

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #5

Do Not Mark In This Box

FILED

2011 JUL 12 AM 10:53

WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: West Virginia Board of Professional Surveyors TITLE NUMBER: 23

CITE AUTHORITY: 30-13A-6

RULE TYPE: PROCEDURAL INTERPRETIVE

EXEMPT LEGISLATIVE RULE

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES NO

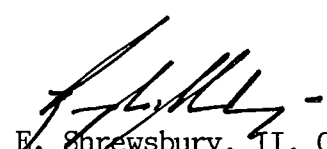
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 3

TITLE OF RULE BEING AMENDED: Disciplinary and Complaint Procedures for Land Surveyors

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS August 2, 2011
July 4, 2011



Roy E. Shrewsbury, II, Chairman
Authorized Signature

**TITLE 23
PROCEDURAL RULE
BOARD OF PROFESSIONAL SURVEYORS**

2011 JUL 12 AM 10:53

**SERIES 3
DISCIPLINARY AND COMPLAINT PROCEDURES
FOR PROFESSIONAL SURVEYORS**

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§23-3-1. General.

1.1. Scope. -- This rule specifies a procedure for the investigation and resolution of complaints against land surveyors.

1.2. Authority. -- W. Va. Code §§30-13A-6 and 30-1-1 et seq.

1.3. Filing Date. -- May 17, 2011.

1.4. Effective Date. -- July 1, 2011.

§23-3-2. Application.

This rule applies to all persons licensed or seeking licensure as a professional surveyor, and all persons endorsed or seeking endorsement to practice in a specialized field of surveying pursuant to W. Va. Code §30-13A-1 et seq.

§23-3-3. Definitions.

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

3.1. "Applicant" means a person who has submitted an application for a license, or a license renewal to the Board.

3.2. "Land Surveyor" or "Surveyor" means a person who engages in the practice of land surveying as defined in W. Va. Code §30-13A-3.

3.3. "Board" means the West Virginia Board of Professional Surveyors.

3.4. "License" means the license issued by the board to qualified persons engaged in the practice of land surveying pursuant to W. Va. Code §30-13A-1 et seq.

3.5. "Investigator" means a member or staff member of the board, or a licensed land surveyor, attorney, paralegal, or present or former law enforcement officer hired or authorized by the Board, who is assigned the

duty to make a preliminary evaluation of a complaint and to ascertain and report to the Board factual information related to a complaint against a land surveyor.

§23-3-4. Disposition of Complaints.

4.1. Any person aggrieved by the acts of a professional surveyor may make initial inquiry to the board by letter or telephone. The board shall make and keep a record of the date and time of telephone calls making inquiry related to a complaint, together with a notation of the date a complaint form was mailed, but a complaint must be reduced to writing and received by the Board before it is considered as filed.

4.2. Any person, firm, corporation, member of the Board, or public officer may make a complaint to the Board which charges a professional surveyor with a violation of W. Va. Code §30-1-8, W. Va. Code §30-13A-1 et seq. or of the Rules of the Board. The Board may provide a form for that purpose, but a complaint may be filed in any written form so long as it contains substantially the same information. In addition to a written narrative describing the matter complained of, the complaint should contain the following:

4.2.1. The name, address and telephone number of the person making the complaint;

4.2.2. The name, address and telephone number of the professional surveyor against whom the complaint is lodged;

4.2.3. Information as to whether there was a contract or letter of agreement with the professional surveyor relevant to the matters charged in the complaint. If there was a contract or letter of agreement, a copy should be submitted as an attachment.

4.2.4. An attachment submitting any additional documents in the possession of the complainant relevant to the matters charged in the complaint.

4.3. A member of the Board may file a written complaint against a professional surveyor based on matters within the personal knowledge of the Board member, matters disclosed by records within the possession of the Board, matters of public record that constitute grounds for disciplinary action, or upon information received through investigative activities undertaken by the Board following a telephone report by an aggrieved person. A member of the Board who files a written complaint may not participate in final deliberations or vote on the final disposition of the case, unless it is clear and the Board determines from written and oral statements that

23CSR3

the complaint is filed as a matter of form, that the member has not prejudged the case, that only unproven allegations are intended in the complaint, and that the member filing the complaint has reached no conclusion based on the mere assertion of the charge.

4.4. Complainants are immune from liability for the allegations contained in their complaints filed with the Board unless the complaint is filed in bad faith or for a malicious purpose, and investigators and witnesses in proceedings before the board are immune from liability for investigations made and testimony given in good faith.

4.5. The Board shall maintain a detailed log book that assigns to each complaint received and filed a Board identification number, records the date the complaint was received, and follows the matter to disposition.

4.6. The board shall keep an active case file status sheet showing the date of each action on a complaint together with explanatory comments.

4.7. The Board shall maintain a separate file on each complaint received and filed, and each file shall have a number assigned to it.

4.8. Upon receipt of a complaint, initial review and preliminary evaluation, the Board shall send a complaint acknowledgment to the complainant stating:

4.8.1. That the matter will be reviewed by the Board;

4.8.2. That the complaint is outside the jurisdiction of the Board, or fails to state sufficient grounds to support any disciplinary action by the Board; or

4.8.3. That more information will be required in order to adequately review the individual complaint.

The Board may include in its complaint acknowledgment a request for additional relevant information from the complainant.

4.9. If it is summarily determined upon receipt that the complaint is outside the jurisdiction of the Board, or fails to state sufficient grounds to support any action by the Board, the Board shall retain a copy of the complaint together with the form of acknowledgment to the complainant and a notation in the complaint log that the complaint was summarily dismissed prior to filing, but the complaint will not be assigned a file number

and the complaint will not be considered filed. Copies of complaints summarily dismissed prior to filing shall be made available to any member of the Board upon request or at the next regular meeting of the Board.

4.10. Unless it is summarily determined upon receipt that the complaint is outside the jurisdiction of the Board, or fails to state sufficient grounds to support any action by the Board, the Board shall send by certified mail a copy of the complaint including any supporting documentation, and a Notice of alleged violation, to the professional surveyor for his or her written comment, and he or she shall submit a written response to the Board within thirty (30) days of the date of the correspondence, or waive the right to do so. If the professional surveyor against whom the complaint is made fails to respond to a Notice of alleged violation, the Board shall notify the professional surveyor that it is initiating further proceedings that may result in the imposition of disciplinary action, in which case the professional surveyor against whom a complaint is made has the right to a hearing.

4.11. A complaint and Notice of alleged violation sent to licensed professional surveyors or applicants for a license are properly served when sent to their last known address. It is the responsibility of the licensed professional surveyor or applicant for a license to keep the Board informed of his or her current address.

4.12. After receipt and review of a complaint, unless the complaint is determined to fall within the provisions of subdivision 5.8.2 of this rule, the Board shall cause to be conducted any reasonable inquiry or investigation it considers necessary to determine the truth and the validity of the allegations set forth in the complaint. The review of complaints and any view or investigation thereof may, at the discretion of the Board, be assigned to a committee of the Board.

4.13. At any point in its investigation of a complaint the Board may, at its discretion, assign or reassign the matter to an investigator to ascertain additional facts and report to the Board. The Board may further procure the services of a licensed professional surveyor to serve as an expert witness in proceedings before the Board. When the Board chooses a licensed professional surveyor to act as an investigator or as an expert witness, the board shall choose, if practicable, a surveyor whose principal business location is in a different area of the state from the area where the accused licensee is engaged in practice.

23CSR3

4.14. Upon receipt of a complaint the investigator shall, within sixty (60) days, review and investigate the complaint and provide the Board with a report. The report shall contain a statement of the allegations, a statement of facts, and an analysis of the complaint, the records reviewed and a statement of the investigators findings and recommendations. The investigator shall, upon request, be afforded an opportunity to interview any person having knowledge of the matter complained of. The investigator's report and any statements of witnesses shall be placed in the complaint file.

4.15. At any time after a complaint is received and before the Board enters an order disposing of the complaint, the professional surveyor against whom the complaint is made may request an informal investigative conference before the Board. The Board or the committee may also request the professional surveyor against whom the complaint is made, and any other person, to attend an informal investigative conference, or to appear at a regular meeting of the Board, in order to facilitate the disposition of a complaint, dispose of procedural issues or prehearing motions, or simplify or settle issues to be raised at hearing by the consent of the parties. The Board or the committee shall give notice of the conference, which notice shall include a statement of issues to be informally discussed. When a member or staff of the board has served as the investigator making a preliminary evaluation of the complaint, that member or staff person shall attend the informal conference. At an informal conference, the statements made by either party at a conference, including any proposed disposition of the complaint, are not admissible at any subsequent hearing on the merits without the consent of all parties to the hearing. A professional surveyor against whom a complaint is made is not required to attend an informal conference when requested to do so by the Board and may not be penalized for refusing an informal conference. At an informal conference the complainant is not entitled to a say in any agreed disposition of the complaint.

4.16. The Board, its Chairman, the complaint committee or Secretary may issue subpoenas requiring witnesses to appear before the Board and subpoenas duces tecum to complete the Board's investigation and to determine the truth or validity of complaints, or to compel the attendance of witnesses at hearing. The investigator may request the Board or its Chairman to issue a subpoena or subpoena duces tecum. A request for subpoena shall be accompanied by a brief statement specifying the necessity for its issuance. Subpoenas

and subpoenas duces tecum may be signed by any member of the Board or its Secretary. Written requests by a party for the issuance of subpoenas or subpoenas duces tecum as provided in this subsection must be received by the Board no later than ten (10) days before a scheduled hearing. Any party requesting the issuance of subpoenas duces tecum shall see that they are properly served in accordance with W. Va. Code §29A-5-1(b).

4.17. At any point in the course of an investigation or inquiry into a complaint, the Board may determine that there is not and will not be sufficient evidence to warrant further proceedings, that the complaint fails to allege misconduct for which a professional surveyor may be sanctioned by the Board, or that the acts charged are not of a serious and substantial nature sufficient to justify the imposition of formal discipline, except that in the event the review and investigation of a complaint is assigned to the committee or an investigator, the committee or investigator shall make their respective findings and recommendations to the Board prior to the Board dismissing the complaint.

§23-3-5. Requests for Hearing Following Denial of a License.

5.1. Any applicant who has had his or her application for a license denied by order of the Board may request a hearing on the denial within twenty (20) days of that action in accordance with the contested case hearing procedures set forth in W. Va. Code §29A-5-1 et seq. and the rules of the Board.

5.2. Contested cases involving a licensed professional surveyor whose renewal of a license was denied for reasons that constitute grounds for professional discipline are treated as disciplinary matters under section 6 of this rule for purposes of determining the burden of proof and other procedural questions.

§23-3-6. Hearing Procedure.

6.1. Any applicant denied a license who submits a written demand for hearing to the Board within twenty (20) days following the denial is entitled to a hearing on the action denying the license. Any professional surveyor against whom a complaint is filed, may at any time following receipt of a Notice of alleged violation, but before a hearing before the board is scheduled, submit a written demand for a hearing.

6.2. When the Chairman of the Board or his or her authorized designee is presented with a demand for a hearing, he or she shall schedule a hearing not less than ten (10) nor more than thirty (30) days of receipt of the written demand, unless postponed to a later date by mutual agreement.

23CSR3

6.3. Following receipt of a professional surveyor=s response to a Notice of alleged violation, and determination by the Board that probable cause exists for the Board to find that the professional surveyor committed misconduct for which he or she may be disciplined by the Board, the Secretary shall provide the professional surveyor charged with an Order, issued in the name of the Board, scheduling the case for formal hearing before the Board. The Order shall be served by certified mail, return receipt requested, upon the charged party at least thirty (30) days prior to the date of hearing. The Order shall state with particularity, by reference to the W. Va. Code or Rule of the Board thereunder, the matters charged in the complaint. The Order shall state the date, time and place for the hearing. The Board may thereafter amend the charges set forth in the Order, except that a hearing based on amended charges is subject to the same thirty (30) day notice requirement.

6.4. The Order scheduling a case for formal hearing before the Board shall include a time frame order requiring all parties to a disciplinary action, within fifteen (15) days of the service of the Order but not later than three days prior to the scheduled date of the hearing, to exchange the following:

6.4.1 A list of proposed witnesses at hearing with addresses and telephone numbers;

6.4.2. Copies of documentary evidence and lists of exhibits intended to be introduced into evidence at hearing; and

6.4.3. Copies of any witness statements in the possession or under the control of the Board.

6.4.4. The time frame for exchanging witness lists, statements of Board witnesses, copies of documentary evidence and lists of exhibits may be extended by agreement of the parties.

6.4.5. The Board has a continuing duty to disclose exculpatory evidence.

6.5. Upon written motion received by the Board no later than twenty (20) days prior to the date of hearing, a more definite statement of the matters charged or the reasons stated for denial of a license shall be provided to the demanding or charged party or his or her counsel, at least fifteen (15) days prior to the hearing date.

6.6. Hearings shall be conducted as follows:

6.6.1. Any party to a hearing shall have the right to be represented by an attorney-at-law, duly qualified to practice law in the state of West Virginia.

6.6.2. The Board shall be represented by the West Virginia Attorney General's Office or, with the consent of the Attorney General, an attorney member of the Board or attorney-at-law duly qualified to practice law in the state of West Virginia and hired by the Board. An attorney member of the Board who represents the Board at hearing may not participate in final deliberations of the Board or vote on the final disposition of the case.

6.6.3. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded from the hearing. Furthermore, the rules of evidence as applied in civil cases in the circuit courts of this state shall be followed. However, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

6.6.4. The rules of privilege recognized by the laws of West Virginia shall be followed.

6.6.5. Objections to evidentiary offers shall be noted in the record. Any party to the hearing may vouch the record as to any excluded testimony or other evidence.

6.6.6. Any party to a hearing may appear with witnesses to testify on his or her behalf; may be heard in person, by counsel or both; may present other evidence in support of his or her position as is considered appropriate by the Board and, when appropriate, may cross-examine witnesses called by the Board in support of the charges or in defense of its decision to deny a license.

6.6.7. The hearing shall be held at a time and place designated by the Board, but no hearing shall be conducted unless and until at least thirty (30) days written notice thereof has been served upon the charged or demanding party and/or his or her attorney in person; or if he or she cannot be found, by delivering the notice at his or her usual place of abode and giving information of its purport, to his wife or her husband, or to any other person found there who is a member of his or her family and above the age of sixteen (16) years; or if neither his wife or her husband nor any such person can be found there, and he or she cannot be found, by leaving the notice posted at the front door of the place of abode; or if he or she does not reside in this state, the notice may be served by the publication thereof once a week for three successive weeks in a newspaper published in this state; or the notice may be served by registered or certified mail.

23CSR3

6.6.8. The hearing shall be open to the general public.

6.6.9. Members of the Board and its officers, agents and employees are competent to testify at the hearing as to material and relevant matters, but no member of the Board who testifies at the hearing may participate in the deliberations or decisions of the Board with respect to the case in which he testified.

6.6.10. The hearing shall be conducted by a quorum of the Board or, in the discretion of the Board, an attorney licensed within this state hired by the Board to serve as hearing examiner, to make written findings of fact and conclusions of law, and to make nonbinding recommendations to the Board as to the appropriate disposition of the case.

6.6.11. A record of the hearing, including the complaint(s), if applicable, the notice of hearing, all pleadings, motions, rulings, stipulations, exhibits, documentary evidence, evidentiary depositions and the stenographic report of the hearing, shall be made and a transcript thereof maintained in the Board's files. Upon request, a copy of the transcript shall be furnished to either party at his or her expense.

6.6.12. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

6.6.13. At any hearing upon a complaint filed against a professional surveyor, or any hearing under subsection 5.2 of this Rule, the Board shall have the burden of proof and shall present its evidence and/or testimony in support of the charges first.

6.6.14. Where a hearing is held upon demand under the provisions of subsections 6.1 of this rule following a denial of a license on the grounds that an applicant is not qualified for a license, the demanding party shall have the burden of proof and shall therefore be required to present his or her evidence first. The Board may require the person demanding the hearing to give security for costs and if the demanding party does not substantially prevail, costs may be assessed against them and may be collected in a civil action or by other proper remedy.

6.6.15. Following the conclusion of the Board's presentation of evidence in accordance with subsection 6.6.13 of this section the Respondent or charged party shall have the right to submit his or her evidence in defense.

6.6.16. Following the conclusion of the demanding party's presentation of evidence in accordance with subsection 6.6.14 of this section, the Board shall have the right to offer its evidence in rebuttal.

6.6.17. The Board may call witnesses to testify in support of its decision to deny a license or in support of the charges instituted against a professional surveyor; may present other evidence to support its position; and, may cross-examine witnesses called by the demanding party or charged party in support of his or her position.

6.6.18. All parties shall have the right to offer opening and closing arguments, not to exceed ten (10) minutes for each presentation.

6.6.19. Hearings held by the Board as a result of a complaint filed against a professional surveyor may be continued or adjourned to a later date or different place by the Board or its designee by appropriate notice to all parties.

6.6.20. Motions for a continuance of a hearing may be granted upon a showing of good cause. Motions for continuance must be in writing and received in the office of the Board no later than seven (7) days before the hearing date. In determining whether good cause exists, consideration will be given to the ability of the party requesting the continuance to proceed effectively without a continuance. A motion for a continuance filed less than seven (7) days from the hearing date may be denied unless the reason for the motion could not have been ascertained earlier. Motions for continuance filed prior to the date of hearing shall be ruled on by the Chairman or Secretary of the Board. All other motions for continuance shall be ruled on by the Board member(s) or the member presiding over the hearing.

6.6.21. All motions related to a case set for hearing before the Board, except motions for continuance and those made during the hearing, shall be in writing and shall be received in the office of the Board at least ten (10) days before the hearing. Prehearing motions may be heard at a prehearing conference or at the hearing prior to the commencement of testimony. The Board member(s) presiding at the hearing shall hear the motions and the response from the non-moving party and shall rule on the motions accordingly.

§23-3-7. Transcription of Testimony and Evidence.

23CSR3

7.1. All testimony, evidence, arguments and rulings on the admissibility of testimony and evidence shall be reported by stenographic notes and characters or by mechanical means.

7.2. All reported materials shall be transcribed. The Board shall have the responsibility to make arrangements for the transcription of the reported testimony and evidence.

7.3. Upon the motion of the Board or any party assigning error or omission in any part of any transcript, the Chairman, presiding member, or hearing examiner shall settle all differences arising as to whether the 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.

7.4. A transcript of the hearing shall be provided to all members of the Board for review at least ten (10) days before the vote is taken on its decision in any disciplinary matter.

§23-3-8. Submission of Proposed Findings of Fact and Conclusions of Law.

8.1. Any party may submit proposed findings of fact and conclusions of law at a time and manner designated by the Board.

8.2. The Board may also initiate or consider stipulation or agreement proposals with regard to the informal disposition of cases and may enter into an agreed stipulation and order without conference.

§23-3-9. Depositions and Discovery.

9.1. Evidentiary depositions may be taken on a voluntary basis and read or otherwise included into evidence as in civil actions in the circuit courts of this state. Neither the Board nor the professional surveyor who is the subject of a disciplinary action is entitled to subpoena witnesses for purposes of discovery depositions.

§23-3-10. Orders.

10.1. Any final order entered by the Board imposing a disciplinary action shall be supported by a written statement of findings of fact and the reasons for the decision. Final orders following hearings shall be made pursuant to the provisions of W. Va. Code §§29A-5-3 and 30-1-8 et seq. Final orders shall be entered within forty-five (45) days following the submission of all documents and materials necessary for the proper disposition of the case, including transcripts, and shall contain findings of fact and conclusions of law.

23CSR3

10.2. The findings of fact and conclusions of law must be approved by a majority of the Board either by a poll or vote at a regular meeting, before a final order is entered. A copy of the final order approved by a majority of the Board shall be served upon the demanding or charged party and/or his or her attorney of record, if any, within ten (10) days after entry by the Board by personal service or by registered or certified mail.

§23-3-11. Appeal.

11.1. An appeal from any final order entered in accordance with these rules shall comply with the provisions of W. Va. Code §§30-1-9 and 29A-6-1 et seq.