

## Agency

Hafa Adai! This is the first in a series of articles that will be provided by the Guam Real Estate Commission in an effort to provide useful information to you as a buyer, seller, landlord, and tenant as it relates to real estate transactions on Guam. Today we will discuss the concept of agency, the underlying concept that establishes the rights and obligations that real estate licensees have towards the people they work for and work with. In our discussion, we will touch on two types of agency: Single Agency and Dual Agency. All agency relationships are established between a “principal” and an “agent”, who is authorized to represent the principal in a real estate transaction. The most common type of agency is established when a principal (property owner) hires a real estate broker as his or her agent to sell or lease the principal’s property. This relationship is normally established in writing through a “listing agreement”, which is a contract between the two parties to either sell or lease the owner’s property. In this scenario, the broker and his or her respective real estate agents, are the “selling agent” for the property owner (who is also referred to as the agent’s client). The selling agent has certain duties and obligations to both the property owner and any potential buyers or renters (who are also referred to as the agent’s customers) of the property they are representing. All selling agents owe certain fiduciary duties to their clients including:

1. Obedience: Obey all lawful instructions from the property owner
2. Loyalty: Take no action that is adverse to the best interest of their client.
3. Disclosure: Fully disclose all known material facts to their client, regardless of whether they benefit or negatively impact their client.
4. Confidentiality: All information relative to their client’s motivation or finances must be kept confidential.
5. Accountability: All agents must keep accurate and timely records of money received from or on behalf of their client in a transaction.
6. Reasonable Care: All agents must exercise care, competency, and proper due diligence to protect their client’s best interests.

In addition to these specific duties to their client, all agents must also exercise reasonable care, honesty, good faith, and disclose all known material facts that may negatively affect a customer’s decision in the real estate transaction.

A second type of “single agency” is established when an agent works exclusively for a buyer or tenant. This relationship is normally established in writing through a “buyer’s representation agreement”. The agent has the same duties and obligations under this scenario as in the previously mentioned “seller’s” relationship. Having a buyer’s representation agreement will eliminate possible conflicts of interest down the road attributed to whether or not your agent actually represents you or the seller/landlord in a transaction.

In some cases, an agent may represent both the buyer and the seller in the same real estate transaction, or two agents from the same real estate brokerage company may be representing the buyer and seller in the same transaction. This is referred to as “dual agency”, and while Guam has no established laws on dual agency, both parties to a real estate transaction should be made aware of the situation and agree to it in writing to avoid potential conflicts during the negotiation and closing process. The simple reason behind this is the fact that in a “dual agency” relationship, the agent is limited in what fiduciary duties and obligations they have to each party in the transaction, thereby, not being able to fully represent both clients in their total best interest. To clarify, the agent representing the seller tries to get the highest and best price, while the agent for the buyer tries to get the lowest and best price. By its very nature, this is impossible for a dual agent to accomplish. That is not to say, however, that if two parties to a real estate transaction are experienced in real estate and feel comfortable with one party representing both sides, they need to use different real estate agents.

For most of us, using a licensed real estate professional in the buying and selling of real estate makes sense, especially for first time buyers or individuals not familiar with the real estate market on Guam. To get the most out of your experience with a real estate professional, make sure you clarify upfront what kind of relationship you want, and make sure you get it in writing. Our goal at the Real Estate Commission is to ensure that all parties to a real estate transaction on Guam are informed and properly represented. If you have any questions or concerns about a real estate transaction, please contact the real estate licensing division of the Department of Revenue and Taxation for assistance.

“Caveat Emptor”... Buyer Beware! Historically, laws relating to the parties in a business relationship were rooted in the belief that the buyers were expected to perform the necessary due diligence to protect their interests in the transaction, and had to deal with the consequences of not fully investigating all matters related to the respective transaction. Over the years, especially as it relates to real estate transactions, this burden has shifted to one of “disclosure”, with laws that promote consumer protection through honesty and good faith dealing by all parties involved. Every jurisdiction in the United States follows some form of “Seller’s Disclosure” with respect to real estate transactions. The Real Estate Commission is currently working with Senator Moylan’s office in creating a “Seller’s Disclosure” law that ensures all parties to a real estate transaction on Guam are treated in a fair and honest manner.

First of all, what is a “Seller’s Disclosure”? It is a written statement that is prepared by the seller or at the seller’s direction, that fully and accurately discloses all past and present material facts related to a residential property being sold. A material fact is any fact, defect, or condition, past or present, which would be expected to measurably affect the value to a reasonable person of the residential real property being offered for sale. The information being disclosed should be 1) facts based on the personal/actual knowledge of the seller; 2) issues that can be observed from visible and accessible areas within the property; and 3) facts that are required by federal or state/territory law such as lead paint and asbestos disclosures. The premise behind having a “Seller’s Disclosure” law is that once the seller provides full and accurate information on any existing or previous problems with the home, land, or property, the buyer can decide for themselves whether or not those issues are something they can live with.

A “Seller’s Disclosure” should be prepared by the seller in good faith and with due care, which means that the seller should be honest and factual when making any disclosures. Sellers may draw upon information known to them personally, facts provided by governmental agencies/departments, reports provided by third parties (surveys, termite reports, engineers, contractors, etc), and managers of homeowner associations if appropriate. Sellers however are not obligated to hire independent contractors or engage the services of third party professionals when preparing a “Seller’s Disclosure” report. A thorough “Seller’s Disclosure” report will include information and comments on any condition or factor that could affect the buyer’s decision to buy the property, the value of the property, or the use of the property. Information might include items affecting title to the property, problems or defects with the house operating systems (electrical, plumbing, sewer/septic, air-conditioning), fixtures and appliances, structural concerns, land issues (drainage, flooding, encroachments), zoning compliance, environmental regulations affecting the property, infestation, legal matters affecting the property (liens, law suits), stigmatized property concerns, or common area issues. An experienced seller’s agent will be able to assist the seller in preparing a disclosure report,

but it is not the responsibility of the agent to provide information, answers, or comments regarding any information concerning the property.

A “Seller’s Disclosure” report, however, should not be considered as a substitute for any inspection report, personal advice, or warranty provided by a third party professional. An experienced buyer’s agent will ensure that the buyer personally inspects and examines any property they plan to purchase for apparent defects, as well as recommend a home inspection by a licensed home inspector prior to the purchase.

Win-Win-Win! Having a good “Seller Disclosure” law and related disclosure form is a benefit for the buyer, seller, and real estate professional. The buyer benefits from obtaining and reviewing key information on the property they are considering for purchase. They are better able to make an informed decision and negotiate the best possible purchase price. The seller benefits by enhancing the marketing of his or her property in several ways. First, he or she may find through the disclosure process that they can make necessary repairs or improvements to the property prior to marketing it, thereby helping to get a better price. Second, by having detailed information on the property, buyers feel more comfortable in making an offer, which can result in higher prices and faster closings. Sellers are also able to market the property “as is” since they have disclosed all material facts related to the property, thereby avoiding legal issues from buyers who have issues with the property after the purchase is completed. Real estate professionals benefit by having more information available to them in marketing the property, as well as, minimizing personal risk associated with unhappy buyers who feel they were misled by incorrect or inaccurate information on the property.

We hope to get a “Seller’s Disclosure” law on the books soon. In the meantime, experienced real estate professionals can assist you in putting together a “Seller’s Disclosure” report when planning to sell your home. In the end, the more you disclose, the safer you are in this ever increasing “consumer protection” environment we all live in. If you have any concerns or comments about disclosure issues, please contact the real estate licensing division of the Department of Revenue and Taxation.

