Do Engineers and Lawyers Approach Problems Differently?

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In the 1980s, I was doing a new edition with Marc M. Schneier of my *Legal Aspects of Architecture, Engineering and the Construction Process* (we are currently working on the 8th edition.) After writing about defects, I remembered something I had read when I was retained by a large geotechnical engineering company that had asked me to evaluate legal risks inherent in its environmental projects. To do this, I had to educate myself on the *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, commonly known as Superfund.

For our purposes, the important word is "response." Upon discovery of an environmental problem, particularly a dangerous one, a response was crucial. Questions had to be addressed. What went wrong? Why? How can we correct the problem as quickly as possible at the least cost?

These questions were addressed to and answered by a team of experts, the response team. The team was put in place at the time the project first went on the drawing boards. Team members were appointed by the leading players, the owner, the designers, the builders, and the specialty subcontractors. Liability problems would be dealt with later.

I added a section to the book that I called "Defect Response Agreements." (Sad to say, this section was deleted from subsequent editions, but hopefully it will be in the forthcoming 8th edition.) The section was based on the CERCLA approach. I assumed that ultimately the cost to correct the defect, and apportionment of any losses caused by the main actors, would be settled. Each of the main actors, as well as their backup sureties and insurers, would pitch in some money and waive claims against one another. The amount that each pitched in would depend on assessment of fault (usually there was enough to go around), the economic stakes that the major actors had in the project, and their bargaining positions and negotiation skills. But this was done after huge amounts of time and money were spent in investigation, pretrial discovery, and judicially imposed pretrial procedures. Often the negotiation was completed on the courthouse steps.

I suggested that we roll back the tape back and do the negotiation at the time the project commenced. An agreement would be made by the major actors that established a response team and would also specify how costs would be shared (usually on the basis economic stakes and roles of the actors). All parties would waive claims against one another, particularly those for consequential damage. This was a problem-solving approach, one that might be used by an engineer.

How would lawyers approach this problem? First some background: Condos generate a high number of claims. If renters in a large apartment complex are unhappy, rather than sue the landlord they are likely to move out. But condos involve owners, not renters; they create owner associations with the power to levy charges to litigate.

Beginning in the late 1990s, California witnessed many condo claims, which generated a specialized bar dealing with these claims. To respond to this booming business, the California legislature enacted SB800 in 2002, currently the California Civil Code §§895–945.5. While this code covered residential buildings, it was enacted in response to condo claims. It was clearly a lawyer response. What did it do?

It first defined "actionable defects" in great detail and provided standards. It described them as issues of water, structure, soil, fire protection, plumbing and sewer, electrical, and other areas of construction. Defects were spelled out in excruciating detail, such as a door that would not let water through, and heating that would retain room temperature at 70° at a point of 3 ft above the floor. Of course there were "catch-alls," such as work that did not meet safety needs, and anything in addition to those defects described that caused a defect.

The statute creates immunity for independent inspectors, establishes warranties, creates a 10-year statute of repose measured from completion, determines against whom claims can be made, and prescribes allowable damages.

The legislation establishes a prelitigation step-by-step procedure. The owner must give the builder notice of any claimed defects. The builder can inspect and offer to repair. If the builder does not offer to repair, the owner can go to court. If the builder offers to repair, the owner has 30 days to decide whether to accept. The builder can make an offer to pay cash instead of repair. Contractual ADR is not preempted. At least in theory, failure by the owner to follow the prescribed procedures bars the owner from going to court. SB800 is not only a lawyer approach but is a lawyer's dream—rules, rules, and more rules.

The instinctive reaction of an engineer to a defect is to ask What went wrong? How do we fix it? The instinctive reaction of a lawyer is to ask Who's at fault? How can we get them to pay?

At the risk of overgeneralization, engineers are practical people who try to solve problems. Lawyers want detailed rules for everything that spotlights disputes.