



INSTITUTE FOR JUSTICE

March 28, 2024

**Via Email**

Commissioner Vicki Blackwell  
Commissioner Brian Gomillion  
Commissioner Anthony Jones  
Commissioner Joe W. Stedman  
Commissioner James Stroo  
Mississippi Real Estate Commission

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Dear Commissioners,

I write on behalf of the Institute for Justice (“**IJ**”), a national nonprofit law firm, to request that the Mississippi Real Estate Commission (the “**Commission**”) reconsider one of its licensure requirements for real estate salespeople.

Specifically, Commission staff has interpreted a rule requiring real estate brokers to supervise licensees to mean that an applicant for a salesperson’s license must be within roughly a one-hour drive of their supervising broker. *See* 30 Miss. Admin. Code Pt. 1601, R. 3.1(A). The Commission has affirmed that interpretation in a formal order posted to its website. *Order*, Miss. Real Est. Comm’n (Mar. 12, 2021), <https://bit.ly/3SwCQmo> [hereinafter Branch Offices Order].

Respectfully, this requirement is outdated given recent experience working remotely, and it likely violates applicants’ rights under the Mississippi Constitution. The Commission’s response to IJ’s public records request also shows that there is widespread confusion about the requirement and that the Commission’s staff applies it unevenly. IJ requests that the Commission reconsider this unnecessary burden and recognize that brokers now have many ways to keep tabs on their licensees beyond physical proximity.

### **About the Institute for Justice**

IJ is a national nonprofit law firm that has worked to protect people's constitutional rights for over 30 years. Through that work, IJ has sought to reduce burdensome and unnecessary licensing requirements, including in the real estate industry. For instance, IJ recently persuaded the Pennsylvania Supreme Court that Pennsylvania's real estate licensure requirements were unconstitutional as applied to short-term vacation property managers. *See Ladd v. Real Est. Comm'n*, 230 A.3d 1096, 1098, 1116 (Pa. 2020). After the Pennsylvania Supreme Court sent the case back to the trial court for further consideration, the trial court held an evidentiary hearing, declared the law unconstitutional as applied to IJ's client, and prohibited Pennsylvania from enforcing it against her. *See Ladd v. Real Est. Comm'n*, 2022 WL 19332047, at \*17 (Pa. Commw. Ct. Oct. 31, 2022).

### **The One-Hour-Drive Requirement is Outdated and Confusing**

Our work challenging burdensome and unnecessary licensing requirements led us to learn about the Commission's one-hour-drive requirement. This requirement is not a formal, published rule. Instead, it is an unwritten staff interpretation of Commission Rule 3.1. That rule requires a "responsible broker . . . to exercise supervision" of their licensees, including real estate salespeople. 30 Miss. Admin. Code Pt. 1601, R. 3.1(A). On its face, Rule 3.1 does not require salespeople to be within an hour's drive of their responsible brokers. But, "by custom and practice," the Commission's staff has "restricted the issuance of salesperson licenses when the salesperson would be located more than 50 miles or an approximate one-hour drive from their employing/responsible broker." Branch Offices Order 2.

The Commission explained in a brief order later posted to its website that it believes the requirement is necessary "in order that licensees be properly supervised." *Id.* at 3. In that same order, the Commission rejected—without explanation—an applicant's assertion that his broker could use "technology applications such as 'Zoom' video conferencing" for supervision. *Id.* at 4–5. The Commission also rejected—again without explanation—the applicant's expressed willingness to travel to his broker when necessary. *Id.* at 4. Instead, the Commission denied the application because, in its view, the physical distance between the applicant and broker was too great "to be reasonable and satisfactory for the proper supervision of the" applicant. *Id.* at 5–6. It reached that result even though the broker had *already* been supervising the applicant's work in neighboring Tennessee for months. *See id.* at 4.

The Branch Offices Order left us uncertain about many aspects of the one-hour-drive requirement, so we submitted a public records request to learn more. The Commission's response showed widespread confusion among Mississippi applicants and licensees about how exactly the requirement applies in practice. Perhaps most notably, the Mississippi Association of Realtors sent a letter to the Commission expressing some of the same concerns IJ has:

In many instances, rules enforced by staff and the commission are *not mentioned at all in the state statute or the Administrative Rules*; in a few

instances policies of the commission may only be gleaned from questions asked on MREC’s applications/forms. A common example is the ***50-mile radius rule for broker supervision of agents, which isn’t found anywhere in state statute or in MREC’s Administrative Rules***; the application is written upon the assumption that this “rule” is in place, when ***there is no evidence available to the licensees or the public that this “rule” has been adopted by MREC.***

MREC000546 (emphasis added).

Not only does the requirement confuse applicants and licensees, our review of the Commission’s production also revealed that the Commission’s staff applies it unevenly. For one thing, the Commission’s staff has rejected any concrete distance requirement in favor of an “approximately [o]ne hours (*sic*) drive” requirement, though staff members and even the Commission’s application materials have used the mileage and time requirements interchangeably. MREC000644. And according to one broker-applicant’s email, a Commission staffer told her that she also needed to be within 50 miles from where her agents would sell properties—a requirement that would be impossible for non-resident brokers and salespeople to meet. *See* MREC000722. We also saw examples of Commission staff approving applicants who did not meet the requirement. For instance, Commission staff licensed an Atlanta-based salesperson supervised by a broker in Memphis because she claimed to travel to the Memphis area a few times per year to see her family. *See* MREC000684–86. Notably, the applicant in the Branch Offices Order also stated that he would travel to see his broker periodically, yet the Commission and its staff reached the opposite result there. *See* Branch Offices Order at 4.

### **The One-Hour-Drive Requirement Is Unconstitutional**

Conditioning approval of licenses on the applicant’s proximity to their designated broker is unfair, irrational in the Zoom era, and unconstitutional.

#### *The 50-Mile Requirement Burdens the Right to Pursue an Occupation*

For over a century, the Mississippi Supreme Court has held that “[t]he right to follow any of the common occupations of life is an inalienable right.” *Moore v. Grillis*, 39 So. 2d 505, 512 (Miss. 1949) (citation omitted); *see Wilby v. State*, 47 So. 465, 466 (Miss. 1908) (citation omitted). Since then, the Mississippi Supreme Court has guarded that right zealously. For instance, it recently struck down irrational licensing restrictions that prevented anyone ever convicted of a felony from becoming a bail agent. *See Chunn v. State, ex rel. Miss. Dep’t of Ins.*, 156 So. 3d 884, 885–86, 888–89 (Miss. 2015). In doing so, the Supreme Court explained, “A person’s God-given, constitutional liberty to engage in a profession should not so easily be extinguished by the government.” *Id.* at 889.

The Commission’s one-hour-drive requirement is unconstitutional for the same reason: it denies applicants their “inalienable” right to pursue an occupation for no good reason. To be sure, IJ is not questioning the requirement that brokers supervise their

licensees. But the Commission has provided no rationale for requiring brokers to do so from within an hour's drive.

The last four years have shown that employers and others can adequately supervise from a distance using widely available remote-work technologies like Zoom. During the pandemic, even proximity did not always allow for in-person supervision. That experience has shown that distance is not an obstacle to supervision. Indeed, IJ understands through discussions with Mississippi brokers that many do not work out of offices since the License Law expressly allows them to work from home. *See* Miss. Code § 73-35-15. As a practical matter, then, many brokers already opt to supervise their licensees primarily through electronic means, regardless of distance.

Worse yet, the one-hour-drive requirement does not actually advance the implicit goal of fostering in-person supervision. On its face, Rule 3.1 only requires the broker "to exercise supervision," not to do so in person. Thus, an applicant located a 55-minute drive from a broker would get a license even if they never intended to see each other in person, yet an applicant a two-hour drive away who intended to see the broker at least once per week would not. Treating these two applicants differently fails to advance even the implicit goal of in-person supervision.

Even if some in-person supervision were necessary, the Commission has never explained why any commute over one hour precludes that. As noted above, the Branch Offices Order did not address the applicant's offer to travel to his responsible broker when necessary. Nearly ten percent of workers commute over an hour and others drive long distances periodically for work. *See, e.g.,* Press Release, U.S. Census Bureau, *Census Bureau Estimates Show Average One-Way Travel Time to Work Rises to All-Time High* (Mar. 18, 2021), <https://bit.ly/493UzqO>. A one-hour cut-off thus denies licenses to many applicants who would make the journey to meet their brokers in person.

In short, the one-hour-drive requirement lacks a rational relationship to the Commission's stated goal of supervision. Modern technology allows brokers to effectively supervise licensees remotely. Because the Commission does not expressly require in-person supervision, the one-hour-drive requirement does nothing to improve supervision. And the arbitrary choice of "approximately one hour" denies licenses to applicants willing to make the journey to see their responsible brokers as needed.

#### *The One-Hour-Drive Requirement Burdens the Right to Travel*

The one-hour-drive requirement also burdens applicants' right to intrastate travel. The Mississippi Supreme Court has recognized a fundamental right to travel within the state. *See Bell v. Bell*, 572 So. 2d 841, 845 (Miss. 1990). "[O]urs is an increasingly mobile society and . . . opportunities for social, economic, professional and educational advancement frequently dictate to reasonable persons that they move from one community to another." *Id.*

Yet, a real estate salesperson who moves more than an hour's drive from a broker he or she has worked with for years will have to find a new broker or face the almost-

immediate loss of a license. *See* Miss. Code § 73-35-15(2). As noted above, the right to pursue an occupation is an “inalienable” right, so even this temporary deprivation is an impermissible burden given the lack of any compelling justification for it. *See, e.g., Miss. High Sch. Activities Ass’n v. Coleman ex rel. Laymon*, 631 So. 2d 768, 775 (Miss. 1994).

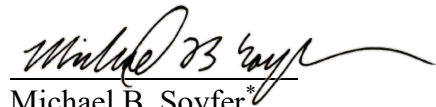
The one-hour-drive requirement penalizes salespeople who move and applicants who want to commute. As a result, it violates the right to travel.

### **Conclusion**

The one-hour-drive requirement is outdated. It places an unnecessary obstacle in the path of would-be salespeople and unconstitutionally burdens their rights to pursue an occupation and to travel. Even setting aside the constitutional issues, it confounds the entire industry, particularly since the Commission applies it inconsistently. The Commission should reconsider the one-hour-drive requirement.

Should you wish to discuss this further, I am available at the email address and phone number below (and I ask that you also copy my colleague Joshua Windham). If there is a formal process for submitting requests to reconsider Commission rules and practices, I would also be happy to use that process.

Sincerely,



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