



Lee Burgess: Welcome back to the Law School Toolbox podcast. Today we have the second in a two-part series on legal writing in the workplace. This episode focuses on persuasive writing and the future of legal writing in the age of AI. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you'll be the best law student and lawyer you can be. We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.

This is Lee from the Law School Toolbox. Welcome back! Today we are going to continue the conversation about legal writing in the workplace with the discussion about persuasive writing and some thoughts on the future of legal writing in the age of AI. So, Alison, when you were practicing, especially in the early days, did you do a lot of persuasive writing?

Alison Monahan: Some. I was a litigator, so there was definitely some threatening letters that were sent. I would say I probably did more objective writing, but I definitely did some persuasive writing – briefs, that kind of thing, to the court. But I don't know, how about you?

Lee Burgess: I did. I was working on some trial teams, and so then you do a lot of persuasive writing. And I did a lot of the silly motions that no one really cared about, but someone needed to write a response. That was my job.

Alison Monahan: Right. Well, I guess too, I read a whole lot of persuasive writing because I worked for a judge. So, everything we read was people trying to persuade us one way or the other, pretty much.

Lee Burgess: That's true. That's true. I mean, you read piles and piles of persuasive writing.

Alison Monahan: Yes, definitely. Many motions in limine and things like that that you were probably tasked with.

Lee Burgess: Yes. I'm interested though, when you did read so much of it over that time that you were clerking, did it really inform some best practices for you in your own writing? Were you taking things away from it?



Alison Monahan: Oh, I think certainly. I think that's one of the advantages of working for a judge, is that you just absorb so much by osmosis about what works and what doesn't work. I definitely recall scenarios where people had essentially had to twist the case law, in some cases even editing out a "not" or something like that, which is extremely egregious and you should never do that. But you did see things like that, which was really unbelievable to me. So it definitely made me think, "Wow, I would never want to get caught doing that after seeing how angry the judge became and the extent to which they were yelled at in open court for this." But I do think you start to see what is the best way to make an argument, how do you marshal evidence to support your side, how do you deal with unfavorable facts or unfavorable precedent? I think that's a really big one in a persuasive piece of writing, because you wouldn't be writing this if the answer was super clear. So sometimes people just want to sort of brush over things that are against them, but I don't think that's the best approach. You really have to engage in a serious way with the pieces that are not really in your favor and make your best case anyway.

Lee Burgess: Yeah, that's very true. I think one of the things about developing your own legal writing is you do want to read other people's work to figure out what your own style is. That really influenced how I was doing my own legal writing. I was struggling to find my voice in the beginning when I transitioned careers and had to figure out how to write like a lawyer. And so that's pretty much what I would do – I would read cases, I would read briefs and be like, "Oh, I like this" or, "Oh, this is very unclear" or, "Oh, this is too long." You start to really get some ideas of what is quality work from your perspective, and then you can emulate that.

Alison Monahan: Well, and I think too, the more you read, the more you start to see where people's tells are across the board. So, I could always tell when either someone was confused about the case law or when they had an issue they were trying to sort of brush under the rug a little bit, because suddenly the language would shift and it would become much more complicated. And anytime you saw this jump up in complexity in the writing, it was always a tell that there was something underlying it that they did not want you to think too carefully about. And so that was always the part where we're like, "Oh, yes, we're going to really dig into this."

Lee Burgess: I'm going to use some really big words, and hopefully you don't recognize that.

Alison Monahan: Yeah, anytime you suddenly see very big words and very elaborate language and long sentences, you always know there's a reason.



Lee Burgess: That's a really interesting observation. In our [last episode](#), we talked about objective writing, specifically memos and emails. And while memos and emails typically present an objective analysis, briefs are what we're mostly talking about when we are talking about persuasive writing, although letters, demand letters and things like that can also be persuasive as well. But we're going to focus on briefs today because they're super important, as you mentioned.

Alison Monahan: Right. And much of what you're filing with the court is a brief or some sort of response, essentially.

Lee Burgess: Yeah. So, the interesting thing is that both objective writing in something like a memo, and a brief, use the basic structure – this CREAC structure that we've been talking about: Conclusion, Rule, Explanation, Analysis, Conclusion. And in the case of a memo, your audience is typically just your supervising attorney, where with the brief, your audience might be Alison, or whoever's the clerk, and the judge. So, the memo really, evaluates strengths and weaknesses and predicts an outcome of your case, but the brief persuasively advocates for your client's desired outcome. And I think it is very important. You can think about this in your legal writing at school, but in your legal writing at work, you really have to figure out what role you're playing, because that's going to influence how you lay out your arguments.

Alison Monahan: Yeah, definitely. And the memo sort of behind the scenes can provide the foundation for the brief, because you've got to figure out objectively what your arguments are before you can decide how you structure them in a persuasive way. So, you can think of the memo as really doing the analysis to figure out what your best arguments are, and the brief is where you get to present those in a way that hopefully is compelling and makes your case and results in a win.

Lee Burgess: Yes. One of the things that I think is interesting to think about when you think about persuasive writing is which role you're playing. Are you on the defense, or are you a plaintiff, or are you the government? Because the way you structure arguments is going to depend on which side you are arguing for. If you are on the plaintiff's or the government's side, and you have the burden of proof, typically – you have to lay out all of it. You don't get to pick and choose your strongest arguments. Typically, there's a whole list of elements or there's a whole structure of law and you have to lay out all the pieces. If you want to argue that somebody is liable for negligence, you can't just be like, "But I'm not going to talk about duty because that's not our strongest argument." That's not how that works. You have to do all the things. And then as you were mentioning, when you are on the defense, you have a bit of a different role depending on the nature of the brief, but often you're poking holes. You may



not be ignoring arguments that are not so good for you, but you are definitely going to not invest in them. You are going to invest in other things, because you really do care that duty is where the whole case falls apart – that that's the most important thing. You're not going to spend your memo arguing whether or not there's a standard of care – that may be very easy to determine. You've got to poke holes in their case. And I think that even something as simple as what role you're playing and how those arguments are framed by that role is something that doesn't get discussed enough when you're doing legal writing at school, but also when you're in the workplace. Because you have to think about, what is your job? What is your lawyering job? And how is that going to be reflected in your work?

Alison Monahan: I think that's a super critical point. And also, I agree it is underdiscussed, because as a defense attorney, which is the side I was always on – I was doing patent litigation, which is probably not relevant – but let's take your negligence example. You might say, "Yes, Your Honor, we're willing to concede that, X, Y, and Z. However, they have not shown that there was a duty", or whatever your best argument is. And you just hammer away at that one point, every single time that it comes up. "Well, yes, we were not arguing about X, Y, and Z. We agree with them on that. Yes, there were damages; however..." Whatever the argument is, you just go back to it over and over again. And that's kind of your job, because if you win on that, the case is gone.

Lee Burgess: Yeah, exactly. I always think of my Torts professor in the very beginning talking about how a tort was like a table – if you lost a leg, the whole thing fell apart. And so, that is really the defense lawyer's job. I was a defense lawyer too. You're just trying to knock out one of those table legs, so the whole thing falls apart.

Alison Monahan: Right, poof! Yeah, you don't have to overcome everything; you just have to overcome one thing that matters. And if you do that, then you win.

Lee Burgess: Yeah. I think one of the other tricky things when you are on the defense side is how to deal with mandatory adverse authority – stuff that's not going to be good for you. I think there's a tendency to want to ignore it, but that makes it look like you don't know it, and that's a problem because it's authority.

Alison Monahan: Right, because the flip side of that is, if there is some mandatory authority that is against you as a defense, you know that the other side is going to be hammering away at that, because you have to have an answer. Sometimes there's not really a great answer, so you might have to make some creative arguments, you might have to do some creative lawyering, you might find ways



to distinguish your case from that law. In some cases, these may not be great options, and in some cases, you might just have to concede, again, "Yes, Your Honor, we recognize this case is on point; however, there are all these other things we would prefer to talk about." But yeah, you can't ignore it.

Lee Burgess: No, because then it looks like you don't know what you're doing, and that's not a good look either.

Alison Monahan: Right, no. And that's the sort of thing judges are skeptical, their clerks are very skeptical. That's the exact thing we're going to hone in on if one party is saying there's this really important mandatory authority on point, and the other side just doesn't even address it – that's going to be the first question.

Lee Burgess: So, when we think about facts in a brief, I think this is something else that's important for newer lawyers to think about – there's no just bland statement of the facts. You know what I mean?

Alison Monahan: The facts are not just the facts.

Lee Burgess: No, they're a story. They can be a compelling story, maybe from a certain side. And your job isn't to just say what happened, but you're supposed to emphasize favorable facts by going into more detail about those favorable facts. Maybe you're going to put them first. Maybe you're going to make sure that you highlight them at the beginning and the end so they're the first and the last thing that people see. And then you're going to de-emphasize the facts that aren't so great for you. You're going to minimize details. You may not mention them, but you're just going to hide them in there, squished in between, make them the bologna of the sandwich. They don't really want to be seen. They're kind of inside and embedded in the sentences. But there's a lot of stuff that you can do so your facts become persuasive as well. And I think this is something that I remember them teaching us some in law school, but I think that in practice you often have to do this more. Word choice is also incredibly important. You can shade meaning of certain things one way or the other, just based on what words you use, even though you're remaining accurate to the story. This is where wordsmithing becomes kind of fun.

Alison Monahan: Right, exactly. I'm thinking if I made up a case where, say, my client was a person who maybe had a few too many drinks at a holiday party and they're driving home, but oh, they're a preschool teacher. So, which of those am I going to lead with? It's going to be, "Oh, this very experienced preschool teacher



who's" blah, blah, blah, blah, blah, "such a great person, and everybody loves her."

Lee Burgess: With an impeccable driving record.

Alison Monahan: Right, an impeccable record. Yeah, and then at some point in the middle we are going to mention the fact that maybe she had a few too many drinks, but then we're going to move on. We don't want to overemphasize that aspect.

Lee Burgess: And it might not even be a few too many; it just might be some. It might be "some" drinks.

Alison Monahan: She's not even really sure if she asked for tonic water, but she isn't sure if she got a gin and tonic instead. There's some ambiguity here. Really going to have to see what happens with the jury on that one. Unfortunately, these things do happen, but it was certainly not her intention to be in this situation.

Lee Burgess: Right. And you can also use these humanizing labels for sympathetic parties. So maybe you're a teacher, you call her by her first name, and you call the victim...

Alison Monahan: Or even Miss Sally.

Lee Burgess: Right, and then you call the victim or the plaintiff by their last name. There are lots of different things that you can do to make your party seem very sympathetic, and that is part of your job, is to be a storyteller.

Alison Monahan: Oh, absolutely. It's the big bad corporation is going up against very lovely and kind person. Neither of those are probably 100% accurate. I'm sure this person has bad days, I'm sure there are people at the corporation who are perfectly nice. But your job is to tell the story in the way that would be most persuasive. And obviously you can't overdo this. I mean, you've probably read briefs that have... I've definitely read them where you're like, "Come on, seriously? Um, no."

Lee Burgess: We've all read the same depositions.

Alison Monahan: We're like, "Uh, no. That is too far beyond. I'm not buying this." So, it has to be credible. But I do think within the realm of credible, there are definitely things you can do that even subconsciously might help people see things in your way.



- Lee Burgess: Yeah. Another thing to think about with persuasive writing is even your headers are persuasive. They can be full sentences, they can state your desired results or your rationale. Remember, people read things really quickly, even judges. And so, these sign posts – you shouldn't assume that they're just a header, they're not going to read that. They'll definitely read the header. They might not read anything else, but they'll probably read the header. And that is also considered persuasive.
- Alison Monahan: Yeah, and I think usually in a persuasive memo, those are going to be drafted differently than in an objective memo, so it might contain your desired outcome: "The court must rule this way because of" blah, blah, blah. You make your very best argument in the header.
- Lee Burgess: Yeah, and using words like "must" and "shall", instead of the court "will" or "might".
- Alison Monahan: Should.
- Lee Burgess: Right, should. So, you want to make it so easy for them to agree with you, is really what you're going for.
- Alison Monahan: Right, and I do think you have to use those words sparingly. If you have really strong case law on point that says the court must do something, then, yeah, say that. But if the case law is a little ambiguous or things are a little wishy-washy and you come in and you tell the judge that they must do something, they're going to be like, "Oh, really? You think? No." But if they really are confined by the case law and it's on your side, then yeah. But make it clear that unless you want to go up on appeal, you must do this.
- Lee Burgess: Yep, absolutely. So, what are just some main takeaways that we wanted to share today about writing persuasively? Using that CREAC structure – I know we sound like a broken record, but the structure really helps, so you just do it. It can be boring, but it's very effective. Focusing on your strongest legal arguments. Don't ignore the bumner arguments, but just bury them a little bit. I don't know that you need to use the froofy language like Alison was saying. I think you can just acknowledge it and move on to juicier stuff.
- Alison Monahan: The thing is, it is what it is. If you've done all the research, you've found as many cases on point as you can, they're all kind of against you – at some point, that's a judgment call for whoever is in charge of this brief. But they just probably want to address it and move on and say, "Even we concede this point." There's



no point in arguing about things that if there's literally nothing on point. You may as well just say, "You know what? That's against us. We're moving on to other areas where we think we have a better argument."

Lee Burgess: Yeah, I think that's true. We talked about emphasizing favorable facts and making sure that your facts are written in a persuasive way, being very thoughtful about your word choice, framing the rules favorably to you whenever possible, and to write assertively and advocate zealously for your client. That's your job.

Alison Monahan: Right. I think your job, when I think of what the job of an attorney is in a scenario where you're making an argument for your client – your job is to take all of the facts, all of the law, figure out what is best for you, and then make that argument. So if things are totally against you, you can't make stuff up, you cannot take out words like "not". People do this and it generally backfires on them. But you have the material to work with that you have, and within that framework, you need to figure out what your best approach is and put that forward. And then think about, "How can I humanize my client if I have a person or a corporation? This corporation might be a great corporate citizen. They are out in the community doing all these things. It is very unlikely as a corporation to have contaminated this site. They're out planting trees, for goodness sake. They couldn't have done this." So again, within reason. I think it's very easy to go overboard. And if something doesn't pass the smell test, you probably just shouldn't even put it in there, because someone might have to stand up in court and the judge is going to be like, "Does this seem like a winning argument to you? Because I'm kind of offended that you even put this in here." And the thing is, you really don't want to make the judge angry and you don't want to make them not trust you. So, anything you're putting in a persuasive document needs to be supported by at least, "Yeah, I could stand up in court and make that argument with a straight face."

Lee Burgess: Yeah. No laughing. No laughing at all.

Alison Monahan: Yeah. Basically, does it pass the straight face test? If you're not going to stand up in front of a judge and say, "Your Honor, we believe", blah, blah, blah.

Lee Burgess: Yeah.

Alison Monahan: Yeah. If you can't do it, then no, you can't put this in, because the thing is, someone is going to ask about it. People are not stupid. And if the judge doesn't ask, the other side will point it out, I guarantee you, because they will get





whatever you wrote, and someone will read it in their office and they will start laughing. And that will be the leading sentence of their response: "This is not even a credible argument, Your Honor."

Lee Burgess: Yeah. Oh, I definitely included things in briefs saying things like, "If they'd read the rest of the sentence", and quoted the rest of the sentence. I mean, there are definitely some, yeah. I actually thought that was the most fun, when you got to just be like, "You did your job terribly, and I am a better lawyer than you are."

Alison Monahan: Right, like, "I read the case." You're not really going to get away with things. Someone's being paid to find the places that you're bullsh\*tting, basically.

Lee Burgess: Yeah, exactly.

Alison Monahan: And they will find them. And you will find yourself in court, defending the fact that apparently some junior associate on your team edited a case to say "not" instead of not "not", and now you're the one who's about to get sanctioned.

Lee Burgess: Yep, which goes back to our earlier discussion of why supervising attorneys are so picky, is because they're representing your work as their own. Well, we're running low on time, so that kind of wraps up our discussion of persuasive legal writing. However, in prepping for this podcast, I could not, in good conscience, not mention the future, because we have been talking a lot about AI and how powerful it is even when studying for exams. You've got a great YouTube video about that. But AI is going to rock the legal profession. And it's starting to, but I know it's going to take a bit to be adopted. But I think it might really change what legal writing means. I know you've been doing some research on this and getting up to speed, so I was just curious, for our listeners, what are some of your thoughts on what's coming down the pipe with AI and the work of young lawyers?

Alison Monahan: Well, I think it's going to be super interesting. I would be a little concerned, to be honest. I went to a demo recently from [Casetext](#) that has a tool called CoCounsel. I think they've just been bought by Westlaw recently, actually. So anyway, it will be a Westlaw tool soon. But CoCounsel is pretty wild, the things that it can do. You can do research in ways that you could not do a year ago. So, you can come in and just ask it questions, basically, and it will go out and search. Ask it a question in a natural language, and it will go out and pull an answer for you. So, I think that's something that is going to be pretty transformative, and I think people who are in law school really need to actually be paying attention to and making sure they can work with these tools. So, there I have fewer concerns



about people not having work to do, because I think you can just use this tool. But it will allow you to be more effective. Instead of tons of Boolean searches and things like that, you basically will just ask it a question, like, "I need a case in the Southern District of New York that says X." And it'll go out and get you one, which is pretty crazy. But they're also training it to draft, and I think that's really where a lot of the low-level work might be impacted. So things like... I remember drafting responses to discovery requests and things like that. All of that stuff I think will be automated, kind of like e-discovery has been automated in a lot of ways. And the interesting part is, at what point does the drafting stop being able to be useful? So, if we're talking about drafting an entire brief or an entire motion, I think there's going to still need to be thought put into that by actual attorneys, and what is your strategy and that kind of thing. But in terms of telling you what the law is, summarizing documents – so, summarizing deposition transcripts or something – that type of stuff the AI can do super quickly and really well. But I think it's definitely something people really need to be paying attention to, because you want to be the person who knows how all this works when you get into the workplace, so that a) you understand the tools and you can use them, and b) you're kind of protecting your position as a person who actually understands this. And then you can have a lot of value.

Lee Burgess:

I agree. I think it's fascinating. For me, I keep coming back to the ethical ramifications of this, and the computer doesn't have a code of ethics. I mean, they kind of can, you can build one in. But if I'm paying somebody for legal advice, I think it's going to take a lot of attention to detail and a change in how we work, because there's going to be something spit out and then you're still going to be responsible to do something with it. You're still going to have to validate its work, you're still going to have to read the citations, make sure it's right, make sure it fits with your litigation plan. There has been a lot of automation that still creates mistakes. So, I think that for me is going to be the interesting piece, is how does this really blend with what that "thinking like a lawyer" piece is, and then how are we going to need to work to make sure that we can maintain representation of our clients and not kind of just hand it over to the machine until the machine can do it fully better than we can, which maybe is coming down the pipeline, but who knows?

Alison Monahan:

Well, I will say from a technical standpoint, there's some interesting stuff going on now. So, if you just go to ChatGPT and type in a legal question, that would be crazy to put in a brief. I mean, it literally will just make up something. You know this. There's the story of the lawyer who did that; he's been sanctioned. He asked for case names, it gave him case names. They were just made-up case names. So, that's sort of a general approach model. It hasn't been trained on a specific data set of legal materials. But now what people are doing – this is what



I'm pretty sure CoCounsel does, and some other people we're going to be talking to on the podcast coming up – but basically, you have that kind of general knowledge database. Not really a database, but kind of a database. Anyway, you have your ChatGPT, basically, that enables you to talk to it and it talks back. But what you can do is actually – and this is probably not 100% technically accurate – but I think of it as sort of hooking up a database of your actual materials. So maybe you say, "Okay, these are all of the federal cases, this is the database of federal cases." So now, that's kind of your input, and you're using the ChatGPT part to do other things. The key point there is that it can start actually citing real cases. So, any kind of responsible legal AI at this point has to cite its cases, has to cite everything. So, people are just paying the \$20 a month for ChatGPT-4 and being like, "Oh, cool, it gave me some cases. I'm good." That is not a good idea. But if you have these tools like CoCounsel, they have fed it a database of cases that is updated on basically a daily basis, and every single thing that it gives you, it's linking to the actual case. So yeah, I think of it as supervising a junior associate, if I'm the partner. Or even a summer associate, like we talked about on the prior podcast. Would I 100% trust that that person is correct? Probably not. I'm probably going to need to check their work. I mean, that is my ethical responsibility. So I think of it the same way. You need a source that you can check, and then someone actually has to look at it.

Lee Burgess: Yeah, this is a wild new frontier. I think this stuff is fascinating. I was hiding from it for a while because it kind of freaked me out, but you got me all into it with Claude, and now I'm just here for it. I hope our audience is also here for it because I think we're going to talk about this stuff a lot.

Alison Monahan: It is seriously creepy. It is pretty crazy. I guess I think of it too a little bit like the self-driving cars. I am personally creeped out by that when I see some car driving through San Francisco with no one at the wheel. However, I recognize, rationally, the car is a better driver than most people. That's just the reality. I know that that's true and it still creeps me out, so I think this is a little bit the same.

Lee Burgess: I know. I still haven't taken one of those self-driving taxis, but my daughter calls them "ghost cars". That's what she calls them.

Alison Monahan: Yeah, that's what they look like. No, it is. It's really creepy. You see the wheel turning and nobody's turning it. It does look like there's a ghost. They basically shut down right now I think its cruise because they had a couple of accidents. But then you think about how many car accidents happen with people every single day and we still let ourselves drive.



Lee Burgess: I know, it's so true. I was driving from LA back to San Francisco on I-5, which if anyone has ever done that drive is the most boring drive ever. But my car has the adaptive cruise control where you'd basically just be like, "Don't get too much closer than the car in front of me and drive this speed." And then, it just drove me home. I mean, I have to have my hands on the steering wheel, but for hours, I was just listening to a podcast or talking on the phone, and my hands are just resting on the steering wheel. And the car basically, safely, probably with more attention than I had, got me home.

Alison Monahan: Yeah, I don't know. It's definitely a wild world and developing super quickly. It's only been in the last couple of months that we've been able to do these. They're called RAGs, for anybody who really cares – but this sort of Retrieval Assisted Generation, I think, where you get the citations. But that's very new. And even the Casetext person doing the presentation, people were asking questions, like, "Oh, could I have it draft this for me right now, or this?" And she's like, "Well, give me a couple of months. We want to make sure we've tested it first."

Lee Burgess: Yeah, it's wild. It's going to be fun to see what happens. It's crazy, but we're going to keep talking about it, because I think it's fascinating, and it is the future, so we might as well be part of it.

Alison Monahan: Well, and I think people who are in school actually sort of have an advantage, because they can just grow up as lawyers using this, and really know how to use it effectively. And I think that has a lot of value.

Lee Burgess: Yeah. With that, I think we are out of time. Thank you so much for joining us to talk about legal writing. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a rating or review on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we'd love to hear from you. Thanks for listening, and we'll talk soon!

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