINED MANNER, AVOIDING REPARTEE, LIMITING HIS COMMENTS AND RULINGS TO WHAT IS REASONABLY REQUIRED FOR THE ORDERLY PROGRESS OF THE TRIAL, AND REFRAINING FROM UN-NECESSARY DISPARAGEMENT OF PERSONS OR ISSUES.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is in substantial conformity with the Standard. The Standard is clearly a statement of the obvious, but as such, a recognized and acceptable guide to proper conduct.

ABA STANDARD

6.5 DETERRING AND CORRECTING MISCONDUCT OF ATTORNEYS.

THE TRIAL JUDGE SHOULD REQUIRE ATTORNEYS TO RESPECT THEIR OBLIGATIONS AS OFFICERS OF THE COURT TO SUPPORT THE AUTHORITY OF THE COURT AND ENABLE THE TRIAL TO PROCEED WITH DIGNITY. WHEN AN ATTORNEY CAUSES A SIGNIFICANT

DISRUPTION IN A CRIMINAL PROCEEDING, THE TRIAL JUDGE, HAVING PARTICULAR REGARD TO THE PROVISIONS OF SECTION 6.3, SHOULD CORRECT THE ABUSE, AND IF NECESSARY, DISCIPLINE THE ATTORNEY BY USE OF ONE OR MORE OF THE FOLLOWING SANCTIONS:

(i) CENSURE OR REPRIMAND;

(ii) CITATION OR PUNISHMENT FOR CONTEMPT;

(iii) REMOVAL FROM THE COURTROOM;

(iv) SUSPENSION FOR A LIMITED TIME OF THE RIGHT TO PRACTICE IN THE COURT WHERE THE MISCONDUCT OCCURRED IF SUCH SANCTION IS PERMITTED BY LAW;

(v) INFORMING THE APPROPRIATE DISCIPLINARY BODIES IN EVERY JURISDICTION WHERE THE ATTORNEY IS ADMITTED TO PRACTICE OF THE NATURE OF THE ATTORNEY'S MISCONDUCT AND OF ANY SANCTION IMPOSED.

KANSAS CODE

> An attorney-at-law may be disbarred or disciplined by the supreme court, for any of the following causes arising after his admission to practice in this state: (1) For willful disobedience of an order of court requiring him to do or forbear an act connected with or in the course of his profession. (2) For a willful violation of his oath, or of any duty imposed upon an attorney-at-law. (K.S.A. 1971 Supp. 7-111 (1), (2)).
>
> It shall be the duty of all judges of courts to report to the board of law examiners any action or inaction on the part of an attorney appearing before him, which in the opinion of the judge constitutes probable cause for discipline. Nothing herein shall be construed in any manner as limiting the powers of such judge in contempt proceedings. Upon receipt of such report the board shall proceed as hereinafter provided for complaints. (K.S.A. 1971 Supp. 7-124, S. Ct. Rule No. 202 (c)).

COMMENT

Kansas law and practice is in conformity with this Standard, except as to subsection IV relating to suspension from practice which power by

reason of the statute appears to be vested exclusively in the Supreme Court. See K.S.A. 1971 Supp. 7-111, supra, and K.S.A. 1971 Supp. 7-124 S. Ct. Rule No. 201 et seq.

No statutory or other authority is necessary for a judge to proceed under subsection V. The utilization of this Standard should be a deterrent to practices of misconduct by increasing numbers of so-called "national lawyers."

In Harding v. Henderson, 123 Kan. 533, 255 Pac. 969, (1927) our court said that the trial court on its own motion should reprimand counsel indulging in villifying and abusive argument.

Our Supreme Court has frequently imposed the discipline of censure, as was done in the most recent case of State v. Nelson, 206 Kan. 154 476 P. 2d 240, (1970).

In the case of In re Estate of Williams, 160 Kan. 220, 160 P.2d 260 (1945) it is declared that courts generally have disciplinary jurisdiction over counsel appearing before them, not only for the purpose of enforcing legal rights, but for the additional purpose of enforcing honorable conduct on their part as officers of the court. Cited in support is the earlier case of Hess v. Conway, 92 Kan. 787, 142 Pac. 253, (1914) which states that the court has power to make disciplinary orders to remedy breaches of professional duty, independent of the right of clients and others. Implicit in such jurisdiction is the power to censure. For contempt, see citations and Comment under 7.1 to .5 inclusive, infra.

ABA STANDARD

6.6 THE DEFENDANT'S ELECTION TO REPRESENT HIMSELF AT TRIAL.

A DEFENDANT SHOULD BE PERMITTED AT HIS ELECTION TO PROCEED IN THE TRIAL OF HIS CASE WITHOUT THE ASSISTANCE OF COUNSEL ONLY AFTER THE TRIAL JUDGE MAKES THOROUGH INQUIRY AND IS SATISFIED THAT HE

(i) HAS BEEN CLEARLY ADVISED OF HIS RIGHT TO THE ASSISTANCE OF COUNSEL, INCLUDING HIS RIGHT TO THE ASSIGNMENT OF COUNSEL WHEN HE IS SO ENTITLED;

(ii) POSSESSES THE INTELLIGENCE AND CAPACITY TO APPRECIATE THE CONSEQUENCES OF HIS DECISION; AND

(iii) COMPREHENDS THE NATURE OR THE CHARGES AND PROCEEDINGS, THE RANGE OF PERMISSIBLE PUNISHMENTS, AND ANY ADDITIONAL FACTS ESSENTIAL TO A BROAD UNDERSTANDING OF THE CASE.

KANSAS CODE

See K.S.A. 1971 Supp. 22-4503 and 22-4517 under Providing Defense Services, 1.1.

COMMENT

Kansas law and practice is in conformity with this Standard. While our present statutes relating to providing attorney services to the indigent and our code provisions otherwise make no specific provision for an accused to waive an attorney, historically a person has had a right to represent himself. The defendant's Sixth Amendment right to the assistance of counsel cannot be abrogated unless knowingly and intelligently waived, however strongly the defendant may desire to proceed alone. (Von Moultke v. Gillies, 332 U.S. 708 (1948)). A fair trial is impossible if a defendant is tried for a crime while denying him counsel. (Gideon v. Wainwright, 372 U.S. 335 (1963)).

In State v. Armstrong, 207 Kan. 681, 486 P.2d 1322, (1971) our court quotes and applies Berryhille v. Page, 349 F 2d 984, 10th Cir. as follows:

> ". . . In order to effectuate a waiver of the right to counsel, the record must plainly show that the accused was offered the assistance of counsel but intelligently and understandably rejected the offer . . . ."

To the same effect under former code, see Lloyd v. State, 197 Kan. 389, 416 P.2d 766, (1966). See also Chance v. State, 197 Kan. 16, 422 P.2d 868, (1967). See Providing Defense Services, 7.1, .2 and .3.

ABA STANDARD

6.7 STANDBY COUNSEL FOR DEFENDANT REPRESENTING HIMSELF.

WHEN A DEFENDANT HAS BEEN PERMITTED TO PROCEED WITHOUT THE ASSISTANCE OF COUNSEL, THE TRIAL JUDGE SHOULD CONSIDER THE APPOINTMENT OF STANDBY COUNSEL TO ASSIST THE DEFENDANT WHEN CALLED UPON AND TO CALL THE JUDGE'S ATTENTION TO MATTERS FAVORABLE TO THE ACCUSED UPON WHICH THE JUDGE SHOULD RULE ON HIS OWN MOTION. STANDBY COUNSEL SHOULD ALWAYS BE APPOINTED IN CASES EXPECTED TO BE LONG OR COMPLICATED OR IN WHICH THERE ARE MULTIPLE DEFENDANTS.

KANSAS CODE

No comparable code provision.

COMMENT

Because of apparent restrictions on right of indigent to waive counsel (See Comment under 6.6, supra) there does not appear to be any record of experience or practice otherwise concerning this Standard.

In Mayberry v. Pennsylvania, 400 U.S. 455, (1971) in a concurring opinion, Burger, Chief Justice said that:

> "When a defendant refuses counsel, as he did here, or seeks to discharge him, a trial judge is well advised - as so many do - to have such 'standby counsel' to perform the services a trained advocate would perform . . ."

ABA STANDARD

6.8 THE DISRUPTIVE DEFENDANT.

A DEFENDANT MAY BE REMOVED FROM THE COURTROOM DURING HIS TRIAL WHEN HIS CONDUCT IS SO DISRUPTIVE THAT THE TRIAL CANNOT PROCEED IN AN ORDERLY MANNER. REMOVAL IS PREFERABLE TO GAGGING OR SHACKLING THE DISRUPTIVE DEFENDANT. IF REMOVED, THE DEFENDANT SHOULD BE REQUIRED TO BE PRESENT IN THE COURT BUILDING WHILE THE TRIAL IS IN PROGRESS, BE GIVEN THE OPPORTUNITY OF LEARNING OF THE TRIAL PROCEEDINGS THROUGH HIS COUNSEL AT REASONABLE INTERVALS, AND BE GIVEN A CONTINUING OPPORTUNITY TO RETURN TO THE COURTROOM DURING THE TRIAL UPON HIS ASSURANCE OF GOOD BEHAVIOR. THE REMOVED DEFENDANT SHOULD BE SUMMONED TO THE COURTROOM AT APPROPRIATE INTERVALS, WITH THE OFFER TO PERMIT HIM TO REMAIN REPEATED IN OPEN COURT EACH TIME.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice conforms with this Standard. Instances of necessity of its application are infrequent.

Standards and guides are set out in the case of Illinois v. Allen, 397 U.S. 337, (1970) in which the Supreme Court of the United States held that a disruptive defendant could be removed from the courtroom and the trial continued under certain conditions and said,

> "Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights ... we explicitely hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of court and judicial proceedings." (p.343).

The court further discouraged but did not rule out other forms of in-court restraints, such as shackles and gags.

ABA STANDARD

6.9 MISCONDUCT OF DEFENDANT REPRESENTING HIMSELF.

IF A DEFENDANT PERMITTED TO PROCEED WITHOUT THE ASSISTANCE OF COUNSEL ENGAGES IN CONDUCT WHICH IS SO DISRUPTIVE THAT THE TRIAL CANNOT PROCEED IN AN ORDERLY MANNER, THE COURT SHOULD, AFTER APPROPRIATE WARNINGS, REVOKE THE PERMISSION AND REQUIRE REPRESENTATION BY COUNSEL. IF STANDBY COUNSEL HAS PREVIOUSLY BEEN APPOINTED, HE SHOULD BE ASKED TO REPRESENT THE DEFENDANT. IN ANY EVENT, THE TRIAL SHOULD BE RECESSED ONLY LONG ENOUGH FOR COUNSEL TO PREPARE HIMSELF TO GO FORWARD.

KANSAS CODE

No comparable code provision.

COMMENT

See Comment under 6.7, supra.

ABA STANDARD

6.10 MISCONDUCT OF SPECTATORS AND OTHERS.

THE RIGHT OF THE DEFENDANT TO A PUBLIC TRIAL DOES NOT GIVE PARTICULAR MEMBERS OF THE GENERAL PUBLIC OR OF THE NEWS MEDIA A RIGHT TO ENTER THE COURTROOM OR TO REMAIN THERE. ANY PERSON WHO ENGAGES IN CONDUCT WHICH DISTURBS THE ODERLY PROCESS OF THE TRIAL MAY BE ADMONISHED OR EXCLUDED, AND, IF HIS CONDUCT IS INTENTIONAL, MAY BE PUNISHED FOR CONTEMPT. ANY PERSON WHOSE CONDUCT TENDS TO MENACE A DEFENDANT, AN ATTORNEY, A WITNESS, A JUROR, A COURT OFFICER, OR THE JUDGE IN A CRIMINAL PROCEEDING MAY BE REMOVED FROM THE COURTROOM.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas law and practice is in conformity with this Standard. In the interest of orderly court room procedure and decorum and in the safeguarding of the rights of a defendant, a trial judge, where the mother of the victim of the homicide arose and screamed four times, "He killed my son," would

be entirely justified in having the offending party removed from the courtroom and the jury be admonished to disregard such demonstration. It is within the sound discretion of the court to determine the effect of outbursts of emotion, weeping, fainting, applause or other demonstrations. (State v. Franklin, 167 Kan. 706, 208 P.2d 195 (1949).

ABA STANDARD

6.11 ARRANGEMENTS FOR THE NEWS MEDIA.

ALTHOUGH THE NEWS MEDIA MAY OBSERVE THE TRIAL OF A CRIMINAL CASE IN ORDER THAT INFORMATION BE OBTAINED FOR CIRCULATION TO THE GENERAL PUBLIC, THE TRIAL JUDGE SHOULD, NEVERTHELESS, REQUIRE THAT THE CONDUCT OF THEIR REPRESENTATIVES NOT JEOPARDIZE THE ORDER AND DECORUM OF THE COURTROOM. HE SHOULD MAKE REASONABLE ARRANGEMENTS TO ACCOMMODATE THEM CONSISTENT WITH THE OPPORTUNITY OF OTHER MEMBERS OF THE PUBLIC TO ATTEND THE TRIAL.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is in conformity with this Standard. For guides generally, See ABA Standards, Fair Trial and Free Press 3.5 (a) (Approved Draft, 1968), a Standard not included in this project.

ABA STANDARD

PART VII. USE OF THE CONTEMPT POWER

7.1 INHERENT POWER OF THE COURT.

THE COURT HAS THE INHERENT POWER TO PUNISH ANY CONTEMPT IN ORDER TO PROTECT THE RIGHTS OF THE DEFENDANT AND THE INTERESTS OF THE PUBLIC BY ASSURING THAT THE ADMINISTRATION OF CRIMINAL JUSTICE SHALL NOT BE THWARTED. THE TRIAL JUDGE HAS THE POWER TO CITE AND, IF NECESSARY, PUNISH SUMMARILY ANYONE WHO, IN HIS PRESENCE IN OPEN COURT, WILLFULLY OBSTRUCTS THE COURSE OF CRIMINAL PROCEEDINGS.

KANSAS CODE

That contempts committed during the sitting of the court or of a judge at chambers, in its or his presence, are direct contempts. All others are indirect contempts. (K.S.A. 20-1202).

That a direct contempt may be punished summarily, without written accusation against the person arraigned, but if the court or judge in chambers shall adjudge him guilty thereof a judgment shall be entered of record, in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto, and the sentence of the court thereon. (K.S.A. 20-1203).

COMMENT

Although statutes have been enacted relating to contempt, the power of the court is not so limited but is found in the inherent power to punish for contempt and to determine whether a contempt has been committed. (State v. Rose, 74 Kan. 260, 85 Pac 803 (1906)). See also In re Millington, 24 Kan. 214 (188).

An attorney's acts may constitute contempt of court. (In re Hanson, 99 Kan. 23, 160 Pac. 1141 (1916)).

A direct contempt may be punished summarily without written accusation, but the court must make an appropriate record of the conduct constituting such contempt with a statement of whatever defense or extenuation the accused offered thereto, and the sentence of the court thereon. (K.S.A. 20-1203, supra). The latter requirement is jurisdictional in character and is to enable the accused to have a test or review in a superior court of the validity of the judgment pronounced. (Wallace v. Webber, 134 Kan. 201, 5 P.2d 855 (1931)).

ABA STANDARD

7.2 ADMONITION AND WARNING.

NO SANCTION OTHER THAN CENSURE SHOULD BE IMPOSED BY THE TRIAL JUDGE UNLESS

(i) IT IS CLEAR FROM THE IDENTITY OF THE OFFENDER AND THE CHARACTER OF HIS ACTS THAT DISRUPTIVE CONDUCT WAS WILFULLY CONTEMPTUOUS, OR

(ii) THE CONDUCT WARRANTING THE SANCTION WAS PRECEDED BY A CLEAR WARNING THAT THE CONDUCT IS IMPERMISSIBLE AND THAT SPECIFIED SANCTIONS MAY BE IMPOSED FOR ITS REPETITION.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is in substantial conformity with this Standard. In Illinois v. Allen, 397 U.S. 337 (1970) Brennan J. in a concurring opinion indicates that no action against an unruly defendant is permissible until after he has been warned of the possible consequences of continued misbehavior.

ABA STANDARD

7.3 NOTICE OF INTENT TO USE CONTEMPT POWER; POSTPONEMENT OF ADJUDICATION.

(a) THE TRIAL JUDGE SHOULD, AS SOON AS PRACTICABLE AFTER HE IS SATISFIED THAT COURTROOM MISCONDUCT REQUIRES CONTEMPT PROCEEDINGS, INFORM THE ALLEGED OFFENDER OF HIS INTENTION TO INSTITUTE SUCH PROCEEDINGS.

(b) THE TRIAL JUDGE SHOULD CONSIDER THE ADVISABILITY OF DEFERRING ADJUDICATION OF CONTEMPT FOR COURTROOM MISCONDUCT OF A DEFENDANT, AN ATTORNEY OR A WITNESS UNTIL AFTER THE TRIAL, AND SHOULD DEFER SUCH A PROCEEDING UNLESS PROMPT PUNISHMENT IS IMPERATIVE.

KANSAS CODE

No comparable code provision.

COMMENT

There is no reported experience of any such happening, but it appears reasonable to expect practice to conform with this Standard.

In Sacher v. United States, 343 U.S. 10 (1952) in which several attorneys and one defendant who represented himself were held in contempt the trial judge waited until after the trial was over to cite, adjudicate and sentence the contemnors. This procedure was upheld the Supreme Court suggesting that if the adjudications had occurred during the trial the defendants would have been prejudiced, since the contempt proceedings must be public and "only the naive and inexperienced would assume that news of such action will not reach the jurors."

The court must weigh the necessity of immediate action by summary procedure, as against an adjudication after the trial which cannot adversely affect the course of the trial. Later proceedings can also facilitate transfer of the contempt proceedings to another judge. (See 7.5, infra).

In any event, summary punishment is only possible when needed ". . . to restore order and maintain the dignity and authority of the court." (Johnson v. Mississippi, 403 U.S. 212 (1971)).

ABA STANDARD

7.4 NOTICE OF CHARGES AND OPPORTUNITY TO BE HEARD.

BEFORE IMPOSING ANY PUNISHMENT FOR CRIMINAL CONTEMPT, THE JUDGE SHOULD GIVE THE OFFENDER NOTICE OF THE CHARGES AND AT LEAST A SUMMARY OPPORTUNITY TO ADDUCE EVIDENCE OR ARGUMENT RELEVANT TO GUILT OR PUNISHMENT.

KANSAS CODE

See K.S.A. 20-1203 under 7.1, supra.

COMMENT

Kansas law and practice is in conformity with this Standard. In case of summary action, the statutory requirement of the entry of record in which the specified conduct constituting contempt with a statement of defense or extenuation offered has been declared a jurisdictional requirement in order that the validity of the judgment may be tested on appeal. See Wallace v. Webber under 7.1, supra.

When the contempt action is by a later procedure, process may be an order to show cause. The essential thing is that the defendant shall have notice and a fair opportunity to explain and defend the charge. (State v. Rose, 74 Kan. 261, 85 Pac. 803).

ABA STANDARD

7.5 REFERRAL TO ANOTHER JUDGE.

THE JUDGE BEFORE WHOM COURTROOM MISCONDUCT OCCURS MAY IMPOSE APPROPRIATE SANCTIONS, INCLUDING PUNISHMENT FOR CONTEMPT, BUT SHOULD REFER THE MATTER TO ANOTHER JUDGE IF HIS CONDUCT WAS SO INTEGRATED WITH THE CONTEMPT THAT HE CONTRIBUTED TO IT OR WAS OTHERWISE INVOLVED, OR HIS OBJECTIVITY CAN REASONABLY BE QUESTIONED.

KANSAS CODE

That the provisions of this act shall apply to all proceedings for contempt in all courts of Kansas, and before all judges

in chambers; but this act shall not affect any proceedings for contempt pending at the time of the passage thereof. Upon request by a district judge the attorney general shall furnish said court with a special prosecutor to prosecute contempt proceedings. (K.S.A. 1971 Supp. 20-1206).

COMMENT

Kansas law is in conformity with this Standard. Although summary proceeding as outlined under 7.1, supra, is permitted, circumstances may necessitate or make preferential a separate proceedings or one before a different judge. The later procedural enactment in 1967 (K.S.A. 1971 Supp. 20-1206, supra) making available from the Attorney General a special prosecutor to prosecute contempt proceedings simplifies this method of procedure.

Sometimes the proceeding in contempt is treated as a part of the case out of which the contempt arises and in others it is treated as an independent proceeding. (Barton v. Barton, 99 Kan. 727, 163 Pac. 179 (1971), Frey v. Willey, 161 Kan. 196, 166 P.2d 659 (1946)). It has been brought as an original proceeding. (State v. Pittsburg, 80 Kan. 710, 104 P. 847 (1909), Barton v. Barton, supra). The only question before the court in such a proceeding is whether the accused is guilty as charged. (Haynes v. Haynes, 168 Kan. 219, 212 P. 2d 213 (1949)). The judgment rests in the sound discretion of the trier of the facts. (Brayfield v. Brayfield, 175 Kan. 337, 264 P. 3d 1064 (1953)).

In Mayberry v. Pennsylvania, 400 U.S. 455 (1971), the Supreme Court reaffirms that it is not every attack on a judge that disqualifies him from sitting, but under the circumstances there, when the judge necessarily became embroiled in a running, bitter controversy and was so cruelly slandered as not likely to maintain that calm detachment necessary for fair adjudication, it was held that due process required a defendant should be given a public trial before a judge other than the one reviled by the contemnor.

ABA STANDARD

PART VIII. SENTENCING AND POST-CONVICTION REMEDIES

8.1 DUTIES OF JUDGE IN SENTENCING.

THE TRIAL JUDGE, AND NOT THE JURY, SHOULD BE EMPOWERED TO DETERMINE SENTENCE, EXCEPT POSSIBLY IN CAPITAL CASES. WHENEVER FEASIBLE, THE SENTENCE SHOULD BE IMPOSED BY THE JUDGE WHO PRESIDED AT THE TRIAL OR WHO ACCEPTED THE PLEA OF GUILTY OR NOLO CONTENDERE, IN ACCORDANCE WITH ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES, AND ABA STANDARDS, PROBATION.

KANSAS CODE

See K.S.A. 1971 Supp. 21-4501 under Sentencing Alternatives and Procedures.

COMMENT

Kansas is in conformity with this Standard. Murder in the first degree (K.S.A. 21-3401), Aggravated kidnapping (K.S.A. 1971 Supp. 21-3421 and Treason (K.S.A. 21-3801) are the offenses included as Class A felonies, which by the code provide the alternate to the death sentence.

ABA STANDARD

8.2 DUTIES OF JUDGE ADMINISTERING POST-CONVICTION REMEDIES.

THE TRIAL JUDGE HAVING JURISDICTION OF APPLICATIONS FOR POST-CONVICTION RELIEF SHOULD FINALLY DISPOSE OF EACH APPLICATION AT THE EARLIEST STAGE CONSISTENT WITH THE PURPOSE OF DECIDING CLAIMS ON THEIR UNDERLYING MERITS RATHER THAN ON FORMAL OR TECHNICAL GROUNDS. HE SHOULD BE FAMILIAR WITH AND SHOULD ADHERE TO ABA STANDARDS, POST-CONVICTION REMEDIES.

KANSAS CODE

> Unless the motion and the files and records of the case conclusively show that the movant is entitled to no relief, the court shall notify the county attorney and grant a prompt hearing. "Prompt" means as soon as reasonably possible considering other urgent business of the court. All proceedings on the motion shall be recorded by the official court reporter. (K.S.A. 1971 Supp. 60-2702, S. Ct. Rule No. 121 (f)).

COMMENT

Kansas is in conformity with this Standard. In Rodgers v. State, 197 Kan. 622, 419 P. 2d 828 (1966) the rule and requirement of a prompt hearing is referred to. In Williams v. State, 203 Kan. 246, 452 P.2d 856 (1969) our court said:

> "A prisoner in custody under an enhanced sentence must file post-conviction proceedings attacking that sentence in the court which imposed the same as provided in K.S.A. 60-1507."

ABA STANDARD

PART IX. PROCEDURES REGARDING JUDICIAL MISFEASANCE, NONFEASANCE AND DISABILITY

9.1 PROCEDURES FOR DISCIPLINING JUDGES.

(a) EACH JURISDICTION SHOULD ESTABLISH AN INDEPENDENT COMMISSION, COMPOSED OF LAY CITIZENS, LAWYERS AND JUDGES, TO INVESTIGATE COMPLAINTS OF JUDICIAL MISCONDUCT OR INCOMPETENCE AGAINST JUDGES IN ALL COURTS OF THE JURISDICTION. THE COMMISSION SHOULD BE EMPOWERED TO INVESTIGATE ANY SUCH COMPLAINT RECEIVED BY IT, TO EMPLOY THE SUBPOENA POWER, APPOINT HEARING OFFICERS TO EXAMINE COMPLAINTS AND RECEIVE EVIDENCE, AND TO MAKE FINDINGS AND RECOMMENDATIONS TO THE HIGHEST COURT IN THE JURISDICTION. SUCH COURT SHOULD BE EMPOWERED TO REMOVE ANY JUDGE FOUND BY IT AND THE COMMISSION TO BE GUILTY OF GROSS MISCONDUCT OR INCOMPETENCE IN THE PERFORMANCE OF HIS DUTIES. PROVISION FOR CENSURE OR SUSPENSION SHOULD BE MADE FOR LESS SERIOUS MISCONDUCT. IN ORDER TO PROTECT THE PARTICIPANTS PROVISION SHOULD BE MADE FOR KEEPING ALL COMPLAINTS AND COMMISSION PROCEEDINGS CONFIDENTIAL UNLESS THE COMMISSION RECOMMENDS DISCIPLINE BY THE HIGHEST COURT, AT WHICH TIME THE COMMISSION'S RECORD, UPON BEING FILED WITH THE COURT, SHOULD BECOME PUBLIC.

(b) THE TRIAL JUDGE SHOULD COOPERATE WITH SUCH A COMMISSION IN UPHOLDING AND ENFORCING STANDARDS OF JUDICIAL CONDUCT AND CANONS OF JUDICIAL ETHICS.

KANSAS CODE

See Rules of the Supreme Court of Kansas relating to Judicial Conduct, Rules 601 to 629.

COMMENT

Kansas is not in conformity with this Standard. A proposition to amend the judicial article of the Kansas Constitution has been authorized and directed to be submitted to the electors of the state at the general election in the year 1972 as provided by law. (See Ch. 392, 1972 Session Laws of Kansas). Its pertinent provision is: ". . . . Other judges (than Supreme Court justices) shall be subject . . . . to discipline, suspension and removal for cause by the Supreme Court after appropriate hearing . . . ." (Sec. 15).

The procedure of the Standard, including lay citizens and lawyers on an independent commission, is in effect in several states with fairly uniform procedures and causes for discipline and removal. If adopted, the Kansas plan will vest all such power in the Supreme Court.

ABA STANDARD

9.2 RETIREMENT OF JUDGES FOR DISABILITY.

EACH JURISDICTION SHOULD MAKE APPROPRIATE PROVISION FOR THE PROMPT RETIREMENT ON EQUITABLE TERMS OF JUDGES WHO BECOME PHYSICALLY OR MENTALLY DISABLED FROM THE PROPER FULFILLMENT OF THE ORDINARY OBLIGATIONS OF THE JUDICIAL OFFICE.

KANSAS CODE

> Any judge who has become permanently physically or mentally disabled may, upon being found so disabled by the supreme court, retire, and upon such retirement he shall be entitled to receive the retirement annuity as provided in section 10 (20-2610) of this act ... (K.S.A. 20-2609 (1974)). See also Rules of the Supreme Court of Kansas relating to Judicial Conduct. Rules 601 to 629.

COMMENT

Kansas is in conformity with this Standard.