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## Forty Years on, Practitioners, Parties, and Scholars Look Ahead

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## **Forty Years on, Practitioners, Parties, and Scholars Look Ahead**

*The votes are in: focus on preventing and limiting conflicts*

By Thomas D. Barton and James P. Groton

During the 40 years since the Pound Conference at which Harvard Law School Professor Frank Sander first suggested that some conflicts could be resolved in ways other than traditional litigation, alternative methods to address legal and business problems have been refined and reinvented in an evolving explosion of creativity. Thousands of talented dispute resolution professionals, lawyers, and community participants have been attracted to the practice of dispute resolution techniques such as mediation, arbitration, and other processes. From small claims court cases to billion-dollar multinational arbitrations, countless disputes have been resolved respectfully, efficiently, and often amicably using a variety of dispute resolution techniques.

Nevertheless, users of dispute resolution services and professionals in the field acknowledge that resolving conflict can still take an inordinate amount of time, require considerable costs, and even in some cases intensify hostilities. That recognition was part of the impetus for the 2016-2017 Global Pound Conference (GPC) series, the results of which we hope will spark new tools and practices toward averting and de-escalating conflicts.

By the conclusion of the Global Pound Conference process, thousands of delegates and participants had voted on 20 core questions that sought their views on dispute resolution, and online voting at the conclusion of the onsite conferences supplemented the data. The delegates represented all major stakeholders: parties (users of dispute resolution services, including business leaders and inside counsel); advisors (including outside lawyers); providers of dispute resolution services; and two kinds of influencers (academics and members of the government or the judiciary).

This enormous and ambitious undertaking was aimed at understanding how to best serve people in conflict. Future generations may look back on the 1976 Pound Conference and the Global Pound Conference series and recognize their enabling role in a movement away from power-based adversarial confrontation toward the search for solutions based in human consent, shared interests, mutual regard, and strong relationships.

### **The overall GPC voting results**

Across the globe and consistently among all participant groups, the GPC voting results and other answers to questions supported the following conclusions:

- Dispute resolution should be conceived and practiced earlier in the trajectory of risks that can develop into conflict, escalating from differences of opinion to arguments, aggression, and finally formal dispute resolution efforts;

- Where possible, risks should be understood and addressed in advance so that problems never arise; and
- Where prevention fails, steps should be initiated to de-escalate, contain, or provide “real-time” *ad hoc* resolution of conflicts so that formal dispute resolution can be avoided.

### **Detailed voting results**

The questions asked during the third session of the Global Pound Conference were focused on learning how dispute resolution can be improved. Question 3.2 asked specifically “To improve the future of commercial dispute resolution, which of the following processes and tools should be prioritized?”

- Adjudicative dispute resolution methods (litigation or arbitration);
- Combining adjudicative with non-adjudicative processes (e.g. arbitration/litigation with mediation/conciliation);
- Encouragement by courts, tribunals, or other providers to reduce time and/or costs;
- Non-adjudicative dispute resolution methods (mediation or conciliation);
- Pre-dispute or pre-escalation processes to prevent disputes;
- Technology to enable faster, cheaper procedures (e.g. Online Dispute Resolution, electronic administration, remote hearings).

The GPC Cumulative Data Results from the 29 conferences<sup>1</sup> show that “Pre-dispute or pre-escalation processes to prevent disputes” was the top choice among all alternative processes. Under the GPC system for ranking preferences,<sup>2</sup> this pre-dispute/pre-escalation choice received a score of 3363, with the closest alternative receiving a relatively distant 2929. In the “cross-sorting” of voting results, the pre-dispute/pre-escalation alternative was the top choice of parties, advisors, and influencers – every stakeholder except the two provider groups (adjudicative and non-adjudicative) – and even for them, the pre-dispute/pre-escalation choice received second-most votes.

This outcome of the “how can we improve” question correlates well with the response to a key question in the fourth session devoted to the general subject of what action items should be considered and by whom. This final – and perhaps most significant – question in the survey asked “what innovations/trends are going to have the most significant influence on the future of dispute resolution?” The option “Changes in corporate attitudes to conflict prevention” received a score of 2959, second to the strongly compatible alternative “Greater emphasis on collaborative as opposed to adversarial processes for resolving disputes,” which received 3361 points. These

two alternatives were the consistent number 1 and number 2 choices across every stakeholder group.<sup>3</sup>

### **History of prevention efforts**

These preferences for collaborative pre-dispute processes are not new. During the 1950s, the lawyer and legal scholar Louis M. Brown called for the development of “Preventive Law.”<sup>4</sup> Since that time, research and practice have moved, particularly in the construction industry, toward finding and developing methods for preventing and de-escalating conflict. As far back as a decade ago, a group of dispute resolution thought leaders predicted that the field’s next frontier would be the “anticipation of conflict” – thinking ahead.<sup>5</sup>

The advantages of anticipating and averting problems have percolated even longer through time-honored adages such as “a stitch in time saves nine” and “an ounce of prevention is worth a pound of cure.” These life maxims are not hollow: in many aspects of life, preventing a problem is almost always more effective, efficient, and relationally respectful than waiting for cost or injuries and then trying to fix both the problem and the damage it has inflicted.

Why, then, are we only now seeing early intervention tools as the most pressing need for the dispute resolution community? Perhaps today’s robust calls for prevention and de-escalation are the product of the experiences, successes, and acknowledgement of the limitations of the 40-year dispute resolution movement. During that period, dispute resolution professionals have been exposed to thousands of problems within a variety of organizations, transactions, or domestic relationships, problems that have then escalated beyond the parties’ capabilities of self-resolution. Reflecting on these escalations may have prompted dispute resolution providers to uncover the root causes of the problems and imagine steps that might have been taken at an earlier stage to avert or defuse the conflict. This same exposure has probably alerted the dispute resolution community to see how frequently the same kinds of problems – identical or slightly camouflaged – seem to recur and to recognize the potential value of methods to prevent and de-escalate conflict.

As a result of the voting on the GPCs core questions – the attitudes and preferences it reveals, the training it may ultimately facilitate, and the creativity it may inspire – prevention and de-escalation may now become more central to the future of dispute resolution and to the work of practitioners.

### **Challenges in training professionals in prevention skills**

To satisfy the urgings of the dispute resolution community for a new collaborative approach to resolving conflict, tools for prevention and de-escalation must be identified, refined, and widely trained. These techniques are not necessarily intuitive, nor do they fit easily with the mentality or procedures ingrained in lawyers (who now make up such a large portion of the dispute resolution community) by their formal legal education. That relative unfamiliarity with the ideas and needed skills may also have contributed to the delayed recognition of their value

for dispute resolution practice. At the outset of the dispute resolution movement, arbitration and mediation were arguably more comfortable methods for lawyers than prevention and de-escalation. Indeed, ideas about the origins of disputes within systems of relationships, and how to make early interventions to avert or stem the problems, remain rare within legal education.

Lawyers are traditionally trained, especially in the formative first year, by reading appellate judgments. Inside virtually every appellate court report, the damage has been done. The roles of lawyers and judges are essentially reactive and *post hoc*: they gather evidence to reconstruct a moment of potentially blameworthy behavior. They assess responsibility and calculate compensatory damages. Rarely is a case subjected to an “autopsy”<sup>6</sup> in which the root causes of the dispute are investigated. Equally rarely is an aftermath imagined, with some idea of how the litigation process itself may have affected the parties’ future interpersonal or business relationships, or their individual well-being.<sup>7</sup> To the 1L student learning to “think like a lawyer,” legal problem-solving is almost exclusively portrayed through events that have already happened, in a past tense<sup>8</sup> where cold, immutable historical facts<sup>9</sup> were mapped onto the elements of legal rules to determine binary issues of liability.

### **Some prevention tools**

Fortunately, the past four decades have produced a wealth of dispute prevention and resolution tools that enable problem-solving in the present tense: parties are now being taught how to steer the conversation away from blame for past events toward finding immediate common ground and moving forward. Letting loose of the past and of any need to vindicate legal rules permits the parties to emphasize “What can we do, right now, that will be most constructive?” or ask “How can we focus principally on ‘fixing the problem, rather than fixing the blame’?”

The challenge of the GPC voting results, and next step for the dispute resolution community, is to refine and train for tools that operate in the future tense so that dispute resolution professionals can:

- Discern risks or frictions well ahead of their clients’ perceptions;
- Help parties understand the root causes of those risks; and
- Suggest interventions that could at least limit those risks and perhaps even transform potential problems into positive opportunities.

These goals are realistic; they are an extension of the effective counseling and neutral advising that many dispute resolution professionals now offer. Nor do they imperil the livelihood of dispute resolution professionals. Rather, they suggest a broader skill set and expansion into roles more like a designer than a repair person.

Fortunately, many in our field have made a strong start. Practical and successful preventive and de-escalation methods have been well described, and their underlying concepts

and implications well explored, in a variety of materials generated in the United States<sup>10</sup> and in Europe (under the banner of “Proactive Law.”)<sup>11</sup> Construction industry leaders have collaborated over several decades to develop effective tools to “keep the peace” on construction projects.<sup>12</sup> As a result, this sector enjoys widely adopted techniques to deal with the high risks that emerge from high-capital, deadline-driven, multi-party, and intricate projects. Building on this experience and others in international settings and US labor relations, in a resource titled *The Negotiator’s Desk Reference*, Christopher Honeyman, Andrea Kupfer Schneider, and James P. Groton (one of the authors of this article) have summarized and analyzed various methods.<sup>13</sup> They categorize the techniques as “Problem Prevention;” “Problem Solving;” and “Dispute De-escalation and ‘Real-Time’ Resolution.” Space limitations prohibit more than a simple listing of these tools, but their cataloguing below reveals their diversity and practicality.

The Problem Prevention tools include pre-dispute agreements to engage in:

- Good, open communications;
- Realistic allocation of risks;
- Joint initial analysis of potential problems;
- Incentives to parties to encourage cooperation; and
- Efforts to establish a partnering relationship.

Problem-solving tools include pre-dispute contract clauses that are useful to avert problems or facilitate quick negotiation methods to keep threats contained:

- Notice and cure agreements
- Covenants of good faith and fair dealing
- Agreements that encourage rational behavior
- Agreements to encourage the sharing of basic information
- A variety of ongoing “in-house” problem-solving tools such as:
  - Appointing an ombuds
  - Charging dispute transaction costs against the budget of the department in which the dispute arose, to internalize awareness of the financial impacts where problems are permitted to escalate
  - Instituting sensible document production and retention policies as well as memos to internal files that memorialize good-faith efforts to prevent or resolve problems
  - Creating crisis management policies and checklists
  - Conducting periodic legal audits and feedback mechanisms to help foresee problems

Finally, several possible dispute de-escalation and “real-time” resolution tools may be agreed upon at the pre-dispute stage:

- Negotiations
- Step Negotiations
- Use of a “Standing Neutral”

- Standing Arbitrator
- Standing Mediator

The general themes of these future-tense tools are to “think ahead” thoughtfully, with as much understanding as possible of the relationships and environments that form the context for problems and disputes; enhance communications and share information through as many channels as feasible, establishing early warnings and good feedback loops to analyze and take responsibility for problems as they arise; and encourage empathy and fairness in dealings, because trust and mutual accommodations can ward off many disputes or unnecessary adverse consequences. Finally, the authors urge people to establish standing relationships with experts in the field of the enterprise (who could include dispute resolution professionals) whose simple presence in projects may, as proven in the construction industry with standing neutrals,<sup>14</sup> paradoxically instill a sense of self-reliance and collaborative problem-solving.

### **Where next?**

On the more distant horizon are novel efforts to enhance prevention and goal-seeking uses of the law itself. The dispute resolution ideal of open, shared communications has already been applied to the formatting and visualization of many legal regulations and contracts.<sup>15</sup> Lawyers and information designers have collaborated in a series of “Legal Design Jams” to promote comprehensibility, self-help, and stronger compliance with legal requirements.<sup>16</sup> The hoped-for results – backed by some early verification<sup>17</sup> – are that making law more genuinely accessible to its ultimate users will advance its functionality as well as its cultural acceptance.<sup>18</sup>

A second set of initiatives seeks prevention and de-escalation from a completely different perspective: by automating various legal operations and generating open-sourced, fair-minded modules of common legal activity that can then be embedded as computer-readable “prose objects” into contracts.<sup>19</sup> These coded clauses execute various real-world operations seamlessly, once contractual parameters are electronically verified. An indelible record of unfolding transactions can then be reliably stored and shared through public-ledger block-chain technology.<sup>20</sup>

With information from the voting on the core questions at Global Pound Conference meetings all around the world, these and other dispute prevention and resolution methods – in practice as well as design – will continue to evolve, at a pace of innovation that may now accelerate. We are indebted to the Global Pound Conference initiative and to the rich data it has generated to help guide the future.

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<sup>1</sup> Global Pound Conference Series, 2016-17, SHAPING THE FUTURE OF DISPUTE RESOLUTION & IMPROVING ACCESS TO JUSTICE: CUMULATED DATA RESULTS, MARCH 2016-SEPTEMBER 2017 (2017).

<sup>2</sup> Votes on the multiple-choice questions were weighted. The first choice scored 3 points, second choice 2 points, and third choice 1 point.

<sup>3</sup> Global Pound Conference Series, 2016-17, SHAPING THE FUTURE OF DISPUTE RESOLUTION & IMPROVING ACCESS TO JUSTICE: ONLINE VOTING RESULTS (JULY—AUGUST 2017) (2017).

<sup>4</sup> LOUIS M. BROWN, *PREVENTIVE LAW* (1950).

<sup>5</sup> Christopher Honeyman et al., *The Next Frontier is Anticipation: Thinking Ahead about Conflict to Help Clients Find Constructive Ways to Engage Issues in Advance*, 25 *ALTERNATIVES TO THE HIGH COST OF LITIG.* 99 (2007).

<sup>6</sup> Louis M. Brown, *Legal Audit*, 38 *S. CAL. L. REV.* 431 (1965).

<sup>7</sup> Reflections and research on the impact of legal system encounters on personal well-being is one general theme of Therapeutic Jurisprudence. See generally <http://law2.arizona.edu/depts/upr-intj/>.

<sup>8</sup> Thomas D. Barton, *The Modes and Tenses of Legal Problem Solving, and What to Do About them in Legal Education*, 43 *CAL. W.L. REV.* 389 (2007).

<sup>9</sup> Louis M. Brown, *The Law Office: A Preventive Law Laboratory*, 104 *U. PA. L. REV.* 940, 944 (1956).

<sup>10</sup> See, e.g., CPR. 2010. DISPUTE PREVENTION INITIATIVE, AND PRACTICE MANUAL FOR REDUCING DISPUTES THROUGH WISE PREVENTION PRACTICES. New York: International Institute for Conflict Prevention & Resolution. Available online at <https://www.cpradr.org/newspublications/articles/2010-11-23-cpr-prevention-practice-materials> (last visited January 27, 2017); George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 *AM. BUS. L.J.* 641 (2010); Thomas D. Barton, *PREVENTIVE LAW AND PROBLEM SOLVING: LAWYERING FOR THE FUTURE* (Vandeplas Publishing, 2009).

<sup>11</sup> See, e.g., Gerlinde Berger-Walliser, *The Past and Future of Proactive Law: An Overview of the Development of the Proactive Law Movement*, in *PROACTIVE LAW IN A BUSINESS ENVIRONMENT* 13, 16 (Gerlinde Berger-Walliser & Kim Ostergaard eds., 2012). Edward A. Dauer, *The Role of Culture in Legal Risk Management*, 49 *SCANDINAVIAN STUD. L.* 93 (2006).

<sup>12</sup> James P. Groton, *The Standing Neutral: A 'Real Time' Resolution Procedure that also Can Prevent Disputes*, 27 *ALTERNATIVES TO THE HIGH COST OF LITIG.* 177 (2009).

<sup>13</sup> James P. Groton et al., *Thinking Ahead [Chapter 70]*, in *THE NEGOTIATOR'S DESK REFERENCE* (Christopher Honeyman & Andrea Kupfer Schenider eds., 2017).

<sup>14</sup> James P. Groton & Kurt L. Dettman, *How and Why the Standing Neutral Dispute Prevention and Resolution Technique Can Be Applied*, 29 *ALTERNATIVES TO THE HIGH COST OF LITIG.* 177 (2011).

<sup>15</sup> Gerlinde Berger-Walliser et al., *From Visualization to Legal Design: A Collaborative and Creative Process* (54 *AMER. BUS. L. J.* 347 (2017); Thomas D. Barton et al., *Visualization: Seeing Contracts for What They Are, and What They Could Become*, 19 *J.L. BUS. & ETHICS* 47 (2013).

<sup>16</sup> “Legal Design Jams” were originally created by Information Designer Stefania Passera. See Margaret Hagan, *Legal Design Jam: A Sketchnote*, Open Law Lab (Oct. 26, 2013), <http://www.openlawlab.com/2013/10/26/legal-design-jam-sketchnote/>.

<sup>17</sup> Stefania Passera, *Beyond the Wall of Text: How Information Design Can Make Contracts User-Friendly*, in *DESIGN, USER EXPERIENCE, AND USABILITY: USERS AND INTERACTIONS* (Aaron Marcus, ed., 2015).

<sup>18</sup> Thomas D. Barton, *Re-designing Law and Lawyering for the Information Age*, 30 *NOTRE DAME J. OF L., ETHICS, AND PUB. POL'Y* 1 (2016).

<sup>19</sup> See generally the work of James G. Hazard, founder of CommonAccord.org. See <http://www.commonaccord.org/>

<sup>20</sup> James G. Hazard & Helena Haapio, *Wise Contracts: Smart Contracts that Work for People and Machines*, in *TRENDS AND COMMUNITIES OF LEGAL INFORMATICS. PROCEEDINGS OF THE 20<sup>TH</sup> INTERNATIONAL LEGAL INFORMATICS SYMPOSIUM IRIS 425-432* (Erich Schweighofer et al., eds., 2017).