

TRIAL BY JURY

ABA STANDARD

PART I. WHEN TRIAL BY JURY; WAIVER

1.1 RIGHT TO JURY TRIAL.

DEFENDANTS IN ALL CRIMINAL CASES SHOULD HAVE THE RIGHT TO BE TRIED BY A JURY OF TWELVE WHOSE VERDICT MUST BE UNANIMOUS, EXCEPT THAT WHERE NOT BARRED BY APPLICABLE CONSTITUTIONAL PROVISIONS, THE RIGHT TO JURY TRIAL MAY BE LIMITED IN ONE OR MORE OF THE FOLLOWING WAYS:

KANSAS CODE

The right of trial by jury shall be inviolate. (Kan. Const. Bill of Rights, Sec. 5).

In all prosecutions, the accused shall be allowed...to have...a speedy trial by an impartial jury of the county or district in which the offense is alleged to have been committed. (Kan. Const. Bill of Rights, Sec. 5).

A jury in a felony case shall consist of twelve members. However, the parties may agree in writing, at any time before the verdict, with the approval of the court, that the jury shall consist of any number less than twelve. (K.S.A. 1971 Supp. 22-3403(2)). See also K.S.A. 1971 Supp. 22-3411 under 2.6 *infra*.

COMMENT

The Kansas code conforms with this Standard. In the case of Williams v. Florida, 399 U.S. 78 (1970), it was held that the twelve man panel is not a necessary ingredient of a "trial by jury" and the court upheld a Florida trial by a jury of six. The court comments on various

historical documentations concerning how the number twelve was arrived at, such as Lord Coke's explanation that the "number of twelve is much respected in Holy writ, as 12 apostles, 12 stones, 12 tribes, etc." and concluded that the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance, except of mystics.

The purpose of a jury was stated to be to prevent oppression by the government by providing a "safeguard against the corrupt or over-zealous prosecutor and against the complaint biased, or eccentric judge", quoting from Duncan v. Louisiana, 391 U.S. 156 (1967). The accomplishment of that purpose with less than 12 was sustained in the following language:

"Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility which results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body which makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12 - particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a factfinder hardly seems likely to be a function of its size."

In Bourne v. Atchison, Topeka and Santa Fe Railway Co., 209 Kan. 511, 497 P.2d 110 (1972), the Kansas Supreme Court took note of the effect of the above-cited case, saying: "Prior to Williams v. Florida, supra, we all assumed that trial by jury meant a trial by a jury of 12 members," but held that the legislature has power to regulate the number and interpreted the legislative intent in the applicable statute to require a jury of 12 unless the parties stipulate otherwise.

ABA STANDARD

(a) BY DENIAL OF JURY TRIAL TO THOSE CHARGED WITH "PETTY OFFENSES".

KANSAS CODE

Trials in the municipal or police court of a city shall be to the court. (K.S.A. 1971 Supp. 22-3404 (4)).

COMMENT

The Kansas code conforms with this Standard. It has been recognized that the constitutional provisions for jury trials have been construed as not to apply to "petty offenses," those crimes which were triable without a jury at common law and those crimes created by later law which are comparable in degree of infamy or prescribed punishment to offenses triable without a jury at common law. (Callan v. Wilson, 127 U.S. 540 (1888); District of Columbia v. Cotts, 282 U.S. 63 (1930); District of Columbia v. Clowans, 300 U.S. 617 (1937)).

ABA STANDARD

(b) BY REQUIRING TRIAL WITHOUT JURY FOR LESSER OFFENSES, PROVIDED THERE IS A RIGHT TO APPEAL WITHOUT UNREASONABLE RESTRICTIONS TO A COURT IN WHICH A TRIAL DE NOVO BY A JURY MAY BE HAD.

KANSAS CODE

The trial of misdemeanor cases in a state court other than the district court shall be to the court unless a jury trial is requested by the defendant. Such request shall be in writing and shall be filed at least 48 hours prior to the time set for trial. (K.S.A. 1971 Supp. 22-3404 (2)). See K.S.A. 1971 Supp. 22-3404 (4) under 1.1 (a), supra.

(1) The defendant shall have the right to appeal to the district court of the county from any judgment of a court of limited jurisdiction or a municipal or police court which adjudges the defendant guilty of a violation of the laws of Kansas or the ordinances of any municipality of Kansas or which imposes a sentence of fine or confinement or both. The appeal shall stay all further proceedings upon the judgment appealed from.

(2) An appeal to the district court shall be taken by filing a notice of appeal in the court where the judgment appealed from was rendered. No appeal shall be taken more than ten (10) days after the date of the judgment appealed from.

(3) The magistrate or judge whose judgment is appealed from, or the clerk of such court, if there be one shall certify the complaint, warrant and any appearance bond to the district court of the county on or before the next court day of such district court occurring more than ten (10) days after the appeal. (K.S.A. 1971 Supp. 22-3609).

... any appeal of a conviction for a violation of a municipal ordinance or a misdemeanor against the state shall be tried by a jury in each case unless waived. (K.S.A. 1971 Supp. 20-301).

COMMENT

The Kansas code conforms with this Standard.

ABA STANDARD

(c) BY THE USE OF JURIES OF LESS THAN TWELVE, WITHOUT REGARD TO THE CONSENT OF THE PARTIES; OR

KANSAS CODE

A jury in a misdemeanor case tried in a state court other than the district court shall consist of six members unless the defendant requests a jury of twelve or another number is agreed upon by the parties. The parties may agree in writing, at any time before the verdict, with the approval of the court, that the jury may consist of any number less than the number originally impaneled. (K.S.A. 1971 Supp. 22-3404 (3)).

COMMENT

The Kansas code conforms with this Standard. As to a jury of less than twelve members, see the comment under 1.1, supra.

ABA STANDARD

(d) BY PERMITTING LESS THAN UNANIMOUS VERDICTS, WITHOUT REGARD TO THE CONSENT OF THE PARTIES.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code makes no provision for less than unanimous verdict. In Johnson v. Louisiana, _____ U.S. _____, 92 S.Ct. 1620 (1972), the Supreme Court of the United States held that state provisions allowing less than unanimous verdict in certain cases were ruled valid under the due process and equal protection clauses of the Fourteenth Amendment. Under consideration were constitutional and statutory provisions permitting a verdict of nine of twelve jurors as sufficient to return a verdict in cases where the punishment is necessarily at hard labor. Additional argument that standards in other cases requiring unanimous verdict of jury of twelve members in capital cases and of five members in less serious crimes were determined not to be unconstitutional or so invidiously discriminatory as to constitute defective legislative judgment. In the jointly heard case of Apodaca v. Oregon, _____ U.S. _____, 92 S. Ct. 1628 (1972), involving a statute permitting the return of a ten to two verdict, it was held that the Sixth Amendment does not require jury unanimity. Reference is also made to the jury function as in Williams v. Florida, supra, which case upheld a jury of less than twelve, citing from Duncan v. Louisiana, supra, that the purpose of trial by jury is to prevent oppression by the government by providing a "safeguard against the complaint biased, or eccentric judge." The court said:

"A requirement of unanimity, however, does not materially contribute to the exercise of this common sense judgment...In terms of this function, we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of ten to two or eleven to one."

ABA STANDARD

1.2 WAIVER OF TRIAL BY JURY.

(a) CASES REQUIRED TO BE TRIED BY JURY SHOULD BE SO TRIED UNLESS JURY TRIAL IS WAIVED.

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

(c) A DEFENDANT MAY NOT WITHDRAW A VOLUNTARY AND KNOWING WAIVER AS A MATTER OF RIGHT, BUT THE COURT, IN ITS DISCRETION, MAY PERMIT WITHDRAWAL PRIOR TO THE COMMENCEMENT OF THE TRIAL.

KANSAS CODE

The defendant and prosecuting attorney, with the consent of the court, may submit the trial of any felony to the court. All other trials of felony cases shall be by jury. (K.S.A. 1971 Supp. 22-3403 (1)).

The trial of misdemeanor cases in a state court other than the district court shall be to the court unless a jury trial is requested by the defendant. Such request shall be in writing and shall be filed at least 48 hours prior to the time set for trial.

Except as otherwise provided by law, the rules and procedures applicable to jury trials in felony cases shall apply to jury trials in misdemeanor cases. (K.S.A. 1971 Supp. 22-3404 (2) and (5)).

COMMENT

The code and case law is in conformity with this Standard. For decision covering all items in accordance with the Standard, see State v. Blanton, 203 Kan. 81, 453 P2d 30 (1969).

ABA STANDARD

1.3 WAIVER OF FULL JURY.

(a) THE DEFENDANT MAY ELECT TRIAL BY A NUMBER OF JURORS (FIXED BY CONSTITUTION, STATUTE, OR RULE OF COURT) LESS THAN THE NUMBER TO WHICH HE IS ENTITLED.

(b) AT ANY TIME BEFORE VERDICT, THE PARTIES WITH THE APPROVAL OF THE COURT MAY STIPULATE THAT THE JURY SHALL CONSIST OF ANY NUMBER LESS THAN THAT REQUIRED FOR A FULL JURY.

(c) THE COURT SHOULD NOT PERMIT SUCH AN ELECTION OR ACCEPT SUCH A STIPULATION UNLESS THE DEFENDANT, AFTER BEING ADVISED BY THE COURT OF HIS RIGHT TO TRIAL BY A FULL JURY, PERSONALLY WAIVES HIS RIGHT TO TRIAL BY A FULL JURY EITHER IN WRITING OR IN OPEN COURT FOR THE RECORD.

KANSAS CODE

See K.S.A. 1971 Supp. 22-3403 (2) and K.S.A. 1971 Supp. 22-3404 (3) and (5) following Standard 1.1 *supra*.

COMMENT

The Kansas code conforms with this requirement. As to requirements of waiver, see State v. Blanton under, 1.2 *supra*.

ABA STANDARD

PART II. SELECTION OF THE JURY

2.1 SELECTION OF PROSPECTIVE JURORS.

THE SELECTION OF PROSPECTIVE JURORS SHOULD BE GOVERNED BY THE FOLLOWING GENERAL PRINCIPLES:

(a) THE NAMES OF THOSE PERSONS WHO MAY BE CALLED FOR JURY SERVICE SHOULD BE SELECTED AT RANDOM FROM SOURCES WHICH WILL FURNISH A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY.

KANSAS CODE

The public policy of this state is declared to be that jury service is the solemn obligation of all qualified citizens, and that

excuses from the discharge of this responsibility should be granted by the judges of the courts of this state only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health or safety; that all litigants entitled to trial by jury shall have the right to juries selected at random from a fair cross section of the community in the district wherein the court convenes; and that all citizens shall have the opportunity to be considered for service on juries in the district courts of Kansas. (K.S.A. 1971 Supp. 43-155).

From and after January 1, 1972, all jury lists shall be prepared in accordance with the provisions of this act. Jury commissioners shall cause to be prepared under their supervision a list of persons qualified as jurors in each county. Jury lists shall be prepared from voter registration records and enumeration or census records of the county in accordance with the intent and purposes of this act. The jury list of each county shall be prepared and ready for use on January 1, 1972, and annually thereafter the commissioners shall cause the jury list of each county to be revised and updated by adding names of qualified jurors and removing names of those who have died, removed from the county, or who have otherwise become disqualified. For the purposes of preparation and revision of jury lists, commissioners shall have access to the voter registration and enumeration or census records of each county. (K.S.A. 1971 Supp. 43-162).

No person shall be excluded from service as a grand or petit juror in the district courts of Kansas on account of race, color, religion, sex, national origin, or economic status. Every juror, grand and petit, shall be a citizen of the state, resident of the county and possess the qualifications of an elector as now, or in the future established. (K.S.A. 1971 Supp. 43-156).

COMMENT

The Kansas code conforms with this Standard.

ABA STANDARD

(b) JURY OFFICIALS SHOULD DETERMINE THE QUALIFICATIONS OF PROSPECTIVE JURORS BY QUESTIONNAIRE OR INTERVIEW, AND DISQUALIFY THOSE WHO FAIL TO MEET SPECIFIED MINIMUM REQUIREMENTS. THE GROUNDS FOR DISQUALIFICATION SHOULD BE CLEARLY STATED OBJECTIVE CRITERIA, SUCH AS:

(i) INABILITY TO READ, WRITE, SPEAK, AND UNDERSTAND THE ENGLISH LANGUAGE;

(ii) INCAPACITY, BY REASON OF MENTAL OR PHYSICAL INFIRMITY, TO RENDER EFFICIENT JURY SERVICE;

(iii) FAILURE TO MEET REASONABLE REQUIREMENTS CONCERNING CITIZENSHIP, RESIDENCE, OR AGE; AND

(iv) PENDING CHARGE OR CONVICTION OF A FELONY OR A CRIME INVOLVING MORAL TURPITUDE.

KANSAS CODE

The following persons shall be excused from jury service:

(a) Persons unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out a jury questionnaire form prepared by the commissioner;

(b) persons under adjudication of incompetency;

(c) Persons who within ten (10) years immediately preceding have been convicted of or pleaded guilty, or nolo contendere, to an indictment or information charging a felony. (K.S.A. 1971 Supp. 43-158).

Each jury commissioner may require any person summoned for jury duty to answer in writing such questions as he may address to such person, touching his name, age, residence, occupation and qualifications as a juror, with a view to the due and faithful jury service of such person; and also all questions as to similar matters touching all persons in his household.

Any person summoned for jury duty who shall fail or refuse to answer such questions in writing, signing his name thereto, shall be cited for contempt of court.

Any person summoned for jury duty who shall willfully or corruptly make false answers to such questions put to him by the jury commissioner shall be deemed to be guilty of a class A misdemeanor. (K.S.A. 1971 Supp. 43-161). See K.S.A. 1971 Supp. 43-162 and 43-156 cited supra under 2.1.

COMMENT

The Kansas code conforms with this Standard.

ABA STANDARD

(c) PROSPECTIVE JURORS MAY BE EXCUSED FROM JURY SERVICE UPON REQUEST ON THE BASIS OF CLEARLY STATED GROUNDS FOR EXEMPTION, SUCH AS:

(i) THAT THE PERSON HAS PREVIOUSLY SERVED AS A JUROR WITHIN A SPECIFIED PERIOD OF TIME; OR

(ii) THAT THE PERSON IS ACTIVELY ENGAGED IN ONE OF A LIMITED NUMBER OF SPECIFICALLY IDENTIFIED CRITICAL OCCUPATIONS.

(d) THE COURT MAY EXCUSE OTHER PERSONS UPON A SHOWING OF UNDUE HARDSHIP OR EXTREME INCONVENIENCE.

KANSAS CODE

In addition to the persons excused from jury service in section 4 (43-158), the following persons may be excused from jury service by the court:

(a) Persons so physically or mentally infirm as to be unequal to the task of ordinary jury duty;

(b) persons who have served as jurors in the county within one (1) year immediately preceding;

(c) persons whose presence elsewhere is required for the public welfare, health or safety;

(d) persons for whom jury service would cause extraordinary or compelling personal hardship;

(e) persons whose personal relationship to the parties or whose information or interest in the case to be tried is such that there is a probability such persons would find it difficult to be impartial. (K.S.A. 1971 Supp. 43-159).

COMMENT

The Kansas code conforms with this Standard. It was held in State v. Clift, 202 Kan. 512, 449 P2d 1006, (1969), that the excusing of jurors from reporting for duty is a judicial function to be exercised only by the court. The practice of excusing by bailiff or court reporter was disapproved, but excusing by bailiff in the particular case was determined not to have prejudiced the substantial rights of defendant.

ABA STANDARD

2.2 LIST OF PROSPECTIVE JURORS.

UPON REQUEST THE PARTIES SHOULD BE FURNISHED WITH A LIST OF PROSPECTIVE JURORS WITH THEIR ADDRESSES.

KANSAS CODE

When drawn, a list of prospective jurors and their addresses shall be filed in the office of the clerk of the court and shall be a public record. (K.S.A. 1971 Supp. 22-3408 (1)).

COMMENT

The Kansas code is in substantial conformity with the Standard.

ABA STANDARD

2.3 CHALLENGE TO THE ARRAY.

THE PROSECUTING ATTORNEY AND THE DEFENDANT OR HIS ATTORNEY MAY CHALLENGE THE ARRAY ON THE GROUND THAT THERE HAS BEEN A MATERIAL DEPARTURE FROM THE REQUIREMENTS OF THE LAW GOVERNING SELECTION OF JURORS.

KANSAS CODE

(1) Any objection to the manner in which a jury panel has been selected or drawn shall be raised by a motion to discharge the jury panel. The motion shall be made at least five days prior to the date set for trial if the names and addresses of the panel members and the grounds for objection thereto are known to the parties or can be learned by an inspection of the records of the clerk of the district court at that time; in other cases the motion must be made prior to the time when the jury is sworn to try the case. For good cause shown, the court may entertain the motion at any time thereafter.

(2) The motion shall be in writing and shall state facts which, if true, show that the jury panel was improperly selected or drawn.

(3) If the motion states facts which, if true, show that the jury panel has been improperly selected or drawn, it shall be the duty of the court to conduct a hearing. The burden of proof shall be on the movant.

(4) If the court finds that the jury panel was improperly selected or drawn, the court shall order the jury panel discharged and the selection or drawing of a new panel in the manner provided by law. (K.S.A. 1971 Supp. 22-3407).

COMMENT

The Kansas code conforms with this Standard. The court followed another recent case holding that as a general principle a jury panel is not to be quashed on any ground which does not involve corruption, serious misconduct or palpable disregard of the law, in State v. Theus, 207 Kan. 571, 485 P2d 1327, (1971):

"Mere irregularities in the jury selection process which do not prejudice the accused's substantial rights will not vitiate the panel."
(State v. Starphill, 206 Kan. 612, 481 P2d 998, (1971)).

ABA STANDARD

2.4 VOIR DIRE EXAMINATION.

A VOIR DIRE EXAMINATION SHOULD BE CONDUCTED FOR THE PURPOSE OF DISCOVERING BASES FOR CHALLENGE FOR CAUSE AND FOR THE PURPOSE OF GAINING KNOWLEDGE TO ENABLE AN INTELLIGENT EXERCISE OF PEREMPTORY CHALLENGES. THE JUDGE SHOULD INITIATE THE VOIR DIRE EXAMINATION BY IDENTIFYING THE PARTIES AND THEIR RESPECTIVE COUNSEL AND BY BRIEFLY OUTLINING THE NATURE OF THE CASE. THE JUDGE SHOULD THEN PUT TO THE PROSPECTIVE JURORS ANY QUESTIONS WHICH HE THINKS NECESSARY, TOUCHING THEIR QUALIFICATIONS TO SERVE AS JURORS IN THE CAUSE ON TRIAL. THE JUDGE SHOULD ALSO PERMIT SUCH ADDITIONAL QUESTIONS BY THE DEFENDANT OR HIS ATTORNEY AND THE PROSECUTING ATTORNEY AS HE DEEMS REASONABLE AND PROPER.

KANSAS CODE

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

COMMENT

The Kansas code and practice is in substantial conformity with this Standard. In State v. Guffey, 205 Kan. 9, 468 P2d 254, (1970), it was held that the extent of examination of jurors on voir dire is within the trial court's discretion and that its basic purpose is to enable the parties to select jurors competent to judge and determine facts in issue without bias, prejudice or partiality.

qualification of a juror, required by the law of the state, is included in the purpose reference of voir dire in State v. Stanphill, 206 Kan. 612, 481 P.2d 998, (1971).

ABA STANDARD

2.5 CHALLENGES FOR CAUSE.

IF THE JUDGE AFTER EXAMINATION OF ANY JUROR IS OF THE OPINION THAT GROUNDS FOR CHALLENGE FOR CAUSE ARE PRESENT, THE JUDGE SHOULD EXCUSE THAT JUROR FROM THE TRIAL OF THE CASE. IF THE JUDGE DOES NOT EXCUSE THE JUROR, ANY PARTY MAY CHALLENGE THE JUROR FOR CAUSE. A CHALLENGE TO AN INDIVIDUAL JUROR SHOULD BE MADE BEFORE HE IS SWORN TO TRY THE CASE, BUT THE JUDGE MAY PERMIT IT TO BE MADE AFTER HE IS SWORN BUT BEFORE JEOPARDY HAS ATTACHED.

KANSAS CODE

(1) Each party may challenge any prospective juror for cause. Challenges for cause shall be tried by the court.

(2) A juror may be challenged for cause of any of the following grounds:

(a) He is related to the defendant, or a person alleged to have been injured by the crime charged or the person on whose complaint the prosecution was begun, by consanguinity within the sixth degree, or is the spouse of any person so related.

(b) He is attorney, client, employer, employee, landlord, tenant, debtor, creditor or a member of the household of the defendant or a person alleged to have been injured by the crime charged for the person on whose complaint the prosecution was instituted;

(c) He is or has been a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.

(d) He has served on the grand jury which returned the indictment or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information, or on any other investigatory body which inquired into the facts of the crime charged.

(e) He was a juror at a former trial of the same cause.

(f) He was a juror in a civil action against the defendant arising out of the act charged as a crime.

(g) He was a witness to the act or acts alleged to constitute the crime.

(h) He occupies a fiduciary relationship to the defendant or a person alleged to have been injured by the crime or the person on whose complaint the prosecution was instituted.

(i) His state of mind with reference to the case or any of the parties is such that the court determines there is doubt that he can act impartially and without prejudice to the substantial rights of any party.

(3) All challenges for cause must be made before the jury is sworn to try the case. (K.S.A. 1971 Supp. 22-3410).

COMMENT

The Kansas code conforms with the Standard, except that it does not direct that the court shall excuse for cause if in his opinion grounds for challenge are present. In practice this is done.

In State v. Coleman, 206 Kan. 587, 481 P2d 1008, (1971), it is said that an impartial juror is one who is free from bias. It is also declared that the trial court's decision as to the qualification of a juror will not be disturbed on appeal, unless disqualification appears as a matter of law or there has been an abuse of discretion.

Generally, error in overruling a challenge to a juror for cause is not ground for reversal when the juror does not sit in the case and when the accused is not in some way prejudiced thereby. When a venireman is removed from the panel by peremptory challenge his qualifications or lack of them are no longer a controlling factor upon which to base prejudicial error on appeal. The question in such case is whether the jury who tried the accused was composed of impartial citizens. (State v. Sagebiel, 206 Kan. 482, 480 P2d 44, (1971)).

It was held in State v. Stuart, 206 Kan. 11, 476 P2d 975, (1970), that the statutory enumeration of disqualifying causes does not deprive the courts of their inherent right to declare that other causes also require dismissal of a prospective juror in order to insure a fair and impartial trial.

Failure to challenge for cause of a known incompetent juror at the time of impanelling constitutes a waiver to complain on that ground thereafter. (State v. Paxton, 201 Kan. 353, 440 P.2d 650 (1968)).

ABA STANDARD

2.6 PEREMPTORY CHALLENGES.

THE NUMBER OF PEREMPTORY CHALLENGES AND THE PROCEDURE FOR THEIR EXERCISE SHOULD BE GOVERNED BY RULE OR STATUTE.

KANSAS CODE

(1) Peremptory challenges shall be allowed as follows:

(a) Each defendant charged with a class A felony shall be allowed twelve peremptory challenges.

(b) Each defendant charged with a class B felony shall be allowed eight peremptory challenges.

(c) Each defendant charged with a felony other than a class A or class B felony shall be allowed six peremptory challenges.

(d) Each defendant charged with a misdemeanor shall be allowed four peremptory challenges.

(e) Additional peremptory challenges shall not be allowed on account of separate counts charged in the complaint, information or indictment.

(f) The prosecution shall be allowed the same number of peremptory challenges as all the defendants.

(2) After the parties have interposed all of their challenges, the jury shall be sworn to try the case.

(3) Immediately after the jury is empaneled and sworn, a trial judge may empanel one or more alternate or additional jurors whenever, in his discretion, he believes it advisable to have such jurors available to replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable to perform their duties. Such jurors shall be selected in the same manner, have the same qualifications, and be subject to the same examination and challenges and take the same oath and have the same functions, powers and privileges as the regular jurors. Each party shall be entitled to one (1) peremptory

challenge to such alternate jurors. Such alternate jurors shall be seated near the other jurors, with equal power and facilities for seeing and hearing the proceedings in the case, and they must attend at all times upon the trial of the cause in company with the other jurors. They shall obey the orders of and be bound by the admonition of the court upon each adjournment, but if the regular jurors are ordered to be kept in custody during the trial of the cause, such alternate jurors also shall be kept in confinement with the other jurors. Upon final submission of the case to the jury, such alternate jurors shall be kept in the custody of the sheriff and shall not be discharged until the original jurors are discharged. If any regular juror shall be discharged from jury service in any such action prior to the jury reaching its verdict, the court shall draw the name of an alternate juror who shall replace the juror so discharged and be subject to the same rules and regulations as though he has been selected as one of the original jurors. (K.S.A. 22-3412 (1974)).

In all felony trials, upon the request of either the prosecution or the defendant, the court shall cause enough jurors to be called, examined, and passed for cause before any peremptory challenges are required, so that there will remain sufficient jurors, after the number of peremptory challenges allowed by law for the case on trial shall have been exhausted, to enable the court to cause twelve jurors to be sworn to try the case. (K.S.A. 22-3411 (1974)).

COMMENT

The Kansas code conforms with this Standard. Peremptory challenge is a right which may be waived. It has been held no reversible error results in permitting a party to challenge several jurors at a time rather than to alternate the peremptory challenges. When a defendant fails or refuses to exercise his remaining peremptory challenges, the court may strike the required number from the panel in order to reduce the jury to the correct number. (State v. Hunt, 198 Kan. 222, 424 P.2d 571, (1967)). As to peremptory challenges to alternate additional jurors see Section 2.7 below.

ABA STANDARD

2.7 ALTERNATE OR ADDITIONAL JURORS.

A TRIAL JUDGE MAY EMPANEL ONE OR MORE ALTERNATE OR ADDITIONAL JURORS WHENEVER, IN HIS DISCRETION, HE BELIEVES IT ADVISABLE TO HAVE SUCH JURORS AVAILABLE TO REPLACE JURORS WHO, PRIOR TO THE TIME THE JURY RETIRES TO

CONSIDER ITS VERDICT, BECOME OR ARE FOUND TO BE UNABLE OR DISQUALIFIED TO PERFORM THEIR DUTIES. SUCH JURORS SHOULD BE DRAWN IN THE SAME MANNER, HAVE THE SAME QUALIFICATIONS, BE SUBJECT TO THE SAME EXAMINATION AND CHALLENGES, AND TAKE THE SAME OATH AND HAVE THE SAME FUNCTIONS, POWERS, FACILITIES AND PRIVILEGES AS THE REGULAR JURORS.

KANSAS CODE

See K.S.A. 22-3412 (3) (1974), *supra*.

COMMENT

The Kansas code does not conform with the Standard.

ABA STANDARD

PART III. JUROR ORIENTATION AND COMPENSATION

3.1 JUROR ORIENTATION; USE OF HANDBOOKS.

PROSPECTIVE JURORS SHOULD RECEIVE AN ORIENTATION WHICH INFORMS THEM OF THE NATURE OF THEIR DUTIES AND INTRODUCES THEM TO TRIAL PROCEDURE AND LEGAL TERMINOLOGY, BUT WHICH DOES NOT INCLUDE ANYTHING TO BE REGARDED BY THE JURORS AS INSTRUCTIONS OF LAW TO BE APPLIED IN ANY CASE OR ANYTHING THAT MAY PREJUDICE A PARTY OR MISLEAD THE JURORS. IT IS PREFERABLE THAT THIS ORIENTATION BE ACCOMPLISHED BY THE USE OF JUROR HANDBOOKS, WHICH MAY BUT NEED NOT BE IMPLEMENTED BY ORAL INSTRUCTIONS.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice conforms with this Standard. Although included in PIK Civil, the orientation provisions apply equally to criminal jury trials. The Bar Association of the state of Kansas, on request of any district judge, provides for distribution to prospective jurors a pamphlet entitled, "Your Rights and Duties as a Juror." Many district judges have developed juror handbooks of their own which they send to jurors who are called for service.

In *State v. Guffey*, cited *supra* at 2.4, the court takes note of the desirability of some form of orientation for a new jury panel as in PIK Civil 1.01 to 1.07 inclusive and points out that when given, they should be made of record.

ABA STANDARD

3.2 COMPENSATION OF JURORS.

JURORS SHOULD RECEIVE REASONABLE COMPENSATION FOR THEIR SERVICE. SUCH COMPENSATION SHOULD INCLUDE:

- (a) A PER DIEM ALLOWANCE WHICH IS SUFFICIENT TO PREVENT UNDUE HARDSHIP; AND
- (b) REIMBURSEMENT FOR REASONABLE TRAVEL AND SUBSISTENCE EXPENSES.

KANSAS LAW

Jurors shall be paid the following fees out of the county general fund: For attending before any court pursuant to this act, for each day of attendance ten dollars (\$10) per day; for each mile necessarily traveled in going to and returning from the place of attendance, mileage at the rate prescribed by law. (K.S.A. 1974 Supp. 43-171).

COMMENT

The Kansas code conforms with the Standard. Reasonableness of allowance is a matter of legislative determination.

ABA STANDARD

PART IV. SPECIAL PROCEDURES DURING JURY TRIAL

4.1 CUSTODY AND RESTRAINT OF DEFENDANTS AND WITNESSES.

- (a) DURING TRIAL THE DEFENDANT SHOULD BE SEATED WHERE HE CAN EFFECTIVELY CONSULT WITH HIS COUNSEL AND CAN SEE AND HEAR THE PROCEEDINGS.
- (b) AN INCARCERATED DEFENDANT OR WITNESS SHOULD NOT BE REQUIRED TO APPEAR IN COURT IN THE DISTINCTIVE ATTIRE OF A PRISONER OR CONVICT.
- (c) DEFENDANTS AND WITNESSES SHOULD NOT BE SUBJECTED TO PHYSICAL RESTRAINT WHILE IN COURT UNLESS THE TRIAL JUDGE HAS FOUND SUCH RESTRAINT REASONABLY NECESSARY TO MAINTAIN ORDER. IF THE TRIAL JUDGE ORDERS SUCH RESTRAINT, HE SHOULD ENTER INTO THE RECORD OF THE CASE THE REASONS THEREFOR. WHENEVER PHYSICAL RESTRAINT OF A DEFENDANT OR WITNESS OCCURS IN THE PRESENCE OF JURORS TRYING THE CASE, THE JUDGE SHOULD INSTRUCT THOSE JURORS THAT SUCH RESTRAINT IS NOT TO BE CONSIDERED IN ASSESSING THE PROOF AND DETERMINING GUILT.

KANSAS CODE

(1) The defendant in a felony case shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by law. In prosecutions for crimes not

punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes.

(2) The defendant must be present, either personally or by counsel at every stage of the trial of a misdemeanor case. (K.S.A. 1971 Supp. 22-3405).

COMMENT

The Kansas code conforms with the Standard, except as to reference to incarcerated defendant or witness appearing in the distinctive attire of a prisoner or being subjected to physical restraint. Provision for committing material witness to the custody of the sheriff or marshal for failure to comply with bond or other conditions for appearance is found in K.S.A. 1971 Supp. 22-2805.

ABA STANDARD

4.2 NOTE TAKING BY JURORS.

JURORS MAY TAKE NOTES REGARDING THE EVIDENCE PRESENTED TO THEM AND KEEP THESE NOTES WITH THEM WHEN THEY RETIRE FOR THEIR DELIBERATIONS. SUCH NOTES SHOULD BE TREATED AS CONFIDENTIAL BETWEEN THE JUROR MAKING THEM AND HIS FELLOW JURORS.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas case law is in substantial conformity with this Standard. On the question of a juror taking notes our court said:

"It is not error per se for a juror to take notes during the trial and it clearly does not belong to that class of misconduct where a new trial must be peremptorily granted without a showing of prejudice to substantial rights. The question of

whether jurors should take notes during the trial should be left to the sound discretion of the trial court." (State v. Jackson, 201 Kan. 795, 443 P.2d 279, (1968)).

ABA STANDARD

4.3 SUBSTITUTION OF JUDGE.

IF BY REASON OF DEATH, SICKNESS OR OTHER DISABILITY THE JUDGE BEFORE WHOM A JURY TRIAL HAS COMMENCED IS UNABLE TO PROCEED WITH THE TRIAL, ANOTHER JUDGE, UPON CERTIFYING THAT HE HAS FAMILIARIZED HIMSELF WITH THE RECORD OF THE TRIAL, MAY PROCEED WITH AND FINISH THE TRIAL.

KANSAS CODE

If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, another judge sitting in or assigned to the court in which the action is being tried, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial. (K.S.A. 1971 Supp. 43-168).

COMMENT

The Kansas Code conforms with the Standard.

ABA STANDARD

4.4 EVIDENCE OF PRIOR CONVICTIONS.

WHEN THE DEFENDANT'S PRIOR CONVICTIONS ARE ADMISSIBLE SOLELY FOR THE PURPOSE OF DETERMINING THE SENTENCE TO BE IMPOSED, THE JURY SHOULD NOT BE INFORMED OF THEM, EITHER THROUGH ALLEGATIONS IN THE CHARGE OR BY THE INTRODUCTION OF EVIDENCE, UNTIL IT HAS FOUND THE DEFENDANT GUILTY.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas practice is in substantial conformity with the Standard. Under K.S.A. 21-4504 (1974) relating to increased penalty for a second or more time of a conviction of a felony, evidence of any prior conviction is for the consideration of the court only.

ABA STANDARD

4.5 MOTION FOR JUDGMENT OF ACQUITTAL.

(a) AFTER THE EVIDENCE ON EITHER SIDE IS CLOSED, THE COURT ON MOTION OF A DEFENDANT OR ON ITS OWN MOTION SHALL ORDER THE ENTRY OF A JUDGMENT OF ACQUITTAL OF ONE OR MORE OFFENSES CHARGED IF THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A CONVICTION OF SUCH OFFENSE OR OFFENSES. SUCH A MOTION BY THE DEFENDANT, IF NOT GRANTED, SHALL NOT BE DEEMED TO WITHDRAW THE CASE FROM THE JURY OR TO BAR THE DEFENDANT FROM OFFERING EVIDENCE.

KANSAS CODE

The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more crimes charged in the complaint, indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such crime or crimes. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without having reserved the right. (K.S.A. 22-3419 (1) (1974)).

COMMENT

The Kansas code conforms with this Standard. It is error to argue a motion of judgment or acquittal when the jury is present. State v. Rambo, 208 Kan. 929, 495 P.2d 101 (1973).

ABA STANDARD

(b) IF THE DEFENDANT'S MOTION IS MADE AT THE CLOSE OF THE EVIDENCE OFFERED BY THE PROSECUTION, THE COURT MAY NOT RESERVE DECISION ON THE MOTION. IF THE DEFENDANT'S MOTION IS MADE AT THE CLOSE OF ALL THE EVIDENCE, THE COURT MAY RESERVE DECISION ON THE MOTION, SUBMIT THE CASE TO THE JURY AND DECIDE THE MOTION EITHER BEFORE THE JURY RETURNS A VERDICT OF AFTER IT RETURNS A VERDICT OF GUILTY OR IS DISCHARGED WITHOUT HAVING RETURNED A VERDICT.

KANSAS CODE

If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. (K.S.A. 1971 Supp. 22-3419 (2)). See last sentence of K.S.A. 1971 Supp. 22-3419(1) under 4.5 supra.

COMMENT

The Kansas code conforms with this Standard.

ABA STANDARD

(c) IF THE JURY RETURNS A VERDICT OF GUILTY OR IS DISCHARGED WITHOUT HAVING RETURNED A VERDICT, THE DEFENDANT'S MOTION MAY BE MADE OR RENEWED WITHIN A CERTAIN TIME, SET BY STATUTE OR RULE, AFTER DISCHARGE OF THE JURY OR WITHIN SUCH FURTHER TIME AS THE COURT MAY FIX. SUCH A MOTION IS NOT BARRED BY DEFENDANT'S FAILURE TO MAKE A SIMILAR MOTION PRIOR TO THE SUBMISSION OF THE CASE TO THE JURY.

KANSAS CODE

If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within seven days

after the jury is discharged or within such further time as the court may fix during the seven-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury. (K.S.A. 1971 Supp. 22-3419 (3)).

COMMENT

The Kansas code conforms with this Standard.

ABA STANDARD

4.6 JURY INSTRUCTIONS.

(a) A COLLECTION OF ACCURATE, IMPARTIAL, AND UNDERSTANDABLE PATTERN JURY INSTRUCTIONS SHOULD BE AVAILABLE FOR USE IN CRIMINAL CASES IN EACH JURISDICTION. COUNSEL AND THE COURT SHOULD NONETHELESS REMAIN RESPONSIBLE FOR ENSURING THAT THE JURY IS ADEQUATELY INSTRUCTED AS DICTATED BY THE NEEDS OF THE INDIVIDUAL CASE, AND TO THAT END SHOULD MODIFY AND SUPPLEMENT THE PATTERN INSTRUCTIONS WHENEVER NECESSARY.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code conforms with this Standard. There is available for general use in Kansas, PIK Criminal Jury Instructions.

ABA STANDARD

(b) AT THE CLOSE OF THE EVIDENCE OR AT SUCH EARLIER TIME AS THE COURT REASONABLY DIRECTS, THE COURT SHOULD ALLOW ANY PARTY TO TENDER WRITTEN INSTRUCTIONS AND MAY DIRECT COUNSEL TO PREPARE DESIGNATED INSTRUCTIONS IN WRITING. COPIES OF TENDERED INSTRUCTIONS AND INSTRUCTIONS PREPARED AT THE DIRECTION OF THE COURT SHOULD BE FURNISHED THE OTHER PARTIES.

KANSAS CODE

At the close of the evidence or at such earlier time during the trial as the judge reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The judge shall instruct the jury at the close of the evidence before argument and the judge may, in his discretion, after the opening statement, instruct the jury on such matters as in his opinion will assist the jury in considering the evidence as it is presented ... (K.S.A. 1971 Supp. 22-3414 (3)).

COMMENT

The Kansas code conforms with this Standard.

ABA STANDARD

(c) AT A CONFERENCE ON INSTRUCTIONS, WHICH SHOULD BE HELD OUT OF THE HEARING OF THE JURY, AND, ON REQUEST OF ANY PARTY, OUT OF THE PRESENCE OF THE JURY, COUNSEL SHOULD BE AFFORDED AN OPPORUTNITY TO OBJECT TO ANY INSTRUCTION TENDERED BY ANOTHER PARTY OR PREPARED AT THE DIRECTION OF THE COURT. THE COURT SHOULD ADVISE COUNSEL WHAT INSTRUCTIONS WILL BE GIVEN PRIOR TO THEIR DELIVERY AND, IN ANY EVENT, BEFORE THE ARGUMENTS TO THE JURY. NO PARTY SHOULD BE PERMITTED TO RAISE ON APPEAL THE FAILURE TO GIVE AN INSTRUCTION UNLESS HE SHALL HAVE TENDERED IT, AND NO PARTY SHOULD BE PERMITTED TO RAISE ON APPEAL THE GIVING OF AN INSTRUCTION UNLESS HE OBJECTED THERETO, STATING DISTINCTLY THE MATTER TO WHICH HE OBJECTS AND THE GROUNDS OF HIS OBJECTION. HOWEVER, IF THE INTERESTS OF JUSTICE SO REQUIRE, SUBSTANTIAL DEFECTS OR OMISSIONS SHOULD NOT BE DEEMED WAIVED BY FAILURE TO OBJECT TO OR TENDER AN INSTRUCTION.

KANSAS CODE

The court shall pass upon the objections to the instructions and shall either give each instruction as requested or proposed or refuse to do so, or give the requested instruction with modification

No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating distinctly the matter to which he objects and the grounds of his objection unless the instruction is clearly erroneous. Opportunity shall be given to make the objections out of the hearing of the jury. (K.S.A. 1971 Supp. 22-3414 (3)).

COMMENT

The Kansas code conforms with this Standard.

ABA STANDARD

(d) AFTER THE JURY IS SWORN THE COURT MAY GIVE PRELIMINARY INSTRUCTIONS DEEMED APPROPRIATE FOR THEIR GUIDANCE IN HEARING THE CASE. AFTER THE ARGUMENTS ARE COMPLETED, THE COURT SHOULD GIVE THE JURY ALL NECESSARY INSTRUCTIONS.

KANSAS CODE

... The judge shall instruct the jury at the close of the evidence before argument and the judge may, in his discretion, after the opening statements, instruct the jury on such matters as in his opinion will assist the jury in considering the evidence as it is presented (K.S.A. 1971 Supp. 22-3414 (3)).

COMMENT

The Kansas code conforms with the Standard.

ABA STANDARD

(e) ALL INSTRUCTIONS, WHETHER GIVEN OR REFUSED, SHOULD BECOME A PART OF THE RECORD. ALL OBJECTIONS MADE TO INSTRUCTIONS AND THE RULINGS THEREON SHOULD BE INCLUDED IN THE RECORD.

KANSAS CODE

...All instructions given or requested must be filed as a part of the record of the case.

The court reporter shall record all objections to the instructions given or refused by the court, together with modifications made, and the rulings of the court. (K.S.A. 22-3414 (3) (1974)).

COMMENT

The Kansas code conforms with the Standard. The court in State v. Scott, 210 Kan. 426, 502 P.2d 753 (1972), held that objections to instructions must be timely made or the instruction be clearly erroneous before it will be considered on appeal.

ABA STANDARD

4.7 SUMMARY OF AND COMMENT ON EVIDENCE.

(a) THE COURT, AT THE TIME IT INSTRUCTS THE JURY, MAY SUMMARIZE AND COMMENT ON THE EVIDENCE, PROVIDED THE JURY IS CLEARLY AND UNEQUIVOCALLY INSTRUCTED THAT IT IS THE EXCLUSIVE JUDGE OF THE FACTS, THAT IT IS TO DETERMINE THE WEIGHT OF THE EVIDENCE AND THE CREDIBILITY OF WITNESSES, AND THAT IT IS NOT BOUND BY THE COMMENTS OF THE COURT.

(b) THE SUMMARY AND COMMENT PERMITTED IN SUBSECTION (a) IS GOVERNED BY THE FOLLOWING PRINCIPLES:

(i) THE COURT MAY ANALYZE THE EVIDENCE, DRAW THE ATTENTION OF THE JURY TO IMPORTANT PORTIONS OF THE EVIDENCE, AND FAIRLY AND ACCURATELY SUMMARIZE THE CONTENTIONS OF BOTH THE PROSECUTION AND THE DEFENSE.

(ii) THE COURT MAY NOT SUGGEST A VERDICT OF GUILTY OR NOT GUILTY NOR MAY THE COURT DIRECTLY EXPRESS AN OPINION ON THE GUILT OR INNOCENCE OF THE DEFENDANT.

(iii) THE COURT MAY NOT PRESENT ANY ITEM OF EVIDENCE AS A PROVEN OR UNDISPUTED FACT UNLESS THE MATTER HAS BEEN AFFIRMATIVELY CONCEDED OR IS THE SUBJECT OF JUDICIAL NOTICE.

(iv) THE COURT MAY STATE THE LAW AND COMMENT ON MATTERS IN EVIDENCE BEARING ON THE CREDIBILITY OF ANY WITNESS, BUT MAY NOT DIRECTLY EXPRESS AN OPINION THAT CERTAIN TESTIMONY IS WORTHY OR UNWORTHY OF BELIEF.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas law does not conform with this Standard. In State v. Jones, 204 Kan. 719, 466 P.2d 283, (1970) the court made comment to a seven

year old rape victim appearing as a witness and conducted some interrogation of her. The court said that, "... a judge should exercise great care and caution to say nothing within the hearing of the jury which would give them an indication of what he thought about the truth or falsity of any part of the testimony." In support of denying the claim of error the court further said, that "... nowhere did the trial court comment on the evidence; he did not comment on the witness' credibility; and he did not comment on the weight of the evidence."

ABA STANDARD

PART V. JURY DELIBERATIONS AND VERDICT

5.1 MATERIALS TO JURY ROOM.

(a) THE COURT IN ITS DISCRETION MAY PERMIT THE JURY, UPON RETIRING FOR DELIBERATION, TO TAKE TO THE JURY ROOM A COPY OF THE CHARGES AGAINST THE DEFENDANT AND EXHIBITS AND WRITINGS WHICH HAVE BEEN RECEIVED IN EVIDENCE, EXCEPT DEPOSITIONS.

(b) AMONG THE CONSIDERATIONS WHICH ARE APPROPRIATE IN THE EXERCISE OF THIS DISCRETION ARE:

(i) WHETHER THE MATERIAL WILL AID THE JURY IN A PROPER CONSIDERATION OF THE CASE;

(ii) WHETHER ANY PARTY WILL BE UNDULY PREJUDICED BY SUBMISSION OF THE MATERIAL; AND

(iii) WHETHER THE MATERIAL MAY BE SUBJECTED TO IMPROPER USE BY THE JURY.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas case law conforms with this requirement except as it relates to copy of the charges. In State v. Stiff, 148 Kan. 224, 80 P.2d 1089, (1938) it was held that it was within the discretion of the trial court to send to the jury, at its request, an exhibit which had been received in evidence.

The sending to the jury room of the transcribed testimony of a witness given at the hearing of a cause on its merits was held to be reversible error in State v. Wilson, 188 Kan. 67, 360 P.2d 1092 (1961). Cases are also cited which refer to the rule excluding depositions from being taken to the jury room.

ABA STANDARD

5.2 JURY REQUEST TO REVIEW EVIDENCE.

(a) IF THE JURY, AFTER RETIRING FOR DELIBERATION, REQUESTS A REVIEW OF CERTAIN TESTIMONY OR OTHER EVIDENCE, THEY SHALL BE CONDUCTED TO THE COURTROOM. WHENEVER THE JURY'S REQUEST IS REASONABLE, THE COURT, AFTER NOTICE TO THE PROSECUTOR AND COUNSEL FOR THE DEFENSE, SHALL HAVE THE REQUESTED PARTS OF THE TESTIMONY READ TO THE JURY AND SHALL PERMIT THE JURY TO REEXAMINE THE REQUESTED MATERIALS ADMITTED INTO EVIDENCE.

(b) THE COURT NEED NOT SUBMIT EVIDENCE TO THE JURY FOR REVIEW BEYOND THAT SPECIFICALLY REQUESTED BY THE JURY, BUT IN ITS DISCRETION THE COURT MAY ALSO HAVE THE JURY REVIEW OTHER EVIDENCE RELATING TO THE SAME FACTUAL ISSUE SO AS NOT TO GIVE UNDUE PROMINENCE TO THE EVIDENCE REQUESTED.

5.3 ADDITIONAL INSTRUCTIONS.

(a) IF THE JURY, AFTER RETIRING FOR DELIBERATION, DESIRES TO BE INFORMED ON ANY POINT OF LAW, THEY SHALL BE CONDUCTED TO THE COURTROOM. THE COURT SHALL GIVE APPROPRIATE ADDITIONAL INSTRUCTIONS IN RESPONSE TO THE JURY'S REQUEST UNLESS:

(i) THE JURY MAY BE ADEQUATELY INFORMED BY DIRECTING THEIR ATTENTION TO SOME PORTION OF THE ORIGINAL INSTRUCTIONS;

(ii) THE REQUEST CONCERNS MATTERS NOT IN EVIDENCE OR QUESTIONS WHICH DO NOT PERTAIN TO THE LAW OF THE CASE; OR

(iii) THE REQUEST WOULD CALL UPON THE JUDGE TO EXPRESS AN OPINION UPON FACTUAL MATTERS THAT THE JURY SHOULD DETERMINE.

(b) THE COURT NEED NOT GIVE ADDITIONAL INSTRUCTIONS BEYOND THOSE SPECIFICALLY REQUESTED BY THE JURY, BUT IN ITS DISCRETION THE COURT MAY ALSO GIVE OR REPEAT OTHER INSTRUCTIONS TO AVOID GIVING UNDUE PROMINENCE TO THE REQUESTED INSTRUCTIONS.

(c) 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.

(d) THE PROVISIONS OF SECTION 4.6 (c) AND (e) ALSO APPLY TO THE GIVING OF ALL ADDITIONAL INSTRUCTIONS, EXCEPT THAT THE COURT IN ITS DISCRETION SHALL DECIDE WHETHER ADDITIONAL ARGUMENT WILL BE PERMITTED.

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. 22-3420 (3)).

COMMENT

Kansas law conforms with the Standard. An almost identical section of the civil code was held applicable to the criminal code by reason of a former provision, now repealed, in State v. Blockyou, 195 Kan. 405, 407 P.2d 519 (1965). In applying the civil provisions our court held in Howard v. Miller, 207 Kan. 246, 485 P.2d 199, (1971) that the trial court committed reversible error in giving an additional instruction to the jury during its deliberation, the content of the jury's question and the court's answer thereto not being known and the communication having taken place outside the presence of and without notice to the parties or their counsel, in violation of the statute. The court cites with approval decisions that the procedural code provides a method for dealing with such matters in open court, that stamp of approval can not be given to judge carrying information to jury room, and that "... All (the trial judges) communications with the jury ought to be in open court."

In Jacks v. Cloughley, 203 Kan. 699, 457 P. 2d 175 (1969), the court held that where on request, in presence of parties and counsel, the testimony of a witness was read, limited to subject matter indicated by the jury, an objection cannot be sustained that all the testimony was not read, in the absence of the jury's request to have the entire testimony of the witness read, and that the trial court is entitled to rely on what the foreman says as to the sufficiency of what was requested and read. The court also cites with approval Phillips v. Carlson, 178 Kan. 206, 284 P.2d 604 (1955), with similar facts, that an objection that undue emphasis was given the testimony of the witness could not be sustained.

Objection to the giving of an instruction after the jury had retired to deliberate, thus depriving defense counsel of the chance to comment thereon in final argument was held to be without merit in Williams v. Benefit Trust Life Ins. Co., 200 Kan. 51, 434 P.2d 765 (1967).

In Cox v. Hand, 185 Kan. 780, 347 P.2d 265 (1959) in a habeas corpus proceeding, the court held that the voluntary absence of a defendant on the second day of a trial, after the state had rested its case on the first day, did not affect the right of the court to proceed with the trial, receive the verdict and impose sentence. Cases are collected

dealing with the right of the court to proceed during voluntary absence of defendant. See also to the same effect State v. Maxwell, 151 Kan. 951, 102 P.2d 109 (1940), and cases there cited.

ABA STANDARD

5.4 LENGTH OF DELIBERATIONS; DEADLOCKED JURY.

(a) BEFORE THE JURY RETIRED FOR DELIBERATION, THE COURT MAY GIVE AN INSTRUCTION WHICH INFORMS THE JURY:

(i) THAT IN ORDER TO RETURN A VERDICT, EACH JUROR MUST AGREE THERETO;

(ii) THAT JURORS HAVE A DUTY TO CONSULT WITH ONE ANOTHER AND TO DELIBERATE WITH A VIEW TO REACHING AN AGREEMENT, IF IT CAN BE DONE WITHOUT VIOLENCE TO INDIVIDUAL JUDGMENT;

(iii) THAT EACH JUROR MUST DECIDE THE CASE FOR HIMSELF, BUT ONLY AFTER AN IMPARTIAL CONSIDERATION OF THE EVIDENCE WITH HIS FELLOW JURORS;

(iv) THAT IN THE COURSE OF DELIBERATIONS A JUROR SHOULD NOT HESITATE TO REEXAMINE HIS OWN VIEWS AND CHANGE HIS OPINION IF CONVINCED IT IS ERRONEOUS; AND

(v) THAT NO JUROR SHOULD SURRENDER HIS HONEST CONVICTION AS TO THE WEIGHT OR EFFECT OF THE EVIDENCE SOLELY BECAUSE OF THE OPINION OF HIS FELLOW JURORS, OR FOR THE MERE PURPOSE OF RETURNING A VERDICT.

(b) IF IT APPEARS TO THE COURT THAT THE JURY HAS BEEN UNABLE TO AGREE, THE COURT MAY REQUIRE THE JURY TO CONTINUE THEIR DELIBERATIONS AND MAY GIVE OR REPEAT AN INSTRUCTION AS PROVIDED IN SUBSECTION (a). THE COURT SHALL NOT REQUIRE OR THREATEN TO REQUIRE THE JURY TO DELIBERATE FOR AN UNREASONABLE LENGTH OF TIME OR FOR UNREASONABLE INTERVALS.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas code and practice is in substantial conformity with the Standard.

See PIK Criminal 51.01 to 51.10 inclusive and 68.12. Although the court has not rejected the so-called Allen charge, it has cautioned against its use.

In State v. Boyd, 206 Kan. 597, 481 P.2d 1015 (1971) the Supreme Court reiterated this warning: "The practice of submitting a forcing-type instruction after the jury has reported the failure to agree on a verdict it is not commended and may well lead to prejudicial error. If such an instruction is to be given, trial courts would

be well advised to submit the same before the jury retires, not afterwards." For collection of cases dealing with the Allen charge see PIK Criminal, Comment following 68.12, Deadlocked Jury.

ABA STANDARD

(c) THE JURY MAY BE DISCHARGED WITHOUT HAVING AGREED UPON A VERDICT IF IT APPEARS THAT THERE IS NO REASONABLE PROBABILITY OF AGREEMENT.

KANSAS CODE

The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity, or other necessity to be found by the court requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing. (K.S.A. 1971 Supp. 22-3420 (4)).

COMMENT

Kansas law conforms with the Standard and is broader in that the code includes reference to discharge on account of sickness, accident, calamity or other necessity requiring their discharge.

In applying almost identical language under former procedure, the court notes the effect of such a discharge, that the proceedings become a nullity, are not subject to review by an appellate court, the defendant has not been in jeopardy and the second trial is tried de novo.

The court further said:

"The length of time a jury should be kept together and the probability of an agreement must be determined by the trial court from the facts and circumstances of the particular case. The existence of inability to agree nullifies any seeming jeopardy, and when the trial court concurs in and affirms the jury's conclusion that it is unable to agree, the finding is absolute and conclusive in the absence of abuse of discretion." (State v. Blockyou, 195 Kan. 405, 407 P.2d 519 (1965)).

Where a jury panel had been sworn and an alternate was being qualified, a regular juror informed the court of his inability to be impartial. A mistrial was declared. The Supreme Court held that the general modern rule is that a court may discharge a jury without working an acquittal of the defendant in any case where the ends of justice would otherwise be defeated. The court should exercise sound discretion and the greatest caution, especially in capital cases. (State v. Gray, 189 Kan. 398, 369 P.2d 330 (1962)).

In K.S.A. 1971 Supp. 22-3423 there is spelled out the circumstances under which a mistrial may be declared, and the procedure that should follow such order. See also 1971 Supp. 21-3108 (e) that a defendant is not in jeopardy by reason of the inability of the jury to agree.

ABA STANDARD

5.5 POLLING THE JURY.

WHEN A VERDICT HAS BEEN RETURNED AND BEFORE THE JURY HAS DISPERSED, THE JURY SHALL BE POLLED AT THE REQUEST OF ANY PARTY OR UPON THE COURT'S OWN MOTION. THE POLL SHALL BE CONDUCTED BY THE COURT OR CLERK OF COURT ASKING EACH JUROR INDIVIDUALLY WHETHER THE VERDICT ANNOUNCED IS HIS VERDICT. IF UPON THE POLL THERE IS NOT UNANIMOUS CONCURRENCE, THE JURY MAY BE DIRECTED TO RETIRE FOR FURTHER DELIBERATIONS OR MAY BE DISCHARGED.

KANSAS CODE

The verdict shall be written, signed by the foreman, and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury discharged from the case. If, however, the verdict be defective in form only, the same may, with the assent of the jury, before they are discharged, be corrected by the court. (K.S.A. 1971 Supp. 22-3421)).

COMMENT

The Kansas code conforms with this Standard. In an early Kansas case, Thornburgh v. Cole, 27 Kan. 490 (1882) it was held that the action of the trial court in refusing to poll the jury when requested so to do by a party was erroneous.

ABA STANDARD

5.6 JUDICIAL COMMENT ON VERDICT.

WHILE IT IS APPROPRIATE FOR THE COURT 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 jurors are generally limited to the orientation time. See 3.1, *supra*.

ABA STANDARD

5.7 IMPEACHMENT OF THE VERDICT.

(a) UPON AN INQUIRY INTO THE VALIDITY OF A VERDICT, NO EVIDENCE SHALL BE RECEIVED TO SHOW THE EFFECT OF ANY STATEMENT, CONDUCT, EVENT OR CONDITION UPON THE MIND OF A JUROR OR CONCERNING THE MENTAL PROCESSES BY WHICH THE VERDICT WAS DETERMINED.

(b) THE LIMITATIONS IN SUBSECTION (a) SHALL NOT BAR EVIDENCE CONCERNING WHETHER THE VERDICT WAS REACHED BY LOT.

(c) SUBJECT TO THE LIMITATIONS IN SUBSECTION (a), A JUROR'S TESTIMONY OR AFFIDAVIT SHALL BE RECEIVED WHEN IT CONCERNS:

(i) WHETHER MATTERS NOT IN EVIDENCE CAME TO THE ATTENTION OF ONE OR MORE JURORS, UNDER CIRCUMSTANCES WHICH WOULD VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; OR

(ii) ANY OTHER MISCONDUCT FOR WHICH THE JURISDICTION PERMITS JURORS TO IMPEACH THEIR VERDICT.

KANSAS CODE

Evidence to test a verdict or indictment.
Upon an inquiry as to the validity of a verdict or an indictment no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined. (K.S.A. 60-441).

COMMENT

Kansas code and case law conforms with the Standard, except that no case has arisen dealing with decision by lot or the question of lack of confrontation of witnesses. The latter situation arose in the case of Parker v. Gladden, 385 U.S. 363 (1966). There it was held that a prejudicial statement of a bailiff in charge of a sequestered jury after trial, that was heard by some of the jurors, violated the defendant's constitutional guarantee of the right to trial by an impartial jury and to be confronted with the witnesses against him.

By K.S.A. 60-402 the rules of evidence are made applicable to criminal proceedings. In State v. Schroeder, 201 Kan. 811, 443 P.2d 284 (1968), the code citation was applied where post-trial statements of several jurors attached to a new trial motion, which statements purported to give the jurors' understanding of the evidence in reaching their verdict. The court declared that this was simply an attempt to impeach the jury's verdict, which has always been forbidden, formerly by case law and now by statute (K.S.A. 60-441).

In State v. Dye, 148 Kan. 421, 83 P.2d 113 (1938), it was declared that our Kansas court has taken and maintained the position that no juror should be allowed to impeach his own verdict. Cases are there collected supporting this rule under various factual situations. While, this cited case recognized that a hearing on oral evidence, instead of affidavits was proper, the use of affidavits as a means of presenting the facts was not ruled improper.

