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Informed Consent as an Ethical Principle for Business

John R. Rowan

I. Introduction

The ethical responsibilities of business leaders can be ascertained only when the underlying normative framework is satisfactory. A stakeholder theory of business has in recent times become a framework to which appeal is frequently made in this respect. Because it rests on fairly strong moral underpinnings, stakeholder theory has much to recommend it. However, examination of the literature on this subject reveals that something is missing. Because additional considerations are often required in order to arrive at more specific conclusions about just which obligations might be owed by businesses in particular cases, applying stakeholder theory to particular situations often yields conclusions which are unhelpfully vague.

In this paper, I propose one such additional consideration, namely the concept of informed consent. This principle is best known for its prominent role in the field of medical ethics (Beauchamp and Childress, 1994; Fadan, 1986; Katz, 1978), though it has been mentioned, if not fully discussed, in the contexts of engineering (Harris, Pritchard and Rabins, 1995; Martin and Schizinger, 1989), technology (Burnham, 1983) and human subjects research (Bok, 1989). However, informed consent is either absent from stakeholder theory of business

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as it is currently conceived, or its presence in the stakeholder framework has not been appreciated. Either way, its explicit recognition will facilitate more precise conclusions regarding the duties of business. More directly, informed consent–as a guiding principle for business–is ethically required.

Motivating this thesis is the recognition that the medical and business professions have traditionally followed distinct ethical guidelines. In medicine, the focus has tended to be on the well-being of the patient. The value of autonomy is thought to trump other values which might be in play, and as a result great care is taken to ensure that the patient is aware of the nature of her situation and her options. "Full disclosure" is thus thought to be an obligation of medical professionals. In business, a *caveat emptor* (or "buyer beware") approach, according to which no such obligation obtains (and which even allows for some deception), has been regarded as perfectly permissible. While some scholars have come to challenge this degree of freedom on the part of business, an endorsement of the stringent obligations accompanying an informed consent requirement has not been forthcoming. However, with the advent of managed care (in which health care is profit-oriented), there is much more similarity between the practices of the two professions. A manufacturer of medical supplies that sells its products to a hospital is another case in which business and medicine intersect, and thus is another instance of the potential tension between *caveat emptor* and informed consent. For example, should a manufacturer of artificial limbs be required to disclose to its hospital customers problems with those limbs? Accordingly, it seems logical that the ethical principles guiding the medical and business practices should be aligned, or that any differences between them should be justified. The simplified choices, then, are as follows: either a morally relevant difference between the two professions must be found, one which would justify the distinct guiding principles, or a unified set of principles must be found that governs both medicine and business. The present argument suggests that it is a mistake to apply the principle of informed consent to medicine only.

This may seem a strange conclusion in that business is thought to be different from the other professions, and is often not considered a profession at all. First, business as an industry (or a collection of industries) is not self-regulating, unlike law, medicine and others. Second, the fairly substantial duties owed by lawyers and doctors to their clients and patients are well-established; the public relies heavily on these professionals, and it is commonly believed that the obligations owed to the public, including those obligations issuing from the principle of informed consent, must recognize this reliance. However, the first of these worries seems irrelevant while the second seems misguided. First, it is not clear why self-regulation is a necessary aspect of a profession. Insofar as the term 'profession' designates a certain level of knowledge and expertise, business is indeed a profession, and businesspersons (especially managers) are professionals with respect to their particular products or services. This portrayal of a profession (with its emphasis on knowledge and expertise), while consistent with some definitions that have been offered, is inconsistent with others which import into the definition intellecual aspects of the work and the amount of requisite training (Bayles, 1981; Newton, 1981), or, which is more troubling, conditions that are themselves already normatively laden (Sullivan, 1988). Such definitions beg questions of professional ethics in the realm of business. The more general portrayal is thus more appropriate, and it suggests that the second worry above is based on a false distinction, for the public does rely on businesspersons for their knowledge and expertise. Thus, it is *prima facie* plausible that similar obligations on the part of businesspersons, *qua* professionals, will obtain.

For present purposes the focus will be on duties owed to members of the public, who in the context of this discussion are particularly vulnerable. Henceforth, 'public' will refer both to customers and to members of the community at large, even though these groups are typically separated in discussions of stakeholder theory. Also, examples pertaining to sales practices will be utilized more frequently than other sorts of cases. These limitations are for ease of discussion only, and it should be clear that the conclusions reached herein will be applicable to a wider range of contexts.

After reviewing stakeholder theory in the next section, the notion of informed consent will be examined in more detail. This will be followed in the fourth section by a discussion of some possible applications of the informed consent addition to (or component of) stakeholder theory. Finally, the brief concluding section will include a comment regarding prospects for enforcement.

II. Stakeholder Theory

As originally conceived by R. Edward Freeman (1984: 25), a stakeholder is "any group or individual who can affect or is affected by the achievement of the firm's objectives." The descriptive version has its basis in a long-standing view which places corporate management at the center of a nexus of contracts between itself and these various groups, which include shareholders, employees, suppliers, customers and the public at large (Coase, 1937). In other words, these are groups with whom management has contracted, either explicitly or implicitly. For example, a community allows a firm to build facilities in or near, and to benefit from, an already existing infrastructure in exchange for the benefits of the (successful) operation of the firm (Schlossberger, 1994).

The normative version of stakeholder theory considered herein will focus on the groups affected by the firm (as opposed to the groups affecting the firm). It is natural to think that groups affected by a firm may be owed certain duties by it. These may be negative duties only (duties to refrain from treating those groups in certain ways) or they may be positive (duties to actively assist those groups in certain ways). According to the standard normative view of stakeholder theory, management is to consider all stakeholder groups equally in its decision-making process; no particular constituency is to be considered more important than any other. This flies in the face of the traditional view of business, according to which the goal is to maximize profit and thus shareholder wealth; the effects of business decisions on other groups, including the public at large, are to be considered only to the extent that those effects ultimately bear on profit (Friedman, 1970). Stakeholder theory takes the other extreme, going further even than "compromise" theories (Goodpaster, 1991) which allow for shareholder priority but with certain constraints, thus protecting other constituencies.

Kantian deontology is frequently utilized in the defense of normative stakeholder theory. In the literature, it is the second formulation of Kant's categorical imperative which is referred to most often. According to Kant (1785/1981: 429), you are to "act as to treat humanity, whether in your own person or in that of any other, in every case as an end and never as merely a means." As applied to the context of business, managers are to treat all stakeholder groups as ends in themselves, and never as means only. Assigning pride of place to shareholders violates the imperative, since it allows for employees, customers and the general public to be treated as means to the end of shareholder profit.

Hypothetical contractarianism has also been appealed to in an effort to justify stakeholder theory. Freeman (1994) describes this justification in terms of the "original position" framework of John Rawls (1971). Rawls utilizes the "veil of ignorance," a theoretical device preventing contractors from knowing their actual stakes in life (such as race, gender and class). The veil, which serves to eliminate potential bias, guarantees that the contractors are free and equal, and that morality is thus defined as 'the rules to which the contractors, or free and equal persons generally, would agree'. Rawls's more precise task is to arrive at acceptable principles of distributive justice, and he suggests that the rules generated in the original position would call for strict equality or something very close to it. As applied to stakeholder theory, which is concerned to address the actions of management rather than distributive justice, it is claimed that in ignorance of the particular stakes in the corporation they will hold, people will agree to rules which call for substantive equality, and this is just what stakeholder theory calls for.

These justifications are persuasive, and the general prescription that all stakeholder constituencies are to receive equal consideration should be followed. The problem, however, is that the notion of "equal consideration," in itself, is often unhelpfully vague when applied to particular cases. Sales practices illustrate this difficulty. Some commentators (Carr, 1968) have suggested that lying to potential customers is perfectly permissible, since the practice of sales is analogous to poker, in which lying, or "bluffing" generally, occurs regularly and is thought to be just part of the game. Whether this violates the normative version of stakeholder theory as described above is not immediately clear. While the practice of "misleading" customers without formally lying (as in certain modes of advertising) might be thought less problematic, its ethical status is similarly uncertain. Other examples of difficult cases include questions pertaining to pollution (such as disposal of hazardous wastes and other environmental issues) and to plant relocation (which can have devastating impacts on communities).

III. Informed Consent

In order to arrive at more precise conclusions regarding the obligations of business in these sorts of cases, it is suggested that the notion of "informed consent" be built into the stakeholder framework. This concept is applied most often to health care. It is a commonly accepted principle that patients deciding among various alternative courses of action with respect to their health must make their decisions under conditions of informed consent (Beauchamp and Childress, 1994: 142-46; Katz, 1978: 770). Health care professionals, in other words, are charged with the duty to ensure that the conditions of informed consent are met. My suggestion is that business, contrary to certain lines of thought, is not relevantly different, and that it is therefore appropriate to extend this requirement beyond the scope of the health care industry and into the realm of business generally.

Underlying this proposal is the recognition that in the context of stakeholder theory, in which all relations among the various constituencies are contractual in nature, the specific relationship between business (or management) and the public must itself be contractual. Actions of management are ethically permissible (a) to the degree that they coincide with the terms of the contract, and (b) to the degree that the contract itself is justified. Assessing the moral status of contracts is thus natural. Among the necessary conditions for the moral legitimacy of contracts are three that jointly comprise what is being referred to as 'informed consent'. Whether these three (which will be discussed shortly) are jointly sufficient for the moral legitimacy of contracts generally need not be addressed, though an implication of these claims is that informed consent itself is a necessary (complex) condition for all acceptable contracts.

The three aspects of informed consent are not new; each has been discussed in connection with informed consent by various commentators in various ways. Their application to business, however, is new.

The appropriateness of these conditions in the context of business follows from considerations of Kantian deontology–the foundational moral theory justifying the stakeholder framework. All persons are to be treated as ends in themselves, and never as means only. This is because all persons are moral equals (which explains the equal consideration requirement of stakeholder theory); everyone has certain values and formulates goals based on those values, and this is always and everywhere to be recognized.

With this justification in mind, the three aspects of informed consent are as follows. First, the members of the public with whom the business is dealing must be competent. This means they must have the rational capacity to understand the various alternatives available to them, deliberate about those alternatives (i.e., investigate the reasonably foreseeable consequences of each alternative), and decide which course of action is most likely to bring about their desired ends. Because business professionals recognize (or should recognize) that some members of the public do not meet a level of competence which is minimally acceptable, they are obligated to refrain from engaging in contractual relations with those individuals. To do otherwise would be to use those individuals as means to its end of profit. This is not to suggest the existence of an obligation to analyze the competence level of all customers; more mildly, the obligation is to refrain from dealing with those who demonstrate signs of incompetence. Further, this is not to suggest that all dealings with all children, for example, are to be prohibited. Selling a candy bar to most minors is certainly permissible, as most minors are sufficiently competent to understand the relevant ramifications, which are minimal. Selling cigarettes to minors differs in this respect, and this would explain the generally accepted prohibition of that practice.

Second, the contract must be entered into voluntarily. The members of the public with whom the business is dealing must have at their disposal an adequate range of acceptable options. The choice to accept a particular arrangement must not be one option from among an overly restricted set. That which counts as "overly restricted" is an issue for further discussion, but there are certainly some situations which meet this standard. "Agreements" executed under conditions of scarcity of options are not voluntary. Because business professionals recognize (or should recognize) that the public may face such scarcity in certain circumstances, they are obligated not to use that fact to their advantage, as this would amount to exploitation–the use of a vastly superior bargaining position to one's advantage in order to gain additional benefits. For business to do otherwise would be to use those individuals with limited options as means to its end of profit. The wrongfulness of using *de facto* monopoly power to extract unnecessarily high prices for needed goods would thus be accounted for by this second aspect of informed consent.

Third, the members of the public with whom the business is dealing must possess the relevant knowledge pertaining to the available alternatives. Without such knowledge, they are not in a position to exercise their rational capacity and make a decision consistent with their goals. In other words, the consent, in addition to being given voluntarily and by a competent public, must be informed. Because business professionals recognize (or should recognize) that the public does not possess equivalent knowledge and expertise with respect to the product or service in question, they are obligated to disclose to the public all information relevant to that good or service, and then allow a choice to be made. For business to do otherwise would be to use members of the public as means to its end of profit.

As contractarianism is occasionally the foundational theory utilized by stakeholder theorists, it should be noted that the conditions of informed consent are likely to follow from this approach as well. In a Rawlsian original position, individuals ignorant of their particular stakes in the corporation would be motivated to protect themselves against exploitation. This would generate rules requiring that contracts, extant or implied, are to be made only when the conditions of competence, voluntarism, and full disclosure are met. The protest that individuals are not locked into particular stakeholder groups, but are able to enter into and exit from particular groups with relative ease, is dubious. While some members of the public may be in a position to purchase substantial quantities of stock and reap the benefits of profit enjoyed by the shareholder constituency, many members of the public are certainly not in a position to do this.

In terms of sales practices, this three-part notion of informed consent represents movement away from the *caveat emptor* ("buyer beware") principle. Though often associated with Milton Friedman and the shareholder theory of the firm, *caveat emptor* is not necessarily incompatible with stakeholder theory. This is because in certain contexts it is thought to be common knowledge that businesspersons will not be fully forthcoming. The traditional example of used car sales can be used to illustrate this point. With rare exceptions, the asking price for a used car exceeds the price with which the dealership would be content. It is also thought to be common knowledge that used cars may possess some undesirable characteristics. Thus, the assumption is that the "game" begins with these aspects already known; customer and salesperson engage in a negotiation on equal ground, and the equal consideration requirement of stakeholder theory is therefore not violated.

This is the reasoning utilized by Carr (1968) to support the analogy between bluffing in the game of poker and bluffing in the "game" of business. The problem is that while the analogy is valid, the conclusion that *caveat emptor* may in general be followed is not supported. This is because the permissibility of bluffing is conditional; when (and only when) the parties are aware of the "rules of the game," which in the case of poker allow for deception, there is no ethical misconduct in attempting to deceive. But then the players' consent to take part in the game is informed with respect to the game's guidelines. Thus, if a player exploits another's ignorance of the rules for his own gain, he acts wrongly. The general principle, then, is that one party may bluff (lie to, mislead, or withhold information from) another when and only when the latter is aware that the "rules of the game" allow for such actions. In other words, informed consent is required. The analogy then suggests that in business, lying to, misleading, or withholding relevant information from a customer is permissible when and only when the customer is informed that these actions are permissible. Because there are cases where customers are not aware of the prevailing norms (not all customers know to be skeptical when shopping for used cars), it is appropriate that business be charged with the duty of acting in accordance with informed consent.

However, there are other reasons for thinking that the movement away from *caveat emptor* is uncalled for. First, it may be objected that the informed consent principle, and the disclosure requirement in particular, is asking too much of business. Business is a competitive enterprise; individual firms must recognize which practices are being utilized by other firms, and often must adapt if they are to survive. If business A is failing to act in accordance with the disclosure requirement, it might seem unreasonable to continue the demand that business B do so, as that would seem to put business B at a competitive disadvantage. Second, the ascription to business of a duty to disclose all relevant information may appear arbitrary. If members of the public are shopping for a product why should the burden not fall on those individuals to investigate the product?

Reasonable responses to each of these criticisms can be provided. Regarding the first, it is misguided to assume that the existing duties of one firm are so strongly a function of the activities of other firms. There is no basis for thinking that the unethical actions of one company negate the culpability of another. One can imagine comparable arguments made by slaveowners in the American South in the nineteenth century. While ceasing slave operations would put plantation A at a competitive disadvantage with respect to plantation B, which is continuing its practice, this does not remove or even mitigate the ethical duty of plantation A not to enslave. Further, from a prudential standpoint there are good reasons for thinking that adhering to the disclosure requirement would positively impact profits over the long run. A corporation which makes it a policy to ensure that its public is well-informed will likely earn its trust, and thus its business.

Regarding the claim that the disclosure requirement is a burden placed on business arbitrarily, it should be recognized that while in theory members of the public could perhaps educate themselves about the nature of a product, in practice this is extremely difficult. Matching the level of knowledge and expertise of businesspersons in the many industries with which the average consumer typically deals does not seem feasible. The response that individuals who fail to research the prevailing business practices play the game at their own risk is unconvincing. For many, there simply is no choice about whether to play; the demands of life require significant interaction with a variety of businesses. Thus, a more logical approach would be to recognize that businesspersons are professionals with respect to their product or service, and since the public relies on professionals in various ways, a duty to disclose can be derived through the Kantian considerations discussed earlier. The failure to disclose would allow businesses, through omission, to use the public as means to their end of profit.

IV. Applications

It should be noted that the specific duties of business entailed by the informed consent principle will vary according to such factors as the level of complexity of the product or service and the degree to which well-being is at stake. In many cases, the positive duties owed to the public will be limited to a duty simply *to* inform, as opposed to a stronger duty to ensure that the customer *is* informed. When selling an article of clothing, for example, a business need only disclose very basic information, such as the type of fabric and cleaning instructions, and this can be done in a variety of ways (e.g., verbally or in written form). The only guideline might be that the information should be conveyed in a way that a "reasonable person" would be able to understand its content. Warranty limitations masked in fine print or technical jargon are thus unacceptable. Greater scrutiny is likely to be required of other sorts of businesses. Pharmaceutical companies, for example, must be more careful. They may even be obligated to disclose relevant information verbally (as well as in written form), perhaps through an interview process, in order to increase clarity and to minimize misunderstandings. Pages of fine print would certainly be inadequate as a means for disclosing crucial information. In the case of medical procedures, the obligations will be stronger still. Because so much is at stake, a subjective standard may have to replace the "reasonable person" standard alluded to above. In other words, a duty on the part of medical professionals to ensure that their customers (patients) *are* informed, as opposed to a duty merely *to* inform, might be in order.

Still, each individual case will present its own set of particular circumstances. The suggestion here is not that all difficult situations will be readily resolved with the addition of informed consent to the normative stakeholder framework. More mildly, it is hoped that the broad range of implications which might plausibly be claimed to follow from stakeholder theory will narrow significantly once informed consent is recognized. It is in this spirit that several tentative applications are offered.

In the context of advertising practices, for example, false "sale" prices, usually compared to a "regular" price at which the product is rarely sold (and which in reality is a dummy price), convey to the public a false sense of savings and urgency. This strategy, which is used by retailers on a regular basis, seems to violate the condition of full disclosure; it crosses the line from what might be called persuasive advertising (providing objective reasons for the customer to purchase the product) to manipulative advertising (intentionally creating false perceptions with the aim of selling the product) (Beauchamp, 1984). This conflicts with a Kantian ethic, and thus the stakeholder theory which it grounds. While the customer is nonetheless agreeing to exchange a certain amount of money for a certain product regardless of the advertising procedure, the consent to the sales contract is not informed. The implication, then, is that informed consent must address the potential for exploiting unequal bargaining positions not only with respect to the nature of the product, but with respect to the accurate pricing of that product.

A more difficult context is what has been called "lifestyle advertising," (Brenkert, 1998). Marketers of such products as automobiles and alcohol have come to associate their goods with wealth, sex, popularity, and other positive images (socially defined). Some might claim that even this is misleading, as it communicates to the public the idea that the purchase of the product will be accompanied by these sorts of images. However, pinpointing the unethical nature of this practice is more difficult. If the relevant information about the product (and its pricing) have been disclosed, and if business is not exploiting any lack of available options from which the public might suffer, then unless an incompetence argument is made, no aspect of informed consent seems to be violated.

An example which affects the community at large is that of pollution. Here, too, the general prescription of stakeholder theory, that all groups are to receive equal consideration, can be unhelpful. Assessing this issue under conditions of informed consent, however, allows for more precision. Polluting the air or water in a particular community, or disposing of certain wastes, is permissible only when the community is aware of the ramifications of that pollutive activity and consents to it. Because legitimate consent requires the absence of coercive conditions (including a dearth of acceptable options), the instances of legitimate polluting may be few; business must not exploit depressed communities willing to do anything for short-term economic relief. (For such communities, large-scale changes in economic policy might be the most effective means of rectifying their situations, but in the meantime, the informed consent principle instructs corporations to avoid participating in their exploitation.) However, when its economic situation is less extreme, a community may agree to some pollution in exchange for certain benefits, such as a certain level of guaranteed employment.

To this point, the focus has been on the public as the group to whom duties issuing from informed consent are owed. As a general principle for business ethics, however, it should be clear that informed consent will be applicable to a wider range of cases. A firm which engages in contractual dealings with other firms will be affected by the informed consent addition in a similar way. Manufacturers who sell to retailers, for example, are obligated to disclose all relevant aspects of the products being sold. Computer companies which sell to businesses, and consulting firms which sell their services to corporations, possess similar obligations. In these sorts of cases the customer just happens to be another company rather than the general public, but there is no reason for thinking that informed consent is any less applicable on this count; a consulting firm is hired for its particular expertise, and its failure to adhere to the disclosure requirement amounts to exploitation of its client, which is impermissible on the Kantian grounds provided earlier.

Questions pertaining to employee rights are also resolved more easily when informed consent is explicitly recognized. Employees are entitled to be informed of the specific nature and ramifications of the jobs for which they are hired. This includes knowledge of the details of the benefits structure, the risks involved, and the relevant policies of the particular workplace. Further, because the terms of employment must be agreed to under all the conditions of informed consent, companies must not use a significantly superior bargaining position to their advantage. Thus, an employee who because of extremely few options would be willing to accept a very low wage may nonetheless be owed a higher salary, since the condition of voluntary agreement may otherwise be violated. (Again, broader changes in economic policy may be worth pursuing in order to ease the severity of the potential employee's disadvantage, but in the meantime businesses ought not use the existing severity for its own benefit.) Other terms of the employment contract may also be unacceptable on this reasoning. Drug testing policies, especially those which are particularly invasive and exhibit significant disregard for personal privacy (such as monitored urine testing), appear to be ethically out of bounds when the employee has at her disposal no reasonable alternative to accepting the job on the company's terms. Again, a complete assessment of each case in accordance with informed consent requires greater scrutiny than can be provided at this time.

V. Conclusion

As indicated in the introduction, it would make no practical difference if informed consent were conceived as an outright addition to normative stakeholder theory. However, the analysis provided herein suggests that informed consent is already an inherent feature of that theory, in which case its absence from the current literature is an oversight rather than an omission. The normative stakeholder framework relies on the descriptive stakeholder framework, which posits all relations among the various constituencies as contractual in nature. Since the conditions of informed consent (competence, voluntarism and disclosure) were claimed to be necessary for any contract to be ethically acceptable, they are (and thus informed consent is) already part of stakeholder theory.

Whether there are implications for government regulation is an open question. Ethics as practical philosophy aims to positively affect individual conduct, and in business this can be done in several ways and at several levels. Most directly, it is hoped that the individual business professional acquainted with the aspects of informed consent and its rationale will act appropriately in circumstances which call for that principle's recognition. While it is not (contrary to certain views) overly optimistic to think that some change on the individual level is possible, a realistic assessment reveals that success of this sort will be limited at best. Thus, companies which highlight informed consent in their formal policy statements will be likely to generate greater adherence to it among employees, especially in those companies which emphasize education and enforcement of its ethics policies. Above the company level is the industry level, to which appeal may be necessary for the reason that the individual firm, likely to believe the implementation of an informed consent policy will be financially disadvantageous, will have no incentive to distinguish itself from its competitors in this respect. Even at the industry level, however, there may exist a collective economic interest not to enforce an ethic of informed consent. Further, there is the legal consideration that antitrust legislation serves as a disincentive to any collective activity.

At this point, assuming these types of self-regulation will be inadequate, three rough options remain. First, it might be thought that business-wide self-governance is a feasible solution (Maitland, 1985). This would require a peak organization responsible for monitoring compliance with a code of ethics that cuts across the various industries. This option, however, is currently problematic, as there is no code (or peak organization) in place. The recommendation that informed consent be added to the code is thus premature. The remaining alternatives are to impose government regulations or simply to accept whatever level of success can be brought about by corporate and industry codes (as well as conscientious decision-making by individuals). Because government involvement is costly, these other methods should be afforded full opportunity to bring about the desired changes in the behavior of business leaders. Codes of conduct already exist, and they can work. However, if informed consent is resisted, the interests at stake are likely to be sufficiently important to warrant government regulation. This ought not cause undue concern. Businesses are already required, for example, to disclose certain sorts of information to customers and to refrain from engaging in false advertising. Enforcing the principle of informed consent as it is described in this paper would just take these sorts of guidelines further. The principle suggests that "disclosure" in the form of fine print or technical jargon (which is often legally permissible) is unacceptable, as is advertising which is seriously misleading even if not false in a technical sense.

The question of whether government oversight will ultimately be a permissible (or required) means of enforcement requires a more detailed analysis of the relevant considerations. The first and more modest step is simply to understand that acting in accordance with the principle of informed consent is ethically required of business professionals.

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