

Editing and Empathy

By Patrick Barry

“Design begins with empathy.” I recently wrote that on the board during a class for students in the Child Welfare Appellate Clinic at the University of Michigan Law School.

I thought it might help them write better briefs.

I got the idea from Ilse Crawford, whose work as an interior designer can be seen all over the world—from airport lounges in Hong Kong, to fancy restaurants in London, to pear-shaped stools at IKEA. In Crawford’s view, “empathy is a cornerstone of design.”¹ She thinks it is important to understand the spaces and products she creates from the perspective of the people who will use them. How easily can a busy waiter pick up a chair and move it to the other side of the table? How quickly can a jet-lagged traveler settle into a daybed and start to relax? What exactly do people use a ceramic pitcher to pour?

The students in the class had, of course, been told over and over again that “Who is the audience?” is the first question to ask when approaching any piece of writing—be it a brief, an email, or even a postcard. But introducing the term *empathy* into the

conversation seemed to help them think more critically and concretely about what that important question really means. As did asking them to imagine what a full day might look like in the life of the Court of Appeals judges to whom they’d soon be submitting their briefs.

Too often we skip over these types of considerations. We rush to cram as much information as possible into our arguments and explanations, forgetting that an overstuffed brief is not a user-friendly brief. Judges already have many other overstuffed things in their lives: dockets, calendars, email inboxes. Why tax their brains (and their time) even more? Why not instead begin by thinking about what kind of brief you would like to read if you were in their position? Why not start with empathy?

Strategic empathy

You might even think of this use of empathy in strategic terms. It’s goal-oriented compassion. The more accurately you imagine what it’s like to be the judge you are trying to persuade, the more likely you’ll be to craft a brief addressing that judge’s particular concerns and preferences.

That’s one of the reasons why a judge’s former law clerks are such coveted sources

of information. They’ve got inside intel—about chambers, about past decisions, about the judge’s pet peeves and predilections. It’s tough to imagine a more helpful focus group.²

But even if you can’t track down a former clerk, it seems useful to take a moment and think about, in detail, the felt experience of the judge or judges who will be deciding your case. What are their mornings like? What are their afternoons like? How many other briefs do you think are competing for their attention?

As lawyers, we are trained to empathize with our clients and to try to get judges to do the same. But extending that empathetic function to the judges themselves could be beneficial as well. We might write shorter briefs. We might write more vivid briefs. We might get to our point more quickly and inspect our sentences more scrupulously, realizing that a busy judge has little time (and even less patience) for irrelevant arguments and unprofessional punctuation.

We might also approach revisions a bit like the fiction writer George Saunders does. When he edits his stories, he tries to have empathy not just for his characters but also for his readers. In his view, revision is ultimately about imagining your readers to be “as humane, bright, witty, experienced, and

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well-intentioned as you.”³ You need to find a way to “welcome [them] in.”⁴

Granted, some of the qualities that Saunders ascribes to his ideal readers may seem tough to square with the everyday realities of being an appellate advocate, especially if your past encounters with a certain judge or panel were at best unencouraging and at worst downright nasty. Trying to empathize with a blowhard can be a waste of time.

Yet the generosity that motivates Saunders’s method may nevertheless be worth adopting. The best briefs are a kind of gift. They say to the judge, “Look, I know you have a really difficult job to do. So read me. I can help.” They collect the relevant cases. They highlight the relevant facts. And they proceed with a rhythm and honesty that makes for easy reading, free of distracting grammatical errors and full of clear, concise language. They are, in short, well-designed, audience-specific products, something akin to “a judicial opinion on a silver platter”—which is exactly how constitutional law professor Geoffrey Stone described the experience of reading the briefs of Justice Ruth Bader Ginsburg back when she was still a practicing attorney and he was a Supreme Court clerk for Justice William Brennan.⁵

Silver platter

Stone made this observation during a public conversation he had with Ginsburg at the University of Chicago Law School in 2013. “That was always my aim,” Ginsburg explained. “When I wrote briefs, I wanted to give the Court something the Court could convert into an opinion.”⁶

She obviously succeeded. In several landmark cases—including *Frontiero v*

Richardson, *Reed v Reed*, and *Craig v Boren*—Ginsburg was able to persuade the Court to reverse its position on gender discrimination and secure important, paradigm-shifting protections for women under the Fourteenth Amendment.⁷ She understood the obstacles that the justices faced. She gave them the specific facts and conceptual tools they needed. And she did it all with a kind of understated charm and forthrightness that led her to become, in the words of her good friend Justice Antonin Scalia, “the Thurgood Marshall of [women’s rights].”⁸ That’s strategic empathy at its best. ■

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ENDNOTES

1. Abstract—The Art of Design, *Ilse Crawford: Interior Design* (Netflix broadcast February 10, 2017).
2. For example, see Lat, *Supreme Court Clerk Hiring Watch: To Know a Judge, Know Her Clerks*, Above the Law (posted July 19, 2017) <<https://abovethelaw.com/2017/07/supreme-court-clerk-hiring-watch-to-know-a-judge-know-her-clerks/>>. All websites cited in this article were accessed March 31, 2018.
3. Saunders, *What Writers Really Do When They Write*, The Guardian (posted March 4, 2017) <<https://www.theguardian.com/books/2017/mar/04/what-writers-really-do-when-they-write>>. I thank Marcos Kotlik, a Michigan Law student from Argentina, for putting Saunders’s essay on my radar.
4. *Id.*
5. Justice Ruth Bader Ginsburg and Geoffrey Stone, *Roe at 40*, University of Chicago Law School (May 11, 2013) <<https://www.law.uchicago.edu/recordings/justice-ruth-bader-ginsburg-and-geoffrey-stone-roe-40>>.
6. *Id.*
7. *Frontiero v Richardson*, 411 US 677; 93 S Ct 1764; 36 L Ed 2d 583 (1973); *Reed v Reed*, 404 US 71; 92 S Ct 251; 30 L Ed 2d 225 (1971); and *Craig v Boren*, 429 US 190; 97 S Ct 451; 50 L Ed 2d 397 (1976).
8. Scalia, *Ruth Bader Ginsburg: The High Court’s Counterweight*, TIME (April 16, 2015) <<http://time.com/3823889/ruth-bader-ginsburg-2015-time-100/>>.

A New Contest

The contest returns! Thrills and chills.

The sentence below appeared in the pre-2007 Federal Rules of Civil Procedure. It’s 72 words. The version adopted as part of the so-called restyling of the civil rules is 28 words. (No fair researching before you answer.) The main trouble is unnecessary repetition:

When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party.

To the first two persons who email me an “A” revision, I’ll send a copy of *Seeing Through Legalese: More Essays on Plain Language* or (ready for this?) my new children’s book, *Mr. Mouthful Learns His Lesson*. Address: kimblej@cooley.edu. Please put “Contest” in the subject line. The deadline is July 23.

A reminder: the online version of the column is usually posted before the print version is ready. To get the jump, Google “Plain Language column index.” Or follow me on Twitter: @ProfJoeKimble. I always try to tweet when a new column is posted.