

Providing Effective Feedback and Critiquing

One of the most complex and important aspects of teaching legal writing is providing effective feedback. This session will explore the major approaches to providing feedback and critiquing student work, including the major problems new professors encounter and tips on how to critique efficiently and effectively so that students are more likely to be open to the feedback they receive.

Craig T. Smith, Vanderbilt University

Handout for the Workshop on *Providing Effective Feedback*

Instructions: This handout contains (I) an assignment (a scenario plus edited cases) given to a first-year student and (II) an analytical chart prepared by the student. Please read both. During the workshop, we will examine a memorandum written by a student in response to the assignment. We then will discuss how to provide effective feedback that can help the student rewrite the memorandum.

I. Assignment: Our client is Watchtower Security, Inc., of Kalamazoo, Michigan. This company provides security services to other companies. Kelly Kline is Watchtower's president. Below, in italicized text, is my summary of what Ms. Kline has told me. Presume for now that Ms. Kline's statements are true.

- 1. Recently we had a reporter enter our building without my knowledge. He caused damage to our building and to our business's reputation. I want to know what we can do about it.*
- 2. On August 23, I received a telephone call from a freelance reporter. He wanted to interview me. I declined. I told him to leave and not to contact me again. I said that I would contact him if he were to convince my public relations officer that an interview would make sense. "Until then," I told him, "Watchtower is off limits."*
- 3. Nevertheless, on August 25, the reporter got into our building. Employees staff our building's only public entrance. No non-employee may enter the building without their permission. These employees, however, have discretion to permit visitors to enter. The reporter deceived us. We would not have let him in if he had used his real name. But he provided a false name and said he was interested in working as a security guard with Watchtower. He said nothing about filming or reporting. We let him in as part of a five-person tour group. Four times each year we invite a group to tour our building. We do this to publicize our security training program.*
- 4. The reporter secretly filmed his tour using a hidden camera. Later, he broadcast the film. None of his film showed an area that we keep private. But his film did show a trainee beginning to cry. Our program is very demanding. It's not unusual for a tour group to see such a display. Another scene that the reporter filmed and broadcast showed trainees being tested about disguises and similar tricks that people may use to enter secured areas without permission. We run a training scenario where the trainees guard a building. We show them a picture of a person who was not authorized to enter that building. We'll insert into the group the person whose picture the trainees have seen. But the person is disguised. The trainees have to detect this person.*

5. *The reporter seemed to know about this detection exercise. He interrupted it by loudly asking the person whom the trainees were supposed to detect: "Are you the one?" The trainees heard this. This ruined the exercise. This has happened before. I guess that's a risk we put up with when we invite tour groups into our facility.*

Write only the Discussion section of a memorandum. Analyze whether the reporter trespassed when he entered Watchtower's building after Watchtower's employees gave him permission to enter. For the governing law, use only the following four cases.

Case #1: AMERICAN TRANSMISSION, INC., Plaintiffs-Appellants, v. CHANNEL 7 of DETROIT, INC., and Joe Ducey, Defendants-Appellees. Court of Appeals of Michigan, 2000; 609 N.W.2d 607

***609** Plaintiffs appeal from the trial court order granting defendants' motion for summary disposition ... with regard to plaintiffs' claims of ... trespass, [etc.]. We affirm.

Call for Action, a consumer advocacy group, asked defendant Joe Ducey, a reporter for defendant Channel 7, to do a story on transmission repair facilities. Defendants rented a car, and a certified mechanic disconnected its vacuum hose. The car became more difficult to shift and made a clunking noise. The mechanic explained that, given these problems, the vacuum line was one of the first things that should be checked.

Evelyn Stern, a volunteer at Call for Action, took the vehicle to American Transmissions of Troy (hereafter plaintiff). She posed as a customer but was equipped with a hidden camera. Plaintiff's manager told Stern that he needed to do an internal inspection, which would involve disassembling the transmission, for \$249 plus additional charges for parts and labor for any items that needed to be replaced.

Later, Ducey interviewed plaintiff's manager. Then Channel 7 aired its broadcast of the transmission shop investigation. ***610** The segment included interviews with consumers who believed that they had been duped into paying for unnecessary work. ...

***613** ... [P]laintiffs argue that defendants were trespassers on plaintiff's premises because the defendants gained entry by concealing their true identity and misrepresenting Stern's relationship to them. Stern was given consent to enter plaintiffs' premises. However, the consent was procured by Stern's misrepresentations regarding her identity, her relationship to defendants, and her purpose for being on the premises. Accordingly, plaintiffs maintain that Stern's entry was unauthorized. This is an issue of first impression in Michigan.

A trespass is an unauthorized invasion upon the private property of another. *Cloverleaf Car Co. v. Phillips Petroleum Co.*, 540 N.W.2d 297 (Mich. App. 1995). Thus, if the property owner consents to the entry, no trespass occurs. ... In *J.H. Desnick, M.D. v. ABC, Inc.*, 44 F.3d 1345 (7th Cir. 1995), the Seventh Circuit Court of Appeals ... stated: "[T]here is no journalists' privilege to trespass.... And there can be no implied consent ... when express consent is procured by a misrepresentation or a misleading omission." *Id.* at 1351. The court held that the use of test patients with concealed cameras was not a trespass. ...

We find *Desnick* persuasive and adopt its reasoning. Accordingly, the trial court properly granted summary disposition of plaintiffs' trespass claim. Although Stern misrepresented her purpose, plaintiffs' consent was still valid because she did not invade any of the specific interests relating to the peaceable possession of land that the tort of trespass seeks to protect. *Cf. Desnick, supra* at 1352. Stern entered only those areas of plaintiffs' shop that were open to anyone seeking transmission repair services and videotaped plaintiffs' employee engaging in a professional discussion with her. Stern did not disrupt the shop or invade anyone's private space, and the videotape she made did not reveal the intimate details of anybody's life. *See id.* at 1352-53. ... **Affirmed.**

Case #2: CLOVERLEAF CAR COMPANY, [etc.,] Plaintiffs-Appellants, v. PHILLIPS PETROLEUM COMPANY, Defendant-Appellee. Court of Appeals of Michigan, 1995; 540 N.W.2d 297

Plaintiffs appeal from a summary disposition granted to Phillips on claims of trespass [etc.] for contamination of ground water under plaintiffs' property. We affirm

Plaintiffs own property directly across the street from a gasoline station. Phillips owned the gasoline station, and it installed a hose to connect the gasoline tanks to the pumps. Later, a contractor was replacing the old gasoline tanks. This contractor dislodged the buried tanks and lines and left them lying on the ground. The contractor ran over a gasoline line with a backhoe. The next time a customer used the pump connected to that line, gasoline spurted into the air. ...

Plaintiffs then attempted to secure financing for a company located across the street from the gasoline station. Because of the ground water contamination, no financing was available. Plaintiffs filed suit against Phillips, alleging ... trespass, [etc.]. The trial court granted summary disposition for Phillips. ...

A trespass is an unauthorized invasion upon the private property of another. *Gelman Sciences, supra*. However, the actor must intend to intrude on the property of another without authorization to do so. If the intrusion was due to an accident ... or an abnormally dangerous condition, an action for trespass is not proper. Although plaintiffs allege that Phillips caused the gasoline to spill into the ground water, they did not claim that Phillips intended this intrusion. The trial court's ... summary disposition of the trespass claim [therefore] was proper **Affirmed.**

Case #3: J.H. DESNICK, M.D., [etc.], Plaintiffs-Appellants, v. AMERICAN BROADCASTING COMPANIES, Inc., [etc.], Defendants-Appellees. U.S. Court of Appeals, 7th Circuit, 1995; 44 F.3d 1345.

***1347** The plaintiffs appeal from the dismissal of their suit for trespass [etc.] arising out of the production and broadcast of a program that was highly critical of the Desnick Eye Center. ...

In 1993 ABC telephoned Dr. Desnick and told him that *PrimeTime Live* wanted to do a broadcast segment on large cataract practices. The Desnick Eye Center has 25 offices ... and performs more than 10,000 cataract operations a year. ***1348** ... Desnick permitted an ABC crew to videotape the Desnick Eye Center's main premises, to film a cataract operation "live," and to interview doctors, technicians, and patients. Unbeknownst to Desnick, ABC had dispatched persons equipped with concealed cameras to other offices of the Desnick Eye Center. Posing as patients, these persons requested eye examinations. ... The program aired on June 10.

... ***1351** [Desnick] claims that the defendants trespassed by insinuating the test patients into the Wisconsin and Indiana offices of the Desnick Eye Center

To enter upon another's land without consent is a trespass. The force of this rule has, it is true, been diluted somewhat by concepts of privilege and of implied consent. But there is no journalists' privilege to trespass. *Prahl v. Brosamle*, 98 Wis.2d 130 (App.1980). And there can be no implied consent ... when express consent is procured by a misrepresentation or a misleading omission. The Desnick Eye Center would not have agreed to the entry of the test patients into its offices had it known they wanted eye examinations only in order to gather material for a television exposé of the Center and that they were going to make secret videotapes of the examinations.

Yet some cases ... deem consent effective even though it was procured by fraud [and] the entrant has intentions that if known to the owner of the property would cause him ... to revoke his consent. ***1352** ... If a homeowner opens his door to a purported meter reader who is in fact nothing of the sort, the homeowner's consent to his entry is not a defense to a suit for trespass. *See State v. Donahue*, 93 Or. App. 341 (1988) And likewise if a competitor gained entry to a business firm's premises posing as a customer but in fact hoping to steal the firm's trade secrets. ...

How to distinguish the two classes of case – the seducer from the medical impersonator, the restaurant critic from the meter-reader impersonator? The answer can have nothing to do with fraud; there is fraud in all the cases. It has to do with the interest that the tort, trespass, protects: the inviolability of the person's property. The ... homeowner victimized by the phony meter reader does not want strangers in his house unless they have authorized service functions.

There was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. The test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers

themselves). The activities of the offices were not disrupted Nor was there any invasion of a person's private space, ... as in the famous case of *De May v. Roberts*, 46 Mich. 160 (1881) (where a doctor, called to the plaintiff's home to deliver her baby, brought along a friend who was curious to see a birth but was not a medical doctor, and represented the friend to be his medical assistant) No embarrassingly intimate details of anybody's life were publicized in the present case. ... There was no theft, or intent to steal, trade secrets; no disruption of decorum, of peace and quiet; no noisy or distracting demonstrations. ...

Affirmed in part

Case #4: *DE MAY and SCATTERGOOD, Defendants, v. ROBERTS, Plaintiff. Supreme Court of Michigan, 1881; 46 Mich. 160.*

***161** The plaintiff, Mrs. Roberts, was a poor married woman confined to her bed due to pregnancy. She employed defendant De May, a physician. He visited the plaintiff, and against her desire, and intending to deceive her, caused to be present, while she was in childbirth, the co-defendant Scattergood. Scattergood was a young unmarried man, a stranger to the plaintiff, and utterly ignorant of the practice of medicine. The plaintiff believed at the time, however, that he was an assistant physician. ...

***163** ... The plaintiff and her husband had a right to presume that a practicing physician would not bring with him into the house a young man in no way connected with the medical profession; and that something more clear as to his non-professional character would be required to put the plaintiff and her husband upon their guard than De May's remark that he had brought a friend along to help carry his things. ***164** ...

***165** Dr. De May therefore introduced an unprofessional young unmarried man into the house of the plaintiff, without the plaintiff having any knowledge or reason to believe the true character of such third party. To the plaintiff the occasion was a most sacred one. ... ***166** The fact that she consented to the presence of Scattergood, supposing him to be a physician, does not preclude her from maintaining an action. Obtaining admission under such circumstances without fully disclosing his true character was deceit, and the wrong thus done entitles the injured party to recover the damages sustained. **Judgment affirmed.**

II. The Student Author's Chart Showing Relevant Rules:

Note: Each cell shows a rule or sub-rule (varies by *row*) from a case (varies by *column*).

	<i>Amer. Transm.</i>	<i>Desnick</i>	<i>Cloverleaf</i>	<i>De May</i>
<i>MI Trespass rule</i>	= unauth'd invasion upon pvt. property	None. IL law: 'to enter upon land without consent'	= intentional & unauth'd invasion upon pvt. prop.	<i>None</i>
<i>Intent sub-rule</i>	<i>No explicit definition</i>	<i>No explicit definition</i>	the actor must intend to intrude	<i>None</i>
<i>'Invasion' sub-rule</i>	<i>No explicit def'n;</i> = entry	<i>No explicit definition;</i> = entry	<i>None</i>	<i>None</i>
<i>Authorization sub-rule(s)</i>	consent = authoriza.: 'if the property owner consents to the entry, no trespass occurs.'	1. consent may be valid tho' procured by fraud – trespass protects 'inviolability' of the property, so consent is void only if that inviolability is harmed. 2. if express consent is procured by misrep. or misleading omission, no implied consent	<i>None</i>	'deceit' can void consent