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THE ROLE AND LIABILITY OF THE QUALIFYING AGENT IN A CORPORATE STRUCTURE

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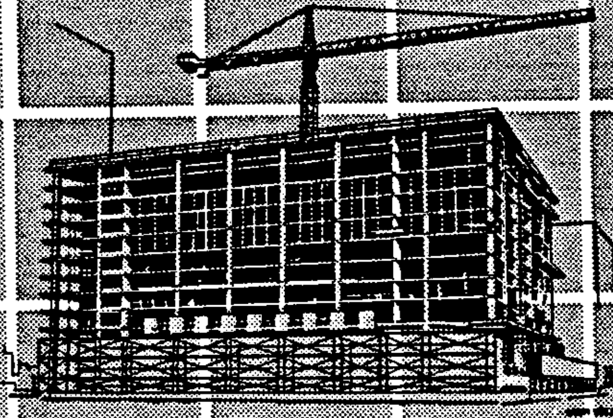

Professor Wilson C. Barnes A.I.A.
Project Director

Professor Larry R. Leiby Esq.
Co-Project Director

Florida International University
Department of Construction Management
Miami, Florida
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J.R. (Jock) Crockett - Contractor, Ft. Lauderdale

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EXECUTIVE SUMMARY

Research into the role and liability of the construction qualifying agent in the Florida corporate structure has been approached through inquiry in two primary areas: 1) the consequence of licensing legislation and disciplinary actions of the Construction Industry Licensing Board; 2) the length of time for which a construction firm or professional may be exposed for claims of liability. Analysis and discussion of the second area has proven to be relatively simple. On the other hand, the first area has proven to be more complex.

Previously applicable and current versions of chapter 489 of the Florida Statutes were examined on the main subject of inquiry. Provisions of the 1993 version, which address the role and/or liability of the qualifier, have been analyzed and discussed in detail. Relevant decisions of Florida courts on this subject have been identified and reviewed thoroughly. An attempt was made to determine if a precedential trend has been established through judicial interpretation of the statutes.

A survey type questionnaire solicited opinion on construction related questions of interest. The questionnaire was sent to primarily contractors and subcontractors. Their responses have been presented statistically along with interpretive comment in this report. Examination of relevant statutes and case law of states who regulate construction in a manner similar to Florida was also conducted. Comparative analyses illuminated areas of agreement and issues of disparity. Questions are raised about the merits of certain language present in the statutes and certain issues as yet unaddressed by statute.

FINDINGS, CONCLUSIONS, and RECOMMENDATIONS

Findings. With regard to construction specific law; i.e., that set forth in chapter 489 of the Florida Statutes, it is unclear whether or not the statutorily imposed (by 489) obligations can result in a *civil* cause of action against the qualifier. The Florida District Courts of Appeal have come down on both sides of this question. The issue is now before the Florida Supreme Court. It is therefore fair to say that this issue is unresolved and will remain so until the Florida Supreme Court makes their decision. Commentary is provided on the position of other states on this issue.

There are several other provisions of the 1993 version of chapter 489, which the research team, considered to be potential areas of concern for construction qualifiers. The first has to do with the newly authorized financially responsible officer. Despite an apparent attempt to shift the financial responsibility previously borne by the primary qualifier, he or she appears to still ultimately be responsible for all financial matters associated with a project. This would negate any shifting of responsibility to the person controlling the purse strings and leave responsibility with the qualifier. The second has to do with the new authorization for a license issued to a firm as opposed to an individual. Will the corporate shield prevail or will a yet to be determined judicial interpretation extend liability to individuals?

With regard to law that primarily addresses the time for exposure, the research team examined Florida Statute 95.11(3)(c) (1990) as having significant impact. It appears that the times prescribed in that statute (also know as the statute of limitations and statute of repose) may be excessive at fifteen years compared to comparable other states setting a maximum of ten years. This is in contrast to other routine statutes and or regulations governing the conduct of

business in general throughout the country. In addition, qualifiers may face liability under the worker's compensation laws.

Not addressed at all, yet spoken to with considerable detail and substance in other states, are the issues of: bonding of qualifiers, limits to the number of corporations an individual can qualify, and/or equity requirement ties between multiple jobs for a qualifying entity.

The research illuminated financial responsibility as a paramount concern of governmental bodies writing construction legislation in that the perceived need for greater financial responsibility in the industry seems to be driving much of the legislation.

Conclusions. The research undertaken in this project has highlighted considerable evidence bearing directly on the issue of liability. In the face of this evidence the research team has concluded that the construction qualifying agent may have liability that is more akin to that of a professional, than that of an officer of a commercial enterprise. Typically however, liability results from either (1) ignorance of the responsibility undertaken by the qualifying agent, or (2) a lack of comprehension of the risks undertaken, or (3) the negligent or intentional failure to exercise due care known to be undertaken.

Recommendations. Chapter 93-166, Laws of Florida, amending Chapter 489 made significant progress toward solving the ignorance problem by imposing continuing education requirements. Ignorance of the liability undertaken was not more pronounced with new licensees. Neither was there a proportionate relationship of disciplinary actions against licensees who passed an examination as distinguished from those grandfathered in without examination. Effort should be expended to continue refining the language of that work. Specifically, the issue of the financially responsible officer and his or her ultimate liability vis-a-vis that of the primary

qualifier, as well as the phrase "financial responsibility," need to be reviewed by the legislature for intent, and perhaps further defined. There may also be merit in setting forth prescribed responsibilities of the qualifier directed towards assurance of on-site supervision. In order for the law to be effective, qualifiers must become better informed. An effort should be made to educate qualifiers about the purpose of the current law, their responsibilities under it, and their exposure to liability when the responsibilities are not followed. And, lastly, the questions of time period of exposure for liability, and qualifier worth in relation to the value of projects undertaken, should be reviewed in relation to what is working in other states versus our own.

MAIN DISCUSSION

The Role and Liability of the Qualifying Agent in the Corporate Structure

I. Approach, Sources, and Perceptions. This research report reflects an inquiry into the role and liability of the qualifying agent in the corporate structure. The motivation for the research is the perception that the present laws create excessive exposure for qualifying agents. Such exposure could cause the construction industry, the State's second largest, to suffer in various ways. Individuals willing to act as qualifying agents might refuse to expose themselves to such liability. In turn, the commerce of the State of Florida and the construction industry, in particular, could suffer.

In the last few years, the legislature has passed revisions and additions to the licensing statute. The recent revisions and additions to chapter 489 of the Florida Statutes, provides for licenses to be issued to a business entity as well as an individual contractor. The new legislation also creates a special category of corporate officer, the financially responsible officer, who faces personal liability for financial matters. In addition, the financially responsible officer submits himself or herself to the jurisdiction of the Construction Industry Licensing Board. Meanwhile, the Florida Third District Court of Appeal has certified a question to the Florida Supreme Court on the issue of whether chapter 489 of the Florida Statutes creates a private cause of action against individual qualifying agents.

The present study analyzes the latest statutory developments affecting qualifying agents

as well as the existing Florida appellate court decisions. Through direct interviews with contractors, building officials and others; through statistical studies of the rate and nature of disciplinary actions involving qualifiers; and through comparative investigation of the laws of other states, the research team pieced together a picture of the role and liability of qualifying agents in the construction process. From these studies, the team drew conclusions and made recommendations.

We begin with a brief discussion of the purpose of licensing laws; we then review the laws regulating qualifying agents in Florida, and the other states. The responses from numerous interviews with building officials and others, as well as the results of our survey of contractors and subcontractors are discussed.

While these findings are not exhaustive, we believe they profile the issues which trouble many people actively involved, or considering being actively involved, in the Florida construction industry. Hopefully, the results will be informative to those in the industry, as well as aid those legislating the regulation and licensing of qualifying agents.

II. Licensing Law. The purpose of licensing businesses has traditionally been to protect the public health and welfare. In *State of Florida ex rel. Alma G. Reynolds v. City of St. Petersburg*, the Supreme Court of Florida held that the trade or business of a construction contractor is one which may be regulated by the legislature in the interest of public welfare.[1] Provisions of a statute empowering a municipality to prescribe the qualifications of general contractors, to create a board of examiners for the purpose of examining those desiring to qualify

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[1] 183 So. 304 (Fla. 1938).

as general contractors, and to prescribe fees to be paid for such examinations, is within the bounds of the state and federal constitutions, and does not deny the freedom to contract. In its holding, the Supreme Court related a situation not unlike that of today when it said:

> It must be conceded that the trade or business carried on by the general contractors in the construction of buildings of all sorts is one of paramount importance in the State of Florida. There is probably no State in the Union where the expenditures for the construction of buildings has been greater per capita within the past decade than in the State of Florida. Cities and town have grown by leaps and bounds. ...
>
> So, it appears that there can be no serious question that public welfare is vitally involved in the matter of construction of buildings of all sorts in this state.[2]

In Florida, licensing has long been viewed as a proper function of the police power of the state and its municipalities. Historically, before 1979 no statewide central licensing bureau or department existed. Local examining boards were accountable to the Secretary of State in Tallahassee. In 1979 the Department of Professional Regulation became the umbrella agency for virtually all state licensing.[3]

III. The Florida Statutes and the Qualifying Agent. The issue of limited liability arises primarily in the case of business entities other than sole proprietorships and partnerships. Sole proprietors are personally liable for both business debts and wrongful actions resulting in damages. This is true whether the sole proprietor is a contractor or any other business. Likewise, a partnership exposes the partners to the same personal liability. Other business

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[2] *Id.* at 309.

[3] Chang, *A Comprehensive Study of Licensing Construction Contractors in Florida*, Technical Publication No. 76, BCIAC (1992).

entities, primarily corporations and limited liability companies, have as one of their purposes the ability to limit liability to the assets of the business entity. Presently in Florida, a corporation which wishes to engage in contracting must apply for *registration* or *certification* through a qualifying agent. The qualifying agent must be

> legally qualified to act for the business organization in all matters connected with its contracting business and ... ha[ve] authority to supervise construction undertaken by such business organization. [4]

In addition to requiring qualifiers to have "authority" the Florida statutes impose a duty on qualifiers such that:

> [a]ll primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization; for all field work at sites; and for financial matters, both for the organization in general and for each specific job.[5]

Typically, construction corporations which wished to work in Florida whose principals did not hold a license, advertised for a Florida licensed qualifying agent. Despite the statutory language charging the qualifying agent with responsibilities for finances and supervision, a licensee who joined such a construction company would often act simply as an employee of the principal without much management participation. Ideally, the qualifier would supervise the construction for which he or she pulled the permits as well as participate in the financial management of the company to assure financially responsible actions. In practice, some

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[4] § 489.119, Fla. Stat. (1988).

[5] § 489.1195, Fla. Stat. (1988).

qualifying agents were used solely for their signature for permit applications and nothing more. Building officials tell of countless out-of-state qualifying agents who do nothing more than sell their license for a typical fee of $100 per job. They neither know what is going on at the job site nor are they interested. In one instance, the qualifier continued to qualify jobs while in jail. The co-project director has been requested to prepare agreements for such schemes (which undertakings have been declined). Obviously, by selling their licenses in this manner, qualifiers would be violating the provisions of the state statute. More importantly, however, these individuals would be circumventing the purpose for which the statute was enacted, namely to protect the public health and welfare by intimately involving a qualified person.

IV. The Case Law and the Qualifier. The language of the 1988 statute provides for two types of qualifying agents: primary and secondary. A primary qualifying agent is responsible for all matters on behalf of the contracting firm, unless there is a secondary qualifying agent. A secondary qualifying agent is only responsible for the supervision of field work where his or her license was used to obtain the permit. The secondary qualifying agent is not responsible for supervision of financial matters.[6] There must be at least one primary qualifying agent for each firm. Secondary qualifying agent is a designation which may be sought where an entity has at least two qualifying agents.

Two theories of negligence have been put forth for holding qualifying agents liable. First, qualifiers have been held liable under the common law, that is, under the authority of those judicial decisions over the years. Second, and more recently, they are held liable under a theory

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[6] *See* § 489.1195, Fla. Stat. (1992).

of negligence based on a duty found in the statutes, namely chapter 489 of the Florida statutes. While seemingly very similar, these are not the same. A duty created by statute, as in the latter case, is over and above the duty created under the common law. These similar yet distinct theories have developed over a decade of litigation on the subject of qualifier liability and the meaning of the governing statute.

One of the first Florida reported cases dealing with the liability of the qualifying agent is *Alles v. Dep't of Professional Regulation, Constr. Indus. Licensing Bd.*,[7] In *Alles*, the qualifying agent of a general contractor appealed the decision of the Construction Industry Licensing Board to take disciplinary action to revoke or suspend the qualifying agent's contractor's license. The Board's action came after the collapse of the Harbor Cay Condominium in Cocoa Beach, Florida. Alles was the qualifying agent for the general contractor, Univel, Inc., although another construction company both supervised and pulled the permits on the project. The Board contended that the statutes governing qualifiers created a professional duty of supervision on the qualifier. The court relied on the language of the 1979 statute which stated that a person who:

> proposes to engage in contracting as a partnership, corporation, business trust, or other legal entity, the applicant shall apply through a qualifying agent ... Such application shall also show that the qualifying agent is legally qualified to act for the business organization in all matters connected with its contracting business and that he has authority to supervise construction undertaken by such business organization.[8]

The court believed that the "obvious purpose" of the law of qualifying agent regulation was:

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[7] 423 So. 2d 624 (Fla. 5th DCA 1982).

[8] § 489.119, Fla. Stat. (1979).

> to insure that projects undertaken by a company are to be supervised by one certified and licensed by the board. To allow a contractor to be the "qualifying agent" for a company without placing any requirement on the contractor to exercise any supervision over the company's work done under his license would permit a contractor to loan or rent his license to the company. This would completely circumvent the legislative intent that an individual, certified as competent, be professionally responsible for supervising construction work on jobs requiring a licensed contractor. Thus, the Board was correct in determining that appellant has a *statutorily imposed professional duty*, as sole qualifying agent of record ... to supervise all ... projects. (emphasis supplied)[9]

The court's holding in *Alles* was followed a year later in *Hunt v. Dept. of Professional Regulation*,[10] The *Hunt* case also involved a collapsed building and loss of life. Unlike the facts in *Alles*, in the *Hunt* case building permits were issued in the qualifier's name. Hunt argued that he should not be disciplined since several people had qualified the corporation. The Board determined that all of the qualifiers could potentially face discipline, but it only brought an action against two of the qualifiers. The Court of Appeals left open the issue of whether all the qualifiers could be disciplined by the Board. However, it laid down a standard for determining the duty of a qualifier where there is more than one for a contracting firm. The court said:

> The pertinent question is whether [the qualifier's] involvement in this construction process was such as to raise a duty to supervise construction and not to willfully or deliberately disregard and violate local building codes. We hold that [the qualifier's] involvement was direct and intimate because it was upon his certification that the permit was issued and the plans approved.[11]

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[9] 423 So. 2d at 626.

[10] 444 So. 2d 997 (Fla. 1st DCA 1983).

[11] 444 So. 2d at 999.

The court made clear that the language of the statute created a statutory duty which exposed qualifiers to actions for negligence based on the statute. *Alles* and *Hunt* had both reached the court from an appeal of an administrative agency ruling; it was not long until the court extended this holding beyond the context of administrative agency actions.

The First District Court of Appeal of Florida dramatically expanded its earlier ruling in 1985 in two significant ways. First, it held that the statutory duty to supervise is *non-delegable*. And second, it determined that this statutory duty created a private cause of action against qualifiers. In the case of *Gatwood v. McGee*, the court held a qualifying agent negligent for breaching a statutory duty to supervise a construction project entered into in his name.[12] Gatwood was the president and sole stockholder of Gatwood Enterprises, Inc., a construction company which contracted with the McGees to build a house. Gatwood applied for the building permit himself but he entrusted the supervision of the construction to another. The house was built on a bed of muck, a condition which caused substantial problems to the structure. The homeowners sued Gatwood for negligence in not supervising the construction. The court sided with the homeowners:

> We hold that the negligent performance of the qualifying agent's statutorily-imposed duty of supervision may support a cause of action for damages sustained by subsequent purchasers, such as the appellees, as a result of latent construction defects. We further hold that the qualifying agent's duty of supervision is nondelegable in the sense that such agent will not be allowed to evade responsibility for negligent supervision by relying upon one who, even though apparently a competent builder, has not been certified as a qualifying agent for the company pursuant to Chapter 489. That is to say, the qualifying agent will still be responsible for the negligence of his surrogate regardless of the care which may have

[12] 475 So. 2d 720 (Fla. 1st DCA 1985).

> been exercised in selecting the latter and regardless of whether the latter is an independent contractor or employee of the qualifying agent's firm.[13]

Gatwood argued, without success, that it would be untenable to hold a stockholder of a corporation liable for the corporation's negligence. The court rejected this argument saying, in effect, that qualifiers of a corporation were not protected from liability by the corporate shield. Judge Hall acknowledged this conclusion in his concurring opinion in *Mitchell v. Edge*, [14] when he wrote:

> the statute [489] ha[s] the effect of lifting the protection of the corporate veil. A qualifying agent is personally liable where construction defects result from his failure to exercise "due care in carrying out his statutorily-imposed duty of construction supervision." (citing *Gatwood*)

By imposing individual liability on the qualifying agent, the construction firm is stripped of the limitation of liability which officers of other commercial corporations enjoy. In effect, construction corporations have come to be treated as a professional corporation, like architects, engineers and physicians. The foregoing decisions have tended to create a special duty on the qualifying agent by virtue of the duties imposed by the statute. It is important to note that *this duty is over and above principles of common law negligence.*

However, not all of the Florida appellate courts have accepted this second theory of liability based on the language of chapter 489. Some courts have interpreted the statute's language as not creating liability above what exists under the common law. In *Finkle v. Mayerchak*, a qualifying agent was sued for building defects. The qualifier was issued a building

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[13] 475 So. 2d at 723.

[14] 598 So. 2d 125 (Fla. 2d DCA 1992).

permit and he allowed an unlicensed person to use his license.[15] Based on the first theory of liability (the common law duty) the court held that the qualifier could be found negligent. However, based on the second theory of liability (the chapter 489 statutory duty) the court said that there was "no evidence [in § 489.119 or 489.129] of legislative intent to create a private remedy on behalf of individuals." Thus, the court effectively said that the statute does not create a second theory of liability which a plaintiff can rely upon to sue a qualifier for negligence. The court cited *Gatwood*, interestingly, as evidence that a cause of action under the common law existed. In *Mitchell*, Judge Hall had said that the holding in *Gatwood* was codified in the 1988 statute in § 489.1195(1).

Most recently, the 3rd District Court of Appeals in *Murthy v. N. Sinha Corp.* followed the reasoning of *Finkle* and held that:

> neither sections 489.119 nor 489.129, the regulatory and penal statutes, respectively, of chapter 489 creates [sic] a private cause of action against qualifying agents individually...[16]

In *Murthy* a contractor "prematurely cut the overhang all around the existing house and left it uncovered for several weeks" knowing that the owners were living in the house. The home continually flooded and on one occasion the homeowner suffered personal injury when a ceiling collapsed. The homeowners brought an action against the contractor for negligent performance of a contract, breach of implied warranties, discharge of a fraudulent lien, and violations of the minimum building codes. The contractor was the president, sole stockholder, and qualifying

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[15] 578 So. 2d 396, 368 (Fla. 3d DCA 1991).

[16] 618 So. 2d 307,309 (Fla. 3d DCA May 4, 1993).

agent of a construction corporation. The court held that a cause of action existed against the contractor in common law negligence. However, the homeowners' claims of discharge of a fraudulent lien and violation of the minimum building codes must be dismissed against the qualifying agent based on the reasoning in *Finkle*.

The court recognized that its decision, although consistent with earlier precedent in the Third District, conflicted with the interpretation of the Florida First and Fifth District Courts of Appeal. Accordingly, the court certified the following question to the Supreme Court of Florida:

> Does chapter 489, Florida Statutes (1991), the licensing and regulatory chapter governing construction contracting, create a private cause of action against the individual qualifier for a corporation acting as a general contractor?[17]

While the building industry awaits whether the Florida Supreme Court will render a decision, the extent of qualifier liability is not crystal clear.

Subsequent to the facts giving rise to all of the cases described above, Chapter 489 has undergone a major revision in the 1993 legislature, part of which affects construction corporations, and their qualifiers. (The text of the relevant statutory sections is set out in Appendix C).

Remember that the principal qualifying agent is required to assume the duty that the construction contracting firm not act in a financially irresponsible manner. However, in many instances, the qualifying agent who was not an owner of the business, would be put in the position of having financial responsibility, without the control over finances to assure that the duty could be properly performed. The qualifying agent was a victim of "The Golden Rule" --

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[17] *Id.* at 309.

He who has the gold, rules. Theoretically, if the qualifying agent was not in a position to control the finances to assure that the business did not act in a financially irresponsible manner, he or she should resign. As a practical matter, the choice of acting in complete accord with the statutory duty versus putting dinner on the table on a regular basis resulted in a choice which could put dinner ahead of principle. In other cases, the owner of the contracting firm had a home office from which financial matters were administered outside of Florida. In still other cases, some large corporations have a financial structure that is more sophisticated than the requirements for licensing address. If the qualifying agent did participate in the finances, he or she may not be properly trained to deal with the issues presented.

It appears that the legislature intended to alleviate the "Golden Rule" problem by creating the "financially responsible officer". Thus, a qualifying agent who desires to be employed by a firm, but which qualifier is not given control of the finances, would seem to have a workable solution. The qualifying agent agrees to act as a qualifying agent only if the firm has a "financially responsible officer". In that case, the financially responsible officer would be responsible for the finances. The qualifying agent would be responsible for code compliance and construction operations. The Construction Industry Licensing Board also obtains jurisdiction over the financially responsible officer for disciplinary purposes. The problem is, the legislature only made this workable for a secondary qualifying agent, which may be a legislative oversight. The primary qualifying agent remains responsible for all jobs and financial matters, even if there is a "financially responsible officer". How the courts will define the limits of liability for financially responsible officers remains to be seen.

V. The Liability. Qualifying agents are, and should be, concerned about the extent of their personal liability. Are individual qualifying agents responsible where other corporate officers are not? Will personal liability extend to the qualifying agents' personal assets which impact their families? Can one mistake wipe out a personal wealth acquired over many years? Can this risk be insured? How long is one exposed for this liability? We address these issues in terms of the current state of affairs, as well as whether the current state of affairs seems appropriate.

A. Personal Liability. Presently, qualifying agents are liable throughout Florida for their common law negligence (failure to use due care resulting in damage). The appellate court in South Florida (Third District Court of Appeal, covering Dade and Monroe Counties) has not recognized the statute creating the qualifying agent as a specific source of liability giving rise to a private cause of action. In the rest of the State the appellate courts have recognized statutory negligence for failure to fulfill the duties described in the statute. The exposure here is for property damage and/or personal injury which results from failure of a prudent contractor to use due care as established by testimony of other expert contractors (common law negligence). Under common law negligence the failure to follow a duty in Chapter 489 may be considered as evidence of negligence. Statutory negligence would be that where the failure to follow a duty imposed by Chapter 489 in and of itself, which results in property damage or personal injury, is actionable.

Qualifier liability is an issue in other contexts as well. There is some concern that qualifiers may be liable to employees for injury resulting from lack of job safety if unprotected

by failure to have coverage under the Florida's Worker's Compensation Act.[18] Worker's compensation laws act to protect employers from employee claims by providing medical and disability benefits to an injured employee. This employer immunity also extends to employees who are "acting in furtherance of the employer's business." [19] The concern is that qualifiers may be clothed with a separate status and thus be personally liable under the provisions of § 489.119 for employee injuries.

Finally, there is the concern over the issue of financial responsibility. Section 489.1195 (1)(a) Florida Statutes (1993) says:

> All primary qualifying agents for a business organization are jointly and equally responsible for ... financial matters, both for the organization in general and for each specific job.

Where a contracting business organization has designated a "financially responsible officer", that person assumes personal responsibility for all financial aspects of the business organization.[20] Note, however, that the financially responsible officer is not permitted under that statute to also be the primary qualifying agent.

The concern expressed is over what the "personal responsibility" is. The language is subject to judicial interpretation regarding the meaning of personal responsibility. It could amount to a personal guaranty of the debts of the contracting corporation which would avoid the corporate limit of liability. On the other hand, if the responsibility is owed to the licensing board (only), and not to the public or the other party to the contract, no personal liability for

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[18] Forbes, *The Qualifying Agent at Risk: A Need for Legislative Reform*, Florida Construction, Nov-Dec 1989.

[19] § 440.11(1), Fla. Stat. (1990).

[20] *See* § 489.1195(1)(b), Fla. Stat. (1993).

corporate debts would be created by the statute. If the intent of the legislature was to create personal liability of the qualifying agent for corporate debts, then the current language may be appropriate. If the intent of the legislature was to create the duty of responsibility to the Board for purposes of discipline, and not to the public, then additional language would be in order to clarify that intent, such as:

> The responsibility for financial matters and financial aspects of the business organization is owed to the Board for purposes of discipline, and does not create a private right of action in favor of any other person.

B. Duration of Exposure. The duration of a qualifier's liability is governed by Florida Statute § 95.11(3)(c).[21] This statute sets the time limits for commencing an action founded on construction of an improvement to real property. It is both the statute of limitations and the statute of repose. The statute allows four years for:

> An action founded on the design, planning, or *construction of an improvement to real property*, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, *the action must be commenced within 15 years* after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer, whichever date is

[21] *See* Groover, *Reconsidering the Statute of Repose: A Reasonable Reduction*, Florida Architect, May/June 1992.

latest. (emphasis supplied)[22]

The statute of repose extends the limit of this liability 15 years into the future for latent defects. The statute does not limit its application to parties in privity of contract. Because it applies to any action "founded on ... construction of an improvement to real property," it appears to apply to acts of qualifiers of construction contracting firms. Florida's statute of repose is one of the longest in the nation. A large majority of states have a 10 year or shorter statute of repose.[23] In comparison to other states, the exposure under this statute is extreme.

C. Liability Within the Corporate Structure for Tortious Acts. As a business structure, incorporation is attractive because it works to limit the liability of shareholders for debts of the corporation to the extent of their equity share in the company. Acts of the corporation which result in defects and other damages may result in corporate liability. Unlike other forms of business organization, like partnerships, the corporate structure shields the corporation's shareholders, officers and employees from contractual debt. This is known as the corporate shield or veil. Individual corporate officers and agents are not completely insulated from liability. They may be held responsible for their own tortious acts under the general principle that:

> an agent is liable to third persons for his tortious acts ... if they commit or participate in a tort, whether or not it is also by authority of the corporation, or in furtherance of the corporate business they are liable to third persons injured thereby, regardless

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[22] § 91.11(3)(c), Fla. Stat. (1993).

[23] Groover, *supra* note 26, at 28.

of whether liability attaches to the corporation for the tort.[24]

Thus, a qualifying agent, or any other employee or agent of a contracting firm may be personally liable for failure to use *ordinary care* that would be expected of a reasonable person which results in personal injury or property damage. Many factors come into play in determining what this standard of conduct involves which go beyond the bounds of this report. A qualifying agent who entrusts the supervision of construction to another licensed contractor might be found to have used ordinary care in this sense. However, if the corporate veil is lifted by virtue of the responsibilities of the qualifying agent imposed by statute, qualifiers are exposed to personal liability, and one of the key benefits of incorporation is lost. Remember Judge Hall came to this conclusion in *Mitchell v. Edge*,[25] when he wrote:

> the statute [489] ha[s] the effect of lifting the protection of the corporate veil. A qualifying agent is personally liable where construction defects result from his failure to exercise "due care in carrying out his statutorily-imposed duty of construction supervision." (citing *Gatwood*)

D. Joint and Equal Liability. The exposure and liability for tortious acts exists under the common law regardless of the language of Chapter 489 of the Florida Statutes, the licensing statute.

There is particular concern over the following language found in Chapter 489:

1) All primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization; for all field work at all sites; and for

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[24] Fla. Jur. 2d *Business Relationships* § 339 (1978).

[25] 598 So. 2d 125 (Fla. 2d DCA 1992).

financial matters, both for the organization in general and for each specific job.[26]

2) A designated sole primary qualifying agent has all the responsibilities and duties of a primary qualifying agent, notwithstanding that there are secondary qualifying agents for specified jobs. The designated sole primary qualifying agent is jointly and equally responsible with the secondary qualifying agents for field work supervision.[27]

In a corporate structure where there are many primary qualifying agents, the statute clearly makes all qualifiers jointly and equally responsible for each job. The consensus of opinion of those we have interviewed is that primary qualifiers are unaware that their responsibility extends to each job with which the corporation is involved. Such a corporate structure may be represented as follows:

Corporate Officer(s)

Primary Qualifier #1 -- Primary Qualifier #2 -- Primary Qualifier #3

Jobs: A,B,C,D E,F, G,H,I

If Primary Qualifier #2 mishandles job E, for example, both primary qualifiers #1, and #2 are potentially liable for the damage.

It appears that the legislature recognized that contracting firms may have many jobs under way at once, or in separate geographic locations. They then put into place two concepts that would appear to address the practicalities, but which fall short of the mark. The first concept is

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[26] § 489.1195(1)(a), Fla. Stat. (1993).

[27] § 489.1195(2)(d), Fla. Stat. (1993).

that of the financially responsible officer. The Florida Statutes read:

> Upon approval by the board, a business entity may designate a financially responsible officer for purposes of certification or registration. A financially responsible officer shall assume personal responsibility for all financial aspects of the business organization and may not be designated as the primary qualifying agent
>
> Where a business organization has a certified or registered financially responsible officer, the primary qualifying agent shall be responsible for all construction activities of the business organization, both in general and for each specific job.[28]

The financially responsible officer was created for purposes of obtaining jurisdiction over someone who will control the purse strings, but who has not qualified by virtue of experience and testing to be a licensed contractor. Such a corporate structure may be represented as follows:

Corporate Officer(s)

Financially Responsible Officer

Primary Qualifier #1 -- Primary Qualifier #2 -- Primary Qualifier #3

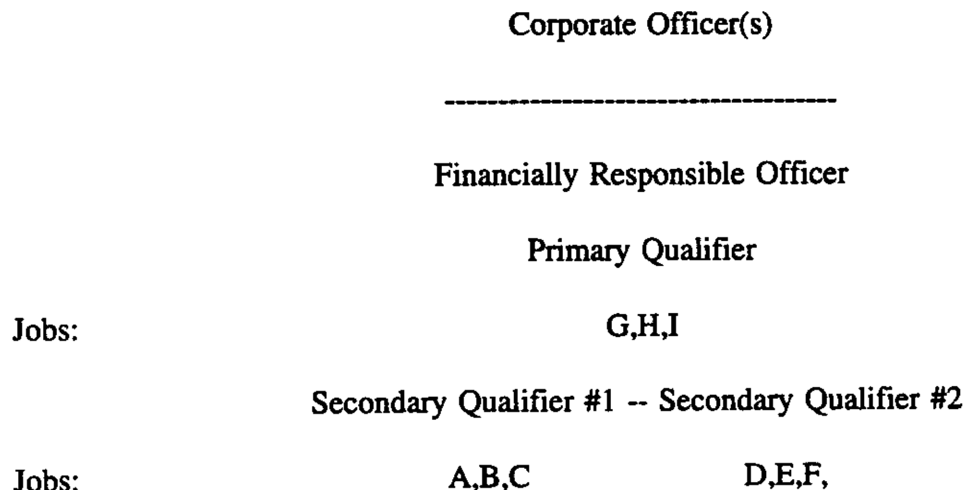
Jobs: A,B,C,D E,F, G,H,I

Note that per the statutes, each primary qualifying agent is still equally responsible for all financial matters. In Florida Statute § 489.1195(1)(a)(1993) the primary qualifying agent is given financial responsibility. In Florida Statute § 489.1195(1)(b) (1993) there is authority for a financially responsible officer to assume personal responsibility for the financial aspects. However, there is nothing which eliminates the duty of financial responsibility for the primary

[28] § 489.1195(1)(b) & (c), Fla. Stat. (1993).

qualifying agent. If the intent was to allow the split of responsibility for financial matters from the qualifying agent to allow his or her focus to be centered on field supervision, there was nothing put in the statute to eliminate that financial responsibility. If the intent was just to add another person who would be equally responsible with the primary qualifying agent, then that goal was met. The wisdom of having the primary qualifying agent (who is to be focused on field operations) be equally responsible for financial matters with the financially responsible officer (who is to be focused on finances) is very subtle.

The second concept which the legislature recognized is that of the secondary qualifying agent. The secondary qualifying agent is only responsible for supervision of field work where his or her license was used to obtain the building permit.[29] The secondary qualifying agent is also responsible for any other work for which he or she accepts responsibility. It is expressly stated that the secondary qualifying agent is not responsible for supervision of financial matters. Such a corporate structure may be represented as follows:



[29] *See* § 489.1195(2)(e), Fla. Stat. (1993).

This concept seems to recognize the practicality that one can only supervise what "is on his or her plate." But on the other hand, the primary qualifying agent is responsible for everything, jointly and equally with any secondary qualifying agents or financially responsible officers. While it may seem noble and simple to have one person be responsible for everything whether "it is on his plate or someone else's plate", that concept appears to be incompatible with reality and human nature. This is particularly so where there is no limit to the amount of work that a contracting firm, or a qualifying agent, may have ongoing at one time. The statute is theoretically reconcilable. However, as a matter of practicality and human nature, without a limit on the amount of work that a qualifying agent may supervise, the statute invites a practice which frustrates its very purpose, to wit, "to insure that projects undertaken by a company are to be supervised by one certified and licensed by the board."

If there is to be a statutory duty of responsibility which can be enforced by private action, then qualifying agents have taken on duties and risks which many have not recognized, and which they have not adequately insured against, nor may be able to.

VI. Other States. In order to better define the role of the qualifying agent in the corporate structure, the research team directed its attention to an analysis of other states' laws. Through a comparison between Florida's treatment of qualifying agents and that of other states, we hoped to gain useful ideas and benefit from the related experiences of these states involved.

Of the fifty states in the union, only about half have any kind of licensing law for general contractors at all. (A tabular analysis of other states' laws is given in Appendix B). Of those states which do have some type of licensing law, only a handful (Arizona, California, Florida and

Nevada) regulate general contractors to any significant degree. There is no typical licensing statue. The licensing statutes which exist vary widely. In broad terms, the statutes address three areas: the definition of contractor/contracting, the requirements for licensure, and disciplinary provisions. This point may be illustrated with parts of the licensing law of Alabama. Some states, like Alabama, Montana, North and South Carolina and Tennessee, for example, place a threshold on the value of work for which a license is needed within their definition. The Alabama licensing law, for example, defines general contractor as:

> one who, for a fixed price, commission, fee or wage, undertakes to construct or superintend the construction of any building, highway, sewer, grading or any improvement or structure where the cost of the undertaking is $20,000.00 or more, and anyone who shall engage in the construction or superintending the construction of any structure or any undertaking or improvement above mentioned in the state of Alabama, costing $20,000.00 or more, shall be deemed and held to have engaged in the business of general contracting in the state of Alabama.[30]

Licenses are often classified by field of contracting and by amount of the contract to be undertaken.

Alabama makes clear that the purpose of licensing is not solely to generate revenue, but rather to "protect the public against incompetent contractors for certain type structures and also to better assure properly constructed structures which are free from defects and dangers to the public."[31] In light of this legislative purpose behind licensing, it is somewhat surprising that not all states require an formal examination in order to receive a license. Alabama requires that applicants for a license take an examination:

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[30] Ala. Code § 34-8-1 (1975).

[31] Ala. Code Art. 1 (1975).

> to ascertain the ability of the applicant to make a practical application of his knowledge of the profession of general contracting; and the board shall investigate thoroughly the financial responsibility and past record of all applicants, which will include an effort towards ascertaining the qualifications of an applicant in reading plans and specifications, estimating costs, construction ethics and other similar matters.[32]

Whereas other states, like Montana, North Dakota and Tennessee make no such formal requirement. However, these jurisdictions like North Dakota typically require contractors to submit "an application under oath containing a statement of the applicant's experience and qualifications."[33] Usually included are some type of financial statement, some statement of the applicant's experience, the necessary fee.

In those jurisdictions, like Alabama, where examinations are required, corporations may qualify for licensure:

> by the examination of one or more of the *responsible managing officers or members of the executive staff* of the applicant's firm according to its own designation.(emphasis supplied)[34]

However, unlike Florida, most states do not include the specific responsibilities of qualifying agents. There are less than a handful of provisions like § 489.1195 of the Florida statutes which describe the duty of a qualifier to supervise field work and financial matters.

Many states create state licensing boards which have disciplinary powers such as this provision from Alabama which gives the board the power to:

> revoke the certificate of license of any general contractor licensed hereunder who is found guilty of any fraud or deceit in obtaining

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[32] Ala. Code § 34-8-3 (1975).

[33] N.D. Cent. Code § 43-07-04 (1991).

[34] *Id.*

> a license or gross negligence, incompetence or misconduct in the conduct of business.[35]

Unlike these (and most other) states, Arizona, California, Florida and Nevada have statutory provisions relating to the specific responsibilities of qualifying agents. Arizona statutes define a contractor as "a person, firm, partnership [or] corporation."[36] The statutes go on to further define "person" as "an applicant, or individual, a qualifying party or owner."[37] Furthermore, Arizona has an extensive statutory section covering qualifiers:

> The terms "responsible managing employee" and "qualifying party" shall, for the purpose of administering this chapter, be synonymous, and shall mean an employee who is regularly employed by the licensee and is *actively engaged* in the classification of work for which such responsible managing employee qualifies on behalf of the licensee. While engaged as a qualifying party for licensees, *the qualifying party shall not take other employment that would conflict with his duties as qualifying party or conflict with his ability to adequately supervise the work* performed by the licensee.(emphasis supplied)[38]

The Arizona courts had occasion to decide whether this statutory provision created a private claim against the qualifying party; they held it did not. In *Colberg v. Rellinger*, a homeowner brought an action against a construction company, the contractor and the contractor's qualifying party to recover damages for alleged faulty construction of a residence.[39] The plaintiff sought recovery under three bases: that the contractor personally guaranteed the

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[35] Ala. Code § 34-8-4 (1975).

[36] Ariz. Rev. Stat. Ann. § 32.1101 (1986).

[37] Ariz. Rev. Stat. Ann. § 32-1101(A)(3) (1986).

[38] Ariz. Rev. Stat. Ann. § 32-1127 (1986).

[39] 770 P.2d 346, 160 Ariz. 42 (1989).

construction; that as an officer in control of the company, the contractor was personally liable for the company's tortious acts; and that as the qualifying party for the company, the contractor was liable for his inadequate supervision of the work performed. Both the trial court and the appellate court denied recovery against the qualifying parties. The Court of Appeals held that the homeowner did not have a negligence claim against the contractor for structural defects, and that the homeowner had no claim of negligent supervision against the contractor's qualifying party. The Arizona Court of Appeals rejected the argument that the language of the statute created a private claim against the qualifying party. The court said it reached its decision because it found "no language in Arizona contractors law to indicate that the legislature contemplated such private claim."[40] Unlike the Arizona court, the Florida 1st District Court of Appeals looked for no such explicit legislative language when, in *Gatwood*, it held that such a private cause of action against a qualifier did exist.

California also has well developed statutory provisions affecting qualifying agents.[41] Although California uses the term "responsible managing employee" and not qualifier, the relevant statutory section states:

> If a corporation, or any other combination or organization , it shall qualify by the appearance of a responsible managing officer or responsible managing employee who is qualified for the same license classification as the classification being applied for.
>
> A responsible managing employee for the purpose of this chapter shall mean an individual who is a *bona fide employee* of the applicant and is actively engaged in the classification of work for which such responsible managing employee is the qualifying

[40] *Id.* at 351.

[41] Cal. [Bus. & Prof.] Code § 7068-7071.10 (Deering 1984).

> person in behalf of the applicant.[42]

Compare the new Florida statutory provision:

> The application for primary qualifying agent must include an affidavit on a form provided by the board attesting that the applicant has final approval authority on all checks, drafts, or payments, regardless of the form of payment, made by the entity, and that the applicant has final approval authority for all construction work performed by the entity.[43]

This recent addition to the Florida statute may be intended to address the same concern as that qualifiers be bona fide employees and not professional qualifiers. However, the language of California's statute is more specific in this regard.

California also has a statutory provision which indicates the duties of an "individual qualifying on behalf of another." Such person:

> shall be responsible for exercising such *direct supervision and control* of his employer's or principal's construction operations as is necessary to secure full compliance with the provisions of this chapter and the rules and regulations of the board relating to such construction operations and such person shall not act in the capacity of the qualifying person for an additional individual or firm unless one of the following conditions exists:
> (a) There is a common ownership of at least 20 percent of the equity of each individual or firm for which the person acts in a qualifying capacity.
> (b) The additional firm is a subsidiary of or a joint venture with the first. "Subsidiary," as used in the subdivision, means any firm at least 20 percent of the equity of which is owned by the other firm.
> (c) With respect to a firm under subdivision (b) or (c) of Section 7068, the majority of the partners or officers are the same.
> "Firm," as used in this section, means a ... corporation.(emphasis

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[42] *Id.* at § 7068(a)

[43] § 489.119(2)(a)(1), Fla. Stat. (1993).

supplied)[44]

Compare the language of Florida's statute:

> All primary qualifying agents for a business organization are jointly and equally *responsible for supervision* of all operations of the business organization; for all field work at all sites; and for financial matters, both for the organization in general and for each specific job.(emphasis supplied)[45]

Whether the California qualifier's exercise of "direct supervision and control" is the same as the Florida requirement for being "responsible for supervision" is unclear. However, the language of the California statute suggests an active, physical presence of the qualifier on the job site whereas the Florida statute does not.

California, like Florida, also makes provision for the disassociation of responsible managing officers from the firm. The qualifier or the licensee must notify the registrar in writing, and must replace the qualifier within 90 days. In addition, like many other states, the qualifying individual must secure a bond, in favor of the state for the benefit of homeowners contracting for home improvement, any person, any employee, or trustee damages as a result of the qualifier's actions.

The California courts, in at least one case, have interpreted the qualifying agent statute. In *Swickheimer v. King*, the plaintiff engaged a contractor for excavation and road grading work.[46] Because the contractor did not have a license, the plaintiff entered into an agreement with the agent of licensed contracting company for that company to supervise the unlicensed

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[44] *Id.* at § 7068.1.

[45] § 489.1195(1)(a), Fla. Stat. (1992).

[46] 99 Cal. Rptr. 176, 22 Cal. App. 3d Supp. 33 (1971).

contractor's work. The actual qualifier of the contracting company (the responsible licensed managing employee) of the construction company never met the plaintiff and in no way participated in agreement. The unlicensed contractor negligently and carelessly performed the grading and excavation, therefore, the plaintiff brought an breach of contract action against the construction company, the company's agent, the unlicensed contractor and the qualifying party.

In attempting to hold the qualifying party liable for breaching his duties as a responsible managing employee, the plaintiffs relied on California statute § 7068.1 which requires that the responsible managing employee exercise "direct supervision and control" over the construction operations. The California Court of Appeal acknowledged that the statute does appear to impose such a duty on a responsible managing employee. Indeed, it would be a reasonable exercise of the police powers to protect the public health and safety by holding the qualifier in this instance liable for breaching the statutory duty to supervise. However, the court disagreed with the plaintiffs that this was the intent of the statute. It said:

> the fact that the Business and Professions Code sections upon which plaintiffs rely constitute a valid exercise of the police power does not render them applicable in a civil action for damages. The sections in question are regulatory and disciplinary in nature, and they were clearly not intended to alter the rules governing civil liability.[47]

Like the Arizona and unlike Florida, the California court of appeal held that the licensing statute did not create a right to civil damages.

The language of the Nevada statute is quite clear about the responsibilities of the qualifie :. Like California, Nevada requires that a natural person who qualifies on behalf of another natural

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[47] *Id.* at 179.

person or firm:

> must prove that he is a *bona fide* member or employee of that person or firm and when his principal or employer is actively engaged as a contractor shall exercise authority in connection with his principal or employer's contracting business in the following manner:
>
> (a) To make technical and administrative decisions;
>
> (b) To hire, superintend, promote, transfer, lay off, discipline or discharge other employees and to direct them, either by himself or through others, or effectively to recommend such action on behalf of his principal or employer; and
>
> (c) To devote himself solely to his principal or employer's business and not to take any other employment which would conflict with his duties under this subsection. (emphasis supplied)[48]

Also, like some other states, Nevada requires a significant financial commitment by a qualifier before he is allowed to qualify more than one licensee:

> A natural person may not qualify on behalf of another for more than one active license unless:
>
> (a) One person owns at least 25 percent of each licensee for which he qualifier; or
>
> (b) One licensee owns at least 25 percent of the other licensee.[49]

The evidence from other states indicates that Florida is in a small minority of states with respect to the extent qualifying agents are regulated. While states share a common purpose in regulating contractors and qualifiers of protecting the public health and safety, they do not share a common method of achieving this end. Compared to the other states, Florida's method of regulating contractors and qualifiers may be seen as well developed or, less charitably, burdensome regulation.

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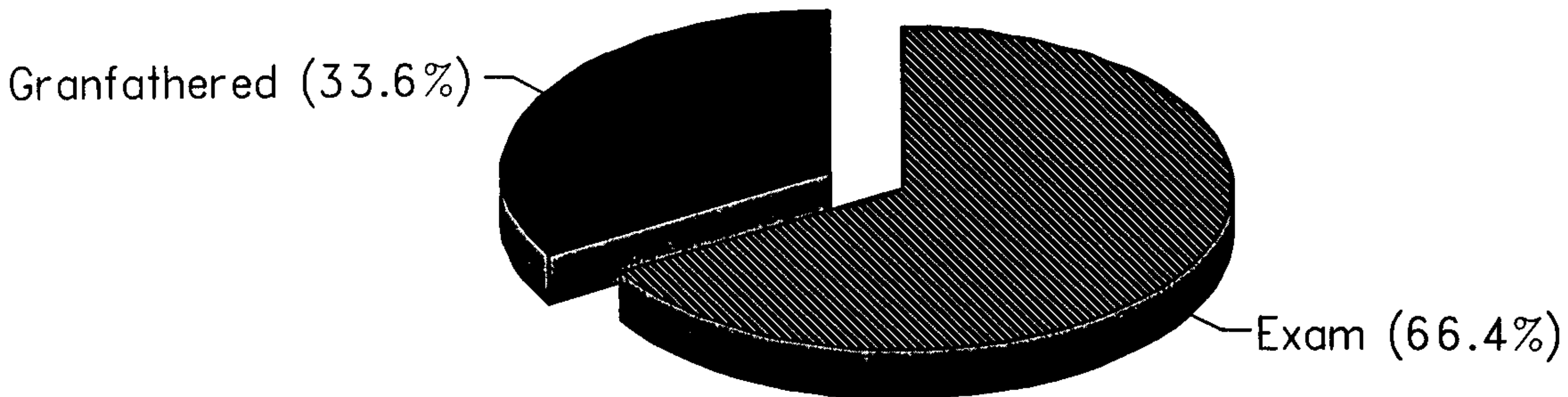
[48] Nev. Rev. Stat. Ann. § 624.260(3) (Michie 1991).

[49] Nev. Rev. Stat. Ann. § 624.260(4) (Michie 1991).

QUALIFIERS DISCIPLINED

Licenses by exam vs. grandfathered



THE ROLE AND LIABILITY OF THE QUALIFYING AGENT

IN A CORPORATE STRUCTURE

PROJECT DIRECTOR
PROFESSOR WILSON C. BARNES, AIA

CO-PROJECT DIRECTOR
PROFESSOR LARRY R. LEIBY, ESQ.

FLORIDA INTERNATIONAL UNIVERSITY
DEPARTMENT OF CONSTRUCTION MANAGEMENT
COLLEGE OF ENGINEERING & DESIGN

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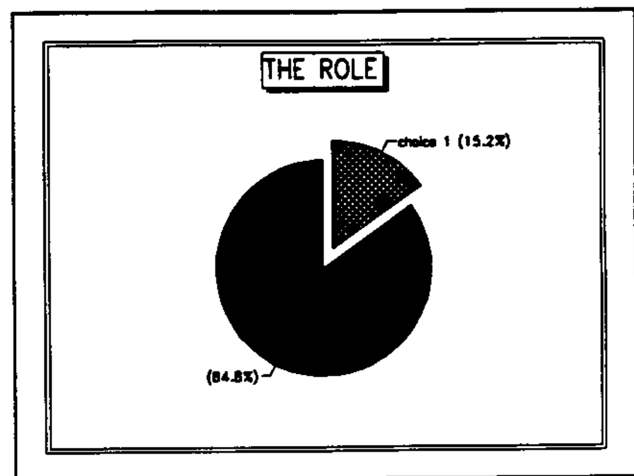
VII. Survey Results. As part of this study, we solicited responses from general contractors and subcontractors on a range of questions regarding both the role and the liability of the qualifying agent in Florida. (This questionnaire is reproduced in Appendix A). The results of this survey are analyzed below.

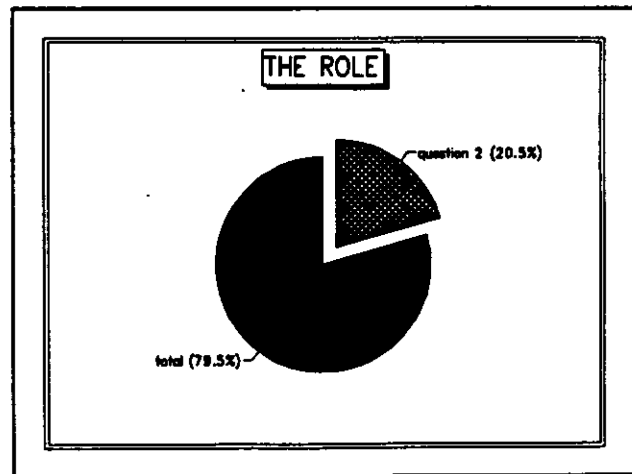
The Role. Choice 1. Have no responsibility of the qualifying agent. Put the responsibility on the design professional/professional inspectors, and require them, with their increased requirements, to have sufficient insurance.



Only 15.2% of those responding thought this was a possible solution to the problem. This number may be surprising given the impression that qualifiers believe they are in an exposed position of liability. The respondents clearly do not think that qualifiers should be completely immune from responsibility, rather they should somehow share this responsibility fairly. Note however that only half of the states have any licensing requirements for general contractors and only a very few of the remaining states regulate the duties of qualifiers.

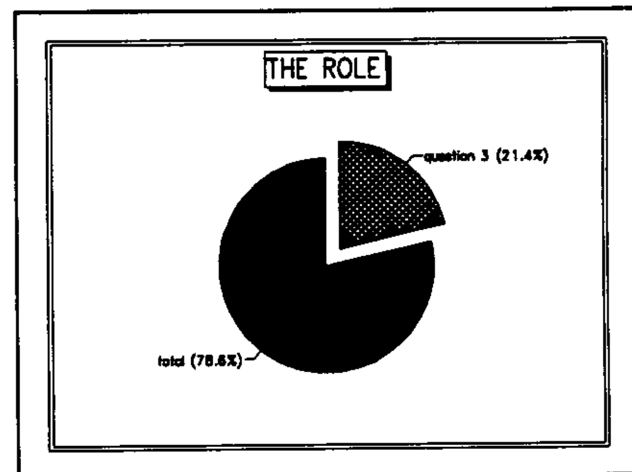
Choice 2. Require the qualifying agent to inspect the work periodically and file signed inspection reports in the company records.

20.5% of those responding chose this answer. Although a larger number chose this over relieving the qualifier of responsibility completely, this response reflects the resistance of the respondents to have qualifiers take on any specific duties.

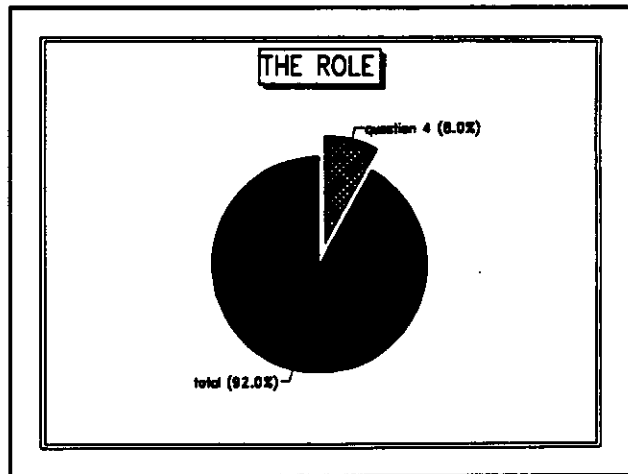


Choice 3. Require the qualifying agent to take a minimum of continuing education courses.

21.4% of those responding chose this answer. Although our interviews found a unanimous positive response to continuing education, based on this response, an overwhelming majority do not see continuing education to be an answer.

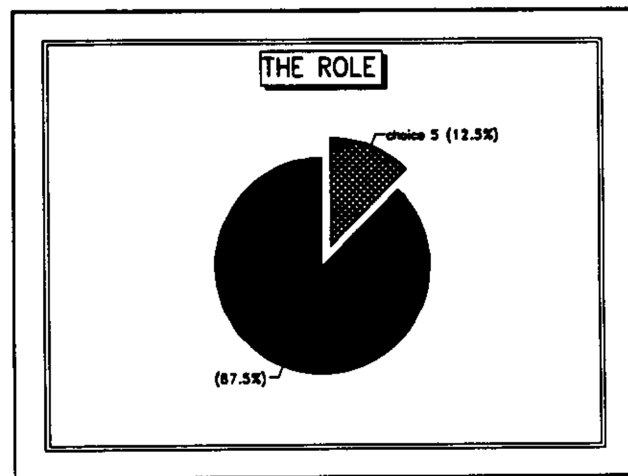


Choice 4. Limit the volume of work for which one qualifying agent may assume responsibility.



Only 8.0% of those responding considered this choice positively. Surprisingly, other states, notably California, have incorporated provisions of this type. While it would seem that there is a direct correlation between the number of jobs a person qualifies and their exposure to liability, the respondents resist this option. Arizona, California, and Nevada have provisions which are intended to limit the dollar volume of work which a qualifier can take on. (See Appendices D, E and F).

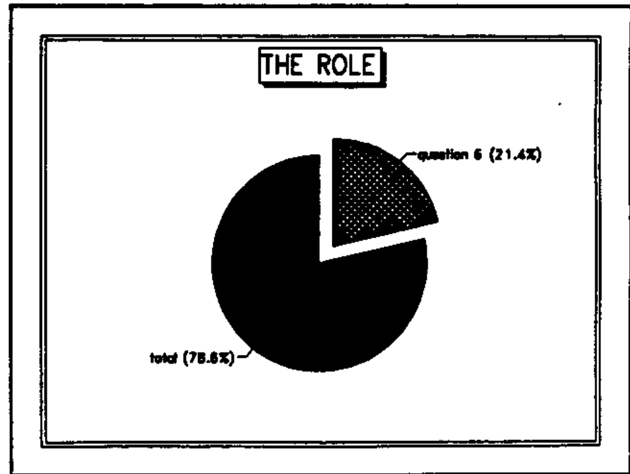
Choice 5. Require licensing of mechanics/journeymen and limit the amount of apprentice/helper/laborer personnel over which they may be responsible.



Likewise, only 12.5% of those responding chose this answer. Once again, this response seems to indicate a resistance to have any more restrictions or controls on contractors and subcontractors. Nevertheless, the perception in the industry has been that the qualify of craftsmanship is poor, and lack of skill has been cited as a primary cause of defective workmanship which leads to liability.

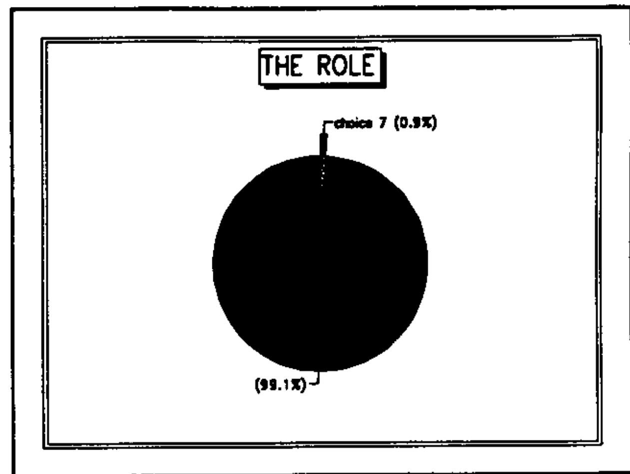
Choice 6. Increase the education/experience required before licensing of a qualifying agent including an internship under the direction of a certificate holder.

Again, although twice as many chose this answer over the previous one, it seems there is little support for increased licensing and regulation in the industry.



Choice 7. Require the qualifying agent to be present at the job at all times that work is being performed.

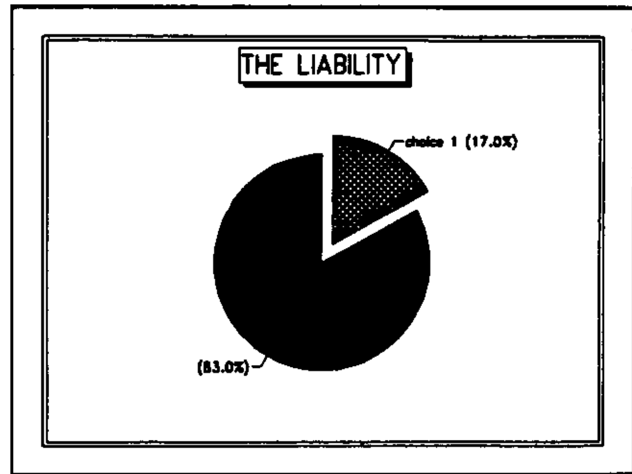
The consensus here seems clear. A mere 0.9% of those responded thought qualifiers should be present at the job at all times. It seems clear that the industry in general does not perceive the role to the qualifier to be a job site superintendent. Note that the language of the California statutes calls for "direct" supervision.



The Liability:

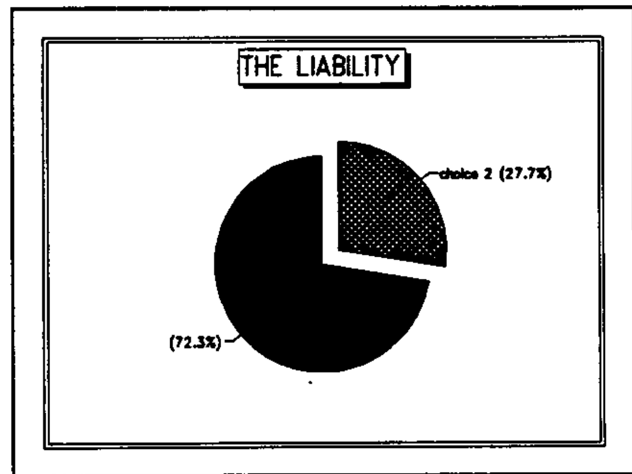
Choice 1. No personal liability of a qualifying agent for a business a organization. [This does not appear likely since other professionals have been exposed to personal liability which risks they have been able to insure against.]

17.0% of those responding chose this answer. Together with choice 4, this was the third most popular response. The idea that qualifiers should not be personally liable at all while popular, seems to be unrealistic.



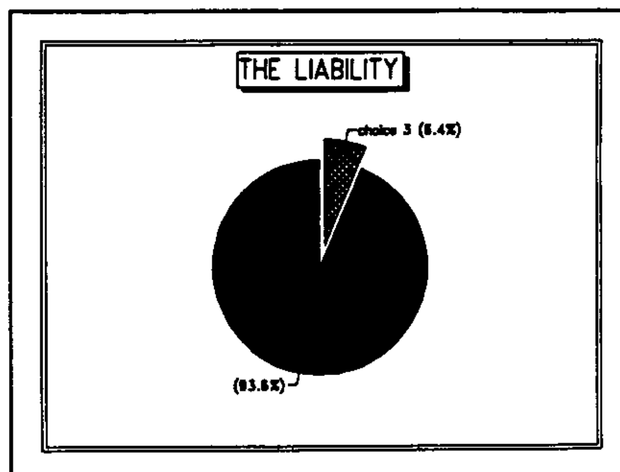
Choice 2. Require a surety bond or other security in proportion to the value of work being undertaken by the business organization, in lieu of personal liability for the qualifying agent.

At 27.7% this answer elicited the most positive responses. Nevertheless, our interviews revealed that bonding has some important flaws. It is seen by many to be an unworkable solution, as tending to keep the small and minority contractors out of the market. Many believe that it would be impossible to implement and would result in an increase in unlicensed activity. California statutes require such a qualifier's bond. (See Appendix E).



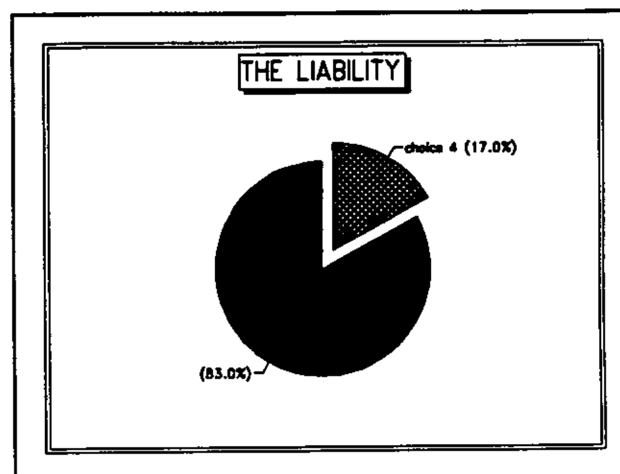
Choice 3. Require the qualifying agent to furnish a surety bond or other security in proportion to the value of work being undertaken.

Only a very few respondents chose this answer. At 6.4% this was one of the least popular choices. Nevertheless this is a feature of the law in other states. Note that where bonding is offered in lieu of personal liability, as in choice 2, it is very popular.



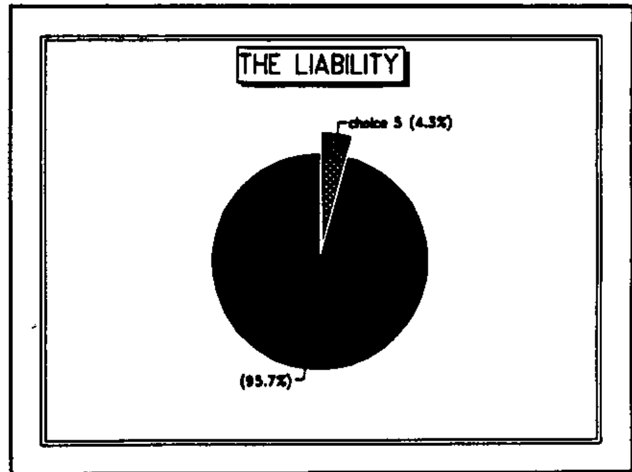
Choice 4. Require qualifying agents to carry professional liability insurance with specified limits.

17.0% of those responding thought qualifiers should carry professional liability insurance. Together with choice 1, was the third most popular choice. The question reflects the fact that the construction corporation is beginning to look more like a professional association than a regular business corporation. With the introduction of the financially qualified officer, the use of such liability insurance will undoubtedly increase.



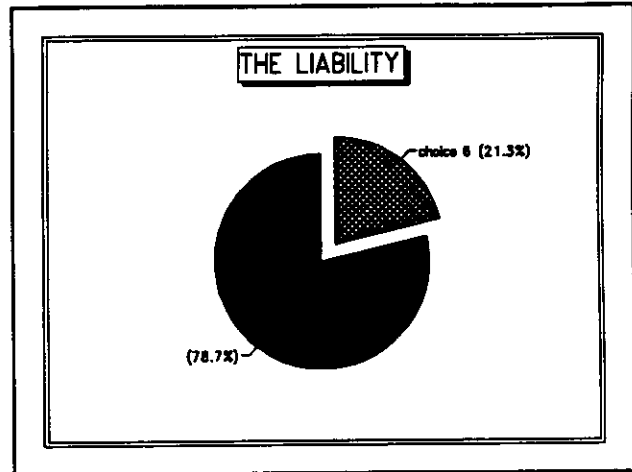
Choice 5. Add sums to the licensing fee for a construction industry recovery fund to pay claims of harmed people.

A mere 4.3% of those responding chose this answer. The construction industry recovery fund is not a popular idea. Almost four times as many respondents said they were willing to carry liability insurance than said they should pay a fee for a recovery fund. This may reflect a willingness to assume individual responsibility than to pay to spread the cost of harm to consumers in general.

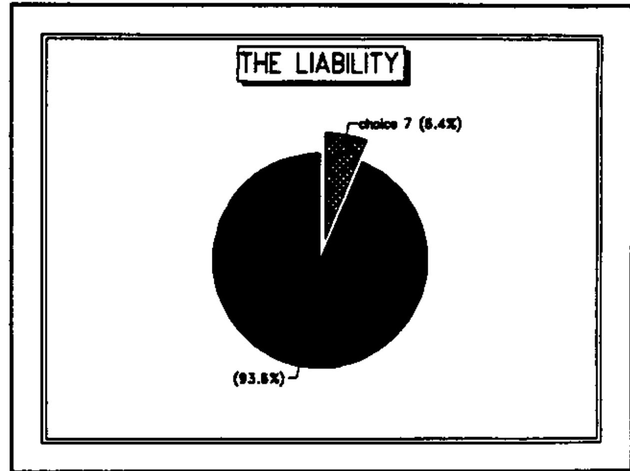


Choice 6. Specify a limit of liability for the qualifying agent.

At 21.3%, this answer was the second most popular response. It can likely be said that qualifiers want to know what the extent of their liability is. Any law which wishes to achieve an effect on behavior must give the qualifier some idea of where he stands with respect to liability.



Choice 7. Require the qualifying agent or other financial responsible person to have a net worth commensurate with the work being performed as established by an audited financial statement to be filed with the license application or renewal.



Only 6.4% of those responding reacted positively to this question. Financial requirements seem to be generally not favored by the industry. Construction is often seen to be a gateway to the American Dream where someone with a pickup truck and a hammer can make good. Although statutes might hold qualifiers personally responsible, the reality is that without a deep pocket somewhere, judgments are notoriously difficult to collect.

The survey gives a sampling of the opinions of people already engaged in the practice of contracting. Some of these responses are worthy of comment.

Of all of the responses, the one which had the least positive response was the question of whether the qualifying agent should be present when all work is being performed. Only one person of those responding agreed that this should occur. On the other hand, there was a very strong positive response to requiring qualifying agents to periodically inspect and file signed inspection reports. Understanding that the purpose of the statute was to be sure that proper supervision of construction occurs by licensed and qualified personnel, this response tends to show that the industry feels that the supervision by the qualifying agent on site as the work is being done is not required, but that the qualifying agent should inspect the work and file signed

inspection reports.

Likewise, the industry was lukewarm about requiring the licensing of mechanics/journeymen, and placing a limit on the amount of lesser qualified or experienced personnel who could be supervised by the licensee.

The response to the survey from those in the industry was overwhelmingly in favor of increased experience and educational requirements for those obtaining a license, as well as required continuing education. The 1993 legislature enacted required continuing education of fourteen classroom hours (50 minutes each) or other approved non-classroom continuing education, every two years as a condition to license renewal. While this is a relatively modest requirement, it signals a positive step forward.

There was a very small positive response from those surveyed in the industry to creating a construction industry recovery fund. A construction industry recovery fund was enacted in the 1993 legislative session as section 21 of Chapter 93-166, Laws of Florida. This will be placed at Section 489.140 Florida Statutes (1993).

There was a very strong positive response to requiring contractors to furnish a surety bond or other security as an alternative to personal liability of the qualifying agent. On the other hand, the positive response was much smaller to the proposal to require the qualifying agent to furnish a bond in proportion to the value of work being undertaken. The wording of the alternatives could be the reason for this. It is possible that the thought of the individual qualifying agent furnishing the bond was less desirable than the contracting firm furnishing the bond.

VIII. Issues and Observations. What follows are some of the issues and observations which flowed from our study. These observations are based on the evidence gathered in the interviews, the survey, DPR files, and an analysis of the other state laws and an in depth review of the Florida statutes and case law.

A limited review of disciplinary actions in the files of the Department of Professional Regulation indicated some surprising facts. (A series of graphics of the disciplinary actions is represented in Appendix I). Common sense fosters the perception that by acting as a qualifier for more than one licensee the risk of disciplinary action increases. Statutes reflect this common sense notion. The Florida statutes say that:

> If the qualifying agent for a business organization desires to qualify additional business organizations, the board shall require him to present evidence of ability and financial responsibility of each such organization. The issuance of such certification or registration is discretionary with the board.[50]

The files of the Department of Professional Regulation, however, indicated that only a very small percentage of those disciplined (12.6%) represented qualifiers of more than one licensee. We note again that these results are from a limited review. It may be that this represents a large proportion of those who have qualified more than one licensee.

Additionally, the common sense perception is that providing examination of qualifiers will result in less disciplinary actions. The disciplinary records show no such correlation. A full 66.4% of those disciplinary files searched were those of exam takers as opposed to those who were grandfathered.

Not surprising perhaps is the fact that almost half of the disciplinary cases studied

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[50] § 489.119(6), Fla. Stat. (1991).

represented qualifiers with prior offenses. We stress again: the investigation of these files was limited. It comprised disciplinary actions over a span of four months. A more extensive review may show a different pattern of results.

A. Financial Responsibility Rather Than Financial Liability. It was somewhat of a shock to find that of all of the complaints resulting in disciplinary action which were examined by the research team, not one involved a public building. The complaints resulting in disciplinary action were almost exclusively the domain of small contractors working to build, improve, or remodel homes. The adequate or inadequate capitalization of a contracting firm may not affect the competence of its supervisory personnel and knowledge of construction. However, there are three compelling reasons to focus on financial responsibility rather than financial liability.

First, the federal bankruptcy law, and creditors' rights laws in Florida, make it possible to avoid whatever liability may be imposed. Note that liability is remedial rather than preventive.

Secondly, If a firm is financially solvent, it may have the resources, and thus the incentive, to prevent and resolve problems.

Thirdly, to be balanced against the concept of financial responsibility is the right to begin a new business. Free enterprise for small business is important. Balancing the harm of potential losses of persons aggrieved by a small business which does not have the resources to satisfy losses which it causes, against the chilling effect of requiring a substantial worth before being able to undertake business has never been easy.

It does appear that it would be prudent to have some graded limitation on the amount of work that a contractor may undertake in relation to the contractor's worth. To some degree that

exists in connection with the progression from residential to general contractor licenses. However, once one has a general contractor license, there is no further restriction on what may be undertaken. (See Nevada's statutory requirements in Appendix F).

It would be helpful if the current language in the statute describing the qualifying agent could be changed to describe whether the responsibilities undertaken are owed to the public, or whether they are only owed to the Construction Industry Licensing Board. If the duties are owed to the public, then the following language should be added to the statute:

> Any person damaged as a result of failure to comply with any of the duties hereunder shall have a cause of action against the qualifying agent for any damages caused thereby.

If the duties are not owed to the public, which would be the recommendation of the research team, then the following language should be added to the statute:

> The duties described herein are owed to the Construction Industry Licensing Board as a matter of discipline. No private right of action is created as a result of the failure to perform any of the duties created hereunder.

B. Abolish Licensing. As was pointed out in the survey of the 50 states, only half the states have any kind of licensing law at all. Of those states, only Arizona, California, Florida and Nevada have any provisions to speak of relating to qualifying agents. Why not abolish licensing altogether? We posed this question to many of those who we interviewed through our Florida survey and elicited some surprising responses. A significant number are receptive to the idea of abolishing licensing for general contractors. Many are aware of the fact that other states do not require licensing of general contractors without catastrophic consequences. However, the majority of those interviewed consider licensing an important check on the conduct

of contractors. Some feel that there should be an change of emphasis on the contractor's examination from business skills to technical skills, although a like number recognized that contractors are more likely to fail where they lack the business skills to run their business. Licensing, though imperfect, at least provides a minimum of competency and therefore should be retained. Abolishing licensing, while within the realm of possibility given the experience of other states, is not likely to occur.

C. Statute of Repose. Because the statute of repose extends the possibility of liability 15 years into the future, qualifiers are understandably worried. Such a period may be excessive and due for a change. Studies have shown that 96% of claims are brought by the 7th year after substantial completion.[51] Again, a look at the statue in other states lends support to a shortening of the statute of repose in Florida. Whether this can be accomplished without raising the constitutional problem of interference with the right to access to the courts is unclear.

D. Employment Agreements. In order to anticipate the exposure of qualifying agents for job safety where they may not be covered by the provisions of worker's compensation, employee agreements have been suggested.[52] While this issue involves only a small portion of the potential exposure of qualifiers, as long as the legal status of qualifiers is in flux, this suggestion merits attention.

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[51] Groover, *supra* note 26, at 28.

[52] Forbes, *supra* note xx, at x.

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APPENDIX A

QUESTIONNAIRE

Re: Role and Liability of Qualifying Agent

The Florida Department of Education has requested a study from the Florida International University School of Construction Management of the role and liability of the qualifying agent in a corporate structure. Professor Wilson Barnes and I are the principals directing the study.

Under Florida law, a construction contractor (and many subtrades) may obtain a license from the state authorizing them to perform construction work statewide, or from a county authorizing them to perform work in that county. In order for a corporation (or other entity) to obtain such a license, an individual who has passed a test administered by the state Construction Industry Licensing Board, or local county trades qualifying board, must apply as a "qualifying agent." The application must show that the qualifying agent is:

> legally qualified to act for the business organization in all matters connected with its contracting business and that he has authority to supervise construction undertaken by such business organization. (F.S. 489.119)

There must be at least one primary qualifying agent. All primary qualifying agents are jointly and equally responsible for:

1) all field work at sites,
2) financial matters, both for the organization in general and for each specific job.

Where there is more than one qualifying agent for a contracting business all of the qualifying agents may execute a joint agreement designating one primary qualifying agent and other secondary qualifying agents. This agreement must be approved by the Construction Industry Licensing Board. A secondary qualifying agent is responsible only for:

1) supervision of field work at sites where his or her license was used to obtain the permit, and
2) any other work for which he or she accepts responsibility.

A secondary qualifying agent is not responsible for supervision of financial matters. (F.s. 489.1195)

Case law has tended to make a qualifier liable for property damage and personal injury under a common law negligence theory. There is no known case law in Florida which has made a qualifying agent individually liable for financial matters as a result of being qualifying

agent, in spite of the inviting language of the statute. The current qualifying agent format has only been effective in Florida since the 1980's.

Many people directly affected by this law are becoming concerned about their individual duties and exposure. There do not appear to be any rules or regulations giving further definition to what is required to carry out the duty of supervision and duty of financial responsibility. Without specific rules or regulations, qualifying agents are left to a "reasonable" standard which is established by expert testimony from other construction professionals.

Understanding that the reason to have laws is to protect the public health and welfare, there should not be a law if there is no fear of shoddy construction or irresponsible financial practices resulting in harm to the public. However, with the experience of Hurricane Andrew, and the constant survey responses from those in construction that lack of payment is their number one problem, the current system can stand improvement.

The Questionnaire

The Role

It would seem appropriate that there be more definition of what a qualifying agent is required to do in order to properly discharge his or her duties. Some initial suggestions include:

1) Have no responsibility of the qualifying agent. Put the responsibility on the design professionals/professional inspectors, and require them, with their increased requirements, to have sufficient insurance.

2) Require the qualifying agent to inspect the work periodically and file signed inspection reports in the company records.

3) Require the qualifying agent to take a minimum of continuing education courses.

4) Limit the volume of work for which one qualifying agent may assume responsibility.

5) Require licensing of mechanics/journeymen and limit the amount of apprentice/helper/laborer personnel over which they may be responsible.

6) Increase the education/experience required before licensing of a qualifying agent including an internship under the direction of a certificate holder.

7) Require the qualifying agent to be present at the job at all times that work is being performed.

The Liability

1) No personal liability of a qualifying agent for a business a organization. [This does not appear likely since other professionals have been exposed to personal liability which risks they have been able to insure against.]

2) Require a surety bond or other security in proportion to the value of work being undertaken by the business organization, in lieu of personal liability for the qualifying agent.

3) Require the qualifying agent to furnish a surety bond or other security in proportion to the value of work being undertaken.

4) Require qualifying agents to carry professional liability insurance with specified limits.

5) Add sums to the licensing fee for a construction industry recovery fund to pay claims of harmed people.

6) Specify a limit of liability for the qualifying agent.

7) Require the qualifying agent or other financial responsible person to have a net worth commensurate with the work being performed as established by an audited financial statement to be filed with the license application or renewal.

One of the aspects of the study is a survey of the industry on these issues. It would be appreciated if you would circle all of the items above which you agree with. Please add any additional ideas that you may have. Finally, please indicate whether you are primarily a contractor, subcontractor, supplier, attorney, design professional, or other. Insert this letter, or a copy, in the enclosed envelope and return it to be counted.

Thank you for your contribution of time in reading (and hopefully response) to this letter.

Sincerely,
Larry R. Leiby

APPENDIX B

LICENSING LAWS IN THE FIFTY STATES

No contractor licensing laws:

1. Colorado
2 Georgia
3. Idaho
4. Illinois
5. Iowa
6. Kentucky
7. Maine
8. Massachusetts
9. Michigan
10. Minnesota
11. Missouri
12. Nebraska
13. New Hampshire
14. New Mexico
15. New York
16. Oklahoma
17. Pennsylvania
18. Rhode Island
19. South Carolina
20. South Dakota
21. Texas
22. Utah***
23. Vermont
24. Wisconsin
25. Wyoming

Some form of contractor licensing law:

1. Alabama
2. Alaska
3 Arizona
4 Arkansas
5 California
6 Connecticut
7 Delaware
8 Florida
9 Hawaii
10 Indiana*****
11 Kansas
12 Louisiana
13 Maryland
14 Mississippi
15 Montana
16 Nevada
17 New Jersey
18 North Carolina
19 North Dakota
20 Ohio
21 Oregon*
22 Tennessee**
23 Virginia
24 Washington
25 West Virginia

*Oregon provides for "registration" of contractors. Registration requires certain formalities not unlike states which require "licenses".
**Tennessee authorizes local governments to license contractors.
***Utah has repealed its statute regulating contractors.
*****Indiana allows local licensing but has no state licensing provisions.

APPENDIX C

CHAPTER 489, RELEVANT SECTIONS

§ 489.119 BUSINESS ORGANIZATION; QUALIFYING AGENTS.--

(1) If an individual proposes to engage in contracting in his own name, registration or certification may be issued only to that individual.

(2)~~(a)~~ If the applicant proposes to engage in contracting as a business organization, including any partnership, corporation, business trust, or other legal entity, or in any name other than his legal name, the business organization ~~applicant~~ must apply for certification or registration through a qualifying agent, or the individual applicant must apply for certification or registration under the fictitious name.

(a) The application must state the name of the partnership and of its partners; the name of the corporation and of its officers and directors and the name of each of its stockholders who is also an officer or director; the name of the business trust and its trustees; or the name of such other legal entity and its members; and must state the fictitious name, if any, under which the business organization is doing business.

1. The application for primary qualifying agent must include an affidavit on a form provided by the board attesting that the applicant has final approval authority on all checks, drafts, or payments, regardless of the form of payment, made by the entity, and that the applicant has final approval authority for all construction work performed by the entity.

2. The application for financially responsible officer must include an affidavit on a form provided by the board attesting that the applicant's approval is required for all checks, drafts, or payments, regardless of the form of payment, made by the entity, and that the applicant has authority to act for the business organization in all financial matters.

3. The application for secondary qualifying agent must include an affidavit on a form provided by the board attesting that the applicant has authority to supervise all construction work performed by the entity as provided in s. 489.1195(2).

(b) ~~In addition,~~ The applicant must furnish evidence of statutory compliance if a fictitious name is used, the provisions of s. 865.09(7) notwithstanding. ~~Such application must also show that the qualifying agent is legally qualified to act for the business organization in all matters connected with its contracting business and that he has authority to supervise construction undertaken by such business organization.~~

(c) A joint venture, including a joint venture composed of qualified business organizations, is itself a separate and distinct organization that must be qualified in accordance with board rules.

(d) The registration or certification, when issued upon application of a business organization, must be in the name of the business organization ~~qualifying agent,~~ and the name of the qualifying agent ~~business organization~~ must be noted thereon. If there is a change in any information that is required to be stated on the application, the business organization shall, within 45 days after such change occurs, mail the correct information to the department.

~~(b) Any person certified or registered pursuant to part I of this chapter who has had his license revoked shall not be eligible to be a partner, officer, director, or trustee of a business organization defined by this section or be employed in a managerial or supervisory capacity for a 5-year period. Such person shall also be ineligible to reapply for certification or registration under part I of this chapter for a period of 5 years.~~

(3)(a) The qualifying agent shall be certified or registered under this part in order for the business organization to be certified or registered in the category of the business conducted for which the qualifying agent is certified or registered. If any qualifying agent ceases to be affiliated with such business organization, he shall so inform the department. In addition, if such qualifying agent is the only certified or registered <u>contractor</u> ~~individual~~ affiliated with business organization, the business organization shall notify the department of the termination of the qualifying agent and shall have 60 days from the termination of the qualifying agent's affiliation with the business organization in which to employ another qualifying agent. The business organization may not engage in contracting until a qualifying agent is employed, <u>unless the executive director or chair of the board has granted a temporary nonrenewable certificate or registration to the financially responsible officer, the president, the sole proprietor, a partner, or, in the case of a limited partnership, the general partner, who assumes all responsibilities of a primary qualifying agent for the entity. This temporary certificate or registration shall only allow the entity to proceed with incomplete contracts as defined in s. 489.121.</u>

(b) The qualifying agent shall inform the department in writing when he proposes to engage in contracting in his own name or in affiliation with another business organization, and he or such new business organization shall supply the same information to the department as required of applicants under this part.

(c) Upon a favorable determination by the board, after investigation of the financial responsibility, credit, and business organization, the department shall issue, without an examination, a new certificate or registration in the <u>business organization</u> ~~qualifying agent's~~ name, and the name of the <u>qualifying agent</u> ~~new business organization~~ shall be noted thereon.

(4) When a certified qualifying agent, on behalf of a business organization, makes application for an occupational license in any municipality or county of this state, the application shall be made with the tax collector in the name of the ~~qualifying agent and the name of the~~ business organization <u>and the qualifying agent</u>; and the license, when issued, shall be issued to the ~~qualifying agent and the~~ business organization, upon payment of the appropriate licensing fee and exhibition to the tax collector of a valid certificate issued by the department, and the state license number shall be noted thereon.

(5)(a) Each registered or certified contractor shall affix the number of his registration or certification to each application for a building permit and on each building permit issued and recorded. Each city or county building department shall require, as a precondition for the issuance of the building permit, that the contractor taking out the permit must provide verification giving his Construction Industry Licensing Board registration or certification number.

(b) The registration or certification number of each contractor shall appear in any <u>proposal, bid, contract,</u> newspaper, airwave transmission, phone directory, or other advertising medium<u>, as defined by board rule,</u> used by that contractor <u>in the practice of contracting.</u>

(6) Each qualifying agent shall pay the department an amount equal to the original fee for certification or registration of a new business organization. If the qualifying agent for a

business organization desires to qualify additional business organization, the board shall require him to present evidence of ability and financial responsibility of each such organization. The issuance of such certification or registration is discretionary with the board.

~~(7) If a business organization or any of its partners officers, directors, trustees, or members is fined for violating s. 489.129(2), the board may, on that basis alone, deny issuance of a certificate or registration to a qualifying agent on behalf of that business organization.~~

Section 14. Section 489.1195, Florida Statutes, is amended to read:

489.1195 Responsibilities.--

(1) A qualifying agent is a primary qualifying agent unless he is a secondary qualifying agent under this section.

(a) All primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization; for all field work at all sites; and for financial matters, both for the organization in general and for each specific job.

(b) Upon approval by the board, a business entity may designate a financially responsible officer for purposes of certification or registration. A financially responsible officer shall assume personal responsibility for all financial aspects of the business organization and may not be designated as the primary qualifying agent.

(c) Where a business organization has a certified or registered financially responsible officer, the primary qualifying agent shall be responsible for all construction activities of the business organization, both in general and for each specific job.

(2)(a) One of the qualifying agents for a business organization that has more than one qualifying agent may be designated as the sole primary qualifying agent for the business organization by a joint agreement that is executed, on a form provided by the board, by all qualifying agents for the business organization.

(b) The joint agreement must be submitted to the board for approval. If the board determines that the joint agreement is in good order, it shall approve the designation and immediately notify the qualifying agents of such approval. The designation made by the joint agreement is effective upon receipt of the notice by the qualifying agents.

(c) The qualifying agent designated for a business organization by a joint agreement is the sole primary qualifying agent for the business organization, and all other qualifying agents for the business organization are secondary qualifying agents.

(d)~~(a)~~ A designated sole primary qualifying agent has all the responsibilities and duties of a primary qualifying agent, notwithstanding that there are secondary qualifying agents for specified jobs. The designated sole primary qualifying agent is jointly and equally responsible with secondary qualifying agents for field work supervision.

(e)~~(b)~~ A secondary qualifying agent is responsible only for:

1. The supervision of field work at sites where his license was used to obtain the building permit; and

2. Any other work for which he accepts responsibility.

A secondary qualifying agent is nor responsible for supervision of financial matters.

(3)(a) A qualifying agent who has been designated by a joint agreement as the sole primary qualifying agent for a business organization may terminate his status as such by giving actual notice to the business organization, to the board, and to all secondary qualifying agents of his intention to terminate his status. His notice to the board must include proof satisfactory

to the board that he has given the notice required in this paragraph.

(b) The status of the qualifying agent shall cease upon the designation of a new primary qualifying agent or 60 days after satisfactory notice of termination has been provided to the board, whichever first occurs.

(c) If no new primary qualifying agent has been designated within 60 days, all secondary qualifying agents for the business organization shall become primary qualifying agents unless the joint agreement specifies that one or more of them shall become sole qualifying agents under such circumstances, in which case only they shall become sole qualifying agents.

(d)~~(b)~~ Any change in the status of a qualifying agent is prospective only. A qualifying agent is not responsible for his predecessor's actions but is responsible, even after a change in status, for matters for which he was responsible while in a particular status.

APPENDIX D

ARIZONA REVISED STATUTES

PROFESSIONS AND OCCUPATIONS

CONTRACTORS

§ 32-1127. Responsible managing employee and qualifying party; definitions

The terms "responsible managing employee" and "qualifying party" shall, for the purpose of administering this chapter, be synonymous, and shall mean an employee who is regularly employed by the licensee and is actively engaged in the classification of work for which such responsible managing employee qualifies in behalf of the licensee. While engaged as a qualifying party for a licensee, the qualifying party shall not take other employment that would conflict with his duties a qualifying party or conflict with his ability to adequately supervise the work performed by the licensee. Such person may act in the capacity of the qualifying party for one additional licensee if one of the following conditions exists:

1. There is a common ownership of at least twenty-five percent of each licensed entity for which the person acts in a qualifying capacity.

2. One licensee is a subsidiary of another licensee for which the same person acts in a qualifying capacity. "Subsidiary" as used in this section means a corporation of which at least twenty-five per cent is owned by the other licensee.

APPENDIX E

CALIFORNIA CODE

BUSINESS AND PROFESSIONS

§ 7068. Qualifications

The board shall require an applicant to show such degree of knowledge and experience in the classification applied for, and such general knowledge of the building, safety, health an lien laws of the state and of the administrative principles of the contracting business as the board deems necessary for the safety and protection of the public. An applicant shall qualify in regard to this experience and knowledge in one of the following ways:
(a) If an individual, he shall qualify by personal appearance or by the appearance of his responsible managing employee who is qualified for the same license classification as the classification being applied for.
(b) If a copartnership or a limited partnership, it shall qualify by the appearance of a general partner or by the appearance of a responsible managing employee who is qualified for the same license classification as the classification being applied for.
(c) If a corporation, or any other combination or organization, it shall qualify by the appearance of a responsible managing officer or responsible managing employee who is qualified for the same license classification as the classification being applied for.

A responsible managing employee for the purpose of this chapter shall mean an individual who is a bona fide employee of the applicant and is actively engaged in the classification of work for which such responsible managing employee is the qualifying person in behalf of the applicant.

The board shall, in addition, require an applicant who qualifies by means of a responsible managing employee under either subdivision (a) or (b) to show his general knowledge of the building, safety, health and lien laws of the state and of the administrative principles of the contracting business as the board deems necessary for the safety and protection of the public.

Except in accordance with Section 7068.1, no person qualifying on behalf of an individual or firm under subdivision (a), (b), or (c) shall hold any other active contractor's license while acting in the capacity of a qualifying individual pursuant to this section.

At the time of application for renewal of a license, the responsible managing individual shall file a statement with the registrar, on a form prescribed by the registrar, verifying his capacity as a responsible managing individual to the licensee.

Statements made by on behalf of an applicant as to the applicant's experience in the classification applied for shall be verified by a qualified and responsible person. In addition, the registrar shall, as specified by board regulation, randomly review a percentage of such statements for their veracity.

Any licensee who has qualified for a license prior to January 1, 1980, by means of a responsible managing employee or officer, shall be permitted to continue as a licensee until January 1, 1982, during which time such licensee shall convert his or her qualifying status to conform with the requirements of this section as amended at the 1979-80 Regular Session of the Legislature.

§ 7068.1. Duty of individual qualifying on behalf of another; Acting as qualifying individual for additional person or firm

The person qualifying on behalf of an individual or firm under paragraph (1), (2), or (3) of subdivision (b) of Section 7068 shall be responsible for exercising that direct supervision and control of his or her employer's or principal's construction operations as is necessary to secure full compliance with the provisions of this chapter and the rules and regulations of the board relating to the construction operations. This person shall not act in the capacity of the qualifying person for an additional individual or firm unless one of the following conditions exists:
(a) There is a common ownership of at least 20 percent of the equity of each individual or firm for which the person acts in a qualifying capacity.
(b) The additional firm is a subsidiary of or a joint venture with the first. "Subsidiary," as used in this subdivision, means any firm at least 20 percent of the equity of which is owned by the other firm.
(c) With respect to a firm under paragraph (2) or (3) of subdivision (b) of Section 7068, the majority of the partners or officers are the same.
(d) Notwithstanding subdivisions (a), (b), and (c), a qualifying individual may act as the qualifier for no more than three firms in any one-year period. Any qualifier, on January 1, 1992, who is acting as the qualifier for more than three firms shall comply with this section by January 1, 1993.
(e) Failure to comply with the requirement set forth in subdivision (d) shall result in the disassociation of the qualifying individual and automatic suspension of the licensee's contractor's license effective January 1, 1993.

"Firm," as used in this section, means a copartnership, a limited partnership, a corporation, or any other combination or organization described in Section 7068.

"Person," as used in this section, is limited to persons natural, notwithstanding the definition of "person in Section 6025 of this chapter.

The board shall require every applicant or licensee qualifying by the appearance of a qualifying individual to submit detailed information on the qualifying individual's duties and responsibilities for supervision and control of the applicant's construction operations.

§ 7071.9. Requirement of qualifying individual's bond as condition precedent to license

(a) In addition to the contractor's bond required pursuant to Sections 7071.5 to 7071.8, inclusive, the board shall require, as a condition precedent to the issuance, reinstatement, reactivation or reissuance of a license and, as a condition precedent to the renewal of a license, that the

qualifying individual as referred to in Sections 7068 and 7068.1, when the qualifying individual is not either the proprietor, a general partner, or joint licensee, shall file or have on file a qualifying individual's bond a provided in Section 7071.10 in the sum of five thousand dollars ($5,000). In the event the responsible managing officer of a corporation owns 10 percent or more of the voting stock of the corporation, the officer shall not be required to file or have on file a contractor's bond as provided for in Section 7071.10. The registrar shall determine the nature and form of the proof required of the responsible managing officer applying for this exemption. No bond shall be required of the holder of an inactive license during the period the license is inactive.

(b) Notwithstanding any other provision of the law to the contrary, the board shall require, as a condition to the continued maintenance of any active license, that the qualifying individual, as referred to in Sections 7068 and 7068.1, when such individual is not personally either the proprietor, a general partner, or a joint licensee, file, or have on file, on and after January 1, 1980, a contractor's bond in the sum of five thousand dollars ($5,000).

§ 7071.10. Qualifying individual's bond

(a) The qualifying individual's bond required by this article shall be executed by an admitted surety insurer in favor of the State of California, in a form acceptable to the registrar and filed with the registrar by the qualifying individual. The qualifying individual's bond shall be for the benefit of the following persons:

(1) Any homeowner contracting for home improvement upon the homeowner's personal family residence damaged as a result of a violation of this chapter by the licensee.

(2) Any person damaged as a result of a willful and deliberate violation of this chapter by the licensee, or by the fraud of the licensee in the execution or performance of a construction contract.

(3) Any employee of the licensee damaged by the licensee's failure to pay wages.

(4) The trustees of any express trust fund damaged as the result of the licensee's failure to pay fringe benefits of eligible employees represented by the union which is signatory to the collective-bargaining agreement. Damage to an express trust fund is limited to actual loss sustained by a licensee's failure to pay the subject fringe benefits and after all other sources of recovery have been realized by the express trust fund. If an eligible employee is not represented by a union, the damaged employee may enforce the liability on the bond on the employee's own behalf to recover fringe benefits. As used in the paragraph:
(A) "Eligible" means entitlement to fringe benefits pursuant to the terms and provisions of the express trust fund.
(B) "Express trust fund" means an express trust fund established pursuant to a collective-bargaining agreement and to which the licensee is obligated to make payments on account of fringe benefits.

(b) The qualifying individual's bond shall not be required in addition to the contractor's bond when the qualifying individual is himself the proprietor under subdivision (a) or a general partner under subdivision (b) of Section 7068.

APPENDIX F

NEVADA REVISED STATUTES

CONTRACTORS

624.260 Applicant to demonstrate experience, knowledge and financial responsibility; qualifications concerning experience and knowledge; limitations on qualifications of natural person.

1. The board shall require an applicant to show such a degree of experience, financial responsibility and such general knowledge of the building, safety, health and lien laws of the State of Nevada and the rudimentary principles of the contracting business as the board deems necessary for the safety and protection of the public.

2. An applicant may qualify in regard to his experience and knowledge in the following ways:

(a) If a natural person, he may qualify by personal appearance or by the appearance of his responsible managing employee.

(b) If a copartnership, a corporation or any other combination or organization, it may qualify by the appearance of the responsible managing officer or member of the personnel of the applicant firm.

3. The natural person qualifying on behalf of another natural person or firm under paragraphs (a) and (b) of subsection 2 must prove that he is a bona fide member or employee of that person or firm and when his principal or employer is actively engaged as a contractor shall exercise authority in connection with his principal or employer's contracting business in the following manner:

(a) To make technical and administrative decisions;

(b) To hire, superintend, promote, transfer, lay off, discipline or discharge other employees and to direct them, either by himself or through others, or effectively to recommend such action on behalf of his principal or employer; and

(c) To devote himself solely to his principal or employer's business and not to take any other employment which would conflict with his duties under this subsection.

4. A natural person may not qualify on behalf of another for more than one active license unless:

(a) One person owns at least 25 percent of each licensee for which he qualifies; or

(b) One licensee owns at least 25 percent of the other licensee.

APPENDIX G

STATUTE OF LIMITATION AND REPOSE
§ 95.11

95.11 Limitations other than for the recovery of real property. --Actions other than for recovery of real property shall be commenced as follows:

(1) WITHIN TWENTY YEARS. --An action on a judgment or decree of a court of record in this state.

(2) WITHIN FIVE YEARS. --

(a) An action on a judgment or decree of any court, not of record, of this state or any court of the United States, any other state or territory in the United States, or a foreign country.

(b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument.

(c) An action to foreclose a mortgage.

(3) WITHIN FOUR YEARS.--

(a) An action founded in negligence.

(b) An action relating to the determination of paternity, with the time running from the date the child reaches the age of majority.

(c) An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or would have been discovered with the exercise of due diligence. In any event, the action must be commenced within 15 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer, whichever date is latest.

APPENDIX H

SELECTED COMMENTS FROM THE INTERVIEWS

No one is interested in suing qualifiers because for defective construction where they don't supervise the job. No one wins in that kind of situation. Certainly not the homeowner. The homeowner is not interested in litigation since it will cost more money to pay for attorney's fees than the defect is worth. The only ones who make money when a homeowner has to go to court is the attorney. The homeowner just wants the problem fixed.

Absentee Qualifiers are a major problem. How can a qualifier supervise construction when he is out of state. Even if the qualifier is sued, you probably can't reach him, and he probably doesn't care. They don't have any money to pay the homeowner anyway, otherwise they wouldn't be selling their licenses.

Legitimate contractors are not the problem. They are interested in satisfying the homeowner. They are not going to get into a situation where they have to be sued for construction defects.

Contractors and their qualifying agents are ignorant of the law which governs them. Notifying qualifiers of their obligations and potential liabilities under the law would cut the problems in half.

Stronger fines are necessary. No one is afraid of the DPR. They are overwhelmed. Qualifiers and Contractors are willing to take their chances knowing that even if they do get reprimanded it will only be a slap on the wrist.

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Qualifiers should be responsible for the construction. That's the way the system is supposed to work. The state test focuses mostly on business knowledge and not building knowledge, however the 489 rewrite was a good move except for the Jim Walker addition.

If qualifiers are now concerned about their liability because of a duty to supervise, what will happen when 489 allows contractors to use unlicensed parties under the scope of their licenses? This will create a greater duty to supervise the work since you know that the parties are unlicensed.

The key question is: What is the definition of supervisor?

***

As a general contractor with a state license of twenty years, I have always believed that the responsibility places on a qualifying agent is close to ridiculous. How many businesses are governed more that the construction industry? We do not design, engineer or are we allowed to

pour the first yard of concrete without an official of the government overseeing every aspect of the construction process. A contractor is merely an entrepreneurial businessman as is the CEO of many of the nations small and huge businesses. Remember, Florida is one of the few states requiring a contractor to be licensed. Yes, I say the qualifying agent is merely the operating officer whom could never cover all field construction and manage a business for profit.

If it were possible to enforce upon all people in the construction industry licensing, we would have a much improved environment, but how do you hire only licensed superintendents? One of my best men has taken the exam four times and has finally given up. Perhaps more levels of licensing may be the answer.

There are many licensed people who have never been near a construction site. If you are going to enforce contractor licensing there should be a history of qualifications although the State exam has more to do with administration than actual construction.

The personal liability of a mega building company cannot use only the qualifier as the victim. It is as if the president of General Motors would go to prison for a defective transmission that caused a fatal accident. It is very hard to comprehend how the head of a major construction company can be liable for an accident on one of this construction sites in the panhandle governed by all the agencies and design people involved in any project.

The general contractor should not require licensing. He should be of good character, financially stable and a business person with integrity since his or her control is completely in the hands of all design, engineering and government control.

***

The fact of the matter is a large scale contractor has no responsibility. They can afford to be insulated or insured. This only hurts the small guys.

There should be no licenses for general contractors, the only ones tested should be subs. Either everyone gets licensed or you only get licensed after you have had enough experience, say ten years.

***

The new law makes construction corporations look more like professional associations. That's the way is should be. If your architect makes a mistake who's liable? He is.

If we do away with licensing the only remedy will be in civil court. If that happens the only ones who will be making any money will be the attorneys.

Bonding is not the answer. It is too expensive and will hurt minority contractors the hardest.

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The statute (489) is vague. It does not tell contractors what their duty is. If a general contractor tells you he doesn't know what he must do to comply, he's telling you the truth.

***

90% of qualifiers are selling their licenses -- that's their main concern. But you can't supervise work is they're out of the state. The problem is widespread. We should require qualifying agents to register for the first time as the qualifying agent on a job.

***

Subcontractors are the key to the process. If they are not performing then you have trouble. The qualifying agent gets into trouble when the owner insists on hiring his own subs because they were the lowest bidders. The qualifier who has to supervise is in a position of not being able to control subs who are incompetent.

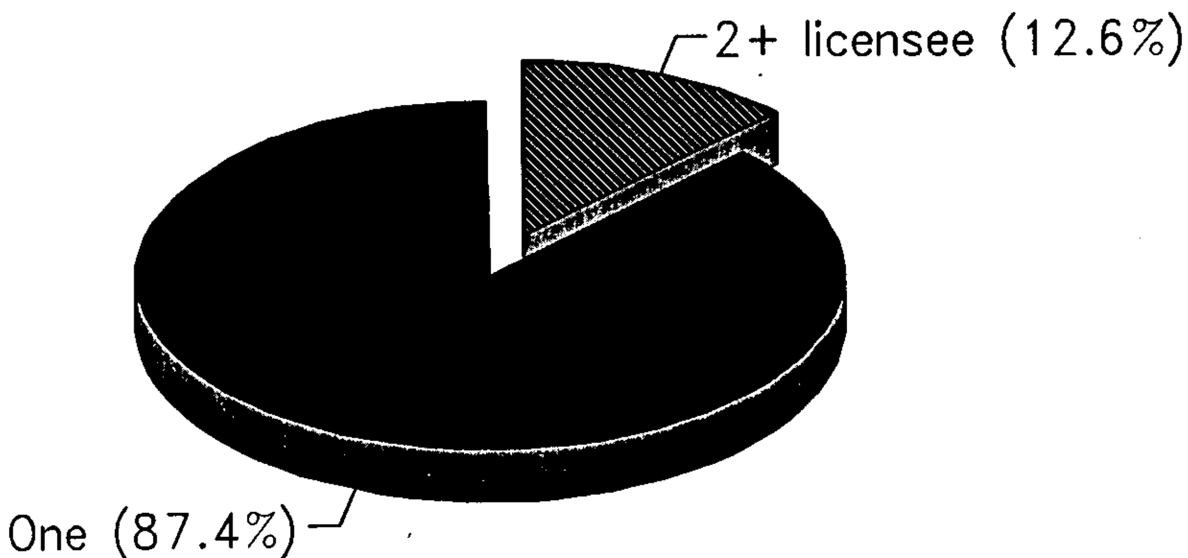
The qualifier shouldn't have to be at the job site everyday.

APPENDIX I

GRAPHIC ANALYSIS OF DISCIPLINARY ACTIONS

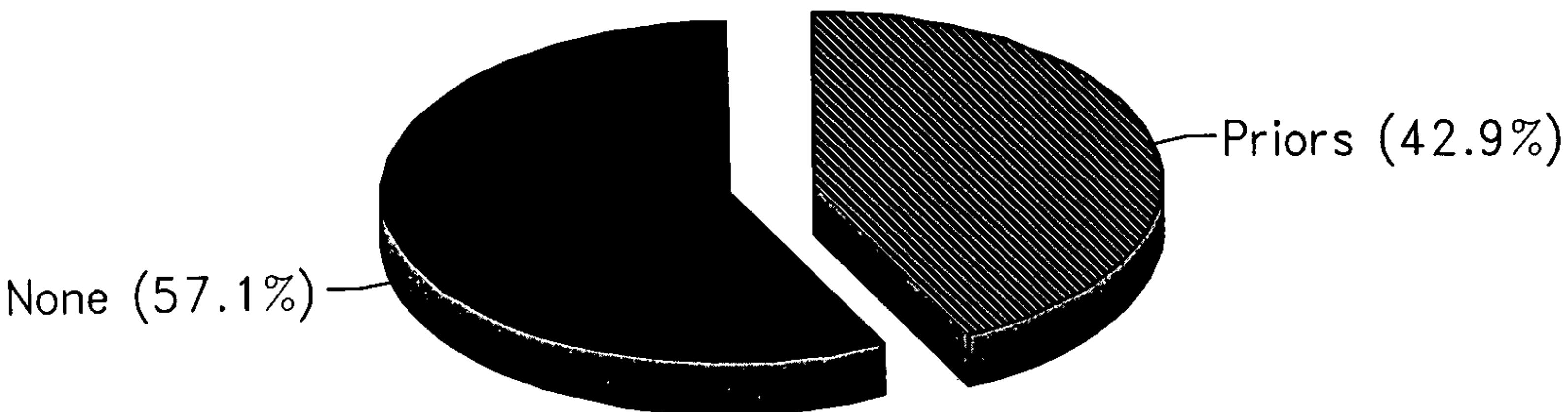
QUALIFIERS DISCIPLINED

Qualifiers of One Licensee vs. More

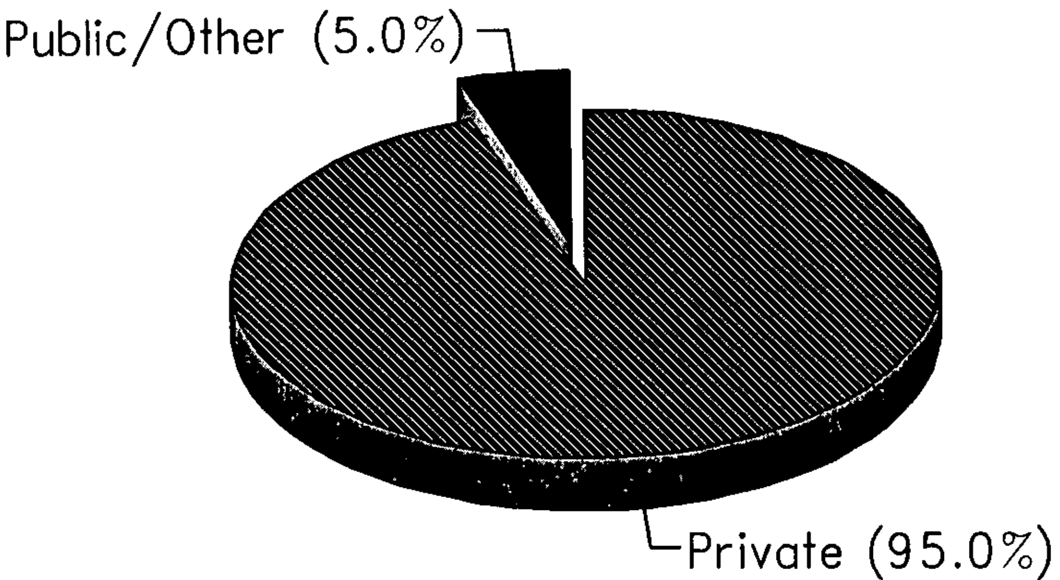


QUALIFIERS DISCIPLINED

Qualifiers with Prior Offences vs. None



QUALIFIERS DISCIPLINED
Private vs. Public/Other Work



QUALIFIERS DISCIPLINED
Actions Contested vs. Not Contested