

OPINION NO. 94-051**Syllabus:**

1. 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.
2. Pursuant to R.C. 1901.34(B), the Madison County Prosecuting Attorney must prosecute in municipal court all misdemeanor cases arising within the unincorporated areas of Madison County, but may prosecute in municipal court misdemeanor cases that occur within the territory of a municipal corporation located within Madison County only in those instances in which he has entered into an agreement with the appropriate municipal corporation under R.C. 1901.34(D).

To: David A. Sams, Madison County Prosecuting Attorney, London, Ohio
By: Lee Fisher, Attorney General, August 30, 1994

You have requested an opinion concerning the prosecution of misdemeanor cases in municipal courts. Specifically, you wish to know whether a county prosecuting attorney may prosecute in municipal court misdemeanor cases that occur within a municipal corporation.

Authority of County Prosecuting Attorney Is Limited to that Conferred by Statute

A county prosecuting attorney, as a creature of statute, may exercise only those powers expressly conferred by statute or such powers as may be reasonably and necessarily inferred from the statutory powers. *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940); *State ex rel. Doerfler v. Price*, 101 Ohio St. 50, 128 N.E. 173 (1920); 1989 Op. Att'y

Gen. No. 89-015 at 2-68. It is, therefore, necessary to examine the statutory scheme concerning the prosecution of criminal offenses in municipal courts in order to determine the scope of the prosecuting attorney's authority and duties in that regard.

Authority of County Prosecuting Attorney Under R.C. 1901.34

R.C. 1901.34 sets forth the duties of the municipal chief legal officer and the county prosecuting attorney with regard to criminal cases brought before a municipal court. That section states in relevant part:

(A) *Except as provided in divisions (B) and (D) of this section, the village solicitor, city director of law, or similar chief legal officer for each municipal corporation within the territory of a municipal court shall prosecute all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which he is the solicitor, director of law, or similar chief legal officer. Except as provided in division (B) of this section, the village solicitor, city director of law, or similar chief legal officer of the municipal corporation in which a municipal court is located shall prosecute all criminal cases brought before the court arising in the unincorporated areas within the territory of the municipal court.*

(B) The Auglaize county, Clermont county, Hocking county, Jackson county, Ottawa county, and Portage county prosecuting attorneys shall prosecute in municipal court all violations of state law arising in their respective counties. The Crawford county, Hamilton county, Madison county, and Wayne county prosecuting attorneys shall prosecute all violations of state law arising within the unincorporated areas of their respective counties.

....

(D) The prosecuting attorney of any county, other than Auglaize, Clermont, Hocking, Jackson, Ottawa, or Portage county, may enter into an agreement with any municipal corporation in the county in which he serves pursuant to which the prosecuting attorney prosecutes all criminal cases brought before the municipal court that has territorial jurisdiction over that municipal corporation for criminal offenses occurring within the municipal corporation. (Emphasis added.)

Pursuant to R.C. 1901.34, the chief legal officer of each municipal corporation within the territory of a municipal court has a duty to prosecute misdemeanor cases brought before the court for misdemeanors occurring within the municipal corporation, except that in certain municipal courts the county prosecuting attorney is statutorily required to prosecute misdemeanors occurring in municipal corporations within the municipal court's territory. 1987 Op. Att'y Gen. No. 87-093; 1984 Op. Att'y Gen. No. 84-014; 1966 Op. Att'y Gen. No. 66-159; *see, e.g.*, 1988 Op. Att'y Gen. No. 88-086 at 2-413; 1977 Op. Att'y Gen. No. 77-008. Concomitantly, with the exception of those prosecuting attorneys listed in R.C. 1901.34(B), the county prosecuting attorney is not authorized to prosecute misdemeanor cases brought before a municipal court, unless 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 those criminal cases within the municipal court's jurisdiction which arise out of criminal offenses occurring within the boundaries of that municipal corporation. Op. No. 87-093; *see State ex rel. Leis v. Panioto*, 1 Ohio St. 3d 10, 437 N.E.2d 298 (1982) (a county prosecuting attorney has no duty to represent the Registrar of the Bureau

of Motor Vehicles in municipal court when a petition is filed in that court pursuant to R.C. 4507.40 or R.C. 4511.191).

Op. No. 87-093, which addressed the issue whether the county prosecuting attorney is responsible for prosecuting minor misdemeanor and traffic cases in municipal court, reasoned as follows:

The Supreme Court of Ohio has held that "[i]n statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage." Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, first paragraph). In R.C. 1901.34(A), then, the word "shall" imposes a legal obligation on the village solicitor, city director of law, or similar chief legal officer of the municipal corporation in which a municipal court is located. See also 1968 Op. Att'y Gen. No. 68-117 at p. 2-169 (R.C. 1901.34 "is not permissive nor is it indefinite or uncertain in its terms but rather it is mandatory, and the legislature used the word 'shall' rather than 'may' or other words of less force and direction"). This legal obligation includes the prosecution in municipal court of all criminal cases which arise in unincorporated areas within the court's jurisdiction.

An analysis of the statutory scheme of R.C. 1901.34 reinforces my conclusion. Since R.C. 1901.34(A) imposes a duty on the city prosecutor to prosecute all criminal cases arising in unincorporated areas, the county prosecutor does not have this duty unless it is imposed in R.C. 1901.34(B). R.C. 1901.34(B) lists certain county prosecutors who must prosecute all state law violations occurring in their respective counties. Division (B) also lists certain county prosecutors who must prosecute all state law violations occurring in the unincorporated areas of their counties. Since the Cuyahoga County prosecutor is not one of those listed, it follows that the general rule of R.C. 1901.34(A) applies: the duty to prosecute in Municipal Court all criminal cases arising in unincorporated areas lies with the city director of law or similar chief legal officer of the municipal corporation in which the court is located. See State ex rel. Boda v. Brown, 157 Ohio St. 368, 372, 105 N.E.2d 643, 646 (1952) (under the statutory construction rule of expressio unius est exclusio alterius, "the express mention of but one class of persons in a statute implies the exclusion of all others").

Op. No. 87-093 at 2-607.

Thus, R.C. 1901.34 does not require a county prosecuting attorney to prosecute misdemeanor cases in a municipal court for misdemeanors occurring in municipal corporations within the municipal court's territory, unless the county prosecuting attorney is expressly 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.

Authority of County Prosecuting Attorney Under R.C. 309.08 and R.C. 2938.13

In addition to R.C. 1901.34, R.C. 309.08 and R.C. 2938.13 also address who has the duty to prosecute misdemeanors in municipal courts. Pursuant to R.C. 309.08(A), a county prosecuting attorney is responsible for the prosecution of cases in which the state is a party, which includes misdemeanor cases. Op. No. 87-093 at 2-608. Similarly, R.C. 2938.13 provides that "[i]n 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." Viewed in isolation, these statutes thus might appear to require the prosecuting attorney to prosecute misdemeanor cases in a municipal court.

However, since R.C. 1901.34 specifically addresses who must prosecute cases in municipal court, the specific provisions of R.C. 1901.34 prevail over the general provisions of R.C. 309.08 and R.C. 2938.13. Op. No. 87-093 at 2-608. *See generally Cincinnati v. Thomas Soft Ice Cream*, 52 Ohio St. 2d 76, 369 N.E.2d 778 (1977) (syllabus, paragraph one) ("[w]here there is no manifest legislative intent that a general provision of the Revised Code prevail over a special provision, the special provision takes precedence"); *State v. Magana*, 115 Ohio App. 106, 184 N.E.2d 525 (Franklin County 1961) (right to trial by jury in municipal court is governed by R.C. 1901.24 rather than R.C. 2938.04, since a specific statute prevails over a general statute). Accordingly, neither R.C. 309.08 nor R.C. 2938.13 imposes a duty upon a county prosecuting attorney to prosecute misdemeanor cases in a municipal court for misdemeanors occurring in municipal corporations within the municipal court's territory. Instead, a county prosecuting attorney may not prosecute misdemeanor cases brought before a municipal court, except as provided in R.C. 1901.34(B) and (D).

Specific Authority of the Madison County Prosecuting Attorney to Prosecute Misdemeanor Cases Brought in Municipal Court

With regard to your particular responsibilities to prosecute misdemeanor cases in municipal courts, R.C. 1901.34(B) requires you, as prosecuting attorney for Madison County, to prosecute in municipal court all misdemeanor cases arising within the unincorporated areas of Madison County. In addition, you may, as prosecuting attorney of Madison County, prosecute in municipal court misdemeanor cases that occur within the territory of a municipal corporation located within Madison County only in those instances in which you have entered into an agreement under R.C. 1901.34(D) with the appropriate municipal corporation whereby you agree to prosecute in municipal court all criminal cases within the municipal court's jurisdiction that arise out of criminal offenses occurring within the boundaries of that municipal corporation.

Conclusion

Therefore, it is my opinion and you are hereby advised as follows:

1. 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.

2. **Pursuant to R.C. 1901.34(B), the Madison County Prosecuting Attorney must prosecute in municipal court all misdemeanor cases arising within the unincorporated areas of Madison County, but may prosecute in municipal court misdemeanor cases that occur within the territory of a municipal corporation located within Madison County only in those instances in which he has entered into an agreement with the appropriate municipal corporation under R.C. 1901.34(D)**