

*Memorandum*

*Attorney Work Product*

**To:** The Ottawa County Board of County Commissioners  
John Shay, Interim County Administrator, Ottawa County

**From:** Michael A. Cox  
Kimberly Moehle  
The Mike Cox Law Firm PLLC

**Re:** Ottawa Mask Mandate Legal Analysis

**Date:** September 28, 2021

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**I. BACKGROUND**

The Generally Applicable Law Governing Health Departments and Health Officers

The State Legislature established the Michigan Public Health Code (“Code”) for the protection and promotion of the public health. Specifically, Part 24 of the Public Health Code discusses Local Health Departments and requires that every county either belong to a “district health department” or “provide for a county health department.”<sup>1</sup>

The Legislature commands that a local health department “shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health.”<sup>2</sup> Among its duties, a local health department shall “make investigations and inquiries as to . . . [t]he causes of disease and especially of epidemics.”<sup>3</sup> The Legislature mandates that, as a local department, the Ottawa County Department of

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<sup>1</sup> MCL 333.2413.

<sup>2</sup> MCL 333.2433(1).

<sup>3</sup> MLC 333.2433 (2)(c)(i).

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Public Health (“Department”) shall have “powers necessary or appropriate to perform the duties and exercise the powers given by law to the local health officer and which are not otherwise prohibited by law.”<sup>4</sup> Section 2435 gives the Department the authority to “[a]dopt regulations to properly safeguard the public health and to prevent the spread of diseases and sources of contamination.”<sup>5</sup>

Section 2428 creates the office of the local Health Officer who serves as the administrative officer of the Department and who “may take actions and make determinations necessary or appropriate to carry out the local health department’s functions under this part or functions delegated under this part and to protect the public health and prevent disease.”<sup>6</sup> Importantly, for the purposes of this memorandum, Section 2453 gives the local Health Officer the power to “issue an emergency order to prohibit the gathering of people for any purpose *and may establish procedures to be followed by persons, including a local governmental entity*, during the epidemic to insure continuation of essential public health services and enforcement of health laws” if the Health Officer finds “that control of an epidemic is necessary to protect the public health.”<sup>7</sup> The local Health Officer is the *only* local official granted the power to issue emergency orders or to “establish procedures to be followed by persons, including a local governmental entity, ...”<sup>8</sup>

#### The Order

Here, the local Health Officer found that “COVID-19 remains a public health issue that impacts local institutions, particularly in educational settings where students younger than twelve (12) years of age are ineligible to receive vaccination, are required to receive an education and are at school five days each

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<sup>4</sup> MCL 333.2433(2)(f).

<sup>5</sup> MCL 333.2435(d).

<sup>6</sup> MCL 333.2428(2).

<sup>7</sup> MCL 333.2453. (Emphasis added).

<sup>8</sup> *Id.*

week for many hours each day.”<sup>9</sup> Motivated by “the health, safety, and well-being of area children in the face of the newest variant of the novel Coronavirus,” on August 20, 2021, Ottawa County Health Officer Lisa Stefanovsky, M.Ed., issued a public health order requiring that masks be worn by students inside pre-kindergarten through sixth-grade schools, (“Ottawa Mask Mandate”).<sup>10</sup> In the body of her order Ms. Stefanovsky relied on MCL 333.2451 and MCL 333.2453 as the basis of her authority. The Ottawa Mask Mandate took immediate effect and will remain in effect “until 60 days past the date COVID-19 vaccine is authorized or approved by the FDA and available to persons in prekindergarten through grade six, or community transmission for Ottawa County is categorized as “Low” by the CDC for at least seven consecutive days, or until further notice from the Administrative Health Officer.”<sup>11</sup>

The following memo responds to four (4) questions posed regarding the Health Officer’s Ottawa Mask Mandate and the powers of the Ottawa County Board of Commissioners (“BOC”), if any, to respond to the mask mandate and the actions of the Health Officer.

## II. ISSUE PRESENTED AND BRIEF ANSWERS

- A. Does the Ottawa County Board of Commissioners have the power to reverse or override a Health Officer’s epidemic order?**
- No. The Ottawa County Board of Commissioners does not have the power to reverse or override a Health Officer’s epidemic order.
- B. Does the Ottawa County Board of Commissioners have the power to terminate the Health Officer’s employment for issuing an epidemic order?**
- Qualified yes. Because Ms. Stefanovsky is a public officer by virtue of her appointment - she is not simply an at-will employee - and so the Ottawa County Board of Commissioners may only remove her if (1) the Board opines that she is “incompetent to execute properly the duties of the office”, or if it is “is satisfied that the officer or agent” is (2) “guilty of official misconduct” or (3) “habitual or willful neglect of duty”; but it may

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<sup>9</sup> ¶ 4, Ottawa Mask Mandate.

<sup>10</sup> ¶ 13, Ottawa Mask Mandate.

<sup>11</sup> *Id.*

only remove for the latter two reasons after it conducts a hearing where Ms. Stefanovsky and her attorney can be heard.

**C. Could the Health Officer be civilly and criminally liable if she withdrew her mask mandate because of political pressure?**

- Qualified yes. If Ms. Stefanovsky were to withdraw her mask mandate solely for political reasons or pecuniary reasons (to preserve her position) then it may be that a court could find that she demonstrated “indifference to whether harm would result as to be the equivalent of intending harm” and so lose her immunity under MCL 333.2465(2). Further, if a prosecutor were to determine that Ms. Stefanovsky rescinded her mandate solely for a political or pecuniary reason, then that prosecutor could charge Ms. Stefanovsky with misconduct in office, MCL 750.505.<sup>12</sup> Any answer here is necessarily speculative because it would depend on facts and evidence that are not before us.

**D. Can the Board of Commissioners defund the Public Health Department in response to the Health Officer issuing an epidemic order?**

- No. At least not entirely, because Michigan law compels each Michigan county to provide health services to the public through a health department under MCL 333.2416 and mandates a minimal level of funding. If the County were to fail to do so it would risk losing local control of the Department.

### **III. DISCUSSION**

**A. Does the Ottawa County Board of Commissioners have the power to reverse or override a Health Officer’s epidemic order?**

Michigan’s Public Health Code requires that every county either belong to a “district health department” or “provide for a county health department.”<sup>13</sup> The Code considers a county health department (such as the Ottawa Health Department) a “local health department.”<sup>14</sup> Ottawa county’s “local governing entity” is their respective board of commissioners.<sup>15</sup>

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<sup>12</sup> Misconduct in office by a public officer is a common law offense subject to the provisions of MCL 750.505.

<sup>13</sup> MCL 333.2413.

<sup>14</sup> MCL 333.1105.

<sup>15</sup> MCL 333.2406(a).

A local health department “may adopt regulations necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department.”<sup>16</sup> A local health department may also issue orders. Here, the Department and the Health Officer issued their order under MCL 333.2453(1), which provides:

If a local health officer determines that control of an epidemic is necessary to protect the public health, *the local health officer may issue an emergency order to prohibit the gathering of people for any purpose and may establish procedures to be followed by persons, including a local governmental entity, during the epidemic* to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.<sup>17</sup>

Section MCL 333.2453 gives the local Health Officer the authority to “*issue an emergency order to prohibit the gathering of people*” and the Health Officer is permitted to “*establish procedures to be followed by persons*, including a local governmental entity, during the epidemic to insure continuation of essential public health services and enforcement of health laws” if the Health Officer finds that “that control of an epidemic is necessary to protect the public health.”<sup>18</sup> Here, the local Health Officer found that because “COVID-19 remains a public health issue that impacts local institutions, particularly in educational settings where students younger than twelve (12) years of age are ineligible to receive vaccination, are required to receive an education and are at school five days each week for many hours each day”<sup>19</sup> an emergency order was necessary. Under the authority granted by MCL 333.2453, the Health Officer established “procedures to be followed. . . during the epidemic” that included requiring people in pre-kindergarten through grade six, and all persons providing service to any persons in pre-kindergarten

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<sup>16</sup> MCL 333.2441.

<sup>17</sup> MCL 333.2453(1).

<sup>18</sup> MCL 333.2453.

<sup>19</sup> Ottawa Mask Mandate.

through grade six, “to consistently and properly wear a facial covering while inside any enclosed building or structure of the institution.”<sup>20</sup>

The Legislature gave the BOC powers over rules, but not orders

The BOC may only exercise powers granted to it by the Legislature.<sup>21</sup> The Legislature gave the BOC limited powers regarding public health, including the authority to approve or disapprove regulations promulgated by local health departments or its health officer.<sup>22</sup>

However, nowhere in the Code has the Legislature given the BOC the power to approve or disapprove a Health Official’s *order* or rescind an *order* issued by the Department. It is a bedrock principal of statutory construction that “[e]xpressio unius est exclusio alterius—express mention in a statute of one thing implies the exclusion of other similar things.”<sup>23</sup> The Legislature explicitly chose to give each county board of commissioners an oversight role regarding rules promulgated by its local public health department or health officer but it also chose *not* to authorize board of commissioner oversight regarding the local public health officer’s *orders*. The grant of authority in MCL 333.2441 indicates that the Legislature knew how to be specific, when it so intended.<sup>24</sup>

So, Michigan law does not grant the BOC the ability to rescind an order issued by a local health

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<sup>20</sup> Ottawa Mask Mandate.

<sup>21</sup> *Sch Dist No 9, Pittsfield Tp, Washtenaw Co v Bd of Sup’rs of Washtenaw Co*, 341 Mich 388, 398; 67 NW2d 165, 170 (1954) (“[A county board of supervisors] may not, in other words, exercise a power not vested in it by statute.”).

<sup>22</sup> MCL 333.2441. (“A local health department may adopt regulations necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department. The regulations **shall be approved or disapproved by the local governing entity.**”)

<sup>23</sup> *Stowers v Wolodzko*, 386 Mich 119, 133; 191 NW2d 355, 362 (1971).

<sup>24</sup> See *Frank W. Lynch & Co. v. Flex Techs., Inc.*, 463 Mich 578, 584, 624 NW2d 180, 183 (2001) (“Most instructive is the fact that the Legislature included no express language regarding retroactivity. . . . We note that the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively.”).

department or its Health Officer.

**B. Does the Ottawa County Board of Commissioners have the power to terminate the Health Officer’s employment for issuing an epidemic order?**

As explained above, MCL 333.2413 compels each Michigan county to provide health services to the public through a health department. MCL 333.2428 requires that every local health department “have a full-time local health officer appointed by the local governing entity.”<sup>25</sup> MCL 333.2428 directs the BOC to appoint a Health Officer who “shall possess professional qualifications for administration of a local health department as prescribed by the department.”<sup>26</sup> The BOC-appointed Health Officer, here Ms. Stefanovsky, acts as “the administrative officer of the board of health and local health department ... to protect the public health and prevent disease.”<sup>27</sup> The individual appointed to the position of Health Officer is a public official or officer.<sup>28</sup>

And as discussed above, county boards of commissioners may not exercise powers not vested in them by statute.<sup>29</sup> Under Michigan law, the board of commissioners is expressly authorized to “remove an officer or agent appointed by the board if, in the board’s opinion, the officer or agent is *incompetent to execute properly the duties of the office* or if, on charges and evidence, the board is satisfied that the officer or agent is *guilty of official misconduct, or habitual or willful neglect of duty*, and if the

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<sup>25</sup> MCL 333.2428.

<sup>26</sup> “A local health department shall have a full-time local health officer appointed by the local governing entity or in case of a district health department by the district board of health. The local health officer shall possess professional qualifications for administration of a local health department as prescribed by the department.” MCL 333.2428.

<sup>27</sup> *Id.*

<sup>28</sup> *Crawford v Benzie-Leelanau Dist Health Dept Bd of Health*, 636 Fed Appx 261, 263 (CA 6, 2016).

<sup>29</sup> *Sch Dist No 9, Pittsfield Tp, Washtenaw Co v Bd of Sup’rs of Washtenaw Co*, 341 Mich 388, 398; 67 NW2d 165, 170 (1954) (“[A county board of supervisors] may not, in other words, exercise a power not vested in it by statute.”).

misconduct or neglect is a sufficient cause for removal.”<sup>30</sup>

MCL 46.11(n) governs the removal of public officers, including local health officers.<sup>31</sup> There are only two unpublished Michigan Court of Appeals cases that discuss the removal power granted by MCL 46.11(n). Neither of those two cases involves a finding by a board of commissioners that an officer is incompetent. In those two cases, the officer(s) was removed for charged conduct that was largely outside the scope of the officer’s duties. In *Swiercz v Crawford Co Bd of Com’rs*, the Court of Appeals affirmed the removal of two county road commissioners who were terminated by the Crawford County Board of Commissioners (the “Crawford BOC”) for misconduct because the road commissioners repeatedly and intentionally violated provisions of the Open Meetings Act (“OMA”).<sup>32</sup> In *Schneider v Shiawassee Co Bd of Com’rs*, the Court of Appeals affirmed the removal of two Veteran Affairs committee members for misconduct and neglect of duty after those member refused to recognize and seat new members appointed by the Shiawassee board of county commissioners.<sup>33</sup>

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<sup>30</sup> MCL 46.11(n).

<sup>31</sup> MCL 46.11. “A county board of commissioners, at a lawfully held meeting, may do 1 or more of the following: . . . (n) Subject to subdivision (o), remove an officer or agent appointed by the board if, in the board’s opinion, the officer or agent is incompetent to execute properly the duties of the office or if, on charges and evidence, the board is satisfied that the officer or agent is guilty of official misconduct, or habitual or willful neglect of duty, and if the misconduct or neglect is a sufficient cause for removal. However, an officer or agent shall not be removed for that misconduct or neglect unless charges of misconduct or neglect are presented to the county board of commissioners or the chairperson of the county board of commissioners, notice of the hearing, with a copy of the charges, is delivered to the officer or agent, and a full opportunity is given the officer or agent to be heard, either in person or by counsel.”

<sup>32</sup> *Swiercz v Crawford Co Bd of Com’rs*, unpublished opinion of the Court of Appeals, issued October, 16, 2003 (Docket No. 232344), 2003 WL 22359384, p \*1.

<sup>33</sup> *Schneider v Shiawassee Co Bd of Com’rs*, unpublished opinion of the Court of Appeals, issued January, 26, 2012 (Docket No. 299920), 2012 WL 247774.

In contrast, there is one Michigan case involving the termination of a county Health Officer by a district board of health which is not subject to MCL 46.11(n). In *Crawford v Benzie-Leelanau Dist Health Dept Bd of Health*, 636 Fed. Appx. 261 (6<sup>th</sup> Cir.2016), the Benzie-Leelanau District Health Department Board



While these cases do not provide clear guidance, they do suggest that removal is a power reserved only for those situations where an appointed officer is either clearly violating the law (*Swiercz*) or defying the board in an unlawful manner (*Schneider*). In both cases the counties provided for a hearing with substantive procedural safeguards—in *Swiercz*, for example, the road commissioners were represented by counsel “at a two-day hearing monitored by a retired judge and the Board of Commissioners found that plaintiffs repeatedly violated the OMA.”<sup>34</sup>

There have been no allegations thus far that Ms. Stefanovsky has committed any type of misconduct or neglect of her statutory duties. If such an allegation does occur in the future, the BOC must follow the procedural rules of MCL 46.11(n) if it were to pursue removal based on misconduct or neglect. We are unaware of any allegation that the Ottawa Mask Mandate is an act of incompetence. The Board is free to consider opining that Ms. Stefanovsky is “incompetent to execute her duties properly” because there are not as many procedural constraints on the BOC in doing so as there is with either a finding of misconduct or neglect of duty. Nonetheless, the Board presumably would have to confront some certain undisputed facts—the uniform support of local hospitals, the similar decision by neighboring Kent County and 16 other Michigan county health officers<sup>35</sup>—in forming an such opinion, especially where this position is appointed based on the health officer having a specific knowledge of public health that the

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of Health removed Crawford, a local health officer under MCL 333.2425, for creating a sexually hostile work environment. The Benzie-Leelanau District Health Department Board of Health is a district board of health created by two or more counties pursuant to MCL 33.2415, and so does not have to follow MCL 46.11(n) which is a restriction on county board of commissioners.

<sup>34</sup> *Swiercz*, at \*2. See also *Schneider v. Shiawassee Cty. Bd. of Comm'rs*, No. 299920, 2012 WL 247774, at \*1 (Mich. Ct. App. Jan. 26, 2012) (noting that the VA Chairperson was to “be given a full opportunity to be heard on this matter.”).

<sup>35</sup> Map: Michigan counties with school mask mandates, *Click On Detroit* <<https://www.clickondetroit.com/health/2021/08/27/map-michigan-counties-with-school-mask-mandates/>> (Last accessed Sept 21, 2021).

commissioners presumably do not.<sup>36</sup>

**C. Would the Health Officer be criminally or civilly liable if she withdrew the mask mandate due to political pressure?**

MCL 333.2465(2) provides that “[a] local health officer or an employee or representative of a local health department is not personally liable for damages sustained in the performance of local health department functions, *except for wanton and wilful misconduct.*” The statute’s plain language clearly outlines the circumstances where immunity is taken away—wanton and willful misconduct.

In general, not having a mask mandate would likely not satisfy the requisite “intent to harm” or “indifference to whether harm will result as to be the equivalent of a willingness that it does”<sup>37</sup> such as to bring the Health Officer’s conduct within the wanton and willful misconduct exception to the immunity provided by MCL 333.2465. However, if the Health Officer were to withdraw or change her prior order, in contravention to her professional opinion, for either professional or pecuniary reason, such an action may be sufficient grounds for a court to find that conduct “indifference to whether harm will result,” where:

- The decision to issue the August 20 order was made in conjunction with the Kent County Health Department,

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<sup>36</sup> “The local health officer shall possess professional qualifications for administration of a local health department as prescribed by the department.” MCL 333.2428(1). The applicable Michigan Department of Health and Human Services administrative rule, “R 325.13003 Administrative health officer; qualifications” states that “An administrative health officer shall comply with 1 of the following requirements:

- (a) Have an M.P.H. or M.S.P.H. degree and 3 years of full-time public health administrative experience.
- (b) Have a related graduate degree and 5 years of full-time public health administrative experience.
- (c) Have a bachelor's degree and 8 years of full-time public health experience, 5 years of which shall have been in the administration of a broad range of public health programs.”

Based on her LinkedIn account, Ottawa County Health Officer Lisa Stefanovsky has a M.Ed. in educational leadership and administration as well as a B.S. in community health education. Ms. Stefanovsky has been with the Ottawa County Department of public health for 18 years. She was the Administrative Health Officer since February 2006 – years 8 months.” See Lisa Stefanovsky, LinkedIn <<https://www.linkedin.com/in/lisa-stefanovsky-8518389>> (last accessed Sept 28, 2021).

<sup>37</sup> *Jennings v Southwood*, 446 Mich 125, 138; 521 NW2d 230, 236 (1994).

- On August 20, 2021, when the original order was issued, Ottawa County reported 70 new COVID cases.<sup>38</sup> As of today, September 28, 2021, in Ottawa County there currently is an average of 95.14 COVID cases per day over the last 7 days.<sup>39</sup>
- In August 2021, there were 1, 821 COVID cases and six COVID-related deaths in Ottawa County. As of September 28, 2021, there have been 2,602 COVID cases and 20 COVID-related deaths this month.

Against that factual backdrop, it is possible that a court could find that if Ms. Stefanovsky changed her order based on political or pecuniary reasons, she acted with “indifference to whether harm would result as to be the equivalent of intending harm” and so lose her civil immunity. In the same way, based on those facts (and others listed above) a county prosecutor or the Attorney General may view that same conduct – changing her professional opinion as a local health officer based on a political or pecuniary reason – as misconduct in office, which is a felony under MCL 750.505,<sup>40</sup> or willful neglect of duty, which is a misdemeanor under MCL 750.478.<sup>41</sup> Ms. Stefanovsky would be acting with knowledge of both the dangers of COVID-19 and the knowledge of a “safe, essential, and proven strategy to reduce the spread of COVID-19 in schools” (i.e., masking) and making the deliberate political choice to rescind measures

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<sup>38</sup> Ottawa County Department of Public Health, *Ottawa County COVID-19 Case Summary Data*, < <https://covid-hub-ottawacountymi.hub.arcgis.com/>> (Last accessed Sept 28, 2021).

<sup>39</sup> Ottawa County Department of Public Health, *Ottawa County COVID-19 Case Summary Data*, < <https://covid-hub-ottawacountymi.hub.arcgis.com/>> (Last accessed Sept 28, 2021).

<sup>40</sup> MCL 750.505. “Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than \$10,000.00, or both in the discretion of the court.”

<sup>41</sup> MCL 750.478 states that “When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor.” The Michigan Court of Appeals held in *People v Medlyn*, 215 Mich App 338, 340-341; 544 NW2d 759 (1996), that the element of misconduct in officer are: (1) that the defendant was a public officer or “any person holding any public trust or employment, (2) that the defendant had a duty that is “enjoined by law” and (3) that the defendant willfully neglected to perform such duty.

designated to protect the public health. Such a choice could constitute wanton and willful misconduct and trigger the exception to the immunity provided by MCL §333.2465.

Again, answering this question is difficult because there are not actual facts and evidence to analyze, but there is certainly a reasonable possibility of losing civil immunity – and exposing oneself to criminal liability – for a public health officer to make a professional decision based for a political reason.

**A. Can the Board of Commissioners defund the Public Health Department in response to the Health Officer issuing an epidemic order?**

While the question does not provide a definition to “defund,” we will provide some guidance. The Code requires that “the local governing entity of a county *shall provide for* a county health department which meets the requirements of this part.”<sup>42</sup> In other words, section 2416 presumes that Ottawa County is required to maintain a county health department capable of providing service under the Code. The Code also presumes Ottawa County meet a minimum funding obligation to the Department. MCL 333.2482 requires that the “total local appropriations for a local health department expended for health services shall be not less in any year than in the local health department’s full fiscal year” in 1978.<sup>43</sup>

If Ottawa County fails to maintain the Department, the Legislature allows the State Department of Health (now called the Department of Health and Human Services) to “issue an administrative compliance order to the local health department's local governing entity. The order shall state the nature of the deficiencies and set forth a reasonable time by which the deficiencies shall be corrected.”<sup>44</sup> This raises

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<sup>42</sup> MCL 333.2416.

<sup>43</sup> MCL 333.2482(1) “The total local appropriations for a local health department expended for health services shall be not less in any year than in the local health department's full fiscal year immediately before the effective date of this part. However, *the department may waive maintenance* of local funding in extraordinary circumstances.” The effective date of MCL 333.2482(1) was 1978.

<sup>44</sup> MCL 333.2497.

the specter of the State Department of Health and Human Services exercising more control, and consequently, Ottawa having less control over its health department.

**CONCLUSION**

If you need any further guidance, please contact us by email or telephone and we will address any follow up questions.

Very truly yours,

**THE MIKE COX LAW FIRM, PLLC**

A handwritten signature in black ink that reads "Michael A. Cox". The signature is written in a cursive style with a large initial 'M' and a stylized 'Cox'.

Michael A. Cox