

16-1104

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA FILED

STEEL OF WEST VIRGINIA, INC.

Plaintiff,

v.

PATRICK MORRISEY,
ATTORNEY GENERAL,
STATE OF WEST VIRGINIA
ACTING IN HIS OFFICIAL CAPACITY,

Defendant.

2016 OCT 28 PM 3:22
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT
Civil Action No. 15-C-2214
Judge Kaufman
UHM

ORDER REGARDING PRODUCTION OF DOCUMENTS

In response to Steel of West Virginia, Inc.'s Freedom of Information Act request for documents, Attorney General Morrissey withheld 349 documents, citing privileges and exemptions. This Court is ORDERING disclosure of 89 of those documents, approximately one-quarter of the total number withheld.

On October 11, 2016, the Plaintiff, by counsel, and Defendant, by counsel, came before the Court for a hearing to address issues related to the documents requested by the Plaintiff pursuant to the West Virginia Freedom of Information Act ("FOIA"), W. Va. Code § 29B-1-1 *et seq.*, and withheld by the Defendant pursuant to a number of claimed exemptions.¹

This has been a hotly contested attempt to allow the public to have information, not privileged or exempt from disclosure, and to essentially inform the public about the proposed hospital merger of Cabell Huntington Hospital and St. Mary's Medical Center, Inc., which will virtually tie up the healthcare market of the Cabell County region. Moreover the Attorney General's communications about the merger were not permitted, as a matter of law, to be done in secret.

¹ W. Va. Code §29B-1-4(a)(5), W. Va. Code §47-18-7-(d), and W. Va. Code § 29B-1-4(a)(8).

This Court has considered the arguments of counsel and the written submissions filed with the Court by the parties and by certain healthcare providers who have moved to intervene, namely Highmark West Virginia, Inc., St. Mary's Medical Center, Inc., and Pallottine Health Services, Inc.. The Court has also independently reviewed, *in camera*, the 349 documents at issue.

Further complicating the Attorney General's duty to disclose was a letter generated by the Federal Trade Commission, parroting the Attorney General's use of an "investigatory exemption" to public disclosure. After reviewing the applicable law, arguments, and documents, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff, Steel of West Virginia, Inc., is a Delaware corporation with its principal place of business in Cabell County, West Virginia.
2. Defendant Attorney General Patrick Morrissey is the elected official charged with administering the Office of the Attorney General and is the statutory custodian of the public records requested in this action.
3. Cabell Huntington Hospital, Inc. submitted a bid to purchase St. Mary's Medical Center, Inc. and entered into an agreement on November 7, 2014, whereby Cabell Huntington Hospital would become the sole member and ultimate parent of St. Mary's Medical Center, Inc.
4. Thereafter, the Attorney General, acting pursuant to his statutory authority to enforce state antitrust laws, conducted a review and investigation into the transaction.
5. St. Mary's Medical Center, Inc. and Cabell Huntington Hospital made voluntary disclosures to the Attorney General's office prior to filing its Assurance of Voluntary Compliance.

6. The Assurance of Voluntary Compliance purported to establish certain agreements and commitments from Cabell Huntington Hospital and St. Mary's Medical Center, Inc. to ensure the legality of the transaction.

7. The original Assurance of Voluntary Compliance was filed in Cabell County on July 31, 2015.

8. By letter dated September 2, 2015, Plaintiff submitted a Freedom of Information Act Request, pursuant to W. Va. Code § 29B-1-3, to Defendant seeking to obtain copies of "all public records and incoming and outgoing correspondence relating to the proposed merger of Cabell Huntington Hospital and St. Mary's Medical Center."

9. In response, the Attorney General refused to disclose 349 documents, citing various exemptions.

10. The Court performed an *in camera* review of those 349 documents.

11. Documents 7-14 and 19-24 describe documents relating to bids submitted to St. Mary's Medical Center by other hospital systems and other interested buyers.

12. Documents 58-89, 91-100, and 240 are letters of support from various businesses, organizations, and politicians, writing in favor of the potential merger.

13. Documents 127-131 and 144 are a series of procedural documents, including Cabell Huntington Hospital's amended Letter of Intent and Certificate of Need application, as well as correspondence between the Health Care Authority and Cabell Huntington Hospital.

14. Document 138 is a letter from Cabell Huntington Hospital's counsel waiving confidentiality provisions under the Hart-Scott-Rodino Act, 18 U.S.C. § 18a(h), which was also provided to this Court as an attachment to St. Mary's Medical Center, Inc.'s Motion to Intervene.²

² See this Court's Order, filed simultaneously herein, dated October 28, 2016, Denying Motion to Intervene.

15. Documents 150-151, 223, 227, and 245 are communications similar to Document 138, serving the purpose of obtaining confidentiality waivers.

16. Documents 205 and 228 are e-mails between Assistant Attorney General Davis and Counsel for the Federal Trade Commission, which discuss proposed legislation.

17. Documents 293-296 consist of e-mails forwarding the already-public Assurance of Voluntary Compliance.

18. Steel of West Virginia, Inc., Plaintiff in this matter, has conceded "the following documents appear to fall within the confines of the claimed exemptions: 1-6, 15-18, 25-27, 29-57, 90, 101, 104-111, 113-124, 126, 132-137, 139-143, 145, 149, 152-155, 157-158, 159-179, 181-199, 201-204, 206-216, 220-222, 224-226, 229-239, 241-244, 246-252, 253-291, 295-309, 315-325, and 335-348." Therefore, the Court is not issuing findings on these documents.

19. St. Mary's Medical Center, Inc. and Pallottine Health Services, Inc. have moved to intervene in this matter, citing an agreement with the Attorney General that the documents were to be kept confidential and citing numerous Freedom of Information Act exemptions in further support of the withholding of the documents.³

20. Highmark West Virginia, Inc. has also filed a Motion to Intervene in the subject matter for the limited purpose of opposing Steel of West Virginia's Memorandum of Law regarding Defendant's *Vaughn* Index.⁴

CONCLUSIONS OF LAW

Prior to passage of the Federal Freedom of Information Act ("FOIA"), Senator Edward V. Long, a proponent of the Federal FOIA, stated, "[a] government by secrecy benefits no one. It injures the people it seeks to serve; it damages its own integrity and operation. It breeds distrust,

³ See Footnote No. 2.

⁴ *Id.*

demeans the fervor of its citizens, and mocks their loyalty.” W. Va. Code § 29B-1-1 provides that “all persons are . . . entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” The goal of the FOIA statute is “to allow as many public records as possible to be made available to the public.” *Daily Gazette Co. v. W. Va. Dev. Office*, 198 W.Va. 563, 569 (1996) (“*Gazette I*”); W. Va. Code § 29B-1-1 (providing that the public “is entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees”).

Two principles arise from the public’s right to know how their government operates and who operates it: “First, the fullest responsible disclosure, not confidentiality, is the dominant objective of the Act. Second, the exclusive exemptions from disclosure must be narrowly construed.” *Hechler v. Casey*, 175 W.Va. 434, 445, 333 S.E.2d 799, 810 (1985). It is with this background that this Court makes the following conclusions of law.

21. In FOIA cases, when a public body refuses to provide documents in response to a FOIA request, the burden is on the public body to justify its withholding of the documents. *Farley v. Worley*, 215 W.Va. 412, 418 (2004).

22. In refusing to disclose 349 public records, the Attorney General relies on the following three West Virginia Code sections to provide him with the authority to creatively craft or legitimize, after the fact, a position that these enumerated documents must be hidden from public view and knowledge:

- a. W. Va. Code §29B-1-4(a)(5), the corollary exemption providing for “information specifically exempted from disclosure by statute.”
- b. W. Va. Code §47-18-7-(d)—incorporated through W. Va. Code §29B-1-4(a)(5)—which prohibits the Attorney General from disclosing “the name or identity of a

person” or “the facts disclosed in the investigation” that the Attorney General is investigating pursuant to his authority to enforce the Antitrust Act; and

- c. W. Va. Code § 29B-1-4(a)(8), the “deliberative process” exemption, which protects from disclosure “[i]nternal memoranda or letters received or prepared by any public body.”

23. “[A] public body has a duty to redact or segregate exempt from non-exempt information contained within the public record(s) responsive to the FOIA request and to disclose the nonexempt information unless such segregation or redaction would impose an unreasonably high burden or expense.” Syl. Pt. 5, *Farley v. Worley*, 215 W.Va. 412, 417 (2004).

24. The segregation, which has already taken place at little expense, or redaction has not and would not impose an unreasonably high burden or expense by any reasonable standard.

25. The Attorney General has made no effort to redact information, instead choosing to segregate wholesale documents.

A. Antitrust Investigation Exemption

26. Attorney General Morrissey’s office attempts to apply an exemption to disclosure under FOIA from the Antitrust Act authority to investigate price fixing. This would enable him to make a deal to merge hospitals without public knowledge of the documents he relies on, thereby effectively gutting the regulatory spine and strength of antitrust enforcement in a capitalistic economy based on open competition.

27. Pursuant to the West Virginia Antitrust Act, the Attorney General has the authority to investigate those persons who may have “engaged in any act that is a violation of the Act,” W. Va. Code § 47-18-7(a), including the investigation of:

- a. proposed contracts or commercial combinations in “restraint of trade,” W. Va. Code

§ 47-18-3; and

- b. an attempt to “establish a monopoly of trade or commerce” within the State of West Virginia for the purpose of excluding competition or controlling pricing, W. Va. Code § 47-18-4.

28. The sole purpose of an antitrust investigation is to determine whether a merger, acquisition, or other market action runs afoul of the aforementioned antitrust prohibitions.

29. Therefore, the “investigative exemption” contained in W. Va. Code § 47-18-7(d) is limited to the “facts disclosed” to the Attorney General as part of his specific investigation of the proposed merger between SMMC and CHH.

30. *Senate Bill No. 597 exempts the subject acquisition from the state antitrust laws enforced by the Attorney General. See S.B 597, 82nd Legis., 2nd Sess., § 16-29B-28(c) (W. Va. 2016).*

31. *The Attorney General cannot now withhold documents based upon authority that does not exist in the instant matter, as a matter of law.*

32. Therefore, this Court **ORDERS** the production of Document Nos. 7-14, 19-24, 58-89, 91-100, 127-131, 138, 144, 150-151, 205, 22, 227, 228, 240, and 245, subject to redaction of any trade secret information pursuant to W. Va. Code § 29B-1-4(a)(1). To the extent any such information is redacted, the Attorney General is **ORDERED** to prepare a *Vaughn* Index identifying said redactions, the nature of the redacted information, and the connection to the claimed exemption within.

B. Federal Trade Commission Exemptions

33. The Federal Trade Commission has written a letter to the Court regarding this matter and asserting various federal protections for subject documents. The subject FOIA request was submitted to a West Virginia agency, under West Virginia FOIA, and is subject to West Virginia

law. The risk of a chilling effect does not outweigh the public's interest in disclosure. This Court does not find the arguments set forth by the FTC compelling in this matter, notwithstanding the important national interest the FTC has in seeing the competitive _____, *inter alia*.

C. Trade Secrets Exemption

34. The *Vaughn* Index makes no reference to W. Va. Code § 29B-1-4(a)(1)—the trade secrets exemption. The Attorney General, the FTC, and those seeking to intervene, consistent with not wanting to disclose, have cited this exemption as a basis for withholding the subject documents, though no such exemption was proffered on the *Vaughn* Index and can be disregarded as a matter of law.

D. Law Enforcement Agency Exemption⁵

35. St. Mary's Medical Center, Inc. and Pallottine have additionally cited W. Va. Code § 29B-1-4(a)(4), the law enforcement agency exemption which exempts "[r]ecords of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement as a basis to support withholding of the subject documents" to thwart public disclosure.

36. Fundamentally, "[t]he primary purpose of the law enforcement exemption to the Freedom of Information Act, W. Va. Code, § 29B-1-4(4) [1977], is to prevent premature disclosure of investigatory materials which might be used in a law enforcement action." *Hechler v. Casey*, 175 W.Va. 434, 437, 333 S.E.2d 799, 803 (1985).

⁵ In reviewing the state and federal cases cited under the law enforcement exemption to FOIA, no precedent exists for Attorney General Morrissey or the Attorney General's Office to apply this exemption to their office's work on this merger. Settled law grants them exemptions to police agencies investigating crimes, to start with.

37. The West Virginia Supreme Court of Appeals has previously stated that it was not “persuaded” by a context-based argument when determining whether or not to disclose documents pursuant to a FOIA request. *A.P. v. Canterbury*, 224 W. Va. 708, 725-26, 688 S.E.2d 317 (2009). Rather, it preferred a “content-driven analysis in determining whether a document is a public record.” *Id.*

E. Deliberative Process Exemption

38. To be exempt under the deliberative process exemption, W. Va. Code 29B-1-4(a)(8), a public record must be both predecisional and deliberative. *Highland Mining Co.*, 235 W.Va. 370, 383, 774 S.E.2d 36, 49 (2015) (internal citations omitted). Predecisional documents are, quite sensibly, those documents “prepared in order to assist an agency decisionmaker in arriving at his decision.” *Id.*

39. Similarly, a “deliberative” document is one that “reflects the give-and-take of the consultative process,” the disclosure of which would reveal the manner in which the agency evaluates possible alternative policies or outcomes. This exemption is designed to protect the government’s decision-making process by encouraging the free discussion of ideas and to insulate “against the chilling effect” that would occur if government officials were “judged not on the basis of their final decisions, but ““for matters they considered before making up their minds.”” *Id.* at 382, 774 S.E.2d at 48.

40. Several documents withheld by the Attorney General were generated or received after the investigation was complete and after the Assurance of Voluntary Compliance was executed.

41. As the Supreme Court of Appeals recognized just last year, “communications *made after the decision* and designed to explain it’ do not affect a decision’s quality” and are therefore not protected. *Id.* at 387, 774 S.E.2d at 53 (emphasis added).

42. Having been made after the date of the applicable agency decision, they are not – by definition – predecisional and deliberative, and therefore cannot be withheld under the deliberative process exemption.

43. Therefore, this Court **ORDERS** the production of Document Nos. 293, 294, 312, 313, 314, 332, 333, 334, and 349, subject to redaction of any trade secret information pursuant to W. Va. Code § 29B-1-4(a)(1). To the extent any such information is redacted, the Attorney General is **ORDERED** to prepare a *Vaughn* Index identifying said redactions, the nature of the redacted information, and the connection to the claimed exemption.

44. Further, this Court **FINDS** that some documents withheld pursuant to the deliberative process exemption do not in fact reveal the deliberative process of the Attorney General during its investigation. Therefore, this Court **ORDERS** the production of Document Nos. 172, 180, 192, 215, and 216, subject to redaction of any trade secret information pursuant to W. Va. Code § 29B-1-4(a)(1). To the extent any such information is redacted, the Attorney General is **ORDERED** to prepare a *Vaughn* Index identifying said redactions, the nature of the redacted information, and the connection to the claimed exemption.

The Court has previously informed both Counsel that, in the event of ordered disclosure, the Court will, *sua sponte*, stay disclosure of the substance of specific documents to allow review. Therefore, the Court **STAYS** disclosure for four (4) days. *However, the stay will end on November 3, 2016, at 3:00 p.m.* Since this concludes the Circuit Court rulings, which are limited to the Freedom of Information Act complaint presented, this is a Final Order. This case shall be **DISMISSED** and **STRICKEN** from the docket of this Court, except to enforce this Order or for sanctions, if necessary. Should there be any substantive review of the Certificate of Need issues,

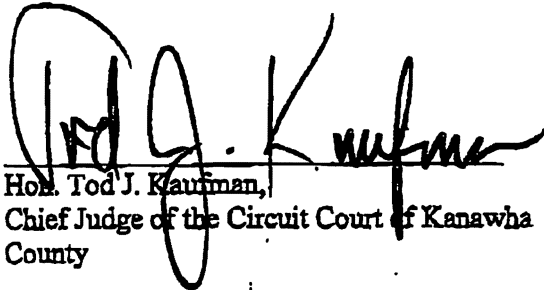
including any and all administrative appeals or new actions, they **SHALL** be randomly assigned by the Circuit Clerk of this Court. Case **DISMISSED**.

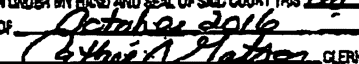
The Clerk is **DIRECTED** to send a copy of this Order to counsel of record.

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Steven A. Travis, Esq.
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Entered this 28th day of October, 2016.


Hon. Tod J. Kaufman,
Chief Judge of the Circuit Court of Kanawha
County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 28th
DAY OF October 2016
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
WVG

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STEEL OF WEST VIRGINIA, INC.

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v.

PATRICK MORRISEY,
ATTORNEY GENERAL,
STATE OF WEST VIRGINIA
ACTING IN HIS OFFICIAL CAPACITY,

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2016 OCT 28 PM 3: 22
CATHY B. HENSON, CLERK
KANAWHA COUNTY CIRCUIT COURT
UHM
Civil Action No. 15-C-2214
(Judge Kaufman)

ORDER REGARDING DISSEMINATION OF THE VAUGHN INDEX

On October 27, 2016, the Plaintiff, by counsel, and Defendant, by counsel, came before the Court for a hearing to address issues related to the October 21, 2016 correspondence from counsel for Plaintiff regarding the Attorney General's dissemination of the *Vaughn* Index, which remains under seal pursuant to this Court's Order.

Based upon the arguments of counsel, the documents submitted to the Court, and the Court's review of the matter, the Court FINDS the following:

FINDINGS OF FACT

- I. The Attorney General provided the Federal Trade Commission with a copy of certain information from the *Vaughn* Index, contrary to this Court's Orders dated August 26, 2016, and September 6, 2016¹.
- II. The Attorney General is estopped from using any privilege or exemption on this public disclosure of the *Vaughn* Index after already transferring information identifying *Vaughn* Index documents to the Federal Trade Commission.

¹ Although the Attorney General states he did not receive the second Order, dated September 6, 2016, the Attorney General was in possession of the first Order, dated August 26, 2016, which notified the Attorney General and his office that the *Vaughn* Index filed under seal.

1. To facilitate a review of the applicability of W. Va. Code § 47-18-7 and the other exemptions relied upon by the Attorney General in withholding documents in this Freedom of Information Act (“FOIA”) case, by Order dated September 6, 2016, the Court ordered the Attorney General to prepare and file a *Vaughn* Index, as described by *Daily Gazette Co. v. W. Va. Dev. Office*, 198 W.Va. 563, 482 S.E.2d 180 (1996).

2. The September 6, 2016 Order expressly stated that “[t]he Index shall be filed with the Court under seal.”

3. Following the filing of the *Vaughn* Index, several parties, including Cabell Huntington Hospital (“CHH”), St. Mary’s Medical Center (“St. Mary’s”), and the Federal Trade Commission (“FTC”) reached out to the Court to express concerns about the public disclosure of the withheld documents.

4. To protect their purported interests, both CHH and St. Mary’s filed motions to intervene in this FOIA proceeding pursuant to Rule 24 of the Rules of Civil Procedure.

5. The FTC, by letter dated October 6, 2016, expressed its concerns about the disclosure of documents listed in the *Vaughn* Index that the FTC had provided to the Attorney General.

6. Neither the FTC nor the hospitals has been made a party to this FOIA proceeding.

7. Plaintiff has repeatedly argued that the *Vaughn* Index should be part of the public docket because the Index, by definition, contains no proprietary, confidential, privileged or exempt material.

8. The Attorney General argued against the unsealing of the Index, insisting that public disclosure of the *Vaughn* Index would violate the very exemptions the Attorney General is claiming.

9. As of the date of this hearing, the *Vaughn* Index remained under seal.

10. By letter dated October 21, 2016, Plaintiff's counsel informed the Court about the apparent dissemination of the *Vaughn* Index by the Attorney General to representatives of the FTC.

11. While the Attorney General and others have benefitted from the confidentiality of the *Vaughn* Index, the Attorney General simultaneously released the contents of the Index, contrary to this Court's Order, to a third party.

CONCLUSIONS OF LAW

12. Despite its broader involvement with the underlying merger, the Federal Trade Commission (FTC) is not a party to this proceeding and, as such, the FTC is not bound by this Court's Order regarding the sealing of the *Vaughn* Index.

13. A party may not unilaterally and without permission of the Court decide to disclose information held under seal to a third party.²

14. A document maintained under seal serves to protect the contents of the document. A party cannot circumvent such an order simply by altering the format or the appearance of the document and claim that the same is not protected.

15. The Attorney General's insistence that the *Vaughn* Index should remain under seal and its continued refusal to produce the requested documents has prejudiced Plaintiff's efforts to gain disclosure.

16. The West Virginia Supreme Court of Appeals has held that a *Vaughn* Index "need not be so detailed that it compromises the privilege claimed." *Farley v. Worley*, 215 W. Va. 412, 417 (2007). By its very nature, the index is intended to protect information that the government has refused to disclose, citing privileges or exemptions to keep documents from public view after a citizen request for information.

² The third party was the Federal Trade Commission in Washington, D.C.. Whom they released the documents to is not known by the Court.

17. "The inherent power of courts to sanction also provides courts with a means to impose sanctions fashioned to address unique problems which may not be addressed within the rules." *State ex rel. Richmond Am. Homes of W. Va. v. Sanders*, 226 W.Va. 103, 111, 697 S.E.2d 139, 147 (2010).

RULING

This Court is now unpersuaded by the Attorney General's arguments that the *Vaughn* Index itself should remain under seal, as a matter of law. Therefore, this Court **ORDERS** that the *Vaughn* Index be unsealed and made a part of the file herein.

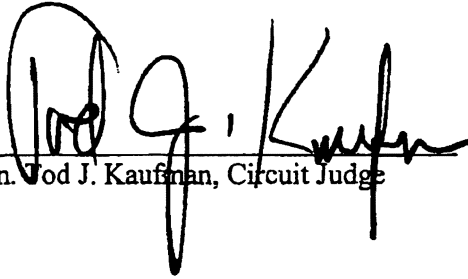
However, this Court, *sua sponte*, **STAYS** this decision for three business days, or until November 3, 2016, at 3:00 p.m., to allow review.

The Clerk is **DIRECTED** to send a copy of this Order to counsel of record.

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(304) 558-0140 (fax)

Entered this 28th day of October, 2016.


Hon. Rod J. Kaufman, Circuit Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
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GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 28th
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Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
UHG

CERTIFICATE OF SERVICE

I, Edward Mark Wenger, verify that I served a true copy of "*Notice of Appeal*" upon the interested parties by facsimile and also depositing it in the United States mail, with first-class postage prepaid, on November 28, 2016, addressed as follows:

Carte P. Goodwin, Esq.
Elise N. McQuain, Esq.
Goodwin & Goodwin, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301



Edward Mark Wenger