HISTORY OF THE USE OF THE TERM "INFORMED CONSENT" UP TO *SALGO*

Robert D. Miller
Honorary Fellow
Medical History and Bioethics Department
University of Wisconsin - Madison

Since the mid-twentieth century it has generally been recognized that medical practitioners have a duty to provide information to patients before the patients can give a valid consent to treatment or participation in research. The term "informed consent" is now widely applied to describe such consent. The term "informed consent" was used in several non-medical contexts before it came to be used in the medical context. This article reviews the various uses of "informed consent" up to the first court decision that used it in a medical context.

There was a general requirement for consent to medical treatment and research prior to the introduction of the duty to provide information. In many contexts of life, there is no duty for others to provide information. In those other contexts, the law steps in only when there is an affirmative misrepresentation. Omissions violate no duty and are often expected. In those contexts, persons need to make their own effort to acquire whatever information they feel they need before making a decision. Thus, there is no requirement that those consents be informed consents. However, often the distinction is overlooked and the term "informed consent" is automatically used when only consent is required or in fact obtained.

Where did this ubiquitous term "informed consent" come from?

It is not of critical importance to track the source of the term. It has taken on its own life and those who practice law, medicine and ethics in the twenty-first century inform their actions with the subsequent robust clinical experience, legal developments and literature. However, many writers and speakers do comment on the source of the term and, when they do so, it is important to be accurate.

"Informed consent" did not originate in the medical context. This article will first discuss the beginnings of the use of "informed consent" in the medical context and then review its earlier use in numerous other contexts. This article focuses on the use of "informed consent" in the English

language. Parallel terms in other languages are beyond the scope of this article.

This article was created by searching several databases of full text articles and books that are available online or through subscribed services at the University of Wisconsin-Madison libraries. It is likely that additional uses of the term will be discovered as more materials become available for such searches.

MEDICAL CONTEXT

CLINICAL MEDICINE

SALGO V. LELAND STANFORD JR. UNIVERSITY BOARD OF TRUSTEES

The first time “informed consent” appeared in an American court decision in a medical context was on October 22, 1957 in a malpractice decision of the California Court of Appeals - *Salgo v. Leland Stanford Jr. University Board of Trustees*.[1]

Judge Absalom F. Bray[2] included the following in his decision in the *Salgo* case:

> A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment. Likewise the physician may not minimize the known dangers of a procedure or operation in order to induce his patient's consent. At the same time, the physician must place the welfare of his patient above all else and this very fact places him in a position in which he sometimes must choose between two alternative courses of action. One is to explain to the patient every risk attendant upon any surgical procedure or operation, no matter how remote; this may well result in alarming a patient who is already unduly apprehensive and who may as a result refuse to undertake surgery in which there is in fact minimal risk; it may also result in actually increasing the risks by reason of the physiological results of the apprehension itself. The other is to recognize that each patient presents a separate problem, that the patient's mental and emotional condition is important and in

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[1] Salgo v. Leland Stanford Jr. University Board of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170, (1st App. Dist. Oct. 22, 1957).

[2] Judge Bray (1889-1987) served full-time on the California Court of Appeals from 1946 to 1964 and was presiding judge from 1959 to 1964. He continued to serve on a part-time basis until 1983. *A. Bray, former appeal court chief dies*, LOS ANGELES TIMES, January 3, 1987.

> certain cases may be crucial, and that in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to an informed consent.[3] [Underlining the term "informed consent" in the quotations in this paper is added.]

This paragraph of the court's opinion was copied verbatim from a friend of the court brief submitted by Paul G. Gebhard, a Chicago attorney, on behalf of the American College of Surgeons.[4] It is ironic that the term that later caused so much concern among surgeons was first introduced in a malpractice court decision through the words of a brief filed on the behalf of their national organization. Gebhard is often credited with introducing the term "informed consent."[5] Gebhard deserves the credit for first use of the term "informed consent" in a medically related court decision, but he did not coin the term. Although the widespread use of the term by courts and medical, legal and ethics writers began with *Salgo*, it had been used in medical and other contexts decades before *Salgo*.

Like several other important decisions in the history of consent, such as *Schloendorff v. Society of New York Hospital*,[6] the *Salgo* decision ultimately favored the physicians and hospital, not the patient. In July 1955, the jury and the trial court in *Salgo* had ruled in favor of the patient.[7] The appellate court threw out this ruling based on errors in the jury instructions and authorized a new trial. The surgeons were most concerned about issues other than consent. The trial court had ruled that it was negligent to delegate the performance of risky procedures to resident surgeons or other assistants and that it was negligent to use a higher dosage of drug than was recommended in the manufacturer's label. In October 1956, Dr. I.S. Rivlin, chairman of the Board of Regents of the American College of Surgeons spoke about these concerns in San Francisco. The reports of Dr. Rivlin's remarks did not mention the consent issue.[8] To the relief of the American

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[3] 154 Cal. App. 2d 560, at 578, 317 P.2d 170, at 181. Most of the Salgo court decision including this paragraph was published by the American Medical Association without commentary in *Salgo v. Stanford University Hospital et al.,* JAMA, 186(4):379-384 (Jan 25, 1958).

[4] Jay Katz. THE SILENT WORLD OF DOCTOR AND PATIENT (New York: Free Press 1984), 60, citing American College of Surgeon's Brief as Amicus Curiae in Support of Defendant and Appellant Frank Gerbode (1956).

[5] *P.G. Gebhard, 69, developer of the term informed consent,* NEW YORK TIMES, Aug. 27, 1997, D21; *Paul G. Gebhard, 69*, CHICAGO TRIBUNE, Aug. 22, 1997.

[6] 211 N.Y. 125, 105 N.E. 92 (April 14, 1914) [ruling for hospital on grounds of charitable immunity]

[7] *$250,000 damage award against hospital, physician*, SAN FRANCISCO CHRONICLE, July 18, 1955, 4; *S.F. Clerk wins $250,000 suit*, OAKLAND TRIBUNE (Cal.), July 16, 1955, 23.

[8] *Surgeon's warning: Malpractice suits called peril*, SAN FRANCISCO CHRONICLE, Oct. 14, 1956, 5; *Suits menace modern surgery, says Dr. Rivlin*. OAKLAND TRIBUNE (Cal.), Oct. 14, 1956, 16-A; Leonard Engel, *Doctors fear scientific setback*, SYRACUSE HERALD AMERICAN (NY), Nov. 4, 1956, 1 & 3.

College of Surgeons, the appellate court found these rulings to be erroneous. One of the other errors dealt with the instructions on the consent issue. The paragraph after the one quoted above states:

> The instruction should be modified to inform the jury that the physician has such discretion consistent, of course, with full disclosure of facts necessary to an informed consent.[9]

Some commentators have noted that this formulation left courts and practitioners with the difficulty of reconciling the discretion to withhold information with the duty to disclose information, until later court decisions established the priority of disclosure.[10]

USE OF TERM "INFORMED CONSENT" IN 1956-1957

In 1956 the medico-legal department of the American Medical Association (AMA) conducted a survey of over 7500 members of the AMA concerning their opinions about malpractice cases. Although court decisions and insurance rates had increased, doctors showed surprisingly little concern about malpractice cases. Nonetheless, the AMA and the American Hospital Association believed that steps could be taken to reduce the incidence of malpractice suits. One approach was through closer control of the medical record. Through publications of these organization and their affiliated state organizations, they sought to increase the use of signed forms. This explains in part the increased organizational attention to consent during this period.[11]

The term "informed consent" was in use in a few publications of the American Medical Association and other Chicago-based medical organizations in late 1956 and early 1957 before the *Salgo* court decision. It is not clear whether Gebhard was responsible for those uses or the term was in use in these circles from some other source. Gebhard submitted the brief in the *Salgo* case in late 1956. He undoubtedly had discussions with his client about the brief before its submission; good legal practice and professional ethics would have dictated such conversations and ultimate client approval of the brief.[12]

One of the earlier uses of "informed consent" in the non-experimental medical context was a statement about ghost surgery and the role of resident surgeons in the operating room that was adopted by American

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[9] 154 Cal. App. 2d 560, at 578, 317 P.2d 170, at 181.
[10] E.g., Jay Katz. THE SILENT WORLD OF DOCTOR AND PATIENT (New York: Free Press 1984), 60-65.
[11] Neal C. Hogan, UNHEALED WOUNDS: MEDICAL MALPRACTICE IN THE TWENTIETH CENTURY (New York: LFB Scholarly 2003), at 124-125.
[12] See supra note 3.

Board of Surgery on April 9, 1956. The Conference Committee on Graduate Training in Surgery (formed by the American College of Surgeons, the American Board of Surgery and the American Medical Association to coordinate standards for surgical residency programs) formulated the statement:

> Since the informed consent of the patient is a moral and legal prerequisite to the performance of a surgical operation, every patient about to undergo surgical operation, or his legal guardian, should have full and complete knowledge of the identity of his surgeon….[13]

The statement was later approved by the Board of Regents of the American College of Surgeons, the American Medical Association, and the Joint Commission on the Accreditation of Hospitals. In June 1957 in an article on moral theology by John J. Lynch, the statement (with the term "informed consent") was reprinted in a discussion of ghost surgery.[14]

The September 7, 1957 issue of the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION included an article by the Law Department of the American Medical Association (AMA) entitled *Consent to operations and other procedures*. The article announced that it was the first of a series of six articles on medico-legal forms and that the AMA would soon be publishing a book containing the material from the six articles. The article included:

> The consent given must be an informed consent with an understanding of what is to be done and of the risks involved.[15]

On September 27, 1957, the Legal Department of the American Medical Association published the booklet entitled MEDICOLEGAL FORMS WITH LEGAL ANALYSIS. It contained the above sentence using the term "informed consent."[16]

There were some publications in 1956 and 1957 by persons associated with organized medicine that addressed consent in the clinical context and did not use the term "informed consent," so there is no indication the term was in general use at that time. Louis J. Regan used the term "understanding'" consent in his medical malpractice book in 1956.[17] Robert

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[13] *Ghosting is out*, MASSACHUSETTS PHYSICIAN, Jan. 1957, 98.
[14] John J. Lynch, *Notes on moral theology*, THEOLOGICAL STUDIES, 18(2):216-248, at 234 (June 1, 1957).
[15] *Consent to operations and other procedures*, JAMA, 165(1):65-70, at 66 (Sept. 7, 1957).
[16] American Medical Association, Law Department, MEDICOLEGAL FORMS, WITH LEGAL ANALYSIS (Chicago: American Medical Association 1957), 1. The publication date is from Copyright Office, Library of Congress, BOOKS AND PAMPHLETS INCLUDING SERIALS AND CONTRIBUTIONS TO PERIODICALS - JULY-DECEMBER 1957, Catalog of Copyright Entries, Third Series, Vol. II, Part 1, Number 2 (Washington, D.C.: Library of Congress 1958), 934.
[17] Louis J. Regan, DOCTOR AND PATIENT AND THE LAW (3d Edition) (1956), at 83,

S. Meyers gave a presentation on April 9, 1956 to the Ohio State Surgical Association that was published in the Bulletin of the American College of Surgeon in its September-October 1956 issue. In the course of advocating formal surgical training in a residency program in lieu of training through preceptorship, he discussed the matter of informing the patient, but did not use the term “informed consent.”

> There are other grave deficiencies in training obtained by preceptorship; it runs the very real risk of violating the fundamental honesty which must exist between the physician and his patient, unless the physician informs his private patient that he is learning to do this surgical procedure under the tutelage of a more competent surgeon. As it is unlikely that the patient would stand for his, it is equally unlikely that the patient will be so informed. There is no place for deceit in the practice of medicine.[18]

Later in the article he mentions the College of Surgeons position on ghost surgery, again without using the term “informed consent” even though the full position statement used the term as discussed previously.

> In the case of surgical patients, the Board of Regents of the College, after due deliberation, issued the following opinion concerning the training of resident is surgery and surgical patients: “Ghost surgery is that surgery in which the patient is not informed of, or is misled as to, the identity of the operating surgeon.”[19]

The same issue of the Bulletin contains an article prepared with the American College of Surgeon’s Professional Liability Program advisor that discusses malpractice concerns. As to standard surgery it discusses only obtaining written consent, with no mention of providing information to the patient.

> Sometimes liability is incurred because the surgeon and the hospital have failed to obtain proper written consent to perform the indicated operative procedure.[20]

Later in the article there is a discussion of providing information to patients when innovative therapy is used.

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[18] *What every surgeon should know today*, BULLETIN OF THE AMERICAN COLLEGE OF SURGEONS, 41(5):207-208,426-428 (Sep.-Oct. 1956), at 426.
[19] Ibid., at 429.
[20] *Operating room is focal point of malpractice hazard, careful study and effort are needed to reduce risk*, BULLETIN OF THE AMERICAN COLLEGE OF SURGEONS, 41(5):255-258 (Sep.-Oct. 1956), at 257.

> In critical cases, the surgeon may be called on, using his own best judgment, to try procedures that go beyond the usual, standard methods and may border on experimentation. When confronted with this situation, the surgeon should not undertake the "radical" procedure without consultation, and, if possible, the patient or a member of the patient's family should be fully apprised of what is being done, and give his consent.[21]

The WISCONSIN MEDICAL JOURNAL published an article on tips to avoid malpractice in its January 1957 issue. One tip was to "be sure to get written consent for operations." A model consent form is included. The discussion of providing information was:

> Special attention should be given to operations which might or are likely to result I sterility. The trend of the cases in recent years indicates that it is extremely unwise to pursue a course of treatment that is self-hazardous or capable of producing harmful effect without securing a written statement from the patient or from someone legally responsible for the patient - a statement which clearly expresses understanding and consent to the specific treatment.[22]

USE OF TERM IN CLINICAL CONTEXT PRIOR TO 1956

Two uses of the term "informed consent" in a clinical context have been found before 1956.

In 1952 in the CURRENT LIST OF MEDICAL LITERATURE published by the Armed Forces Medical Library, the French article by Adrien Peytel entitled *De la nécessité d'un consentement éclairé en cas d'électro-choc*, from the September 1951 issue of PARIS MEDICAL, was translated as *Necessity of informed consent in case of electro-shock*.[23]

Adrien Peytel was a lawyer at the Cour d'Appel (Court of Appeal) in Paris. He was reporting about the case of Beynel v. Doctor Bourrat in Lyon, France. Miss Beynel had a bone broken during electroshock therapy and sued for failure to disclose this risk. The Court in Lyon ruled that the doctor did not have to disclose the risk or obtain her consent since the therapy was low risk. The term *consentement éclairé* (informed consent) was used only in the title of the article. In 1955, after the article was published, an appellate court reversed the decision. It found the doctor liable, ruling that he had a

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[21] Ibid., at 258.

[22] *25 pointers to prevent malpractice*, WISCONSIN MEDICAL JOURNAL, 56:7-15 (Jan. 1957), at 15.

[23] Armed Forces Medical Library, CURRENT LIST OF MEDICAL LITERATURE (Washington D.C. 1952), Vol. 21, No. 1, Item 5437. The citation to Peytel's article is PARIS MEDICAL, 41(35-36):321-3 (Sep. 22-29, 1951).

contractual duty to disclose even this rare risk. The court rejected the physician's assertion that due to her mental illness the patient was unable to understand such warnings and rejected that the danger of an adverse reaction to the warning would justify nondisclosure.[24]

In 1948, the *Report of the Civil Rights Committee* published in the JOURNAL OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, included the following:

> It is the opinion of the subcommittee that physical examination, and especially an examination of the sort conducted by the police and the Public Health department upon women prisoners, is an invasion of the individual's right of privacy which should made in the absence of statutes only under conditions assuring an informed consent thereto on the part of the prisoner.[25]

PUBLIC HEALTH

One use of "informed consent" has been found in Congressional testimony in the public health debate over fluoridation of water. In May 1954, Dr. Paul Manning, a dentist opposed to fluoridation of water, submitted a statement at a hearing before the Committee on Interstate and Foreign Commerce of the House of Representatives on a bill to ban fluoridation.

> Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for tis is the law of the prophets. - Mathew 7:12.
>
> This is, or should be, the doctor's chart compiled by the Best of Pilots.
>
> Taken as the basis for more than one professional society's official code of ethics, this good law is not an implied license, even though some men clearly consider it to be one, to enter into the body of another for any purpose, lacking the full informed consent of the proposed receiver of benefits.[26]

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[24] Beynel c. Docteur Bourrat, Dalloz, JURISPRUDENCE (1951) at 323 (Trib, civ. De Lyon Jan 12, 1951, reversed Dalloz, JURISPRUDENCE (1956) at 3 (Cr. De Cassation Ch. civ. Ire Sect. civ., Nov. 8, 1955), as discussed in Thomas E. Carbonneau, *Principles of medical and psychiatric liability in French law*, INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 29:742, 762-763 (1980).

[25] *Report of the Civil Rights Committee,* JOURNAL OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, 15(8):331, 347 (Aug. 1948).

[26] *Statement of Paul Manning in support of H.R. 341, A bill to protect the public health from the dangers of fluoridation of water*, in Fluoridation of Water, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 83rd Congress, Second Session, May, 25, 26, and 27, 1954 (Washington D.C.: U.S. Government printing Office 1954), 203, at 208.

MEDICAL EXPERIMENTATION

There were at least five writings using “informed consent” in the medical experimentation context before 1956.

In the fall of 1954, Irving Ladimer used “informed consent” in the context of medical research in an article in the Journal of Public Health Law.

> “Mental research, according to Dr. Paul Hoch, of the New York Psychiatric Institute and formed president of the American Psychopathological Association, is perhaps the most difficult. The subject may not be in a position to provide informed consent…”[27]

At that time, Mr. Ladimer, a lawyer, was the Assistant Chief, Office of Research Planning, National Institutes of Health.

On November 17, 1953, the Director of the National Institutes of Health approved a policy entitled “Group consideration of clinical research procedures deviating from accepted practice or involving unusual hazard,” the precursor to Institutional Review Boards (IRBs). The last paragraph of the document stated:

> He [the physician in charge of the patient] shall be responsible for incorporating in the medical record the information given the patient and the nature of the informed consent or agreement accomplished with the patient, including any comments, objections or general reactions made by the patient.[28]

In the same article Mr. Ladimer, referenced a memorandum from Dr. James M. Mackintosh to Dr. Russell Wilder, Director, National Institute of Arthritis and Metabolic Diseases, National Institutes of Health, entitled “the Ethical Aspect of Research,” dated Oct. 7, 1952:

> A further general comment on this subject was offered by the British scientist, Dr. James M. Mackintosh, in his capacity as special consultant to the Public Health Service in 1952. He notes: “There has been a movement of late to invite sick persons to cooperate in physical experiments upon themselves with the primary objective of elucidating, some fundamental problem of disease, without

[27] Irving Ladimer, *Ethical and legal aspects of medical research on human subjects*, JOURNAL OF PUBLIC LAW, 3(2): 467, 493 (Fall 1954).
[28] Posted at http://history.nih.gov/research/downloads/NIH1953humansubjectpolicy.pdf [accessed 15 Sep. 2014].

necessarily affecting their individual treatment." For such effort, he also considers essential informed consent;…[29]

A letter dated November 5, 1947 from Carroll Wilson, first general manager of the Atomic Energy Commission, to Dr. Robert Stone, quoted from a "preliminary unpublished and restricted draft of the [Medical Board] report read to the Commissioners" as follows:

> The atmosphere of secrecy and suppression makes one aspect of the medical work of the Commission especially vulnerable to criticism. We therefore wish to record our approval of the position taken by the medical staff of the AEC in point of their studies of the substances dangerous to human life. We [the Medical Board of Review] believe that no substances known to be, or suspected of being, poisonous or harmful should be given to human beings unless all of the following conditions are fully met: (a) that a reasonable hope exists that the administration of such a substance will improve the condition of the patient, (b) that the patient give his complete and informed consent in writing, and (c) that the responsible next of kin give in writing a similarly complete and informed consent, revocable at any time during the course of such treatment.[30]

In 1934, Peter McEwan used "informed consent" in an article in the BRITISH MEDICAL JOURNAL. He interviewed patients on whom he had performed hysterectomies over an eight-year period. 112 of the 195 patients participated. He collected information on patient satisfaction, menopausal symptoms, justifiability of removing ovaries with the uterus, impact on sexual relationships, and effect on weight. In discussing neurosis after hysterectomy, he stated:

> Certain types of neurosis may be referred to. Morbidity owing to loss of the reproductive organs should be prevented by careful explanation before the operation. Hysterectomy is the most important operation that can be performed upon a woman, and calls for the full and informed consent of the patient, and her husband (if any)…. The husband ought to be consulted. Legally, indeed, he has no right to

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[29] Ibid. at 493.

[30] Carroll Wilson, General Manager, AEC, to Robert Stone, University of California, 5 November 1947 ("Your letter of September 18 regarding the declassification of biological and medical papers was read at the October 11 meeting of the Advisory Committee for Biology and Medicine.") (ACHRE No. DOE-052295-A-1), as quoted in Advisory Committee on Human Radiation Experiments: THE FINAL REPORT OF THE PRESIDENT'S ADVISORY COMMITTEE ON THE HUMAN RADIATION EXPERIMENTS. (New York: Oxford University Press 1996), posted at https://bioethicsarchive. georgetown.edu/achre/final/chap1_2.html [accessed 14 Sep. 2014].

> either compel his wife to have the operation or to prevent it. Actually, he is entitled to a full explanation…[31]

Pater McEwan (1881-1973) was an honorary surgeon at the Bradford Royal Infirmary at the time the article was published.[32]

EARLIER NEAR MISSES

The practice of informed consent was described in medical literature long before this without using the term "informed consent." There are even some near misses, such as an 1830 medical report:

> James Alexander, aet. 9, from Arbroath, entered the Hospital on the 2d February, on account of a disease of the elbow-joint, under which he had laboured eighteen months. The bone can be felt extensively diseased, and the case seems in all respects a favourable one for excision, which will be performed so soon as the parents are informed and give their consent.[33]

Another example is from J.W. Willcock's 1830 legal book:

> When an experiment of this kind is performed with the consent of the party subjected to it, after he has been informed that it is an experiment, the practitioner is answerable neither in damages to the individual, nor in any criminal proceeding; although the result be contrary to expectation, and attended with an injury which has not generally attended the ordinary mode of practice. But if the practitioner performs his experiment without giving such information to, and obtaining the consent of, his patient, he is liable to compensate in damages any injury which may arise from his adopting a new mode of treatment.[34]

NON-MEDICAL EXPERIMENTATION

Joseph Andrew Orban used the term "informed consent form" on pages 54 and 55 of his 1954 Ph. D. thesis at Virginia Polytechnic Institute on *Ability measurement, test bias reduction, and psychological reactions to testing as a function of computer adaptive testing versus conventional testing*.

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[31] Peter McEwan, *A study of hysterectomy*, BRITISH MEDICAL JOURNAL, 1:574, 576 (Mar. 31, 1934).
[32] *P. McEwan*, BRITISH MEDICAL JOURNAL, 494 (Feb. 24, 1973).
[33] *Quarterly report of the Edinburgh Surgical Hospital*, EDINBURGH MEDICAL AND SURGICAL JOURNAL, 33:229, 234 (April 1, 1830)
[34] J.W. Willcock, THE LAWS RELATING TO THE MEDICAL PROFESSION (London: A. Strahan 1830), 110

WORKER'S COMPENSATION

One of the other contexts in which "informed consent" was used before *Salgo* was in worker's compensation cases. Similar to what was later done in the medical context, the courts recognized a duty of one person to provide information to another - the duty of the employer to inform the employee. It then used the term "informed consent" to describe the consent that was required.

In 1952, Arthur Larson wrote in his treatise - THE LAW OF WORKMEN'S COMPENSATION:

> …the courts have been vigilant in insisting upon a showing of a deliberate and informed consent by the employee before employment relation will be held a bar to common-law suit.[35]

Three court decisions in Missouri from 1954 to 1956 cited this treatise and used the term "informed consent."

In 1954, the Missouri Supreme Court wrote in *Stroud v. Zuzich*:

> And it has been said that, most important of all, the employee "loses the right to sue the special employer at common law for negligence; and when the question has been presented in this form, the courts have been vigilant in insisting upon a showing of a deliberate and informed consent by the employee before employment relation will be held a bar to common-law suit." Vol. 1, Larson, The Law of Workmen's Compensation, § 48.10, p. 710 at pages 711-713.[36]

In 1956, it again quoted Larson in *Andra v. St. Louis Fire Door Company*:

> Most important of all, he loses the right to sue the special employer at common law for negligence; and when the question has been presented in this form, the courts have been very vigilant in insisting upon a showing of a deliberate and informed consent by the employee before employment relation will be held a bar to common-law suit.[37]

In 1956, Missouri Court of Appeals in St. Louis in the case of *Schepp v. Mid City Trucking Co.,* applied *Stroud* and *Andra*, citing Larson's treatise:

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[35] Larson, THE LAW OF WORKMEN'S COMPENSATION (1952), Vol. 1, § 48.10, p. 710 at pages 711-713, as quoted in Stroud et al. v. Zuzich et al., 271 S.W.2d 549, 556 (Mo. Sup. Ct. Sept. 13, 1954).
[36] Stroud v. Zuzich, 271 S.W.2d 549, at 556 (Mo. Sep. 13, 1954).
[37] Andra v. St. Louis Fire Door Co, Inc., 287 S.W.2d 816, 819 (Mo. Sup. Ct. Feb. 13, 1956).

> There is no express consent in the instant case. If it is present, it must be implied. The facts and circumstances and acts and conduct of all the parties must show a deliberate and informed consent by the claimant to the substitution of a new temporary employer. Larson, Workmen's Compensation Law, supra; Andra v. St. Louis Fire Door Company, Inc., supra, 287 S.W.2d 819(2). The consent must be voluntary. "An employee, for compensation purposes, cannot have an employer thrust upon him against his will or without his knowledge". Stroud v. Zuzich, Mo.Sup., 271 S.W.2d 549, 556(2, 3). Nor will he be held to have lost his original employer without his knowledge. There must be a "consensual" relationship between the loaned employee and the special employer. Stroud v. Zuzich, supra, 271 S.W.2d 556 (2, 3).[38]

In 1956, the Supreme Court of Vermont used “informed consent” in the worker’s compensation case of *Mercier v. Holmes*:

> In a case of this sort, then, there are three important considerations if the special employer is to become liable for workmen's compensation: first, there must be a contract of hire, express or implied, between the special employer and employee. The necessity for this is derived from the statute, itself, which we have quoted earlier. This involves an informed consent by the employee before the employment relation can be said to exist.[39]

In 1954, the Industrial Commission of Florida decided a worker’s compensation case, *Lindroth v. Rial*, in which it cited Larson:

> Thus, he loses the right to sue the so-called employer at common law for negligence, and as pointed out by Larson in his recent treatise on Workmen's Compensation Law, section 48.10, in commenting on a related problem, when the question has been presented in this form, "the courts have been very vigilant in insisting upon a showing of a deliberate and informed consent by the employee before employment relation will be held a bar to common law suit."… But the principle remains the same, that in such a case, to protect the rights of the so-called employee, as well as those of the alleged employer, there must be a showing of "a deliberate and informed consent" to the employment relation by the alleged employee. The facts in the present case do not sustain the conclusion that such consent existed. For the reasons given, the claim is denied.[40]

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[38] Schepp v. Mid City Trucking Co., 291 S.W.2d 633, 642 (June 12, 1956).
[39] Mercier v. Holmes, 119 Vt. 368, 125 A.2d 790, 795 (Oct. 2, 1956).
[40] Lindroth v. Rial, 6 Florida Supplement 4, 7 (Florida Industrial Commission Mar. 3, 1954).

POLITICS AND GOVERNANCE

"Informed consent" was used in several books and articles about politics and governance. In this context, the term is generally not used to place a duty on any individual to provide information to any other individual. The term is used to focus on the need for efforts to make information available to the relevant population to maintain its support.

In 1953, Fritz Morstein Marx wrote in the UNIVERSITY OF PITTSBURG LAW REVIEW:

> …in a society of diversified interests, the legislature service as an agency of consent by composing disagreements. The means to attain this end is debate. It is by debate that issues are drawn and positions are tested. Disagreement is wanted for the sake of informed consent. Even the ultimate decision is meant to remain open to challenge. [p. 157]
> Their presence assures both the continuity and the relevance of disagreement that is the foundation of informed consent. [p. 158][41]

At the time of his article, Fritz Morstein Marx (1900-1969) was working in the Bureau of the Budget of the Executive Office of the President and was an adjunct professor at American University.[42]

In 1951, in THE SCHOOLS AND NATIONAL SECURITY, the following appears under the heading *Pupils should be helped to understand what must be done if national security is to be strengthened through improved civil and military education*:

> Consent is said to be the major social bond in our way of life. Obviously, this should always be an informed consent, the basis for which should be laid in our schools. If, on the basis of informed consent, national security is to be strengthened through making needed improvements in civil and military aviation, it is necessary that pupils (as capabilities and maturity permit) be helped by schools to:….[43]

On 15 February 1951, the TIMES OF INDIA published as article headed *Bombay Police Bill* that stated:

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[41] Fritz Morstein Marx, *Legislation, representation, and the party system*, UNIVERSITY OF PITTSBURGH LAW REVIEW, 14(2):151, 157 & 158 (Winter 1953).
[42] *In memoriam - Fritz Morstein Marx*, PS: POLITICAL SCIENCE & POLITICS, 2(4):716 (Fall 1969).
[43] Charles W. Sanford, Harold C. Hand, and Willard B. Spalding (eds.), THE SCHOOLS AND NATIONAL SECURITY (New York: McGraw-Hill Book Co, 1951), 241

> For more than one good reason the local authorities would do well to refer the matter to the State Government and get their informed consent for any extension of the order beyond the space of four days.[44]

In the March 21, 1949 issue of CURRENT ECONOMIC DEVELOPMENTS produced by the Policy Information Committee of the U.S. Department of State, there is a secret summary of an *Advisory report prepared by expert for Liberian President* that states:

> In accordance with a request from the President of Liberia for expert advice on legislation providing for the establishment of Corporation and Maritime Codes and authorizing the creation of an International trust Company, a report has been prepared for submission to the Liberian government. The report is a personal one from Francis A. Truslow, President of the New York Curb Exchange and former head of the Rubber Development Corporation. While it does not have have our official stamp of approval and is not a US document, we take no exception to it….. The new legislation would include the unobjectionable features of the old and would provide for: 1) inclusion in the Corporation Code of safeguards to insure "informed consent" by stockholders prior to important action by management…[45]

The May 1, 1950 issue of the same periodical contains a secret report of the adoption of the recommendations by Liberia. It states:

> The Truslow report recommended legislation which would include the unobjectionable features of the old and would, in addition, provide for safeguards in the corporation code and the Trust Act to insure informed consent by stockholders prior to important action by management…[46]

On August 14, 1947, in the parliamentary debates in the New Zealand House of Representatives on the report of the New Zealand delegation to the United Nations, Ronald Algie (who in the 1960s became Speaker of the House of Representatives) said:

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[44] *Bombay Police Bill*, TIMES OF INDIA, 15 Feb 1951, 4.
[45] *Advisory report prepared by expert for Liberian President,* in U.S. Department of State, Policy Information Committee, CURRENT ECONOMIC DEVELOPMENTS, Issue NO. 194, 3 (March 21, 1949).
[46] *Liberia accepts economic plans - Adoption of Truslow recommendations,* U.S. Department of State, Policy Information Committee, CURRENT ECONOMIC DEVELOPMENTS, Issue No. 252, 9 (May 1, 1950).

> No peace treaty has any permanence or validity at all except in so far as it rests on the consent of the people, and consent is of no value unless it is intelligent and informed consent.[47]

In 1945, Luther Harris Evans wrote in his book THE VIRGIN ISLANDS: FROM NAVAL BASE TO THE NEW DEAL:

> A local executive who could govern with their informed consent without the intervention of self-seeking local leaders, would be in a position to govern much better than an executive depending on the consent of these leaders.[48]

Luther Harris Evans (1902-1981) was the Director of the Historical Records Survey of the Works Progress Administration, Librarian of Congress from 1945 to 1953, and later the director general of the United Nations Educational, Scientific, and Cultural Organization (UNESCO).[49]

In 1943, the book MOBILIZING EDUCATIONAL RESOURCES: FOR WINNING THE WAR AND THE PEACE included chapter 5 entitled *The Disorganized Teaching Profession* by Harold C. Hand. It included:

> In other words, we have government by consent. Obviously this kind of government can succeed only if based on an informed consent, and the success of our democracy depends upon the freedom of pupils to learn.[50]

When this was written, Harold Curtis Hand was a Professor of Education at the University of Maryland. He later became a Professor of Education at the University of Illinois.

In 1940, Percival E. Jackson wrote in LOOK AT THE LAW: THE LAW IS WHAT THE LAYMAN MAKES IT:

> By the same token, the law must express the free and informed will of the majority, and rest upon the free and informed consent of the

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[47] PARLIAMENTARY DEBATES (Wellington, New Zealand: E.V. Paul 1948), Vol. 277, 370.
[48] Luther Harris Evans, THE VIRGIN ISLANDS: FROM NAVAL BASE TO NEW DEAL (Ann Arbor MI: J.W. Edwards 1945), 94.
[49] *Luther Evans - Previous Librarians of Congress*, posted at the Library of Congress website - http://www.loc.gov/about/about-the-librarian/previous-librarians-of-congress/luther-evans/ [accessed 28 March 2015].
[50] Harold C. Hand *The disorganized teaching profession*, in Ernest Oscar Melby (Ed.), MOBILIZING EDUCATIONAL RESOURCES: FOR WINNING THE WAR AND THE PEACE (Harper & Brothers 1943), 64, at 76.

> minority, else we lend aid to those who would destroy our democratic system.[51]

Percival E. Jackson was a New York City lawyer who wrote many legal books.

In 1940, the term appeared in a book ADDRESSES AND PROCEEDINGS – NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES:

> Without planning, democratically arrived at thru an informed consent, there is no assurance that the best use will be made of our resources…[52]

In 1939, Grenville Clark wrote in an article, *The limits of free expression*:

> But "consent of the governed" is no mere phrase. It implies that the consent shall be real. And this in turn implies two conditions – first, that the consent shall not be coerced, and, second, that it shall be reasonably well-informed. But how can there be a real and informed consent without discussion?[53]

In the same year, Clark gave a jubilee law lecture at the Catholic University of America entitled "Law and civil liberty":

> I have put forward the thought that, on analysis, the maintenance of free discussion with relation to the problems of government and of all our social and economic relations is not a matter of real choice if we would retain our basic philosophy; I have said that its maintenance is a matter of necessity if the informed consent that makes free institutions workable is to prevail.[54]

Grenville Clark (1882-1967) was a New York City lawyer who was a member of the Corporation that governs Harvard University.[55]

In 1939, Ordway Tead wrote in NEW ADVENTURES IN DEMOCRACY:

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[51] Percival E. Jackson, LOOK AT THE LAW: THE LAW IS WHAT THE LAYMAN MAKES IT (New York: E.P. Dutton 1940), 336.
[52] ADDRESSES AND PROCEEDINGS – NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES (Washington DC). 78:799 (1940).
[53] Grenville Clark, *The limits of free expression*, 73 UNITED STATES LAW REVIEW 392, 394 (1939).
[54] Grenville Clark, *Law and Civil Liberty*, JUBILEE LAW LECTURES, 1889-1939 (Washington DC: Catholic Univ. of Am. Press 1939), 126, 142.
[55] Nancy Peterson Hill, A VERY PRIVATE PUBLIC CITIZEN: THE LIFE OF GRENVILLE CLARK (Columbia MO: University of Missouri Press 2014)

> American professions of democracy, starting with the social contract in the cabin of the Mayflower, have more or less implicitly acknowledged that each individual personality was uniquely worthful. They have affirmed that the active, explicit and informed consent of the governed was vital as a means of assuring that self-choice and self-assumption of operating responsibility were present as conditions of the development of personality…[56]

Ordway Tead (1891-1973) taught industrial relations at Columbia University and was chair of the New York Board of Higher Education from 1938 to 1953.[57]

In 1938, Edward McNall Burns wrote in JAMES MADISON, PHILOSOPHER OF THE CONSTITUTION:

> The major concern of its [democracy] exponents has been to defend the common man against oppression resulting from the exercise of political power founded upon privilege and inequality – in other words to combat monarchy and heredity aristocracy, and to insist that government should rest upon the informed consent of the governed…[58]

Edward McNall Burns (1897-1972) was a professor of history and a professor of political science at Rutgers University.

In 1937, Ordway Tead wrote in the journal SOCIAL FRONTIER:

> A revitalizing of objectives and a sane and liberal handling of problems of policy and method wait fundamentally upon a realization that control in the public interest and informed consent of the interested groups are not extraneous or secondary to the whole problem of proper conduct of education…[59]

This phrase was quoted in 1942 in chapter VII of EDUCATION AND SOCIETY. [60]

In 1937, Stanford University published in THE CHALLENGE OF EDUCATION:

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[56] Ordway Tead, NEW ADVENTURES IN DEMOCRACY (New York: Whittlesey House, McGraw Hill 1939), 4.
[57] *Tead, Orway (1891-1973),* in Morgan Witzel, ENCYCLOPEDIA OF HISTORY OF AMERICAN MANAGEMENT (A&C Black 2005), 493.
[58] Edward McNall Burns, JAMES MADISON, PHILOSOPHER OF THE CONSTITUTION (Rutgers Univ. Press 1938), 75 [Rutgers University studies in history, vol. 1].
[59] Ordway Tead, *Democracy in administration*, SOCIAL FRONTIER, 3(22):105 (Jan. 1937).
[60] Samuel Smith, George Cressman & Robert Speer, editors, EDUCATION AND SOCIETY (New York: Dryden 1941), 218.

> Since our democracy postulates a government by the consent of the governed, and since an informed consent was and is clearly intended, education very properly may be regarded as the life-giving principle of democracy.[61]

In 1936, Russell Hibbard wrote in an article *Administration of the Wisconsin Unemployment Reserves and Compensation Act*:

> In summary, Wisconsin's administrative experience to date indicates the importance to other states of … participation in the law's administration by the interested groups, through their chosen representatives, thereby securing that informed consent without which administration cannot function effectively in a democratic society.[62]

When this was written, Russell Hibbard was a member of the Industrial Commission of Wisconsin that administered the unemployment compensation act.

In 1936, Paul Raushenbush presented the report of the Committee on Unemployment Compensation of International Association of Government Labor Officials. In the report he discussed the benefits of an advisory committee consisting of representatives of organized employees and employers:

> More generally, an advisory committee may help to bring about in the community that informed consent to unemployment compensation which is essential to the effective operation of any law in a democracy.[63]

Paul Raushenbush (1898-1980) and his wife were important in the drafting and enactment of the Wisconsin Unemployment Compensation law. He was serving as head of the Wisconsin Unemployment Division when this report was written.[64]

In 1933, Sallie Stockard wrote in the DAILY TIMES-NEWS in Burlington, North Carolina:

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[61] Stanford University, School of Education, THE CHALLENGE OF EDUCATION (McGraw-Hill 1937), 443.
[62] Russell Hibbard, *Administration of the Wisconsin act*, NATIONAL MUNICIPAL REVIEW, 25:170, 175 (Mar. 1936).
[63] Paul Raushenbush, *Present status of unemployment compensation*, in United States Department of Labor, Division of Labor Standards, BULLETIN NO. 629: LABOR LAWS AND THEIR ADMINISTRATION 1936 (Washington D.C.: U.S. Government printing Office 1937), 19, at 39.
[64] *Papers of Paul and Elizabeth Brandeis Raushenbush*, Social Security Srchives, posted at http://www.ssa.gov/history/archives/lizguide.htm [accessed Apr. 28, 2015].

> To come to an understanding takes talk, and time. All education takes talk, talk, talk. When the subject of the talk is the greatest interest of the country, how may a group be better employed, or more usefully use time than in the clear expression of what they honestly think. It gives allowances for the growth of ideas, and makes for gain. Let it not take the place of yielding, but be informed consent, deliberative, active.[65]

In her article, she mentioned her indebtedness to *The Labor Relations under the New Industrial Administration* by Tead and Metcalf. No such publication has been located. Perhaps, she was referring to Tead and Metcalf's book LABOR RELATIONS UNDER THE NEW RECOVERY ACT, which used the term "informed consent" [presented elsewhere in this article]. Sallie Walker Stockard (1869-1963) was a teacher and author of several history books. She was the first woman to receive a degree from the University of North Carolina.[66]

In 1929, in *The states people and the round table conference,* D.V. Gundappa wrote:

> …but not necessarily based on moral grounds always, in the sense that it is born of the intelligent and informed consent of the People…[67]

D.V. Gundappa (1887-1975) was an Indian writer and philosopher.

In 1920, Hilderic Cousens wrote in his revision of John Bertram Askew's PROS AND CONS: A NEWSPAPER READERS AND DEBATER'S GUIDE TO THE LEADING CONTROVERSIES OF THE DAY:

> (5) Federation would not take away from the Colonies powers they now possess, but rather add to them. It is essential that they be enabled to state their opinions on peace and war, for, at present, they find themselves involved in wars without their informed consent.[68]

"Informed consent" did not appear in earlier editions of the book. Hilderic Cousins was a member of the Chandos Group in London. He was involved

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[65] Sallie Stockard, *NRA – The Blueeagle – Meaning, Labor, Relations*, DAILY TIMES-NEWS (Burlington, N.C.), Sep. 18, 1938, 4.
[66] *Stockard, Sallie Walker*, posted at http://ncpedia.org/biography/stockard-sallie [accessed Mar. 27, 2015].
[67] D.V. Gundappa, *The states people and the round table conference*, INDIAN REVIEW, 30:789, 790 (Dec. 1929).
[68] John Bertram Askew & Hilderic Cousens, PROS AND CONS: A NEWSPAPER READERS AND DEBATER'S GUIDE TO THE LEADING CONTROVERSIES OF THE DAY (6th edition revised and rewritten by Hilderic Cousins) (London: George Routledge & Sons, Ltd. Nov. 1920), 71.

in the Douglas Social Credit movement. He assisted Bertrand Russell in writing his book PROPOSED ROADS TO FREEDOM.[69]

On July 18, 1919, in the debate in the British House of Commons on a loan guarantee for the government of Soudan [sic], Sir Ryland Adkins stated:

> There can be no reason why anyone should obstruct the passage of this Vote, and I imagine that there is a wish on the part of all interested in it, and whose imagination has been stirred by, the great historic problems of the Nile valley, that this enlargement of guarantee shall be done with the informed consent of this Committee and the public, as a matter which will not end here and is not meant to end here.[70]

Ryland Adkins (1862-1925) was an English barrister, judge and member of parliament (1906-1923).

In 1917, the NEW REPUBLIC published an editorial - *The diplomacy of publicity* - that included:

> As President Wilson himself has said, "It is in the full disclosing light of that thought (the thought of the plain people here and everywhere throughout the world) that all policies must be conceived and executed in this midday hour of the world's life"; and by insisting on the democratic diplomacy of full publicity President Wilson has only been seeking to provide a foundation in the method and spirit of international negotiation and intercourse for the permanent emergence by America from its traditional isolation. The American people cannot be depended upon permanently to underwrite any settlement of the war which rests rather upon the indefinite employment of armed force than upon the willing and well informed consent of all the peoples.[71]

BROKER RESPONSIBILITIES

The Securities Exchange Commission (SEC) and the federal courts used the term "informed consent" to describe the fiduciary standard for the responsibility of brokers to make disclosures to their investor clients. Thus, like in the medical context, the term is being used to state a duty - the duty of the broker to provide information to investor clients.

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[69] Miranda B. Hickman (ed.), ONE MUST NOT GO ALTOGETHER WITH THE TIDE: THE LETTERS OF EZRA POUND AND STANLEY NOTT (McGill-Queen's Press 2011), 332; Brian Burkitt & Francis Hutchinson, THE POLITICAL ECONOMY OF SOCIAL CREDIT AND GUILD SOCIALISM (Routledge 2008); Bertrand Russell, PROPOSED ROADS TO FREEDOM (1919).

[70] PARLIAMENTARY DEBATES - OFFICIAL REPORT - HOUSE OF COMMONS (London: His Majesty's Stationary Office 1919), Fifth Series, Vol. 118, 859.

[71] *The diplomacy of publicity*, NEW REPUBLIC (New York), 13:162-164, 163 (Dec. 13, 1917).

In 1951, the SEC used “informed consent” in the case of *In the Matter of Moore & Company*:

> In the position he thus occupied, it was improper for Furlong to purchase for his own account securities which he contemporaneously resold to his customers at a profit, without the customers’ informed consent based upon a full disclosure of every vital particular touching the transaction.[72]

In 1949, the United States Court of Appeals for the District of Columbia stated in the case of *Hughes v. Securities Exchange Commission*:

> After making an independent review of the record, the Commission issued an opinion dated February 18, 1948, in which the Commission found that petitioner was a fiduciary, that as such she was under a duty to make full disclosure of her adverse interest, that no such complete disclosure was made, and that her clients had not given their 'informed consent' to her taking a position adverse to their interests. …
> The best price currently obtainable in the open market and the cost to registrant are both material facts within the meaning of the above-quoted language and they are both factors without which informed consent to a fiduciary's acting in a dual and conflicting role is impossible.” …
> Secondly, even assuming, as urged by amici, that all of petitioner's clients are persons of more than average experience and intelligence with regard to the conceded intricacies of securities transactions, an assumption which is at best dubious in view of the present record, their full knowledge that petitioner either sold them securities she then owned or bought securities in her own name and then resold them to the clients cannot be considered sufficient knowledge to enable the clients to give their informed consent.[73]

The Court of Appeals affirmed the SEC decision. Here are excerpts from the SEC decision that use “informed consent.”

> To prevent any conflict and the possible subordination of this duty to act solely for the benefit of the principal, a fiduciary at common law is forbidden to deal as an adverse party with his principal. An exception is made, however, where the principal gives his informed consent to such dealings. [p. 635]

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[72] In the Matter of Moore & Company, 32 SEC 191, 196 (Jan. 10, 1951).
[73] Hughes v. Securities and Exchange Commission, 85 U.S. App. D.C. 56, 174 F.2d 969, 972 & 976 (May 9, 1949).

> Registrant has an affirmative obligation to disclose all material facts to her clients in a manner which is clear enough so that a client is fully apprised of the facts and is in a position to give his informed consent. [p. 639]
> These statements are not expressions of persons who have given their informed consent to their adviser's taking an adverse position in dealing with them. [p. 640]
> On the basis of the foregoing we conclude that registrant, after establishing a fiduciary relationship with her clients, has omitted to disclose material facts to such clients and has not obtained the informed consent which would provide the only possible justification for her dealing with such clients for her own account and under circumstances in which her self-interest might conflict with her fiduciary obligations to them. [p. 643]
> Finally, as we have already stated, the required disclosures must be made before the completion of the transaction so that the client can, in fact, give his informed consent to the proposed sale or purchase. [p. 646][74]

In 1950, Hugh L. Sowards excerpted the above *Hughes* SEC decision in his legal book - COMMENTS, CASES AMD MATERIALS ON CORPORATE FINANCE - and included the first four of the above uses of "informed consent.[75] Hugh L. Sowards (-1982) was a professor at the University of Miami School of Law and wrote major treatises on securities regulation.[76]

In 1948 in a YALE LAW JOURNAL article on over-the-counter trading, the author wrote:

> Whereas the *Hughes* decision requires divulging of market price, cost and capacity, the judicial rule holds that only capacity need to be revealed. From this disclosure courts have implied that the ensuing transaction enjoys the client's informed consent, on the apparent assumption that, thus warned, the clients can protect themselves by checking elsewhere the value of the securities involved.[77]

In 1948 in a VANDERBILT LAW REVIEW article on over-the-counter securities, the author wrote:

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[74] In the Matter of Arleen W. Hughes doing business as E.W. Hughes & Company, 27 SEC 629 (Feb. 18, 1948).
[75] Hugh L. Sowards, COMMENTS, CASES AND MATERIALS ON CORPORATE FINANCE (Buffalo, N.Y.: Dennis & Co. Inc. 1950), 870, 871, 874, 877.
[76] James S. Mofsky, *In memoriam Hugh L. Sowards*, UNIVERSITY OF MIAMI LAW REVIEW, 36:xix-xx (1982).
[77] *Disclosure requirements on over-the-counter trading*, YALE LAW JOURNAL, 57(7):1316, 1321 (June 1948).

> It is well settled that by the mere form of the words employed as a confirmation, a broker cannot transform himself into a principal at will. Where the elements of agency exist only the specific and informed consent of the customer is sufficient to change such a relationship.[78]

In 1946, the Securities Exchange Commission used "informed consent" in three decisions. *In the Matter of Oxford Company, Inc.,* included:

> That role could not be changed without explicit and informed consent in each case prior to the completion of the transaction…
> To hold that a securities firm can, under the circumstances outlined in this case, validly act as a principle would be to ignore the meaning of the act, and permit the firm, without particular, explicit, and informed consent, by a mere play of words to shift its position in the course of the transaction to suit the convenience of the moment.[79]

In the Matter of Investment Registry of America, Inc., included:

> While it is not necessary, for the purposes of this case to discuss the question at length (see Oxford Company, Inc., 21 S.E.C. 681 (1946), it is fundamental that a broker cannot, by a mere form of words employed in a confirmation, transform himself at will into a principal. Where the elements of agency exist in the relationship (as e.g.. in this case the reliance of customers on respondent's rendition of investment advice, prior dealings, and so forth) only specific and informed consent of the customer is sufficient to change the relationship.[80]

In the Matter of Norris & Hirshberg, Inc., quoted *Oxford* at 885, and further included:

> To procure assent for specific transactions was only part of respondent's duty. That assent should have been a fully informed consent to respondent's acting at arms length as a dealer. [p. 884]
> A broker-dealer vested with a power which, in its precise terms, limits the authority to that of a broker cannot without the informed consent of the customers act as a principal and point to our rules in justification. [p. 895][81]

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[78] L. Guy Clinton, *Over-the-counter securities markets*, 1 VANDERBILT LAW REVIEW 602, 617 (1948).
[79] In the Matter of Oxford Company, Inc., 21 SEC 681, 692 (Jan. 3, 1946), SEC Securities Act Release No. 3769 (Jan. 4, 1946), 15.
[80] In the Matter of Investment Registry of America, Inc., 21 SEC 745 (Jan. 10, 1946).
[81] In the Matter of Norris & Hirshberg, Inc., 21 SEC 865 (Jan. 22, 1946).

The discussion of the *Oxford* case in the 1946 SEC annual report included:

> The Commission held that under all of the circumstances the firm was under the duty to act as agent for the customer in the absence of explicit and informed consent to the firm's acting as principal.[82]

In a 1946 article in the CALIFORNIA LAW REVIEW about California state security issues, T.W. Dahlquist wrote:

> If he deals adversely to this principal, or serves dual interests, full and complete disclosure must be made and an informed consent thereto obtained. [p. 713]
> Non-action by the customer after receiving the dealer confirmation does not constitute ratification. Subsequent ratification would require complete disclosure and explicit, affirmative and informed consent by the customer. [p. 715]
> But even high-grade securities firms which conduct their nonposition trading on the basis of a fair and reasonable spread - sometimes at a gross profit of only one-half point - must clearly bring home to their customers explicit knowledge, at the outset of the transaction, that they are acting in a dealer capacity, and must obtain the customer's informed consent to such relationship.[83]

T.W. Dahlquist was a San Francisco attorney. He was the student editor of the California Law Review in 1922.

In a 1946 article in the Harvard Law review about federal regulation of brokers and dealers, William Taft Lesh wrote:

> The Commission further said that to hold in these circumstances that a securities firm can validly act as a principal would be to ignore the meaning of the statute, "and permit the firm, without particular, explicit, and informed consent, by a mere play of words, to shift its position in the course of the transaction to suit the convenience of the moment."[84]

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[82] *Regulation of Brokers and Dealers, Administration of the Securities Exchange Act of 1934*, TWELFTH ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION - FISCAL YEAR ENDED JUNE 30, 1946 (Washington DC: U.S. G.P. O. 1947), 35.
[83] T.W. Dahlquist, *Regulations and civil liability under the California Corporate Securities Act: IV*, CALIFORNIA LAW REVIEW, 34(4):695 (Dec. 1946).
[84] William Taft Lesh, *Federal regulation of over-the-counter brokers and dealers in securities*, HARVARD LAW REVIEW, 59(8):1237, 1264-65 (Oct. 1946), quoting the *Oxford* decision.

William Taft Lesh (1906-1993) was Special Counsel to the Trading and Exchange Division of the Securities and Exchange Commission at the time he wrote this article.[85]

In a 1945 review of securities issues, Chester T. Lane and George S. Parlin wrote:

> The court declined to disturb an order of the Commission which conditioned the delisting of securities by a requirement that the informed consent of the security holders be first obtained. [p. 634, note 3]
> Requiring the informed consent of the security holders was, as argued by the applicant, a long step beyond prior precedents. [p. 639][86]

Chester T. Lane was Deputy Foreign Liquidation Commissioner, Department of State and former Chief Counsel of the Securities and Exchange Commission (1938-1942). George S. Parlin was an Assistant General Counsel with the Securities and Exchange Commission.[87]

Note that there was a near miss in which the term was almost used in a March 1944, SEC opinion:

> When the relationship between a broker-dealer and his customer is established as one of agent and principal, it is not within the agent's power to free himself from his duties to act as such in transactions with his principal without the clearest warning…. There was nothing to prevent Davis and Fleming from altering this relationship by mutual, informed, consent….[88]

ATTORNEY RESPONSIBILITES

The practice of law is another context in which there is a professional duty of disclosure and "informed consent" has been used to describe the actions of clients when the attorney has satisfied the duty of disclosure.

In 1948, the Colorado Supreme Court in the case of *People ex rel. Kent v. Denious*, claiming professional misconduct by an attorney, used the term "informed consent" to describe the standard for the responsibility of attorneys to make disclosures to their clients:

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[85] HARVARD LAW REVIEW, 59(8):1276 (Oct. 1946),
[86] Chester T. Lane & George S. Parlin, *Security issues and Exchanges*, 1945 ANNUAL SURVEY AMERICAN LAW 634, 639 (1945) [discussing Shawmut Association v. Securities Exchange Commission, 146 F.2d 791 (1st Cir. 1945). The term "informed consent" is not used in the *Shawmut* decision.].
[87] Ibid., at 634.
[88] In the Matter of Bond & Goodwin, Incorporated, 15 SEC 584, at 594 (Mar. 17, 1944).

> The question of respondent's intent in taking title to these properties is the all-important question involved in this proceeding. If, as he declares, and as the manager testified he was told, respondent took title subject to petitioner's approval and with intent of obtaining her informed consent thereto, the transaction was still improper, but not venal nor sufficient cause to justify disbarment or suspension in the situation here presented;…[89]

The duty of disclosure to clients predates the use of the term "informed consent." Canon 6 of the Canons of Ethics of the American Bar Association adopted in 1908 includes:

> It is unprofessional to represent conflicting interests, except by the express consent of all concerned given after a full disclosure of the facts.[90]

TRUSTS AND ESTATES

Trusts and estates were the context in which fiduciary duties originated. Trustees have a duty of disclosure to the beneficiaries of trusts. "Informed consent" has been used to describe the actions of beneficiaries when the trustee has satisfied this duty.

In 1940, the United States Court of Appeals for the District of Columbia used "informed consent" in describing the responsibilities of trustees in the case of *Earll v. Picken*:

> …the sale was invalid upon the principle that a trustee is not permitted to buy in the trust property on his own account without permission of the court or informed consent of the beneficiaries;…[91]

In 1938, A New York Surrogate's Court stated in *In re Estate of S. Agnes Smith*:

> There is no reason for a requirement of unnecessary expenditure or useless waste of the time of all concerned when it is evident that this is unnecessary by reason of the informed consent to the payment of all persons who may by any possibility possess any interest in the subject-matter, provided such persons are all *sui juris*.[92]

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[89] People ex rel. Kent v. Denious, 118 Colo. 342, 353, 196 P.2d 257, 263 (June 28, 1948).
[90] James M. Alman, *Considering the A.B.A.'s 1908 Canons of Ethics*, FORDHAM LAW REVIEW, 71(6):2395-2508 (2003), appendix at 5.
[91] Earll v. Picken, 113 F.2d 150, at 158, 72 App. D.C. 91 (Apr. 15, 1940).
[92] In re Estate of S. Agnes Smith, 169 Misc. 615, 617, 8 N.Y.S.2d 383 (Surr. Ct. Dec. 8, 1938).

LABOR RELATIONS

The use of the term “informed consent” in the area of labor relations is more akin to its use in the area of politics and governance. It is not used to reflect a duty of one individual to inform another. It is used to reflect the general need to provide sufficient information so that participants in the process of labor relations can fulfill their duties of representation and promote labor peace.

In 1933, Henry C. Metcalf wrote in an article *A new industrial partnership*:

> Employee representation is functionally a logical and essential element in the plan of organization which industry is slowly developing - a plan by which in each administrative area and on each administrative level the process of executive direction and control is tempered by representative deliberation and active, informed consent.[93]

Henry C. Metcalf (1867-1942) was an organizational theorist and professor of political science at Tufts College.

Ordway Tead and Henry Clay Metcalf repeated this statement virtually verbatim in their 1933 book, LABOR RELATIONS UNDER THE RECOVERY ACT:

> In short, employee representation promises to become a permanent feature of corporate relations with employees because it id functionally a logical and essential element in the plan of organization which industry is slowly developing - a plan in which each administrative area and at each administrative level the process of executive direction and control is tempered by representative and active, informed consent.[94]

In 1920, “informed consent” appeared in an industrial relations circular from the University of Wisconsin:

> It is fairly safe, then, to urge that all labor auditing be performed under joint direction and by the free and informed consent of the workers.[95]

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[93] Henry C. Metcalf, *A new industrial partnership,* NORTH AMERICAN REVIEW, 236(6):531, at 535 (Dec. 1933).
[94] Ordway Tead and Henry Clayton Metcalf, LABOR RELATIONS UNDER THE RECOVERY ACT (New York: Whittlesey House 1933, 100-101.
[95] The University of Wisconsin – University Extension Division - Department Group and Community Service - Bureau of Commercial and Industrial Relations, Circular No. 2, A LABOR POLICY AND THE LABOR AUDIT (August 30, 1920), 13.

OTHER CONTEXTS

"Informed consent" has been used in a few other contexts that are not tied to imposing a duty of disclosure.

On July 5, 1957, a federal court in Louisiana considered a motion in a criminal case to suppress evidence obtained without a warrant. The government claimed consent. The court stated:

> It is fundamental, in the absence of a valid warrant, either of arrest or for a search, that the burden of proving there was a truly voluntary and fully informed consent rests upon the Government…[96]

The court found that the standard had not been met and suppressed the evidence.

In 1953, Middletown (Ohio) Lincoln Mercury published advertisements in the local newspaper that included the line:

> No replacements are ever made without your informed consent.[97]

On 12 July 1942, the RACINE (Wis) JOURNAL TIMES SUNDAY BULLETIN published an article from Des Moines, Iowa, about a student who was having trouble enlisting. It included:

> Informed consent of his parents necessary before he could be drafted because technically he was still 19.[98]

Harold A. Phelps discussed divorce in CONTEMPORARY SOCIAL PROBLEMS. In the revised edition published in 1942, he wrote:

> Essential Conditions of Marriage….In the third place, the consent of the parties must be free, deliberate, and informed…
>
> …Divorce enters as a problem in the third condition, because, in basing the validity of the marriage contract upon free, deliberate, and informed consent, one presupposes (according to the advocates of divorce) a condition contrary to fact.[99]

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[96] United States v. Kidd, 153 F. Supp. 606, 609 (W.D. La. July 5, 1957).

[97] MIDDLETOWN JOURNAL (Ohio), 27 Nov. 1953, 20. The ad was repeated 1 Jan 1954, 3 Nov 1954 and 10 Nov 1954.

[98] *An open letter to 'der Fuehrer,'* RACINE (Wis) JOURNAL TIMES SUNDAY BULLETIN, 12 July 1942, 1.

[99] Harold A. Phelps, CONTEMPORARY SOCIAL PROBLEMS (New York: Prentice-Hall 1942) [the first sentence is cited as a quote from T.A. Lacey, MARRIAGE IN CHURCH AND STATE (London 1912), 26-29]

Harold A. Phelps was a professor of sociology at the University of Pittsburgh and managing editor of the American Sociology review.

On March 4, 1940, the MANITOBAN in Winnipeg, Canada, published an article about creating a student court of appeal in the University of Manitoba Student Union. It included the following sentence:

> In this way new law has crept into student government without having the informed consent of the faculty representatives.[100]

In 1911, C. Anderson Scott wrote in an article, *The Epistle to Philemon*:

> Philemon must have an opportunity of proving his love, but in a different way from that, and with the full and informed consent of his will.[101]

This is the earliest use of "informed consent" that has been located. C. Anderson Scott was a professor at Westminster College in Cambridge, England.

CONCLUSION

Over sixty sources that used the term "informed consent" before the *Salgo* court decision have been included in this review. Thus, the term has a more extensive history than has generally been recognized.

It is likely that some of the early uses of "informed consent" were not intended to be the use of a term, but were simply the use of "informed" as a adjective describing the "consent." However, clearly many of the later uses were intended to be a term.

No evidence has been found of whether the term moved between the contexts or was independently developed in each context. The lack of cross-references in any of the cited uses suggests independent development.

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[100] *There seems to be some argument for a student court of appeal*, MANITOBAN (Winnipeg), March 4, 1940, 3.

[101] C. Anderson Scott, *The Epistle to Philemon*, in THE EXPOSITOR (London: Hodder and Stoughton 1911), 2:328, at 332.