

OPINION NO. 81-094**Syllabus:**

Both a county prosecutor and a city law director are, pursuant to R.C. 2938.13, under an obligation to either present the case for the state in a criminal prosecution in county court involving the violation of a state statute or ensure that the prosecutorial responsibility is otherwise carried out.

To: Stephen M. Stern, Jefferson County Pros. Atty., Steubenville, Ohio
By: William J. Brown, Attorney General, December 21, 1981

I have before me your request for my opinion in response to the following question:

When the police of [a city] file criminal charges in a county court based upon events that transpire within the city limits and involve city inhabitants, does the county prosecutor or the [city law director] owe the obligation to prosecute in the county court?

It is my understanding, based on information contained in your letter, that the charges to which you refer are those brought for violations of state statutes rather than for violations of municipal ordinances.

County courts are created pursuant to R.C. Chapter 1907 and possess the jurisdiction with regard to misdemeanor and felony cases which was previously vested in mayors.¹ R.C. 1907.031. A county court falls within the broad category of judicial bodies known as magistrate courts. R.C. 2938.01 ("The definition of 'magistrate' set forth in section 2931.01 of the Revised Code. . . applies to Chapter 2938. of the Revised Code"); R.C. 2931.01(A) (" 'Magistrate' includes county court judges. . .").

Prior to the enactment of R.C. 2938.13, a county prosecutor had no duty to prosecute cases in magistrate courts. See Gilliam v. State of Ohio, 7 Ohio N.P. (n.s.) 482 (1908); Railroad Co. v. Lee, 37 Ohio St. 479 (1882). Such a duty, however, is now imposed by R.C. 2938.13, which reads 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.)

R.C. 2938.13 thus states specifically that the city law director or the county prosecutor shall present the case for the state in those cases before a county court or other magistrate court involving the violation of a state statute. 1961 Op. Att'y Gen. No. 2279, p. 304 ("Thus, under Section 2938.13, Revised Code, the municipal corporation solicitor and the county prosecutor are given the duty to prosecute

¹"Mayors retain jurisdiction in all criminal causes involving violation of ordinances of their respective municipal corporations and in all criminal causes involving moving traffic violations occurring on state highways located within their respective municipal corporations, to be exercised concurrently with the county court." R.C. 1907.031.

violations of said Section 3721.99"); 1960 Op. Att'y Gen. No. 1548, p. 495 (city law director or county prosecutor may prosecute case in county court). The use of the word "shall" imposes a mandatory duty on the part of the city law director and county prosecutor to carry out the prosecutorial function, unless, of course, the delegation permitted by R.C. 2938.13 has been accomplished. See generally Malloy v. City of Westlake, 52 Ohio St. 2d 103, 106, 370 N.E.2d 457, 459 (1977) ("By employing the verb 'shall'. . .the General Assembly manifested a clear intent that the statute's provisions. . .are mandatory.").

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. Jewett v. Valley Ry. Co., 34 Ohio St. 601, 608 (1876) ("Where authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner"); State ex rel. Attorney General v. Morris, 63 Ohio St. 496, 512, 59 N.E. 226, 230 (1900) ("And if it should be found that certain things are authorized to be done. . .and no statute can be found prescribing the exact mode of performing that duty or thing, the presumption would be that the general assembly intended that it might be performed in a reasonable manner, not in conflict with any law of the state"). 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." State ex rel. Smith v. Johnson, 12 Ohio App. 2d 87, 91, 231 N.E.2d 81, 84 (1967). 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.

Therefore, it is my opinion, and you are advised, that both a county prosecutor and a city law director are, pursuant to R.C. 2938.13, under an obligation to either present the case for the state in a criminal prosecution in county court involving the violation of a state statute or ensure that the prosecutorial responsibility is otherwise carried out.