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July 8, 2015

Ms. Amber Davis Johnson  
Bay County Department of Corporation Counsel  
515 Center Avenue, Suite 402  
Bay City, Michigan 48708

*Re: Review of County Clerk Request for Appointment of Counsel*

Dear Ms. Johnson:

Pursuant to Bay County's Civil Counsel Guidelines, on June 24, 2015, you retained Gilbert, Smith & Borrello, P.C., to evaluate the potential merit of claims raised by the Bay County Clerk, Cynthia Luczak, in association with her request for retention of outside counsel.<sup>1</sup> Specifically, Ms. Luczak requested the appointment of outside counsel for three reasons:<sup>2</sup>

1. To ensure that her office is afforded sufficient full-time staff to carry out its constitutional and statutorily mandated duties;
2. To ensure that current and future employees of the Clerk's office are lawfully compensated for hours worked; and
3. To investigate discriminatory behavior perpetrated against the Clerk by the Bay County Board of Commissioners.<sup>3</sup>

The Bay County Board of Commissioners is required to provide the funding necessary for each of its departments to function "serviceably." "Serviceability" is the standard adopted by the courts to determine whether a county official has been unlawfully underfunded such that he or she is unable to fulfill their statutory obligations.

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<sup>1</sup> State law imposes a duty on the Bay County Board of Commissioners to employ an attorney to represent the Clerk when she is named as a defendant in a civil action. However, there is no legal requirement that an attorney be retained to represent an official who initiates the action. MCL 49.73.

<sup>2</sup> In her July 1, 2015, letter, Ms. Luczak raised an additional claim concerning the Headlee Amendment and the diversion of fees charged by the Clerk.

<sup>3</sup> In her July 1, 2015, Ms. Luczak indicated the County Board of Commissioners *and* the County Executive were discriminating against her on the basis of her gender (she is the only female elected official) and for the reapportionment that resulted in the elimination of two commissioner seats.

Serviceability must be defined in the context of . . . urgent, extreme, critical, and vital needs. A serviceable level of funding is the minimum budgetary appropriation at which statutorily mandated functions can be fulfilled. A serviceable level is not met when the failure to fund eliminates the function or creates an emergency immediately threatening the existence of the function. A serviceable level is not the optimal level. A function funded at a serviceable level will be carried out in a barely adequate manner, but it will be carried out. A function funded below a serviceable level, however, will not be fulfilled as required by statute.<sup>4</sup>

An analysis of the Clerk's staffing levels was conducted by Resilient-C Corporation in late 2009/early 2010. Resilient-C's opinion indicated that the Clerk's staffing levels were appropriate, but there was a need to update the office's processes. However, in 2011, the Clerk lost a member of her staff due to budget cuts.<sup>5</sup> Additional staff is provided to the Clerk during more active periods, such as elections.

In her June 8, 2015, letter Ms. Luczak sets forth numerous duties fulfilled by her office. Ms. Luczak indicates that she has made repeated requests to the Board of Commissioners for additional staffing, but she has been denied.<sup>6</sup> She also claims that the staffing levels in her office are lower than those of similarly situated offices in other Michigan counties.

However, Ms. Luczak fails to set forth the manner in which she is unable to fulfill the mandated duties of her office. I attempted to contact her in order to gather more information with regard to her claims, including her current staff's ability (or inability) to perform the duties of the office.

I first contacted Ms. Luczak to discuss this matter on June 25, 2015. We spoke twice on that date. She indicated she was too busy to discuss the matter at that time. She further indicated she had matters she wished to clarify with your office prior to speaking with me. We agreed I would contact her again after the holiday.

I next spoke with Ms. Luczak on July 6, 2015. She again indicated she was too busy to talk to me as a result of her office being short on staff. She also told me that she had objections to our retention to review this matter, and – until her questions were answered in that regard – she would not be in a position to discuss the matter with me.

Ms. Luczak's unwillingness to discuss the matter with this office has made it impossible for us to render an opinion as to the merits of her claim and her request for the appointment of outside counsel. Should she become more receptive to speaking with us in the future, we will certainly make ourselves available.

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<sup>4</sup> *Cahalan v Wayne County Bd of Com'rs*, 93 Mich App 114, 124 (1979). See also *Wayne County Sheriff v Wayne County Bd of Com'rs*, 148 Mich App 702, 708 (1983).

<sup>5</sup> The Bay County Prosecutor also lost a legal secretary, and the Bay County Register of Deeds had an employee reduced from full-time to part-time. Other officials also experienced non-personnel-related reductions.

<sup>6</sup> She further indicates other departments have had their budgets and staff increased.

I understand that the Board of Commissioners has approved your retention of an outside vendor to again analyze the staffing levels of the Clerk's office. Given our lack of information to conduct an analysis as to the serviceability of the Clerk's office pursuant to case law, the manner in which you are proceeding seems appropriate. Perhaps upon review of the results of that study, we may be able provide additional comment.

Should you have any questions or concerns; please feel free to contact me. Otherwise, we will wait for further direction from your office.

Sincerely,

*/s/ Amy L. Lusk*

Amy L. Lusk

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