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Professor Roebuck's Lessons for Mediators, Arbitrators, and Historians

*Douglas E. Abrams**

I. INTRODUCTION

“There is properly no history; only biography,” wrote essayist Ralph Waldo Emerson more than a century and a half ago.¹ In our own day, David McCullough, recipient of two Pulitzer Prizes and the Presidential Medal of Freedom, says that historians succeed best when their writing influences perceptions of the present day. “History,” McCullough explains, “is who we are and why we are the way we are.”² History also provides direction for where we are going because, as statesman and Nobel Laureate Sir Winston Churchill put it, “[t]he longer you can look back, the farther you can look forward.”³

Professor Roebuck's biographical essay on Nathaniel Bacon, the centerpiece of his historical article, delivers a timely lesson about how adherence to solid personal standards can elevate a mediator or arbitrator above the rest of the pack. With an eye toward future national direction, the article closes by summoning American historians to chronicle the development of alternative dispute resolution (ADR) since the nation's colonial days.

II. INTEGRITY, DIGNITY, AND TRUST

Professor Roebuck's biographical essay identifies the imposing ledger of governmental officials and private citizens who continually enlisted Nathaniel Bacon's services as a mediator and arbitrator. The array numbered the King, Parliament, and the Privy Council (the Crown's inner advisors).⁴ It also numbered courts; prominent jurists such as Sir Edward Coke, the Chief Justice of the King's Bench;⁵ and the Chancery and the Chancellor (the “Keeper of the King's Conscience,” guardian of equity jurisdiction that tempered the common law).⁶

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1. RALPH WALDO EMERSON, *ESSAYS: FIRST SERIES* 14 (1841).

2. *Historian Addresses Wesleyan*, N.Y. TIMES (June 4, 1984). <http://www.nytimes.com/1984/06/04/nyregion/historian-addresses-wesleyan.html>.

3. Winston S. Churchill, Speech to the Royal College of Physicians (Mar. 2, 1944), in 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES 1897-1963, at 6895, 6897 (Robert Rhodes James ed., 1974).

4. *E.g.*, 10 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 464-68 (1938).

5. *E.g.*, *id.* at 329.

6. *E.g.*, JOHN H. LANGBEIN, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 271-99 (2009).

Why did mediator-arbitrator Bacon remain in such demand for so long? Professor Roebuck finds that Bacon maintained a “reputation for integrity,”⁷ and for “impartiality.”⁸ He was also renowned for “conscience and dignity”⁹ and for “wisdom.”¹⁰ Arbitrators normally sat in groups of two or four to help assure a hearing for each side, but Professor Roebuck reports that Bacon frequently sat alone because “both sides trusted him.”¹¹

For today’s mediators and arbitrators, the lesson from this history is that a solid professional reputation depends on more than native intelligence or professional connections. Nathaniel Bacon was undoubtedly smart, and he was surely well-connected as a Member of Parliament and a versatile public figure from a family of obvious means. But he likely had no monopoly on intelligence or connections among other men who also held themselves out as mediators and arbitrators in matters of British commerce, business, and property.

Being smart or well-connected did not guarantee Bacon a solid reputation, and these head starts provide no guarantees today. Plenty of mediators and arbitrators – lawyers and non-lawyers alike – today are smart, but not all win and hold lasting respect, either in the resolution of particular disputes, or among peers in the dispute resolution community.

Plenty of mediators and arbitrators today are also well connected in professional circles, but connections may not substitute for integrity, dignity, trust, and similar intangibles for very long. Connections might help get a professional’s foot in the door, but the professional still must perform up to and sometimes beyond expectations. In big cities and small towns, and in the international dispute resolution arena, word gets around.

Reputation for integrity, dignity, and trust does not come easily because arbitrations involve adversaries headed for essentially binding resolution, and because mediations import adversarial elements that may come to the fore if the parties do not reach consensual resolution. One arbitrating party may win and another may lose; mediating parties may leave the table with a compromise or other accommodation that delivers less than what each party sought.

A party may have been saddled with a case weak on the facts or the law, but nonetheless may pin some blame for a less than favorable result on the intermediary or decision maker. As mediators and arbitrators practice their craft, it takes a special measure of professionalism to sustain a wholesome reputation when a bulk of the parties appearing over time may emerge with some disappointment at the outcome.

Ethical codes (some mandatory and others aspirational) regulate or influence performance in non-judicial dispute resolution today. Lawyers serving as mediators or arbitrators remain bound by the ABA Model Rules of Professional Conduct, as adopted wholly or in significant part by individual states.¹² Other unofficial organizations also maintain ethical codes that establish standards of performance for lawyers and non-lawyers who serve as mediators or arbitrators.¹³

7. Derek Roebuck, *The English Inheritance: What the First American Colonists Knew of Mediation and Arbitration*, 2016 J. DISP. RESOL. 325, 327.

8. *Id.* at 348.

9. *Id.* at 331.

10. *Id.* at 336-37.

11. *Id.* at 327.

12. MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2016).

13. *E.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. BAR ASS’N 2005); CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (AM. BAR ASS’N 2004); ABA MODEL

Ethical codes are indispensable foundations, but they are just that – foundations. Words on paper do not apply themselves,¹⁴ and judgment calls arise when mediators or arbitrators interpret and apply code provisions in particular circumstances that shape individual cases. Reputation for integrity, dignity, and trust – Nathaniel Bacon's distinctive strengths, according to Professor Roebuck's historical account – may stem from how a mediator or arbitrator bridges the gap between written words and actual interpretation and application. A personal compass can orient a mediator or arbitrator even when shortcuts or inattention might not bring a realistic risk of professional discipline or other untoward consequences under the ethical rules.

III. WHERE DO HISTORIANS GO FROM HERE?

In the closing pages of his article on the British experience, Professor Roebuck summons American historians to research and write about the evolution of mediation and arbitration on this side of the Atlantic since colonial times. “The American story,” he writes, “must be left to American authors.”¹⁵

Some historians, including my University of Missouri School of Law colleague Carli Conklin, already travel the path that Professor Roebuck urges.¹⁶ So too do other historians, such as the ones Professor Roebuck cites and ones whose articles appear in the *Journal's* Spring 2016 Symposium issue.¹⁷ But Professor Roebuck is right that the time is ripe for more American voices to pursue alternative dispute resolution historiography, through a biographical lens or otherwise. Cultural perceptions, law school curricula, and current dispute resolution trends each point toward greater prominence and challenges for ADR, and thus toward greater worth for historical perspectives that emerge from focused research and effective writing.

A. Cultural Perceptions

Investigations into America's ADR history depend initially on the wisdom of historians (including historians with law degrees) who continue overcoming traditional cultural perceptions of the dispute resolution process.

Because the litigation model has traditionally dominated law school curricula, legal education has conditioned generations of lawyers to reflexively view disputes as potential lawsuits destined for the courtroom.¹⁸ Non-lawyers too have visualized

STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (AM. BAR ASS'N 2001); AM. ACAD. OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY § 9.2 (Nov. 2000) (ebook), <http://www.aaml.org/library/publications/19/bounds-advocacy/9-arbitrator> (urging that lawyer-arbitrators comply with all relevant rules applicable to judges).

14. Cf. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 619 (1908) (“The life of the law is in its enforcement.”).

15. Roebuck, *supra* note 7, at [30].

16. E.g., Carli N. Conklin, *A Variety of State-Level Procedures, Practices, and Policies: Arbitration in Early America*, 2016 J. DISP. RESOL. 55, 65-76; Carli N. Conklin, *Lost Options for Mutual Gain? The Lawyer, the Layperson, and Dispute Resolution in Early America*, 28 OHIO ST. J. ON DISP. RESOL. 581 (2013); Carli N. Conklin, *Transformed, Not Transcended: The Role of Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey*, 48 AM. J. LEGAL HIST. 39 (2006).

17. Symposium, *Beyond the FAA: Arbitration Procedure, Practice, and Policy in Historical Perspective*, 2016 J. DISP. RESOL. 1.

18. Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 688-89 (2005).

the courtroom as the expected venue because most Americans have drawn their impressions of the legal system either from serving jury duty, or from watching televised dramatic programming whose popularity stemmed from emphasizing trials as central to the legal process.¹⁹

By the early 1970s, historian and National Humanities Medal recipient William Manchester wrote convincingly about “The Age of Television.”²⁰ Well before the dawn of the 21st century, television had emerged as an especially potent force shaping Americans’ perceptions of the nation and the world.²¹ “In many ways over the past half-century, the history of television has become the history of America,” says one historian.²² “[T]his medium’s programming,” he explains, “has been influential—superseding school, and sometimes even the family, as the major influence on our social and moral development. It is fair to say that there have been two eras in America: Before Television (BT) and After Television (AT).”²³

Televised dramatic portrayals of the trial process frequently bore little resemblance to reality, but networks counted on viewers to give contemporary meaning to English Romantic poet Samuel Taylor Coleridge’s advice to readers of literature nearly two centuries ago. Because fiction writers frequently take measured license with reality, Coleridge said that readers enjoy literature most when they bring a “willing suspension of disbelief for the moment.”²⁴

Similar license and suspension enabled viewers to enjoy fictional televised trial episodes and scenes.²⁵ Mediations and arbitrations, conducted without a judge or jury and frequently in law office conference rooms away from courthouses, rarely won public exposure on the small screen, which earns much of its popularity by sacrificing realism for entertainment.

Television is changing. In their first run or in syndication, shows appearing on network and cable TV today often feature episodes whose characters pursue non-judicial dispute resolution.²⁶ Portrayals of the ADR process frequently take license

19. Douglas E. Abrams, *Picket Fences*, in *PRIME TIME LAW: FICTIONAL TELEVISION AS LEGAL NARRATIVE* 129, 141 (Robert M. Jarvis & Paul R. Joseph eds., 1998).

20. 1 WILLIAM MANCHESTER, *THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA 1932–1972*, at 716 (1974).

21. See, e.g., Douglas E. Abrams, *References to Television Programming in Judicial Opinions and Lawyers’ Advocacy*, 99 *MARQUETTE L. REV.* 993, 996–98 (2016).

22. STEVEN D. STARK, *GLUED TO THE SET: THE 60 TELEVISION SHOWS AND EVENTS THAT MADE US WHO WE ARE TODAY 2* (1997).

23. Abrams, *supra* note 21, at 1020 (quoting STARK, *supra* note 22),

24. 2 SAMUEL TAYLOR COLERIDGE, *BIOGRAPHIA LITERARIA* (1817), reprinted in 7 *THE COLLECTED WORKS OF SAMUEL TAYLOR COLERIDGE* 5, 6 (James Engell & W. Jackson Bate eds., 1983).

25. E.g., *PRIME TIME LAW: FICTIONAL TELEVISION AS LEGAL NARRATIVE* (Robert M. Jarvis & Paul R. Joseph eds., 1998) (discussing television shows that have emphasized the trial process).

26. A growing number of television shows have featured alternative dispute resolution at one time or another. For example, the entire television show *Fairly Legal* revolved around a former litigator turned mediator. *Fairly Legal* (USA Television broadcast, 2011–2012). Mediation has also been portrayed in *The Affair: Season 2, Episode 1* (Showtime television broadcast Oct. 12, 2014); *How I Met Your Mother: The Lighthouse* (CBS television broadcast Nov. 4, 2013); *The Office: Conflict Resolution* (NBC television broadcast May 4, 2006); *Orange is the New Black: Piece of Shit* (Netflix Studios June 17, 2016); *Seinfeld: The Seven* (NBC television broadcast Feb. 1, 1996); and *The Andy Griffith Show: A Feud Is a Feud* (CBS television broadcast Dec. 5, 1960).

Viewers have also witnessed arbitration on television. For example, a number of episodes of “The Good Wife” have involved arbitration, see *The Good Wife: Foreign Affairs* (CBS television broadcast Apr. 12, 2011) (featuring an international investment (ICSID) arbitration); *The Good Wife: Je Ne Sais What?* (CBS television broadcast Jan. 13, 2013) (involving the Court of Arbitration for Sport); *The Good Wife: Dear God* (CBS television broadcast Oct. 15, 2014) (involving Christian arbitration). Silicon Valley

with realism, but similar license has sustained popular television portrayals of the trial process for decades.²⁷

B. *Law School Curricula*

The University of Missouri School of Law's Center for the Study of Dispute Resolution and this Journal have been in the forefront of generational change that can spur ADR historiography. Many law schools now integrate mediation, arbitration, and other non-judicial devices into the civil procedure course that is usually required in the 1L year.²⁸ The University of Missouri is among law schools that also require a first-year "Lawyering" course that introduces students, including future legal historians, to these devices.²⁹

Most law schools have fortified these 1L requirements with upper class electives that grant non-judicial dispute resolution the attention it deserves in the training of 21st century practitioners.³⁰ Externships frequently place upper class law

had an entire episode that focused on arbitration. *Silicon Valley: Binding Arbitration* (HBO television broadcast June 7, 2015). The various Star Trek series (particularly *The Next Generation* and *Deep Space 9*) were also popular proponents of ADR, including both arbitration, see *Arbitration*, MEMORY ALPHA, <http://memory-alpha.wikia.com/wiki/Arbitration> (last visited Dec. 3, 2016), and mediation, see *Mediation*, MEMORY ALPHA, <http://memory-alpha.wikia.com/wiki/Mediator> (last visited Dec. 3, 2016), on several occasions.

In some cases, entire movies have been devoted to subjects relating to ADR. Perhaps the best examples are *THE MEDIATOR* (Phillips Pictures 2015) (involving mediation), and *THE WOMAN IN GOLD* (BBC Films UK 2015) (involving an international arbitration that was at the heart of the Supreme Court case of *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), which dealt with the retroactivity of the Foreign Sovereign Immunities Act). Several movies have also featured segments involving ADR, including *ERIN BROCKOVICH* (Jersey Films 2000) (arbitration); *THE WEDDING CRASHERS* (New Line Cinema 2005) (mediation); *THE BREAK-UP* (Mosaic Media Group & Wild West Picture Show Productions 2006) (mediation); and *DISCLOSURE* (Warner Bros. 1994) (mediation). Interestingly, the movie version of *THE HOBBIT* included an arbitration provision in the dwarves' contract with Bilbo Baggins, even though that provision did not appear in the book. See James Daily, *Read a Lawyer's Amazingly Detailed Analysis of Bilbo's Contract in The Hobbit*, WIRED (Jan. 17, 2013), <http://www.wired.com/2013/01/hobbit-contract-legal-analysis/>.

27. See, e.g., LAW AND POPULAR CULTURE: INTERNATIONAL PERSPECTIVES (Michael Asimow et al. eds., 2014) (analyzing numerous examples of dispute resolution in popular culture); Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1391-92 (2001) (discussing potential misrepresentations of litigation in cinema); Rosalind Lichter et al., *Alternative Dispute Resolution in the Entertainment Industry*, 4 CARDOZO J. CONFLICT RESOL. 1 (2002) (identifying additional examples of ADR in film and television); Jennifer L. Schulz, *The Mediator as Cook: Mediation Metaphors at the Movies*, 2007 J. DISP. RESOL. 455, 455 (discussing depictions of ADR in popular entertainment); Michael Zeytoonian, *Mediation Breaks Into TV and Shows its Advantages Over Litigation*, DISP. RESOL. COUNCIL (Mar. 1, 2011), <http://disputeresolutioncounsel.com/2011/03/01/mediation-breaks-into-tv-and-shows-its-advantages-over-litigation/> (discussing arbitration and mediation in television generally).

28. E.g., Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO ST. J. ON DISP. RESOL. 25, 64 (2010).

29. E.g., John Lande & Jean R. Sternlight, *Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 271 (2010); John Lande & Rafael Gely, "Less Salt, More Vitamins" – *Teaching Dispute Resolution to First-Year Law Students*, in THE ART OF TEACHING DISPUTE RESOLUTION 9 (2014), https://law.missouri.edu/news/files/2014/10/CSDR_TeachingEssays.pdf.

30. E.g., Moffitt, *supra* note 28, at 41-43.

students with agencies whose lawyers prepare for non-judicial dispute resolution, and not only for trials.³¹

Law school training in actual lawyering has gathered momentum as tuitions rise and the employment market for recent law graduates grows more challenging. The growing emphasis on skills-based legal education, which seemed novel only a decade or two ago, has gone mainstream to help meet the expectations of prospective law school applicants, and the needs of enrolled law students who most directly face the challenges.³²

C. Current Dispute Resolution Trends

Not only have popular culture and law schools themselves begun to recalibrate the balance between trials and non-judicial dispute resolution; the ABA Model Rules of Professional Conduct countenance this ongoing recalibration by pronouncing that “[a]lternative dispute resolution has become a substantial part of the civil justice system.”³³ The Model Rules specify that “a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter.”³⁴ “Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.”³⁵

Popular culture, law school curricula, and the ABA’s recognition reflect contemporary circumstances. At both the state and federal levels, the percentage of legal disputes resolved by trials is “declining precipitously,”³⁶ so much so that the term “the vanishing trial” has won a place in the legal lexicon.³⁷ Former U.S. Attorney General Janet Reno and others have urged that today the acronym “ADR” more accurately means “appropriate dispute resolution” because mediation, arbitration, and similar devices can no longer be cast as “alternative.”³⁸ Rather than proceed to final judgment in court, civil disputants today frequently engage a mediator who facilitates the parties’ negotiation, or an arbitrator or arbitral panel who delivers essentially binding resolution.³⁹

31. E.g., James R. Coben, *Summer Musings on Curricular Innovations to Change the Lawyer’s Standard Philosophical Map*, 50 FLA. L. REV. 735, 748 (1998); Linda Morton, *New Approach to Health Care ADR: Training Law Students to be Problem Solvers in the Health Care Context*, 21 GA. ST. U. L. REV. 965, 971-977 (2005).

32. DOUGLAS E. ABRAMS, *EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS* 5 (West Academic 2016).

33. MODEL RULES OF PROF’L CONDUCT, *supra* note 12, R. 2.4 cmt. 1.

34. *Id.* at Preamble [3] (2016).

35. *Id.* at R. 2.4(a) (2016).

36. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 7.

37. See, e.g., Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD., at v (2004); Robert P. Burns, *Advocacy in the Era of the Vanishing Trial*, 61 KAN. L. REV. 893, 893 (2013) (“The vanishing trial is part of our legal landscape.”).

38. E.g., Mary Leonard, *Quieting Conflict: America Is Turning Away From Confrontation and Opening the Door to Mediation*, BOSTON GLOBE, Feb. 16, 1997, at D1 (discussing Reno).

39. E.g., LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS: CASES AND MATERIALS* chs. iv, v (5th ed. 2014).

D. Prominence and Challenges

Historical research into America's ADR experience holds particular relevance because the ascendancy of non-judicial dispute resolution has left many commentators justifiably wary about (to adapt from McCullough and Churchill) who we are, the way we are, and where we are going. Two examples offer a flavor of practical concerns that invite historical inquiry.

Does mediation unfairly disadvantage women, emotionally weaker parties, and racial or ethnic minorities by trading accommodation for rights they might vindicate at trial?⁴⁰ Where arbitration stems from a pre-dispute agreement presented to a party with weaker bargaining power or virtually none at all, might the arbitral proceeding unfairly deprive that party of an opportunity to seek common law or statutory relief from publicly constituted courts or juries, rather than from private decision makers?⁴¹

In the age of the vanishing trial, these and other potential shortcomings challenge the American justice system's capacity to determine rights and obligations under the law. Perceptions about shortcomings and potential remedies may be informed by examining, for example, how mediation and arbitration have treated (or maltreated) weaker and sometimes marginalized parties throughout the nation's history, including during times when the trial process may have treated these parties better or worse.

Regardless of where an historian's inquiry leads, historian John Hope Franklin placed the source squarely where it belongs: "If the house is to be set in order, one cannot begin with the present; he must begin with the past."⁴²

E. Focused Research

American historians chronicling the national ADR experience can achieve the greatest social impact through focused research that aims to reach readers who can guide development and effect change. This primary audience includes academics who can pursue the dialog, but it also includes mediators and arbitrators themselves, lawyers, legislators, and other policy makers who fashion operative standards and help resolve actual disputes.

The historian's focused research might begin by identifying a broad issue such as one of the two examples recited above, or this research might begin by identifying a more discrete aspect of what mediators and arbitrators do in typical proceedings.⁴³ One way or the other, identification can emerge from the historian's own review of the legal literature, or from the historian's discussions with academic ADR experts or legal practitioners.

40. *E.g.*, DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 1027-31 (4th ed. 2015).

41. *E.g.*, Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 459 (2011); *see also, e.g.*, DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 477 (2015) (Supreme Court arbitration decisions "have predictably resulted in the deprivation of consumers' rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws.") (Ginsburg, J., dissenting).

42. John Hope Franklin, *Rediscovering Black America: A Historical Roundup*, N.Y. TIMES (Sept. 8, 1968), <http://www.nytimes.com/books/99/08/15/specials/franklin-roundup.html>.

43. *See, e.g.*, Valerie A. Sanchez, *Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today*, 11 OHIO ST. J. ON DISP. RESOL. 1 (1996).

Historical research can be a stimulating personal adventure because, as author John Updike observed, writing “educates the writer as it goes along.”⁴⁴ Once preliminary investigation convinces the historian that sufficient relevant original sources likely exist to sustain research with a practical contemporary purpose, the writer’s self-education process continues from the initial outlining and research until final publication. Poet Robert Frost once acknowledged, “I have never started a poem yet whose end I knew. Writing a poem is discovering.”⁴⁵ So is writing prose.

F. *Effective Writing*

“[W]ritings are useless unless they are read,” said President Theodore Roosevelt, “and they cannot be read unless they are readable.”⁴⁶ Roosevelt wrote 13 books before he became President and another 23 during and after his presidency, so he spoke from experience.⁴⁷ Like other writers, historians stand the best chance of conveying their message when they deliver concise, precise, simple, clear writing that meets the audience’s needs and expectations.⁴⁸ Just because a historian (or other author) writes something does not guarantee that anyone will read it.

Historians’ articles and books are unofficial sources that no mediator, arbitrator, lawyer, legislator, or policy maker *must* read. Particularly if these potential readers pursue successful careers, they are busy people who usually balance working time with family obligations and other personal commitments. Amid the distractions that mark what journalist Bill Moyers calls the “seductions and demands of modern life,”⁴⁹ these professionals need not even open to the first page, and they can stop reading once they find that the narrative does not relate well to what they do in actual disputes.

This frank recognition that historians and other writers must “earn the right to a reader”⁵⁰ by meeting needs and expectations led Catherine Drinker Bowen to keep a simple sign posted above her desk as she wrote her well-crafted biographies: “Will the reader turn the page?”⁵¹ Historian Stanley Weintraub sets the bar high for historians who seek an affirmative answer and want their work to make a genuine difference to ADR professionals and the parties who rely on them: “I want to be read. I don’t want to be read only by scholars who number maybe 30 to 300, and that’s it.”⁵² Pulitzer Prize-winning historian (and former Librarian of Congress) Daniel

44. John Updike, in *ENCYCLOPEDIA OF THE ESSAY* 868 (Tracy Chevalier ed., 1997).

45. Dick Mason, *Poetry Contest Winners Earn Accolades*, *THE OBSERVER* (May 23, 2012) (quoting Robert Frost), <http://www.lagrandeobserver.com/csp/mediapool/sites/LaGrandeObserver/LocalState/story.csp?cid=4088342&sid=824&fid=151>; ABRAMS, *supra* note 32, at 13.

46. Theodore Roosevelt, *The Historian of the Future*, in 119 *ROOSEVELT’S WRITINGS: SELECTIONS FROM THE WRITINGS OF THEODORE ROOSEVELT* (Maurice Garland Fulton ed., 1920), <http://www.history.org/about-aha-and-membership/aha-history-and-archives/presidential-addresses/theodore-roosevelt>.

47. *Books Written by Theodore Roosevelt*, <http://www.theodorerooseveltcenter.org/Research/Digital-Library/Record.aspx?libID=o274790> (last visited Jan. 23, 2017).

48. *E.g.*, ABRAMS, *supra* note 32, at 43-56; HENRY WEIHOFEN, *LEGAL WRITING STYLE* 4, 8-104 (2d ed. 1980) (discussing these four fundamentals).

49. BILL MOYERS, *FOOLING WITH WORDS: A CELEBRATION OF POETS AND THEIR CRAFT* xiv (1999).

50. ABRAMS, *supra* note 32, at 5.

51. Ruggero J. Aldisert et al., *Opinion Writing and Opinion Readers*, 31 *CARDOZO L. REV.* 1, 39 n.87 (2009).

52. Brian Lamb, *Stanley Weintraub*, in *BOOKNOTES: AMERICA’S FINEST WRITERS ON READING, WRITING, AND THE POWER OF IDEAS* 117 (1997).

Boorstin said “historians tend to write for other historians. I want to write for the human race.”⁵³

Readers lost are opportunities lost, and practical ADR historical research can afford neither.

IV. CONCLUSION

Nostalgia is one of the great faculties of the human mind, and the most vibrant historical writing engages readers with storytelling. (Historian David McCullough advises that, “No harm’s done to history by making it something someone would want to read.”)⁵⁴ But practical historical writing also commands attention for delivering perspectives relevant to the present day and future conditions.

Whether a particular mediated or arbitrated dispute’s stakes appear big or small, non-judicial dispute resolution depends directly on stewardship from mediators and arbitrators themselves, and at least indirectly from legislation and rules that encourage and sustain these non-judicial devices.⁵⁵ Stewards and lawmakers alike can profit from Professor Roebuck’s historical essay exploring the intangibles that marked Nathaniel Bacon’s mediation-arbitration career, and from historians who accept Professor Roebuck’s invitation for practical attention to America’s dispute resolution heritage.

53. Brian Lamb, *Daniel Boorstin*, in *BOOKNOTES: AMERICA’S FINEST WRITERS ON READING, WRITING, AND THE POWER OF IDEAS* 114 (1997).

54. David McCullough, *The Course of Human Events*, Lecturer at the Jefferson Lecture in the Humanities (May/June 2003) (transcript available at <http://www.neh.gov/about/awards/jefferson-lecture/david-mccullough-lecture>).

55. *E.g.*, Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2016); N.J. Stat. Ann. §§ 2A:23A-1 to -30 (West 2016); N.J. Stat. Ann. §§ 2A:24-1 to -11 (West 2016); UTAH CODE ANN. § 30-3-39 (West 2016) (establishing “mandatory domestic mediation program to help reduce the time and tensions associated with obtaining a divorce”).