Canadian law schools infected with terminal niceness

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There's an epidemic of niceness infecting our law schools.

The virus originated at the Harvard-MIT program in the early 1980s on negotiation and has spread to alternative dispute resolution (ADR) programs everywhere. There's even a course in some law schools called "lawyer as negotiator" and this curriculum is buckling under terminal niceness too.

Here's how I defined the problem when I first heard of the Harvard program about 15 years ago. My clients and colleagues with First Nations' land claims files went to Harvard, came back and asked my opinion. Capitalizing on the title of the famous *Getting to Yes: Negotiating Agreement Without Giving In* reference text, I told my colleagues that many people I know don't want to get to yes, they don't want to get past maybe and they are very happy at no. My colleagues agreed.

To be reasonable, the curriculum has some good core values. These include: respect, listening, questioning, creative approaches and making the pie bigger by getting more elements on the table to sweeten the deal. These are all good in principle.

But here's what happened to me recently that caused me to question the preoccupation with coming to a friendly settlement with every negotiating partner or adversary whose path crosses ours.

Every now and then a law school asks me to adjudicate or assist in a simulation or practice moot or mock negotiating session. In a classroom recently, the parties and facts were as follows:

Former sports and movie star turned right-wing state governor.

Artist who uses governor's likeness in art, now on display in a public gallery. The art is causing offence to the governor. The issues included intellectual property, freedom of expression, reproduction rights on the art and so on.

Opposing teams of students played the roles of artist, governor and lawyers for each side. I was asked to judge the effectiveness of the negotiating, counsel the students, assign a mark and report to the professor.

The students did a great job of executing the curriculum on niceness. They met the other side, respectfully probed for areas of mutual interest, suggested various approaches and eventually came to some kind of potential settlement. The various suggestions included donations to charity in lieu of royalties, a joint, bland press release expressing mutual respect and the governor's attendance at a show of the art in question.

I fulfilled my obligation by coaching students and then had a private conversation with the professor. I pointed out that in real political life, especially in America, there was no effective reason for either party to settle.

I cited two cases that came to mind. The first was the J.D. Salinger case in which the reclusive author sued to prevent publication of personal letters. The letters and other documents were submitted in evidence and thus became public documents, available to all. I feared the governor's efforts might make the art that offended him more well known.

The next case that came to mind was the famous show in the Brooklyn Museum of Art featuring a work by Chris Ofili. His work depicted a Black Mary surrounded by elephant dung, pornographic pictures and excerpts from blaxploitation movies. The mayor of New York City at the time was Rudy Giuliani. He attacked the exhibit, made it more famous and probably increased attendance.

I've worked for a lot of politicians and a few museums and galleries. I wracked my brain for any thought or experience I've had that would make me think some kind of joint press release or the right-wing governor milling around with lefties at a gallery was a realistic expectation. I couldn't.

In fact, no settlement was the very best outcome for both sides. If the governor denounced the art, he would curry favor with his core constituency on the right. The opposite would happen if he rubbed friendly shoulders with them at a show. Meanwhile, the artist would be more famous after denunciation and would probably make more money. Doing a deal with the governor would be seen as selling out. I asked the professor what would happen if a student chewed up the allotted 30 minutes of negotiating time with obfuscation and then announced that s/he did so to derail negotiations because a settlement was not in the client's interests.

The professor curtly said the students had to demonstrate mastery of the curriculum. I quickly followed up by asking what would happen if a student demonstrated all such mastery and then derailed the final settlement in the last three minutes of allotted time, announcing that settlement was not in the client's interest.

"Top marks" was the professor's reply.

Well, way over here in the real world, where I sit, I figure that writing a fact case that requires a student to demonstrate technique that is irrelevant is, well, irrelevant. Training lawyers to chew up billable time advancing a case that doesn't help the client is a whole other ethical issue I didn't want to burden the professor with. Finally, thinking that students might know they could reject the curriculum and get full marks is not a realistic assumption.

Niceness is fine and there should be more of it. But perhaps it is inappropriate to zealously seek niceness on billable time or to try building bridges that nobody wants to cross.

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