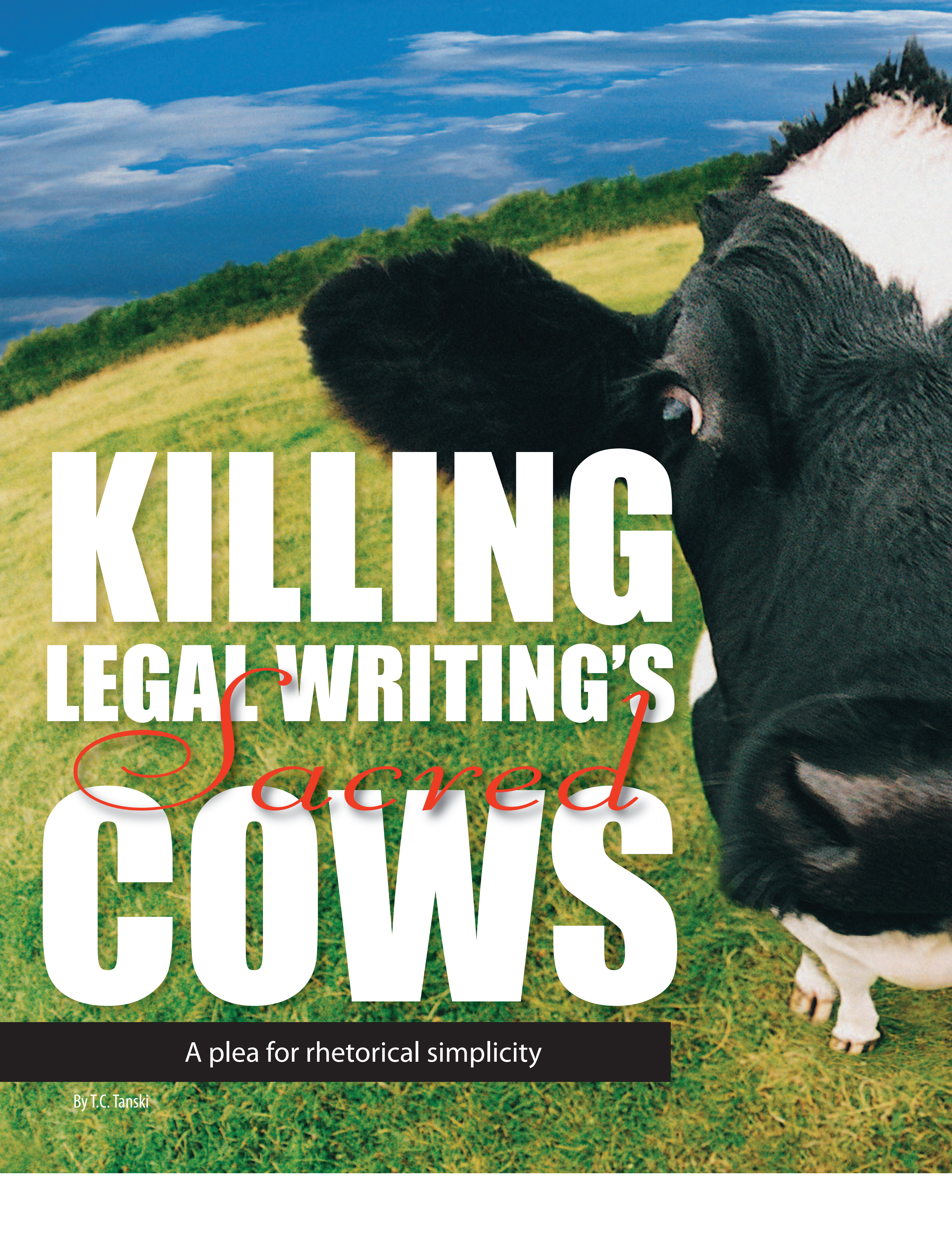
KILLING
LEGAL WRITING'S
Sacred
COWS
A plea for rhetorical simplicity
By T.C. Tanski

May it please the backlogged, overwhelmed and short-on-time court: 7th U.S. Circuit Court of Appeals Judge Richard Posner once wrote that judges, like all human beings, are "leisure-seeking" actors with an aversion to any sort of "hassle" as well as to sheer hard work. Take, for example, one oral argument session in which the Pennsylvania Superior Court may hear about 50 cases. In two days the court hears approximately 100 lawyers argue for 19 hours. (Although, with parties submitting on briefs, moving for an expedited argument or resolving their case, that estimate can change.) So why, understanding human nature and knowing how backlogged an appellate court can be, do lawyers continue writing in ancient prose? Isn't it time to respect the need for speed, brevity and clarity?

Lawyers' writing generally sounds whiny and stuffy. The best approach, however, is to sound relaxed and natural. Tone belies confidence. But we work in a profession fraught with sacred cows. They poison legal writing's advancement and often stifle understanding.

A sacred cow is a figurative concept designating something or a practice immune to question or criticism. The legal profession is a conservative profession, but we can do better. Let's write the way we speak. For the sake of the examples I use, I impute no ill will toward my prosecutorial and defense-bar colleagues. Instead, I hope we can learn from the profession's weaknesses and build stronger, more readable briefs, motions and the like to help both our clients and our judiciary.

Contractions

Not this: "Not only did the Supreme Court of the United States not hold that the rule announced in *Lafler v. Cooper* shall apply retroactively, the Supreme Court's decision did not announce a new constitutional right." But this: "Not only did the U.S. Supreme Court's holding in *Lafler v. Cooper* not announce a retroactive rule, but the court *didn't* announce a new constitutional right."

You hear it all the time: "Legal writing *never* uses contractions. It is unprofessional." Rubbish! The two resources your writing appeals to are a judge's time and attention. It's worthwhile to do anything you can to maximize both.

In 1975, John R. Trimble, author of the book *Writing with Style*, recommended that professional writers occasionally use contractions because "they'll help you unbend, let your readers relax as well and free up your writing voice." Wayne A. Danielson and Dominic L. Lasorsa published a 1989 study confirming that contractions enhance readability. Even Bryan A. Garner, legal-writer paragon, called the legal profession's crusade against contractions a "shibboleth." There's a test he proposed in *Garner's Dictionary of Legal Usage*: "[I]f you

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Audience, of course, plays a role. Some judges will OK your contractions. It's even known that some federal judges use them in opinions, including 9th U.S. Circuit Court of Appeals Chief Judge Alex Kozinski and 10th U.S. Circuit Court of Appeals Judge Neil M. Gorsuch. But, of course, others may not. U.S. Supreme Court Justice Antonin Scalia, in his book *Making Your Case: The Art of Persuading Judges*, calls contractions "marketplace vulgarisms." He warns that judges might view contractions "as an affront to the [court's dignity] [a]nd those judges who don't take offense will not understand your brief, or vote for your case, one whit more readily. There is, in short, something to be lost, and nothing whatever to be gained."

The issue is now left to discretion. I leave you with Posner's use in his opinion *In re Text Messaging Antitrust Litigation* (emphasis added): "Such appeals *should not* be routine, and *won't* be, because as we said both district court and court of appeals must agree to follow an appeal under section 1292(b)."

Whether it's a clerk reading your papers or a judge watching the NFL on a Sunday while reading your brief, attention is your resource and easier-reading papers keep a person's attention. I urge your practice to adopt contractions. Buck the trend. Kill this sacred cow.

Writing in the Third Person

Writing in the third person is something lawyers do religiously.

Not this: "Because the outstanding prescription information is necessary in order to allow the commonwealth to obtain an opinion from the toxicologist as to whether defendant was abusing her prescription medication and/or was impaired by her prescription medications, the commonwealth respectfully requests a continuance of the trial scheduled in this matter." (Forty-nine words.) But this: "Our toxicologist can't render an opinion whether [Smith] abused and/or was impaired by her prescription medications. We respectfully request a trial continuance." (Twenty-three words.) Or this: "Generally, we concede a post-verdict court may not reweigh the evidence and change its mind. We agree a trial court may not reweigh the evidence sua sponte. However, you do have authority to consider post-verdict motions, as in this case."

You'll also notice that I cut out the passive voice where I could, removed designations such as "defendant" and rewrote the sentence in the second person. I reduced the word count, and readability is much improved.

I urge lawyers to write their motions and briefs using first- and second-person pronouns, especially "we" and "you." Readers are much more engaged by a text that speaks to them directly. When we address judges directly, they see how our writing applies to them.

'I Want to Sound Like a Lawyer'

The great trial lawyer Gerry Spence believes that "when it comes to plain talk, lawyers are the worst." When we try to write to sound smart, we really just annoy our readers. As a general rule, if you wouldn't use the word you're about to write in general conversation, kill it.

Not this: "It is believed and therefore averred. …" Or this: "In the instant case. …" But this: "Here. …"

This sacred cow includes jargon — the unnecessarily complicated, technical language used to impress rather than inform the audience. Jargon alienates judges.

Avoid these words: above-mentioned; aforementioned; foregoing; henceforth; hereafter; hereby; herewith; thereafter; thereof; whatsoever; wherein; and whereof.

Typography

I'm not sure which legal-writing professor started this horrendous trend, but it permeates the profession. Legal writing appeals not only to the ears but also to the eyes.

Not this: "THIS COURT NEED NOT ADOPT A NEW STANDARD AS IT RELATES TO THE DESTRUCTION OF POTENTIALLY USEFUL EVIDENCE." Or this: "This Court Need Not Adopt A New Standard As It Relates To The Destruction Of Potentially Useful Evidence." But this: "*This court need not adopt a new standard as it relates to the destruction of potentially useful evidence.*"

First, underlining is a typewriter-age relic. Please stop. Underlining takes up a lawyer's most valuable white space on the paper and can obscure type descenders such as "g," "j," "p" and "q." It makes the type illegible. Multiple emphases are also not easy on the eyes. Use a single type of emphasis per text. For example, for point-headings I apply boldface, for in-text emphasis I use italics and I reserve the use of all caps for main sections such as ARGUMENT. I also use italics for case citations. Remember, however, the Pennsylvania Style Manual prefers signals — i.e., "See generally," "See e.g., c.f." — not to be italicized.

Boldface in text pockmarks the page. ALL-CAP headings give readers a feeling that the writer is shouting at them. The characters are also uniform in size, which detracts from readability. The Tendency of Legal Writers To Use First Caps Promotes A Hiccup Effect In The Writing. Whereas a simplistic, simple-emphasis heading promotes readability and direction: This court need not adopt a new standard as it relates to the destruction of potentially useful evidence.

The best book you can read about typography is Matthew Butterick's *Typography for Lawyers*. Again, appeal not only to the judge's ears but to his or her wearied eyes as well.

We primarily speak language. Speech precedes writing. And when we write in ways significantly different from the way we might speak, the results can become disastrous or, even worse, boring.

I'm not saying we should write exactly as we speak. As Bryan Garner says: Legal writing should be polished and somewhat heightened — but always natural. It's hard work to write that way if you're not accustomed to it. Prefer the simple word over the fancy word, and prefer the concrete word over the abstract word. Let's help esteemed judges with their time, and let's advocate for our clients in new and novel ways to focus judges' attention and help them understand our positions. We do that through plain language. ⚖

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