

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #2

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2007 FEB 15 PM 3:05

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Real Estate Commission TITLE NUMBER: 174

RULE TYPE: Procedural CITE AUTHORITY: WV Code §30-40-8

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 4

TITLE OF RULE BEING PROPOSED: PROCEDURE FOR THE INVESTIGATION AND RESOLUTION
OF COMPLAINTS AND CONTESTED CASE HEARINGS

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON March 19, 2007 AT 10:00 AM ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Richard E. Strader, Executive Director
West Virginia Real Estate Commission
300 Capitol Street, Suite 400
Charleston, WV 25301

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

#4.40



**State of West Virginia
Real Estate Commission**

300 Capitol Street, Suite 400
Charleston, West Virginia 25301
(304) 558-3555
FAX (304) 558-6442
<www.wvrec.org>

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HURRICANE
CAROL H. PUGH, SECRETARY
BECKLEY
VAUGHN L. KIGER
MORGANTOWN

ROBERT R. VITELLO
CHARLESTON
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BECKLEY
RICHARD E. STRADER, CPA
EXECUTIVE DIRECTOR

SUMMARY OF PROPOSED LEGISLATIVE RULE

AGENCY: Real Estate Commission
RULE: 174-4
STATUTORY
AUTHORITY: WV Code §30-40-8

SUMMARY

To amend an existing rule by:

1. Filing new procedural rule which will identify the procedures to be followed in the investigation and resolution of complaints and contested case hearings.



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**STATEMENT OF CIRCUMSTANCES
REQUIRING PROPOSED PROCEDURAL RULE**

AGENCY: Real Estate Commission
RULE: 174-4
STATUTORY
AUTHORITY: WV Code §30-40-8

STATEMENT OF CIRCUMSTANCES

1. The Performance Evaluation and Research Division of the Legislative Auditor's Office informed the Real Estate Commission that in order to comply with the provisions of WV Code §30-1-1 et seq., this procedural rule must be filed.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: PROCEDURE FOR THE INVESTIGATION AND RESOLUTION OF COMPLAINTS

Type of Rule: Legislative Interpretive Procedural

Agency: Real Estate Commiission

Address: 300 Capitol Street, Suite 400
Charleston, WV 25301

Phone Number: 304-558-3555 Email: wvrec@wvrec.org

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

This rule will not have any impact on costs or revenues.
 This rule merely sets out the procedures to be followed in the Investigation and resolution of complaints filed with the Commission, and the procedures to be followed in a contested case hearing.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____

Rule Title: PROCEDURE FOR THE INVESTIGATION AND RESOLUTION OF COMPLAINTS

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

None

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

There will be no fiscal impact resulting from implementation of this rule because procedures outlined in this rule are the procedures that are currently being followed.

Date: February 15, 2007

Signature of Agency Head or Authorized Representative

Richard E. Strader

FILED

TITLE 174
PROCEDURAL RULES
WEST VIRGINIA REAL ESTATE COMMISSION

2007 FEB 15 PM 3:06

SERIES 4

OFFICE WEST VIRGINIA
SECRETARY OF STATE

PROCEDURE FOR THE INVESTIGATION AND RESOLUTION OF COMPLAINTS
AND CONTESTED CASE HEARINGS

§174-4-1. General.

1.1. Scope. -- This rule specifies a procedure for the investigation and resolution of complaints against real estate brokers, associate brokers and salespersons and the conduct of contested case hearings.

1.2. Authority. -- W. Va. Code § 30-40-8

1.3. Filing Date. --

1.4. Effective Date. --

§174-4-2. Definitions.

The following words and phrases as used in this rule have the following meanings, unless the context otherwise requires:

2.1. "Commission" means the West Virginia real estate commission.

2.2. "Executive Director" means the executive director of the West Virginia real estate commission

2.3. "License" means a license to act as a broker, associate broker or salesperson.

2.4. "Licensee" means a person holding a license.

§174-4-3. Causes for Denial of Licenses or Discipline of Licensees.

3.1. The Commission may deny an application for license, place a licensee on probation, limit or restrict a license, suspend or revoke any license, or otherwise discipline any licensee in accordance with these rules and W. Va. Code § 30-40-1, et seq., upon satisfactory proof that a licensee has been convicted of a felony or is engaged in conduct, or committed other acts, practices or acts constituting professional negligence or a willful departure from accepted standards of professional conduct in violation of W. Va. Code § 30-40-1, et seq., or the rules of the Commission.

§174-4-4. Disposition of Complaints

4.1. The Commission may upon its own motion and shall upon the filing of a complaint by any person setting forth a cause of action under W. Va. Code § 30-40-1, et seq., or the rules promulgated thereunder, ascertain the facts and if warranted hold a hearing to determine whether disciplinary action should be imposed against a licensee.

4.2. The Commission will consider complaints of alleged violations of W. Va. Code § 30-40-1, et seq., and the rules promulgated thereunder, only when they are submitted in writing on forms supplied by the Commission and set forth all details of the transaction, giving full names of all persons having knowledge of such transactions, together with specific addresses, dates, monetary amounts involved, copies of contracts, closing statements, correspondence and other pertinent documents and information. Only in this way can the Commission handle such matters expediently and satisfactorily.

4.3. Upon initiation or receipt of the complaint, the Commission shall provide a copy of the complaint to the licensee for his or her response to the allegations contained in the complaint. The accused party shall file an answer within twenty days of the date of service. Failure of the licensee to file a timely response may be considered an admission of the allegations in the complaint: *Provided*, That nothing contained herein shall prohibit the accused party from obtaining an extension of time to file a response, if the Commission, its Executive Director or other authorized representative permits the extension.

4.4. Requests for a response to the allegations contained in a complaint, or requests for additional information will be considered properly served when sent to the licensee's last known address. It is the responsibility of the licensee or applicant to keep the Commission informed of his or her current address.

4.5. After receiving the licensee's response to the complaint and reviewing any information obtained through investigation, the Commission shall determine if probable cause exists that the licensee has violated any provision of W. Va. Code § 30-40-1, et seq., the rules promulgated thereunder, or any order or final decision issued by the Commission.

4.6. Investigation of complaints

4.6.a. The Commission may, upon receipt of a complaint or upon its own motion, review and investigate alleged acts or omissions which the Commission reasonably believes constitute cause for disciplinary action. In order to determine if probable cause exists for a hearing on a complaint, the Executive Director, investigator(s) designated by Commission staff, or the chairperson of the Commission shall cause an investigation to be made into the allegations of the complaint. If the Commission determines that the complaint does not present facts which constitute a basis for disciplinary action, the Commission shall take no further action.

4.6.b. In connection with the investigation of a complaint, the Commission is authorized to subpoena witnesses, books, papers, records and any other evidence to help it determine whether a

contested case proceeding should be instituted.

4.6.c. Every licensee has an affirmative duty to assist the Commission, or its authorized representative, in investigations performed by the Commission.

4.6.d. Upon completion of the investigation, the Commission may:

4.6.d.1. Order the matter to be further investigated;

4.6.d.2. Allow the licensee, who is the subject of the complaint, an opportunity to appear before the Commission for an informal discussion regarding the facts and circumstances of the alleged violations;

4.6.d.3. Determine there is no probable cause to believe a disciplinary violation has occurred and close the case; or

4.6.d.4. Determine there is probable cause to believe that a disciplinary violation has occurred and proceed with a contested case hearing or dispose of the matter through a consent agreement or otherwise.

§174-4-5. Contested Case Hearing

5.1. Hearings shall be conducted in accordance with the provisions of article five, chapter twenty-nine-a of this code and the Commission's rules.

5.2. Hearings shall be held at a time and place determined by the Commission, but in no event less than thirty days after the notice of hearing is given.

5.3. Any member of the Commission has the authority to administer oaths and to examine any person under oath.

5.4. If, after hearing, the Commission determines the licensee has violated any provision of W. Va. Code § 30-40-1, et seq., the Commission's rules or any order or final decision issued by the Commission, a formal decision shall be prepared which contains findings of fact, conclusions of law and specifically lists the disciplinary actions imposed.

5.5. The Commission may elect to have an administrative law judge or hearing examiner conduct the hearing.

5.5.a. In such cases where the Commission elects to utilize an administrative law judge or hearing examiner, the administrative law judge or hearing examiner shall:

5.5.a.1. Be in control of the proceedings as presiding officer,

5.5.a.2. Have the authority to administer oaths,

5.5.a.3. Have the authority to admit or exclude testimony or other evidence, and

5.5.a.4. Have the authority to rule on all motions and objections.

5.5.b. At the conclusion of a hearing, the administrative law judge or hearing examiner shall prepare a proposed order which shall contain findings of fact and conclusions of law. The Commission may request that the administrative law judge or hearing examiner additionally prepare and submit proposed disciplinary action, if any and where warranted, to be taken against the licensee in the proposed order. The Commission may accept, reject or modify the proposed decision of the administrative law judge or hearing examiner.

5.6. Contested case hearings shall be recorded either by mechanical or electrical means or by certified shorthand reporters. Contested case hearings or any part thereof shall be transcribed at the request of any party, with the expense of the transcription to be charged to the requesting party. The recording, stenographic notes or transcription of oral proceedings shall be filed with and maintained by the Commission for at least five years.

§174-4-6. Subpoena Powers

6.1. Commission subpoenas for books, papers, records, and other evidence will be issued to a party upon request. Subpoenas for witnesses may also be obtained. The Executive Director of the Commission, or other representative designated by the Commission, shall issue all subpoenas for both parties upon reasonable cause shown. The request must specify the documents sought to be obtained and the full names and addresses of the witnesses whose testimony is sought.

6.2. Discovery procedures shall consist of those procedures authorized under the State Administrative Procedure Act found in W. Va. Code § 29A-5-1, et seq.

6.3. In the event of a refusal to obey a subpoena, either party or the Commission may petition the circuit court for its enforcement. If a proper showing is made, the circuit court shall order the person to obey the subpoena; if the person fails to obey the order of the court, the person may be found guilty of contempt of court.

§174-4-7. Conduct of Hearing

7.1. If a licensee, upon who a proper notice of hearing has been served, fails to appear in person at the hearing, the Commission or presiding officer may proceed to conduct the hearing (or may enter such other order or judgement deemed appropriate) and the licensee shall be bound by the results of such hearing to the same extent as if the licensee were present.

7.2. Before testimony is presented, the record shall show the identity of any Commission members present, of the presiding officer, and of the primary parties and their representatives, and shall reflect that all testimony is being recorded. The licensee may challenge any member of the Commission for cause prior to the commencement of the hearing; the members of the Commission (with the challenged member abstaining) shall decide by the majority vote whether cause exists and

whether the challenged member shall participate in the hearing. The Commission or presiding officer shall set dates, times and rules for hearings and shall rule on all issues. Hearings shall generally be conducted in the following order, subject to modification at the discretion of the Commission or presiding officer:

7.2.a. The Presiding Officer may read a summary of the charges and answers thereto, and other responsible pleadings filed by the licensee prior to the hearing.

7.2.b. The Assistant Attorney General representing the State's interest before the Commission may make a brief opening statement, which may include a summary of charges and the witnesses and documents to support such.

7.2.c. The licensee shall be offered the opportunity to make an opening statement.

7.2.d. The presentation of evidence on behalf of the State, including a summary at the close of the evidence on behalf of the State.

7.2.e. The presentation of evidence on behalf of the licensee.

7.2.f. Rebuttal evidence on behalf of the State, if any.

7.2.g. Rebuttal evidence on behalf of the licensee, if any.

7.2.h. Closing arguments, if any, by all interested parties on behalf of the Commission and on behalf of the licensee.

7.3. The Commission may grant immunity from disciplinary action to a witness, but only upon a majority vote of the Commission members present. If the hearing is being presided over by an administrative law judge or hearing examiner, the administrative law judge or hearing examiner, shall have authority to grant immunity from disciplinary action before the Commission to a witness. The official record of the hearing shall include the reasons for granting the immunity.

7.4. Admissibility of evidence at the hearing shall be governed by the terms of the West Virginia Administrative Procedure Act. Copies of documents offered as evidence at the hearing shall be provided to opposing parties. Copies must also be furnished to members of the Commission. Notwithstanding the foregoing, to the extent the licensee believes he or she is being asked to reply to accusations, charges, innuendoes, or facts for the first time in the hearing, the licensee shall be afforded the opportunity to respond to any such evidence to the Commission either in writing or at a subsequent scheduled meeting of the Commission; the Assistant Attorney General assigned to prosecute the case before the Commission shall, however, be allowed to continue to present evidence during the hearing.

7.5. When a majority of the Commission presides over the reception of evidence at the hearing, the decision is a final decision.

7.6. Upon the motion of the Commission or any party assigning error or omission in any part of any transcript, the Commission or its appointed administrative law judge or hearing examiner shall settle all differences arising as to whether such transcript truly discloses what occurred at the hearing and shall direct that the transcript be corrected and/or revised as appropriate so as to make it conform to the truth.

§174-4-8. Disposition.

8.1. At the conclusion of any contested case hearing the Commission or presiding officer shall make Findings of Fact and Conclusions of Law and may:

8.1.a. Dismiss the charges. In the event the charges are dismissed, and before a decision by the Commission is reported, the file shall be confidential;

8.1.b. Impose one or more sanctions as considered appropriate in the circumstances for the discipline of a licensee. Available sanctions include, but are not limited to, denial of a license or renewal thereof, administrative fine not to exceed one thousand dollars per day per violation, probation, revocation, suspension, reexamination, restitution, require additional education, censure, denial of future license, downgrade of license, reprimand, impose all costs associated with the investigation and prosecution of the licensee upon the licensee, order the return of compensation collected from an injured consumer, or any other sanction pursuant to W. Va. Code § 30-40-1, et seq.

§174-4-9. Final Decision.

9.1. The final decision of the Commission shall be filed with the Executive Director. A copy of the decision and order shall immediately be sent by certified mail, return receipt requested, to the licensee's last known address or may be served in the manner of original notices upon the licensee.

§174-4-10. Judicial Review.

10.1. Any person adversely affected by any decision or final order made by the Commission, after a hearing, is entitled to judicial review by the circuit court of the county where the hearing was held.

§174-4-11. Application for Reinstatement.

11.1. Any person whose license or certification has been revoked or suspended by the Commission may apply to the Commission for reinstatement in accordance with the terms of the order of revocation or suspension. If an order of revocation does not establish terms upon which reinstatement might occur, an initial application for reinstatement may not be made until two (2) years has elapsed from the date the order becomes effective, and successive applications shall be made no more often than once every two (2) years.

§174-4-12. Publication of Decisions.

12.1. Final decisions of the Commission relating to disciplinary actions, including consent agreements and consent orders, may be transmitted to the appropriate professional association(s), other licensing jurisdictions, news media and other interested persons or organizations.