The Greeks Go Back to Law School:
A Guide to Integrating Student Writing and Collaborative Learning throughout the Legal Curriculum

Heather Garretson, J.D.
Associate Professor of Law
Thomas M. Cooley Law School
Grand Rapids, Michigan

Kelly Kinney, Ph.D
Director of First-Year Writing
Assistant Professor of English and Rhetoric
State University of New York, Binghamton

Abstract

Dear Socrates: You don't have to go it alone. The Greeks modeled the teacher as intellectual adversary, using the Socratic method to test the mettle of students' argumentative skills. Our interactive workshop puts a twist on this model, demonstrating how teachers can be argumentative interrogators *and* collaborative coaches. Our presentation offers small group activities for large-lecture courses, mock exam questions with sample student answers, and malleable grading criteria for use throughout the legal curriculum. By coupling the Socratic method with contemporary pedagogies associated with rhetoric and writing studies, we aim to help law professors teach students self-assessment skills that will support their writing for any class—and well into practice.

A Summary of the Law used for this Exercise

Contract Law: Do what you promised to do, or get sued for not doing it (breach).

Breach: Not doing what you promised to do when you were supposed to do it.
-if it is not yet time to do what you promised to do, there cannot be a suit for breach because your performance was not yet due.

Ordinarily, parties to a contract wait for each other to perform and they have no right to demand reassurance by the other party that performance will be given when it is due.

Occasionally, one party's worry that the other party will not perform is strong enough to warrant action. This occasion is addressed by the law of anticipatory repudiation and prospective inability to perform.

Anticipatory Repudiation: One party learns the other party will not perform when performance is due.

According to the Restatement, an anticipatory repudiation is:

> A statement or an act by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach.
> Restatement (Second) of Contracts § 250.

Nature of the statement: a party's language must be sufficiently explicit to be reasonably interpreted to mean that the party will not or cannot perform. Mere expression of doubt as to his willingness or ability to perform is not enough to constitute a repudiation. Restatement (Second) of Contracts §250, comment b.

Nature of act: the party's act must be both voluntary and affirmative, and must make it actually or apparently impossible for him to perform. Restatement (Second) of Contracts § 250, comment c.

Sometimes statements or acts fall short of these requirements – they do not sufficiently show that a party will fail to perform the promise when performance is due. There may, however, still be reasonable grounds to believe that the obligor will commit a serious breach. In that case, the obligee may request assurances from the obligor that the obligor will perform.

Request for Assurances: Where one party has reasonable grounds to believe that the other will not perform, the party may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he or she has not already been paid until those assurances are given.

Whether "reasonable grounds" exist to believe that one party will not perform must be "determined in the light of all the circumstances of the particular case." Restatement (Second) of Contracts § 251, comment c.

If there are reasonable grounds to demand assurances but no assurances are given within a reasonable time, the failure to provide assurances may be treated as a repudiation. Restatement (Second) of Contracts § 251(2).

Problem

Luxury Builders, Inc. is beginning construction on a new multi-use building downtown. This project is greatly anticipated by the city leaders and is being heralded as a "sign of the recovery" from the sluggish economy. Builders hired Excellent Electric to do all of the electrical work in the building. While working on the electrical installation, Electric learned from other sub contractors that Builders owed them for their work and it had not paid. These subs told stories of trying to collect by calling Builders and by going to its headquarters but nothing had worked. Many subs believed Builders is close to bankruptcy.

Under Electric's contract with Builders, Electric is not to receive payment for the electrical work until after the electrical installation is totally completed. Currently, Electric's installation is 50% complete, but it does not want to finish the work because it fears it will not be paid. Advise Electric of its options.

Model Answer

Builders contracted with Electric to have Electric do all of the electrical work in Builders' new downtown development and Electric is currently half-way done. Payment is due on completion and Electric fears that Builders will not pay when the work is done. Electric seeks advice regarding its options. Electric may not sue Builders now based on Electric's fear that it may not be paid in the future. Electric may, however, request assurances that when Builders' performance is due, Builders will perform. If Builders fails to provide such assurances, Electric may then sue using the doctrine of anticipatory repudiation.

Parties in a contract must perform what do what they promised to do or they can be sued for not performing. Performance by Builders is due when the electrical work is complete. Because the electrical work is not yet complete, Builders' performance is not yet due. Builders has not yet failed to do what it contracted to do – pay Electric – so it cannot yet be sued for breach.

Under the doctrine of anticipatory repudiation, suit is permitted before performance if it is clear that the party will not perform. That is not the case here. Anticipatory repudiation requires a statement or voluntary affirmative act by a party indicating the party cannot or will not perform. Here, Builders has not stated that it will not pay Electric when the work is complete. Neither has Builders done anything to Electric to indicate it will absolutely not pay Electric when payment is due. Because there is no anticipatory repudiation, Electric may not sue.

Electric may, however, demand assurances of payment and suspend working on the office complex because of Builders' prospective inability to perform. Where a party has reasonable grounds to believe the other party will commit a breach by non-performance (a prospective inability to perform), the party may demand adequate assurance of the due performance and suspend his own performance until the assurance is received. In this case, Electric learned from other contractors that they had not been paid for their work in weeks and Electric fears now that it may not be paid. Insolvency is generally treated as a prospective inability to perform, therefore, the nonpayment of the other contractors will likely constitute reasonable grounds to demand adequate assurances that Electric will be paid.

Because Electric has reasonable grounds, it may demand adequate assurances from Builders it will be paid. Under the Restatement, the request does not have to be in writing though I would advise Electric to make the request in writing so there is a record. After making the demand for assurances Electric may suspend working on the office building until it receives adequate assurance from Builders that it will be paid. If Electric receives the assurance, it must resume the electrical work. If Electric does not receive assurances within a reasonable time, Electric may treat that an anticipatory repudiation and sue for damages.

Student Answer

In this situation we have a prospective inability to perform (hereafter PIP), not an anticipatory repudiation (hereafter known as A/R) because Builders has not directly communicated to Electric that Electric will not be paid. Here Electric has a reasonable basis that Builders will not be able to perform due to a reliable source, (i.e. other contractors) that are also working with Builders. Also, the PIP by Builders excuses Electric's condition of being ready, willing and able to perform. Electric can do the following: request assurances from Builders, the assurances must be in writing, they must be reasonable they must be received no later than 30 days. Electric can only demand what the K entitles him to and Electric cannot demand anything outside the K. Failure to get assurances from Builders will then result in an A/R Electric must be sure he has an actionable. A/R before he does not perform or Electric will be in breach. If Electric breaches Builders can sue Electric for damages. The above rules apply to UCC rules of PIP. Under Common Law PIP No writing is necessary and there is no 30 day time limit.

Characteristics of "A" Writing

Content

- The material analyzes and applies law in a clear and coherent way.
- The legal issue is clearly identified.
- The applicable law is plainly stated.
- The law is applied to the relevant facts to analyze the issue.
- The writing is rich with case comparisons and analogies.
- The writing artfully comes to a conclusion based on the application of relevant law to relevant facts.

Organization

- The argument is clearly stated.
- The material contains a thesis paragraph that provides a road map of the issue and resolution.
- The discussion follows a logical outline of the issue, applicable law and conclusion.
- Transitions between and within paragraphs are explicit, clear, and purposeful.
- Paragraphs are purposefully organized and substantially developed with the relevant facts and law.
- Paragraphs have a topic sentence that is focused and specific.
- Sentences following the topic sentence support the topic sentence.
- The introduction and conclusion are clear, succinct, and appropriate.

Style and Mechanics

- The writing style is active, engaging, and appropriate.
- Sentences are clear and logical.
- Word choice is precise, interesting, and appropriate for readers outside the legal community.
- The tone is respectful and professional.
- References to the law are correctly cited.
- There are not problems in grammar, spelling, punctuation, or usage to interfere with communication.

Characteristics of "B" Writing

Content

- The material analyzes and applies the law.
- The legal issue is identified.
- The applicable law is stated.
- The law is applied to the facts to analyze the issue.
- The writing uses case comparisons, but analogies may be underdeveloped.
- The writing comes to a conclusion based on the application of relevant law to relevant facts, but this application is not as detailed as an A paper.

Organization

- The argument is identifiable.
- The material contains a thesis paragraph, but the issue and resolution may not be explicit.
- The overall pattern of the discussion is clear and sensible.
- Transitions between and within paragraphs are present.
- Paragraphs are clearly organized and generally detailed.
- Paragraphs have a topic sentence.
- Sentences following the topic sentence generally support the topic sentence.
- The introduction and conclusion are appropriate to the focus.

Style and Mechanics

- The writing style is generally appropriate, but may occasionally be unclear, repetitive, or choppy.
- Sentences are generally clear and logical.
- Word choice and vocabulary are generally appropriate, but may not be clear to readers outside the legal community.
- The tone is generally appropriate.
- References to the law are generally cited correctly.
- There are not problems in grammar, spelling, punctuation, or usage to interfere with communication.

Characteristics of "C" Writing

Content

- The material is reasonable, but may not fully engage the law.
- The legal issue is generally identified, although parts of the writing may wander from the relevant facts or central issue.
- The applicable law is identified.
- The law is not clearly or thoroughly applied to the facts.
- The analysis applies some but not all of the relevant facts, or the relevance of facts are not integrated into the discussion.
- The writing does not use appropriate case comparisons: analogies are generally inappropriate or missing.
- The writing comes to a conclusion.

Organization

- The argument is identifiable, but underdeveloped.
- The material contains a thesis paragraph, but the issue or resolution are slightly off-track or unclear.
- The overall pattern of the discussion may wander or be unclear.
- Transitions are generally present, but often abrupt or mechanical.
- Paragraphs have general themes but are not clearly organized.
- Paragraphs regularly have unclear or missing topic sentences.
- Sentences following the topic sentence do not always clearly support the topic sentence.
- The introduction and conclusion support the focus, but may be unclear or off-track.

Style and Mechanics

- Sentences are generally basic, choppy, or repetitive.
- Sentences are generally readable, but some may be hard to follow.
- Word choice is logical but generally lacks precision and clarity.
- The tone is at times inappropriate to the writer's purpose.
- References to the law are present but often cited incorrectly.
- Problems in grammar, spelling, punctuation, or usage occasionally interfere with communication and impair the writer's credibility.

The Greeks Go Back to Law School:
A Guide to Integrating Student Writing and Collaborative Learning throughout the Legal Curriculum

Heather Garretson, J.D.
Associate Professor of Law
Thomas M. Cooley Law School
Grand Rapids, Michigan

Kelly Kinney, Ph.D.
Director of First-Year Writing
Assistant Professor of English and Rhetoric
State University of New York, Binghamton

Workshop Goals

- Reflect on your current methods for handling student writing.
- Examine flexible, “common language approach” criteria for responding to and grading student writing.
- Discuss how to use a “common language approach” in collaborative classroom activities and independent student exercises.

Beginning the Discussion

- What questions or concerns do you have about responding to and grading students' writing?
- What methods do you use to foster student success in their written writing?

Exercise One: How Do *You* Respond to Student Writing?

- Read the student's answer carefully, but quickly.
- If presented as a draft in progress, how would you respond to this piece of writing?
- If presented as a formal response to an exam question, what grade would this piece of writing merit?
- Be ready to share your responses.

Don’t be a Chicken.

Candidly share your responses.

Your values about what constitutes good writing matter to the to the success of your students.

The Results . . .

- There are vast differences in the language and criteria law professors use to respond to and evaluate students' written work.

- Students often become frustrated by a lack of understanding of the criteria for evaluation, which may lead not just to poor performance, but to their disregard of the professor or course.

What is the Best Way to Respond?

Develop your own “common language approach” to respond to and grade student writing.

Developing Your Own Common Language: "Characteristics of ABC Writing"

1. Present and explain your criteria to students.
2. Use the common language of the criteria when responding to students' written analysis.
3. Compel students to respond to each others' drafts using the common language of the criteria.
4. Evaluate finished pieces of writing using the criteria.

In-Class Collaborative Exercise: Don't Just Interrogate, *Coach*

- Introduce the law and present the problem.
- Ask small groups to collaborate on an appropriate answer.
- Ask one (or more) groups to justify their answer in front of class.
- Coach groups on strengths/weaknesses of their answer—and ask their peers to do the same—*using a common language.*

Out-of-Class Work and Follow-Up:
From Group Work to Individual Written Response

- Require students to develop individual written responses to the problem.
- Challenge students to **respond** to each others' individual drafts *using a common language.*
- Require students to submit written response to TA/professor, who then **grades** individual work with a rubric that *uses a common language.*

Exercise Two: Responding to vs. Grading Student Writing

- Using "Characteristics," come to consensus on the two most important pieces of advice you'd give to *respond* to this as a draft in progress.
- Using "Characteristics," come to consensus on the *grade* this level of work would merit if offered as a final written answer.
- Be ready to share your responses.

Benefits of the Common Language Approach

- Students find writing a less frustrating, more rewarding learning activity because they are less surprised by feedback and grades.
- Faculty increase the productivity of student peer critique.
- Students increase their ability to earn the grades they aspire to achieve.
- Faculty support *Best Practices for Assessing Student Learning,* by "foster[ing] learning, inspir[ing] confidence in the leaner, [and enhancing] the learner's ability to self-monitor."

Closing Thoughts

- What questions or concerns do you have about using the common language approach or integrating collaborative learning in the law curriculum?