



REAL ESTATE

WINTER

2009

NEWS & VIEWS

NORTH DAKOTA REAL ESTATE COMMISSION SCHEDULES RULES HEARING

A public hearing to receive comments on proposed rules changes is scheduled for 8:30 am CT, Tuesday, January 26, 2010 in the Peace Garden Room, State Capital 600 E Boulevard Ave, Bismarck, North Dakota

The purpose of the amendments is to comply with changes in the NDCC § 43-23-08.2 during the 2009 Legislative Session and to clarify certain provisions pertaining to earnest money and designated broker responsibilities.

Written comments may be submitted to the North Dakota Real Estate Commission, PO Box 727, Bismarck, ND 58502-0727 until February 6, 2010. If you plan to attend the public hearing and will need special facilities or assistance relating to a disability, please contact the North Dakota Real Estate Commission at the above address or call 701-328-9749 at least 7 days prior to the public hearing.

The following are the Commission's proposed rules and amendments to be considered. Original language is stricken and new language is underlined. The reason for recommended adoption appears in the gray area.

CONTINUING EDUCATION

70-02-04-02. Hours required. To qualify for the renewal of a real estate license, each broker or salesperson must complete sixteen hours of continuing education in approved courses before January 1, 2002, and every two years thereafter. A minimum of six of the required sixteen hours of continuing education must be completed in the first year of each two-year period: the number of hours of continuing education as determined by the commission. The commission may require that up to six hours of the total completed each two-year period a portion or all of the continuing education hours must be in one or more specific areas. Such areas may include the following:

1. Fair housing and antitrust.
2. Environmental issues.
3. License law and ethics.
4. Agency law and principles.
5. Contracts.

History: Effective August 1, 1981; amended effective January 1, 1992; October 1, 1993; December 1, 1999.

General Authority: NDCC ~~43-23-08.2~~ 28-32-02, 43-23-08(6)

Law Implemented: NDCC 43-23-08.2



70-02-04-13. Substantively identical offerings. Courses may not be taken for continuing education more than once during any two-year continuing education period, unless material has been significantly changed, or updated, or both. **History:** Effective August 1, 1981; amended effective December 1, 1999.

General Authority: NDCC ~~43-23-08.2~~ 28-32-02, 43-23-08(6)

Law Implemented: NDCC 43-23-08.2

70-02-04-15. Exemptions from continuing education requirement. Any salesperson applicant, upon successful completion of the required postlicensing education requirement, evidence of which has been furnished to the commission by the salesperson applicant's broker, is exempt from the continuing education requirement for only the two-year continuing education period during which the salesperson applicant successfully completed the postlicensing education. Any broker applicant, upon successful completion of the real estate licensing examination is exempt from the continuing education requirement for only the two-year continuing education period during which the broker applicant successfully completed said examination. **History:** Effective August 1, 1981; amended effective January 1, 1992; December 1, 1999; January 1, 2006.



Constance Hofland

Blowin' in the Wind

New Legislation You Need to Know to Negotiate Wind Leases

Constance Hofland
Legal Counsel to the
North Dakota Real Estate Commission

The scope of real estate transactions that require a real estate license, according to current statutes in chapter 43-23 of the North Dakota Century Code, is broad and includes negotiation of leases for wind energy by a third party. Also, none of the existing exceptions for “oil, gas or mineral leases” or “any other mineral leasehold, mineral estate, or mineral interest of any nature whatsoever” can reasonably be interpreted to apply to leases for wind energy.

If you plan to get involved in negotiating leases for wind energy, it is important to note that in 2009 North Dakota enacted legislation that establishes very specific requirements for wind leases and wind easements. This article is just a general discussion as a “heads up” on this issue. Consult the statute itself for the specific requirements, of which there are many.

New legislation on wind leases

Chapter 17-04 of the North Dakota Century Code covers wind energy property rights. The new section, 17-04-06, was enacted this year. This section adds several specific requirements for wind easements and wind energy leases, including in some instances, a certain required font size. It is important to thoroughly review this statute if you are involved in negotiating wind easements or leases.

For example, the lease or easement must be delivered to the property owner with a cover page containing the specific paragraph that is in the statute, in 16-point type. This paragraph starts off with “Special message to property owners” and goes on to point out the agreement is important, binding, needs to be studied, and hiring a lawyer is strongly encouraged. The language also suggests the property owner talk to neighbors about contracts they have received. NDCC 17-04-06(1)(a).

Section 17-04-06(1), in subsections (b) through (i), lists several other “musts” and should be reviewed carefully. Some of these “musts” include a 10-day waiting period between delivery of the lease and execution, the prohibition against any requirement to keep negotiations confidential, and the need to preserve the right of the property owner to be able to continue conducting current business operations during the term of the agreement. Also, the property owner cannot be made liable for property tax associated with the wind energy facility; damages caused by the wind energy facility; or violations of laws by the developer, owner or operator.

The property owner must be allowed to terminate the agreement if the wind energy facility has not operated for a period of at least three years, unless the property owner is paid the minimum lease payments that would have been paid if it had been operating during that time. The statute goes on to define “normal minimum lease payments.”

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POSTURES FOR SUCCESS

Self-Esteem

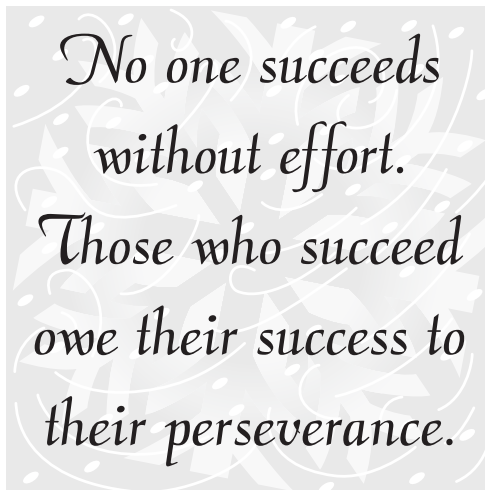
Do you value yourself? While almost everyone enjoys being praised on occasion, successful people know their own value and don't always rely on others to tell them they are worthwhile.

Accepting Of Life's Challenges

People who are successful choose a variety of interesting activities to make their lives more satisfying. Successful people have learned to "roll with the punch" when they experience disappointment or unexpected setbacks. They are able to handle challenges at each stage of life, even though they might be temporarily put off by them.

Flexibility

Are you flexible or do you always have to be right? People who are successful are able to accept their mistakes, admit them, and then move on. Successful people understand that everyone experiences some frustration in life and they accept the need to be flexible enough to meet the difficult demands placed upon them.



Continued from page 2

Also, the agreement must state clearly any circumstances that would allow the developer, owner, and operator of the wind facility to withhold payments for the property owner. The owner of the facility must carry general liability insurance for property damage or bodily injury arising out of the construction or operation of the wind facility.

This is just a quick overview to let you know these specific requirements exist. You "must" study the statute itself for the specifics.

Realistic Expectations

Do you expect too much of yourself? Of others? While successful people can and do set goals to reach for, they are realistic about what they can accomplish. People who are successful are not afraid to say "no" to themselves or others when it's clear the expectation is too great.

Acceptance of Responsibility

Do you accept responsibility for what you do and the choices you make? While almost everyone makes excuses once in a while, successful people are able to accept responsibility for themselves and their actions. At the same time, they refrain from denying responsibility or blaming others.

Ability to Live & Learn

If you can't influence an event, accept the circumstances, and let go. People who are successful learn from disappointment, and then use what they've learned to get greater satisfaction from life. In this way, successful people direct their energy toward making important goals and dreams a reality.

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Just In Case.....

Be sure you receive a certificate of completion for every continuing education course you take and keep your certificates in a safe place. Even though you are NOT required to submit proof of continuing education when renewing your license, you WILL need to furnish certificates if you are audited.

If you are chosen for the continuing education audit, you will receive a notice from the Commission asking you to send your certificates for 16 hours of approved continuing education.

You will be subject to disciplinary action if you are audited and are unable to show that you had completed the continuing education requirement before submitting your renewal to the Commission. Disciplinary action may include penalties such as a fine, additional education, suspension or revocation of your license.

Your livelihood is at stake. Be sure you have completed all the requirements for renewal BEFORE you submit your renewal application and that you are able to produce all necessary certificates of completion as evidence.

Court Cases of Interest

Reprinted with permission from ARELLO Latest Court Decisions 2008-2009

Mistaken Foreclosure

Countrywide v. Thitchener, 192 P.3d 243 (2008)
Nevada Supreme Court

Facts: Countrywide held the mortgage on the Thitcheners' Las Vegas condo. When Thitchener was deployed to Arizona for National Guard Service, the family moved there, but kept their Las Vegas home. Thitchener fell behind on his payments and Countrywide threatened foreclosure. The deficiency was cured, however, before proceedings commenced. Soon thereafter, Countrywide commenced foreclosure on another condo in the same complex. They confused the unit with Thitchener's and hired a broker to prepare the unit for resale. The broker suspected a mistake, but Countrywide insisted there was no error. All of the Thitcheners' possessions were disposed of and the utilities were switched out of Thitchener's name. Countrywide discovered they had prepped the wrong unit for sale, but did not contact Thitchener. When Thitchener discovered that the utilities had been switched he attempted to contact Countrywide, but they would not respond. He returned to the unit to find it empty. Thitchener sued and won a \$3,000,000 judgment which included compensatory and punitive damages. Countrywide appealed.

Issue: Whether the trial court's judgment was excessive.

Held: Affirmed in part, reversed in part. The trial court allowed the Thitcheners to recover \$300,000 compensatory damages three times, once for trespass, once for breach, and once for negligence. Compensatory damages cannot exceed actual loss so the court reduced the damages to just one \$300,000 award. The court also disallowed treble damages for unlawful entry because the statute only contemplated damage to real property and not personal property. The court allowed the nearly \$1,000,000 punitive award to stand because Countrywide had acted with extreme disregard of the Thitcheners' rights and the award was proportionate to the actual damages.

Short Sale Commission

Stewart v. All States Quality Foods, 2009 Iowa App. LEXIS 427,
2009 WL 1499539 (2009)
Court of Appeals of Iowa

Facts: All States listed a warehouse for sale with Stewart, a broker. While the property was for sale, Stewart procured a tenant whose lease included a right of first refusal. The warehouse was mortgaged to a private lender. When All States had difficulty paying the lender, the lender hired Kessler to help wind down All States' business. Stewart found a buyer who made an offer to purchase the warehouse for less than the mortgage. Kessler authorized All States to make a counter offer for an amount that was still too little to pay off the lender. The buyer accepted, but the tenant stepped in to exercise its first refusal right. The tenant was prepared to close with All States when the lender refused to release its lien unless the tenant paid more. The transaction fell apart and Stewart sued All States and the lender for breach of contract and interference with the broker's listing agreement. The trial court found in favor of the broker and the lender appealed.

Issue: Whether the lender who rejected the short sale should be liable for a broker's commission.

Held: Affirmed. The court held that even though Kessler took on a

managerial role in All States' business, his activity was insufficient to make the lender liable for the listing contract. Consequently, the court rejected Stewart's breach of contract theory. The lender acted in bad faith, however, when it refused to release its lien. Normally, a party does nothing wrong when it acts to protect its contractual rights; but because the lender had approved the counter offer that became the contract, it acted in bad faith when it later upset the closing. Its conduct harmed Stewart who worked to put the deal together.

Seller's Liability to Buyer Agent

Valdina v. Martin, 849 N.Y.S.2d 364 (2008)
Supreme Court of N.Y., Appellate Division

Facts: Martin listed her property for sale with Old Ghent Realty. The commission rate was 6%. Valdina, an independent broker, found a buyer for Martin's property. The parties executed a "binder agreement" which required formal contracts and partial down payment. Martin's attorney prepared the formal contract and the buyer signed it. Martin, however, changed her mind about the sale. She returned the buyer's money and refused to sign the contract. Valdina sued Martin and Old Ghent claiming \$22,500 or half of the 6% commission. The trial court dismissed Valdina's suit and he appealed.

Issue: Whether an agent working with or for a buyer may sue for a commission when the seller refuses to complete a transaction.

Held: Affirmed. Valdina had no contract with Martin and, consequently, no claim for payment. Martin's contract was with Old Ghent only. The court also found that Valdina had no claim against Old Ghent. A listing agent's promise to share commissions with another broker is always conditioned upon the listing agent's actual receipt of the commission. Here, Old Ghent did not get paid and did not pursue payment. Thus it had no liability to Valdina.

Listing Broker Cannot Recover Commissions from Defaulting Buyer

Martin v. Avigdor, 2009 WL 1478922 (2009)
California Court of Appeals

Facts: Listing broker entered into a listing agreement with Sellers. The listing agreement provided that if completion of a sale is prevented by a party to the transaction other than Seller then broker compensation was due only if and when Seller collects damages by suit, arbitration, settlement or otherwise. Sellers and Buyers entered into a standardized California Association of Realtors "Residential Purchase Agreement and Joint Escrow Instructions." The brokers for both parties to the transaction agreed to reduce their commissions and the Purchase Agreement contained the following handwritten language: "The commission for [Selling Broker] to be \$40,000— and \$30,000 to [Listing Broker]." Subsequently, Buyers failed to timely complete the purchase and Listing Broker sued Buyers for his commission, claiming he was a third party beneficiary to the Purchase Agreement.

Issue: Can a listing broker recover a commission from buyers, who failed to close the transaction, under a third-party beneficiary theory?

Held: No, the court said that, while the listing broker would have surely benefited from the buyers' performance, there was nothing to indicate that either the buyers or sellers entered into the purchase agreement with the intent to benefit the listing broker. The listing broker's benefit would have been incidental to the buyers' completed performance.

General Authority: NDCC ~~43-23-08.2~~ 28-32-02, 43-23-08(6)

Law Implemented: NDCC 43-23-08.2

70-02-04-16. Service as a lecturer, discussion leader, or speaker. For those persons who serve as a lecturer, discussion leader, or speaker regarding a real estate continuing education program, the commission will grant one-hour credit for every hour of service as an instructor or speaker. Requests for credit must be accompanied by an outline of the instruction, discussion, or speech. No credit shall be given for the teaching of a course which is the same or substantially the same as one taught for credit within the same ~~two-year~~ **continuing education** period. The maximum credit given for service as a lecturer, discussion leader, or speaker will not exceed fifty percent of the continuing education requirement for any ~~two-year~~ **continuing education** period.

History: Effective August 1, 1981; amended effective December 1, 1999.

General Authority: NDCC ~~43-23-08.2~~ 28-32-02, 43-23-08(6)

Law Implemented: NDCC 43-23-08.2

70-02-01-05. Inactive licenses.

1. A qualified licensed salesperson desiring to place the salesperson's license on an inactive status may do so by having the broker with whom the salesperson is associated surrender the salesperson's license to the commission, with a written request from the salesperson that the salesperson's license be placed on an inactive status. The salesperson may keep the salesperson's license on an inactive status for an indefinite period from the date the license is surrendered. The salesperson placing the salesperson's license on inactive status shall pay the required fee for such salesperson's license each year. A salesperson whose license is in an inactive status shall not engage in any manner in any of the activities described under North Dakota Century Code chapters 43-23 and 43-23.1, until the salesperson shall first request that the salesperson's license be reactivated by the commission. During the time that a salesperson's license is on an inactive status educational requirements do not need to be met. However, if any applicable education requirements are unsatisfied, proof of fulfillment must be submitted before the license can be reissued on an active status.

2. A qualified licensed broker who withdraws from the real estate business entirely and who desires to place the broker's license on an inactive status may do so by surrendering the broker's license to the commission, with a written request that the license be placed on an inactive status. The broker may keep the broker's license on an inactive status for an indefinite period from the date of expiration of the license surrendered. The broker placing the broker's license on inactive status shall pay the required fee for such broker's license each year. During the time that a broker's license is on an inactive status educational requirements do not need to be met. However, if any applicable education requirements are unsatisfied, proof of fulfillment must be submitted before the

license can be reissued on an active status.

3. While a license is on inactive status it is not necessary, in the case of a broker, to maintain an active trust account.

4. ~~Applicable education requirements for the reactivation of a license shall consist of eight hours for each year of inactive status, but not to exceed sixteen hours~~ **To reactivate an inactive license, a licensee must meet the continuing education hours as required by North Dakota Century Code section 43-23-08.2 for each continuing education period the licensee's license was inactive, not to exceed the number of hours required for the three continuing education periods prior to reactivation.** The requirements of North Dakota Century Code section 43-23-08.2 must have been fulfilled within the ~~two~~ **three** years immediately preceding the return to active status.

History: Amended May 1, 1986; January 1, 1992; February 1, 2004.

General Authority: NDCC 28-32-02, 43-23-08(7-6)

Law Implemented: NDCC 43-23-08.2

Proposed amendments to 70-02-04-02, 70-02-04-13, 70-02-04-15, and 70-02-04-16 reflect the change in NDCC § 43-23-08.2 during the 2009 legislative session authorizing the ND Real Estate Commission to establish the continuing education requirements. Proposed amendment to 70-02-01-05 clarifies the number of hours a licensee will need to activate their inactive license.

70-02-01-15. Trust account requirements - Handling of funds - Records.

1. All moneys belonging to others and accepted by the broker while acting in the capacity as a broker shall be deposited in an authorized financial institution in this state in an account separate from money belonging to the broker. Clients' funds shall be retained in the depository until the transaction involved is consummated or terminated, at which time the broker shall account for the full amounts received.

- a. **Definitions.** The term "authorized financial institution" means a bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company authorized by federal or state law to do business in this state and insured by the federal deposit insurance corporation, the national credit union share insurance fund, or the federal savings and loan insurance corporation.
- b. **Name of account.** The name of such separate account shall be identified by the words "trust account" or "escrow account".
- c. **Notification.** Each broker shall notify the commission of the name of the institution in which the trust account or accounts are maintained and also the name of the accounts on forms provided therefore. A trust account card shall be filed with the commission by each new applicant for a real estate broker's license. A new form shall be filed with the commission each time a broker changes the

real estate trust account in any manner whatsoever including, but not limited to, change of depository, change of account number, change of business name, or change of method of doing business. The form shall be filed with the commission within ten days after the aforementioned change takes place.

- d. **Authorization.** Each broker shall authorize the commission to examine and audit the trust account and shall complete an authorization form attesting to the trust account and consenting to the examination and audit of the account by a duly authorized representative of the commission.
 - e. **Commingling prohibited.** Each broker shall only deposit trust funds received on real estate transactions in the broker's trust account and shall not commingle the broker's personal funds or other funds in the trust account with the exception that a broker may deposit and keep a sum not to exceed five hundred dollars in the account from the broker's personal funds which sum shall be specifically identified and deposited to cover service charges relating to the trust account.
 - f. **Number of accounts.** A broker may maintain more than one trust account provided the commission is advised of the account.
 - g. **Time of deposit.** Each broker shall deposit all real estate trust money received by the broker or the broker's salesperson in the trust account within twenty-four hours of receipt of the money by the broker or the salesperson unless otherwise provided in the purchase contract. In the event the trust money is received on a day prior to a holiday or other day the depository is closed, the money shall then be deposited on the next business day of the depository.
 - h. **Responsibility.** When a broker is registered in the office of the real estate commission as in the employ of another broker, the responsibility for the maintenance of a separate account shall be the responsibility of the employing broker.
 - i. **Interest-bearing accounts.** All trust accounts must be interest-bearing and the interest earned must be disbursed only as provided by law, unless all persons having an interest in the funds have otherwise agreed in writing and a copy of the agreement is maintained by the broker for inspection by the commission.
2. Brokers are responsible at all times for deposits and earnest money accepted by them or their salespersons.
- a. **Personal payments.** No payments of personal indebtedness of the broker shall be made from the separate account other than a withdrawal of earned commissions payable to the broker or withdrawals made on behalf of the beneficiaries of the separate account.
 - b. **Withdrawals.** Money held in the separate account which is due and payable to the broker should be withdrawn promptly.
 - c. **Earnest money.** A broker shall not be entitled to any

part of the earnest money or other moneys paid to the broker in connection with any real estate transaction as part or all of the broker's commission or fee until the transaction has been consummated or terminated. The earnest money contract shall include a separate written provision, approved by all parties including the broker, for any division of moneys taken in earnest, when the transaction is not consummated and such moneys are retained as forfeiture payment.

3. A broker shall maintain in the broker's office a complete record of all moneys received or escrowed on real estate transactions, in the following manner:
- a. **Bank deposit slips.** A bank deposit slip showing the date of deposit, amount, source of the money, and where deposited.
 - b. **Bank statements.** Monthly bank statements are to be retained and kept on file.
 - c. **Trust account checks.** Trust account checks should be numbered and all voided checks retained. The checks should denote the broker's business name, address, and should be designated as "real estate trust account".
 - d. **Journal.** A permanently bound record book called a journal which shows the chronological sequence in which funds are received and disbursed:
 - (1) For funds received, the journal must include the date, the name of the party who is giving the money, the name of the principal, and the amount.
 - (2) For disbursements, the journal must include the date, the payee, and the amount.
 - (3) For interest earned and withdrawn, the journal must include the amount, the date earned or withdrawn, and the payee.
 - (4) A running balance must be shown after each entry (receipt or disbursement).
 - e. **Ledger.** This record book will show the receipt and the disbursements as they affect a single, particular transaction as between buyer and seller, etc. The ledger must include the names of both parties to a transaction, the dates, and the amounts received. When disbursing funds, the date, payee, and amount must be shown.
 - f. **Reconciliation.** The trust account must be reconciled monthly except in the case where there had been no activity during that month.
 - g. **Maintain records.** Every broker shall keep permanent records of all funds and property of others received by the broker for not less than six years from the date of receipt of any such funds or property.

History: Amended effective August 1, 1981; January 1, 1992; April 1, 1992; December 1, 1999.

General Authority: NDCC 43-23-14.1, 43-23.4-06(2)

Law Implemented: NDCC 43-23-11.1(1)

Proposed amendment clarifies that provisions concerning earnest money be in writing.

OFFICE POLICY

70-02-03-17. Designated broker - Appointed agent.

1. **Responsibilities of designated broker.** The designated broker must have a written company policy that identifies and describes the types of real estate agency relationships in which the agency may engage. In addition, any agency that offers representation to both buyers and sellers must also address in the policy manual the agency's procedures intended to prevent any mishandling of information through both formal and informal sharing of information within the agency, the arrangement of agency office space, and the personal relationships of appointed agents who are representing clients with adverse interests.

21. Appointed agent procedures and disclosure.

a. A designated broker appointing a licensee to act as an agent of a client shall take ordinary and necessary care to protect confidential information disclosed by the client to the appointed agent.

b. An appointed agent may reveal to the agency's designated broker confidential information of a client for seeking advice or assistance for the benefit of the client about a possible transaction. The designated broker shall treat confidential information as such and may not disclose such information unless otherwise requested or permitted by the client who originally disclosed the confidential information.

32. Appointed agent - Written disclosure.

a. An appointed agent shall disclose in writing such appointment to the client before entering into a brokerage agreement and shall include, at a minimum, the following provisions:

- (1) The name of the appointed agent;
- (2) A statement that the appointed agent will be the client's agent and will owe the client fiduciary duties, which among other things, include the obligation not to reveal confidential information obtained from the client to other licensees, except to the designated broker for seeking advice or assistance for the benefit of the client;
- (3) A statement that the agency may be representing both the seller and the buyer in connection with the sale or purchase of real estate;
- (4) A statement that other licensees may be appointed during the term of the brokerage agreement should the appointed agent not be able to fulfill the terms of the brokerage agreement or as by agreement between the designated broker and client. An appointment of another agent as a new or additional agent does not relieve the first appointed agent of any of the fiduciary duties owed to the client. At the time of the appointment of the new or additional agents, the designated broker must comply with the provisions of this section; and
- (5) A section for the client to consent or not consent, in writing, to the appointment.

43. **Appointed agent's duty to the designated broker.** In any appointed agent transaction, the appointed agent shall keep the designated broker fully informed of all activities conducted by the appointed agent during the transaction and

shall notify the designated broker of any other activities that might affect the responsibility of the designated broker.

History: Effective April 1, 1996.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 43-23-12.3

70-02-01-21. Responsibilities of designated broker. The designated broker must have a written company policy that identifies and describes the types of real estate agency relationships in which the agency may engage. In addition, any agency that offers representation to both buyers and sellers must also address in the policy manual the agency's procedures intended to prevent any mishandling of information through both formal and informal sharing of information within the agency, the arrangement of agency office space, and the personal relationships of agents who are representing clients with adverse interests.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 43-23-12.1

Proposed rule change moves the "Responsibilities of designated broker" to a more appropriate section of the Administrative Rules.

Proposed amendments to the Administrative Rules were approved by the ND Real Estate Commission on November 18, 2009.

*Each day comes
bearing its own gifts.*

*Untie the
ribbons.*

-Ruth Ann Schabacker



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*Amid the holiday hustle
and bustle may you
find time to pause, reflect
and rejoice in the true
meaning of Christmas.*

*Merry Christmas & Happy New Year,
Commissioners and Staff*