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COUNTY ATTORNEY'S RELATIONS WITH THE SHERIFF

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My topic according to the program is "County Attorney's Relations with the Sheriff. As I am now serving my third term I do have some general knowledge on this subject and, in addition, I have attended many County Attorneys' meetings and have heard other County Attorneys discuss their problems, both good and bad, and their relations, both good and bad, with their Sheriff, Under Sheriff and Deputies. I am sure that at your meeting you will publicly, or privately, discuss some of your county attorneys but, at any rate, in order to have good honest law enforcement there must be close cooperation between our two offices. This must be true regardless of political differences, ambitions and other outside influences as the County Attorney and Sheriff constitute the highest law enforcement officals in each county and a conflict between these two offices, for any reason, is detrimental to law enforcement in your county and is an unfair imposition on the citizens of your county. We are not elected to our offices to bicker with one another but to preserve the peace and protect the residents of our county to the best of our ability.

I think first of all we should be fully aware of the respective duties of both the County Attorney and the Sheriff. I have taken time to go over the statutes with reference to each office and though some of this may be elementary I believe it is worth going over and perhaps discussing generally after my remarks.

First of all, the duties of the County Attorney are set forth in G.S.1949, 19-701, et seq, and the duties generally set forth in 19-702, as follows:

> "It shall be the duty of the county attorney to appear in the several courts of their respective counties and prosecute or defend on behalf of the people all suits, applications or motions, civil or criminal, arising under the laws of this state, in which the state or their county is a party or interested."

In reference to this statute I would like to point out a few Supreme Court cases which more clearly define the powers and duties of the County Attorney. First of all in the case of Foley V.Hamm, 102 Kan.66, a case arising in 1917, our Supreme Court held that while the County Attorney is not required to take part in the preliminary examination in any felony case unless requested to do so by the magistrate, if he does appear he is entitled to have full charge of the prosecution, and the case should be dismissed if he so directs and where a Justice of the Peace sitting as an examining magistrate refuses to dismiss a criminal prosecution on the motion of the County Attorney, the District Court, by an order, may compel such action. The Court also states:

> "The County Attorney is the representative of the State in criminal prosecutions, and, subject only to a limited direction by the court, controls such actions.

"The law makes it the duty of the County Attorney to conduct criminal prosecutions on behalf of the state and all steps in the trial are alike under his supervision and control. (State v. Wells, 54 Kan.161)

"No one but the County Attorney, or the Attorney General on proper occasion, or persons deputized by them, may control prosecutions within the county." (State v. Snelling, 71 Kan.499).

I call your attention to this case because it is clearly the law in Kansas that the County Attorney is the chief law enforcement officer, insofar as prosecutions are concerned, in his county and this is true regardless of what some Sheriff or other county officer might believe. Our Supreme Court has held that the County Commissioners cannot control a County Attorney in prosecuting criminal actions. This was an early case in Kansas, 14 Kan.293. In that case the court said that even though the Commissioners are in a certain sense the general agents of the county, that is they have general charge of the county affairs and management there are certain limitations, one being they cannot interfere with duties specifically assigned to a given officer. The court goes on to say:

"They may not control the County Attorney in the prosecutions of criminal actions." (Page 306)

Another case of interest to Sheriffs generally is the case of In re Broadhead, 74 Kan.401. In that case the court says:

"The County Attorney is a representative of the State in criminal prosecutions, and, subject only to a limited direction of the court, controls such actions. No crimes can be prosecuted by indictment or information in his county without his signature to the indictment or information." (State v. Brown, 63 Kan. 262; General Statute 1901, Sections 5540, 1777)

The County Attorney is also the legal advisor of the Sheriff and other county officers. These things being true it must be that the county officers, including the Sheriff, are justified in acting upon the advice of the County Attorney, and when the Sheriff, under the direction of the County Attorney, returns a warrant which has been placed in his hands for service to the court that issued it, this ends the official connection of the Sheriff with such warrant, renders the warrant functus officio, and effects abandonment of the prosecution by the State"

At this point I should call your attention to an item I discovered in this case. I believe many of us perhaps feel that once a warrant is issued the Statute of Limitations does not begin to run, that is, say a crime has been committed and in due time a warrant is issued and delivered to the Sheriff. This same case, In re Broadhead, does not necessarily prevent the Statute of Limitations from running. The court says, it is true that a warrant is not made

returnable at any particular time, but the statutes do impose upon the Sheriff the duty of making due return of a Writ or Process delivered to him to be executed. It is not contemplated that a warrant shall never be returned unless the person thereby ordered to be arrested should be apprehended and the warrant served. Nor is it the policy of the law that crimes, murder and treason excepted, should become the subject of judicial investigation and punishment many years after they are committed, unless the guilty person absents himself from the state or so conceals himself that process cannot be served upon him, or unless he conceals the fact of the crime. And the court in referring to another Kansas case, 52 Kan.441, In re Cline, states,

> "We think the better rule is that the complaint must be filed and the warrant issued within the period limited by the statutes; that it must be issued in good faith, and with the intention that it be presently served, that the officer must proceed to execute it according to its commands; that he must make arrest within a reasonable time and at the first reasonable opportunity offered him."

I have previously spoken of the County Attorney's authority in felony cases and he has similar authority in misdemeanor cases as set forth in the case of State ex rel V. Court of Coffeyville, 123 Kan.774. In that case the court states,

"While a County Attorney is not required to appear and conduct the prosecution of a misdemeanor case in a Justice of the Peace court unless requested to do so by the magistrate (63-505), or the complainant, if he does appear he is entitled to have full charge of the prosecution, and the case should be dismissed if he so directs."

I point these cases out not in an attempt to place the County Attorney upon a pedestal and make him to be superior to the Sheriff or any other county official, but to show you just what the law is in the State of Kansas with reference to the County Attorney's power and authority in prosecutions. Now, of course, there are cases where the District Court can intervene and the law states, G.S.1949, 62-807,

"The District Judge may in extreme cases, upon affidavits with him filed of the commission of crime, require the prosecuting attorney to prosecute any criminal by information for such crime, and may compel, by attachment, fine or imprisonment, the compliance with this section."

In other words, if there are cases where you justifiably feel the County Attorney is derelict in his duty or that he willfully fails and refuses to prosecute in a case where the facts clearly show a prosecution should be had then you can by submitting affidavits to the District Judge perhaps compel prosecution if the Judge so orders. I might say the statute says in "extreme cases" and I might further add that this statute has never been directly involved

in any Supreme Court Case even though the statute was passed in 1868. So for all practical purposes the County Attorney is in full charge of prosecutions of all cases whether felony or misdemeanor and as along as he uses good judgment there is very little any one can do about it.

DUTIES OF THE SHERIFF

Now a few brief remarks on duties of the Sheriff as set forth in the Statutes. The primary duty of a Sheriff is set forth in 19-813:

"It shall be the duty of the sheriff and undersheriffs and deputies to keep and preserve the peace in their respective counties, and to quiet and surpress all affrays, riots and unlawful assemblies and insurrections, for which purpose, and for the service of process in civil or criminal cases, and in apprehending or securing any person for felony or breach of the peace, they, and every coroner and constable, may call to their aid such person or persons of their county as they may deem necessary."

Another duty of the Sheriff is set forth in 19-812:

"The sheriff, in person or by his undersheriff or deputy, shall serve and execute, according to law, all process, writs, precepts and orders issued or made by lawful authority and to him directed, and shall attend upon the several courts or record held in his county, and shall receive such fees for his services as are allowed by law."

Another duty and an important one is set forth in 60-3815 which requires the Sheriff to execute every summons, order or other process and return the same as required by law, and if he fails to do so, unless he make it appear to the satisfaction of the court that he was prevented by inevitable accident from so doing. he shall be amerced by the court in a sum not exceeding one thousand dollars upon motion and ten days' notice, and shall be liable to the action of any person aggrieved by such failure. This is an important provision and one which should encourage Sheriffs to be prompt in serving summons, levying executions and serving all other writs, subpoenas and other orders of the court as failure to do so could possibly cost you considerable money.

Of course, there are many other important duties of the Sheriff, perhaps the most painful one being collection of taxes as set forth in 79-2101, et seq, and assisting in income tax collections, 79-3235.

An interesting statute is 19-819, which states,

"No Sheriff, Undersheriff or Deputy shall appear or advise as attorney or counsel, in any case in any court."

I might go a step further and suggest that Sheriffs refrain from giving any legal advice whether in or out of court. The best practice is to direct the inquiring party to his or her attorney. There is no doubt that the Sheriff is the state's chief executive administrative officer in his county. This is clearly stated in

the case of State v.McCarty, Supreme Court case decided in 1919, 104 Kan.301. In that case both a constable and sheriff had a warrant for the same person. The constable had arrested the defendant and the sheriff appeared with another warrant and took control of the defendant. This apparently made the constable mad for at any rate the constable and another defendant jumped the sheriff outside and assaulted him and otherwise willfully obstructed justice and the court said on page 305,

> "The defendants (constables) were not equal in authority with the sheriff. If the constable had been present when the sheriff appeared the sheriff would have had the right to supersede him. It is true that a constable exercises powers of the same general character as those of the sheriff, respecting, preserving public peace, apprehending criminals and the like. But the sheriff is the state's chief executive and administrative officer in his county. In the exercise of executive and administrative functions, in preserving the public peace, in vindicating the law and preserving the rights of government, he represents the sovereignty of the state, and he has no superior in his county.

Now with these references to the duties of County Attorneys and Sheriffs generally I think in a few minutes I can set forth some of

my ideas on inter-office cooperation and relations. We can readily see by reference to the statutes and cases above quoted that there is a wide distinction between the duties of the County Attorney and the Sheriff as we all know, or should all know. I think we all agree that the County Attorney has no authority to make arrests, that is any more authority than any other private citizen and the Sheriff has no authority to prosecute anyone but between the time of arrest and prosecution there are certain things that can be done to help both offices.

1. The County Attorney appreciates very much the Sheriff who makes a full and complete investigation of all cases, particularly felonies. The Sheriff, his Undersheriff and Deputies are the investigating officers. You and your Deputies have had training in investigating techniques and should know how to take statements, how to look for evidence, how to preserve evidence and do other routine things of an investigative nature. The County Attorney is the "prosecutor" and should not be called upon to interrogate every suspect in every case in which an arrest is made. It is certainly gratifying to a County Attorney to have the case "made" by the Sheriff's office and then the County Attorney after reviewing the statements taken by the Sheriff and his Deputies can if he deems it necessary assist in further interrogation or direct the Sheriff to assist him in further interrogation for investigation. I might

add at this point that every case should be treated as though it would be tried before a jury. We are all too lax and many times we are "up against it" as we are not prepared for trial and the defendant knowing this will enter a plea of not guilty forcing the state either to abandon the prosecution or to make a miserable showing before a jury. Of course, in serious cases involving personal injury, murder, rape or major crimes with reference to property, the County Attorney should actively cooperate with the Sheriff's office in the taking of statements and assisting in other investigations within his knowledge. It is well to remember that the County Attorney is by himself in most Kansas counties and if he is required to talk to all witnesses and suspects he is putting himself in a position of having to take the witness stand and by so doing having to employ special counsel to prosecute the action. This is an added reason why the investigation should be carried out by the Sheriff's office rather than by the County Attorney's office.

2. In all major cases the County Attorney and Sheriff should cooperate on news releases. I think one thing that perturbs County Attorneys generally is reading in the evening paper that so and so will be prosecuted for so and so, "the Sheriff stated today". Now as the cases above indicate the Sheriff has no authority to prosecute while the County Attorney has authority in prosecuting all cases, either felonies or misdemeanors. Now the bad part about such publicity is that in the event further investigation should

reveal such a prosecution is not warranted then both the Sheriff and County Attorney receive unfavorable publicity. The County Attorney is required to file a motion to reduce the charge or dismiss the action and this, of course, reflects upon the County Attorney primarily as the next days paper will state the "County Attorney dismissed the action which the Sheriff stated yesterday would be prosecuted".

I think in a large part this problem, when it does arise, is the fault of the newspaper as well as the fault of the County Attorney and Sheriff, as in many cases the news-hound does not know, or care, about the practical aspects of the situation, but is understandably looking for news and if he finds a willing Sheriff he will, of course, take full advantage of it. Now, of course, this same rule should not be applied in all cases, though "two heads are still better than one", and I believe in fairness to everyone concerned in the county the Sheriff should always contact the County Attorney on any questionable matter, even though it may involve only a traffic violation. It always disturbs me very much to dismiss cases that probably should not have been filed in the first place. I might add that we very closely together in our county and such instances have been kept to a minimum because of what I feel is good cooperation between the County Attorney's office and Sheriff's office in Russell County.

3. Neither the County Attorney nor Sheriff should play games with each other, and if there is a matter of considerable importance

affecting anyone in the county or if a crime has been committed, neither the County Attorney nor Sheriff should take the "what's my secret" attitude towards the matter. Together the County Attorney and Sheriff are responsible for law enforcement and prosecution, and any matter of importance should be brought to the attention of both the County Attorney and Sheriff at the earliest possible time. I have known of cases where because of petty jealousy the County Attorney, or Sheriff, has withheld information from each other on particular cases. The results are generally disastrous to both the County Attorney and Sheriff and always cause some embarrassment to some one, which is unnecessary to say the least.

4. I would suggest the County Attorneys and Sheriffs in the various counties periodically have county wide law enforcement meetings. Invite all the constables, justices of the peace, mayors, marshals, city police and other persons interested in law enforcement. I might add that we have had several of these meetings in Russell County, and in fact at our last meeting about six months ago we invited County Attorneys and Sheriffs and other enforcement officers from surrounding counties. The prime benefit of these meetings is exchange of ideas and the obtaining of general information from one another, just as is being done at this meeting here today. What I do not know, you may know, and vice versa. In addition, these meetings on a county wide level are of great benefit

to the Sheriff and County Attorney, in particular, because you may learn of some matter you have overlooked, some violation that needs attention, and thus can take care of the matter promptly. I recall at our last meeting we attempted to show how to interrogate a witness on the witness stand. This was a completely new experience to many marshals and even some policemen in our county and is, of course, something you will all be required to do at one time or another while in office. This kind of cooperation between your County Attorney and Sheriff cannot help but bring beneficial results. You can alternate by having the Sheriff in charge of one meeting and the County Attorney next, or you can jointly be in charge of all meetings, the major item being exchange of information with others present.

5. Use your County Attorney. Do not be afraid to ask your County Attorney for official opinions and advice. This will not only protect you, but in most cases should give you some of the information you want. The County Attorney has at his disposal, or should have, the Kansas statutes, all Kansas cases which have reached the Supreme Court, and in many cases he will have books giving cases in other states covering your particular question. The County Attorney is required by statute to render this service, and even though it might interfere with his private practice he nevertheless has this duty which must be taken care of before anything else.

6. I feel another important matter is that the County Attorney and Sheriff should completely understand one another and should not quote one another in any case or should not make statements that either one has made to any party interested in the case or in the defendant, or to the defendant. In other words, the defendant should never be able to say that the County Attorney told him "so and so" and the Sheriff told him something else, or vice versa. Of course, neither the County Attorney nor Sheriff should make any deals with any defendant, nor should either make any statement which might be embarrassing later on in the trial. Even though you may not get along with your County Attorney, or even though the County Attorney may not get along with you, you should never let your personal feelings interfere with any official duty. We are all over 21 years of age, and it is not very becoming for me to run down the Sheriff in our county to someone who is after his "scalp", and I would not appreciate it if he were running me down to someone who was after my "scalp". In other words, don't "pass the buck". If you have made the decision, so inform the defendant or interested party. Don't tell him the County Attorney said "so and so", or "I hate to do this, but the County Attorney told me to do so", and other such statements. If you feel the County Attorney is clearly wrong on a particular matter, I know of no prohibition which would prevent you from writing the Attorney General direct and setting forth the facts.

We all make mistakes, but not all of us recognize this.

7. There should be a free exchange of information between the two offices. I have known of cases where the Sheriff prohibited his deputies, undersheriff, or clerical aides to give any information to any assistant in the County Attorney's office, and the same has been true in reverse. There should be a free flow of information and exchange between the two offices, again with the thought in mind of promoting the highest type of law enforcement possible in our counties.

8. Another matter I think is of considerable importance is the joint action of the County Attorney and Sheriff on parole applications. In our district, it has been customary for years for the Judge to request recommendations, or objections, from both the County Attorney and Sheriff, and this is as it should be. I do not believe that the County Attorney should be clothed with the full authority to recommend paroles or object to paroles in any instance. Actually, in most cases the Sheriff has had a chance to observe the defendant for days or months and has had much closer personal contact with the defendant than the County Attorney. The Sheriff has equal knowledge of the defendant's record, perhaps has met the wife and family, and other relatives and friends. I think too often County Attorneys take it upon themselves and exclude Sheriffs in this particular field.

It will of course please the Judge if the County Attorney and Sheriff agree on the recommendations, and I should say that in 9 out of 10 cases there would be a complete agreement. However, if there are differences of opinion these should be clearly, truthfully and frankly set forth to the Judge. If the County Attorney recommends and you feel he is wrong, you should so inform the court. After all, there is nothing personal in law enforcement, and everything that is done by either the County Attorney or Sheriff should be done objectively.

Now, these few ideas I have set forth are my own and no doubt there are many, many other more meritorious, but I think these suggestions are basic, are easy to follow, and should be followed if you in fact want closer cooperation with the County Attorney. If for some reason it is impossible for the County Attorney and Sheriff to cooperate, there is very little that can be done and the taxpayers must continue to suffer until one or the other is defeated. It takes organized law enforcement to overcome organized crime, and only through cooperative efforts of the two highest enforcement officers in the county can this be done.

Again, I thank you for your attention, and if you have any questions I will be happy to answer them at the conclusion of this session. If I can ever be of service to any of you in your counties,

I will be happy to do so and would be happy to appear before any of your county law enforcement groups, or meetings. Thank you.