July 30, 1999

OPINION NO. 99-042

The Honorable Richard L. Ross
Morgan County Prosecuting Attorney
109 East Main Street
McConnelsville, Ohio 43756-1125

Dear Prosecutor Ross:

You have requested an opinion concerning the prosecution of state law misdemeanors in county courts. Specifically, you wish to know whether a prosecuting attorney is required to prosecute criminal cases brought before the county court for state law misdemeanors occurring within a village that does not employ an attorney as village solicitor. *See* R.C. 705.11 ("[t]he village solicitor or city director of law shall act as the legal advisor to and attorney for the municipal corporation"); R.C. 733.48 ("[w]hen it deems it necessary, the legislative authority of a village may provide legal counsel for the village").

R.C. Chapter 2938 sets forth general provisions that "apply to trial on the merits of any misdemeanor … which may be instituted in and retained for trial on the merits in any court or before any magistrate inferior to the court of common pleas." R.C. 2938.02. A county court is a court of record inferior to the court of common pleas that has jurisdiction of state law misdemeanor cases. *See* R.C. 1907.01; R.C. 1907.02(A)(1); R.C. 2931.01(A); 1981 Op. Att'y Gen. No. 81-094; 1963 Op. Att'y Gen. No. 397, p. 433; *see also* R.C. 2931.02 ("[a] judge of a county court is a conservator of the peace and has jurisdiction in criminal cases throughout his area of jurisdiction"). Accordingly, the provisions of R.C. Chapter 2938 apply to prosecutions brought in a county court for state law misdemeanors.

Included within R.C. Chapter 2938 are provisions specifying which public officials have the duty to prosecute state law misdemeanors in county courts. In this regard, R.C. 2938.13 provides as follows:

> *In any case prosecuted* for violation of a municipal ordinance the village solicitor or city director of law, and *for a statute, he or the prosecuting attorney, shall present the case* for the municipal corporation and the state respectively, *but either may delegate the responsibility to some other attorney in a proper case,* or, if the defendant be unrepresented by counsel may with leave of court, withdraw

> from the case. But the magistrate or judge shall not permit prosecution of any criminal case by private attorney employed or retained by a complaining witness. (Emphasis added.)

See generally R.C. 309.08(A) (a prosecuting attorney is responsible for the prosecution of cases in which the state is a party).

1981 Op. Att'y Gen. No. 81-094 examined R.C. 2938.13 and concluded that this statute clearly states that both a prosecuting attorney and a city law director are under an obligation to either present the case for the state in those prosecutions before a county court involving the violation of a state statute or ensure that the prosecutorial responsibility is otherwise carried out. As stated in 1981 Op. Att'y Gen. No. 81-094 at 2-359:

> R.C. 2938.13 does not specify the manner in which the city director of law and the county prosecutor are to decide which of them will proceed with a particular prosecution, and I have been unable to locate any other statutory or case law which would require that the decision as to who carries out the prosecution be made in accordance with a specified method. It follows, therefore, that the county prosecutor and the city law director are free to arrive at their own system for determining who will perform this prosecutorial duty. I note, however, that R.C. 2938.13 does require that one or the other of those officeholders present the state's case, unless proper delegation is accomplished, and that "[a] public officer is bound to perform the duties of his office faithfully, to use reasonable skill and diligence, and to act primarily for the benefit of the public." Thus, while the county prosecutor and the city law director may devise their own method for designating the manner in which the duty shall be performed, each is under an obligation to ensure that the prosecutorial function is carried out. (Citations omitted.)

In addition, 1988 Op. Att'y Gen. No. 88-086 at 2-413 n.1 similarly explained that, "[i]n a county court, both a prosecuting attorney of the county and a city law director have the duty to see that the prosecution for violation of a state statute is carried out." Thus prior opinions of the Attorneys General have determined that, pursuant to R.C. 2938.13, a prosecuting attorney is required to either prosecute criminal cases on behalf of the state before a county court or ensure that the prosecutorial responsibility is otherwise discharged. *See generally* 1960 Op. Att'y Gen. No. 1548, p. 495 (under R.C. 2938.13, either a city law director or county prosecuting attorney may prosecute state cases in a county court).

In light of the language of R.C. 2938.13, it is apparent that, if a village does not employ a solicitor, the obligation to prosecute a criminal case in a county court for a state law misdemeanor occurring within the village rests with the prosecuting attorney, unless the court grants the prosecuting attorney leave to withdraw from the case. *See* 1981 Op. Att'y Gen. No. 81-094. Accordingly, if a prosecuting attorney is not granted leave to withdraw from a case, the

prosecuting attorney must either prosecute the case himself, or delegate such prosecution to some other attorney.[1] R.C. 2938.13; *see* 1981 Op. Att'y Gen. No. 81-094.

As a final matter, you have stated in your letter that you believe that the provisions of law cited in 1994 Op. Att'y Gen. No. 94-051 control the disposition of your specific inquiry. 1994 Op. Att'y Gen. No. 94-051 addressed whether a prosecuting attorney may prosecute in municipal court misdemeanor cases that occur within a municipal corporation, and concluded, in part, as follows:

> A county prosecuting attorney may not prosecute misdemeanor cases brought before a municipal court, unless the county prosecuting attorney is required to bring such prosecutions pursuant to R.C. 1901.34(B), or the county prosecuting attorney and a municipal corporation have entered into an agreement pursuant to R.C. 1901.34(D) whereby the county prosecuting attorney agrees to prosecute in municipal court criminal cases within the municipal court's jurisdiction that arise out of criminal offenses occurring within the boundaries of that municipal corporation.

Id. (syllabus, paragraph one).

In reaching this conclusion, the opinion relied upon R.C. 1901.34, which sets forth the specific duties of a municipal corporation's chief legal officer and the prosecuting attorney with regard to criminal cases brought before a municipal court. After reviewing this statute, the opinion determined that, except as provided in R.C. 1901.34(B) and (D),[2] the chief legal officer of a municipal corporation, rather than the prosecuting attorney, is required to prosecute misdemeanor cases brought before a municipal court that has territorial jurisdiction over the municipal corporation. R.C. 1901.34(A). In addition, the opinion further determined that the specific provisions of R.C. 1901.34 prevail over the general provisions of R.C. 309.08 and R.C. 2938.13, which require a prosecuting attorney to prosecute cases in which the state is a party.

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[1] R.C. 309.06(A) authorizes a prosecuting attorney to appoint assistants to aid him in discharging his statutory duties. It follows, therefore, that a prosecuting attorney may appoint an assistant prosecuting attorney to prosecute criminal cases in a county court for state law misdemeanors.

[2] R.C. 1901.34(B) sets forth the counties in which the prosecuting attorney is required to prosecute misdemeanors brought before a municipal court. Under R.C. 1901.34(D), a prosecuting attorney and a municipal corporation may enter into an agreement whereby the prosecuting attorney agrees to prosecute in municipal court those criminal cases within the municipal court's jurisdiction which arise out of criminal offenses occurring within the boundaries of that municipal corporation.

Our review of R.C. 1901.34 discloses no language in that statute specifying which public officials have a duty to prosecute state law misdemeanors in county courts. R.C. 1901.34 thus is not germane when determining whether a prosecuting attorney has a duty to prosecute state law misdemeanor cases brought before a county court. Accordingly, there is no conflict between the provisions of R.C. 1901.34 and R.C. 2938.13, and the provisions of R.C. 1901.34 do not prevail over the provisions of R.C. 2938.13. Instead, the provisions of R.C. 2938.13 are controlling in the situation set forth in your question.

Based on the foregoing, it is my opinion, and you are hereby advised that, pursuant to R.C. 2938.13, a prosecuting attorney is required to prosecute a criminal case brought before the county court for a state law misdemeanor occurring within a village that does not employ an attorney as village solicitor, unless the court grants the prosecuting attorney leave to withdraw from the case or he delegates the prosecution to some other attorney.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

July 30, 1999

The Honorable Richard L. Ross
Morgan County Prosecuting Attorney
109 East Main Street
McConnelsville, Ohio 43756-1125

SYLLABUS: 99-042

Pursuant to R.C. 2938.13, a prosecuting attorney is required to prosecute a criminal case brought before the county court for a state law misdemeanor occurring within a village that does not employ an attorney as village solicitor, unless the court grants the prosecuting attorney leave to withdraw from the case or he delegates the prosecution to some other attorney.