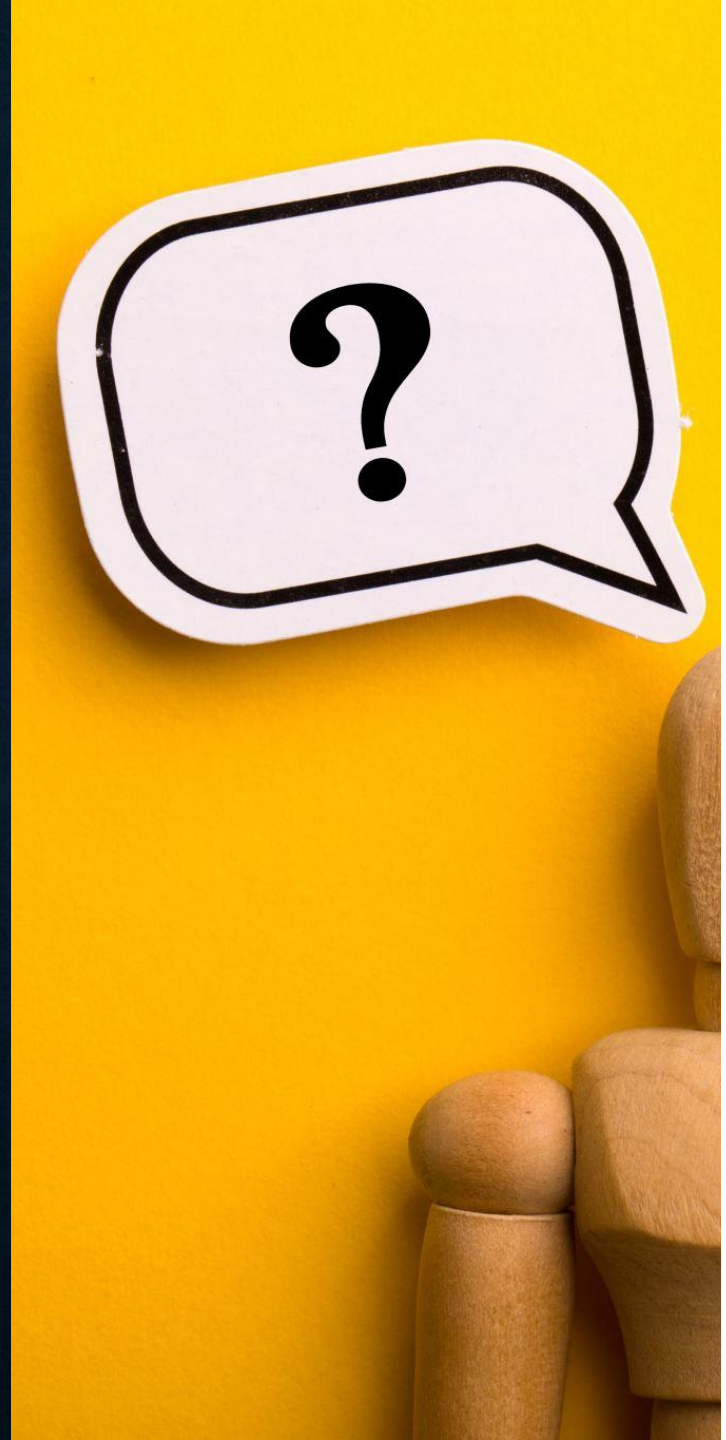
Conflicts of Interest:

Loyalty and Independent Judgment





INTRODUCTION: CONFLICTS OF INTEREST

- Rules appear deceptively simple.
- In difficult situations, seek independent, professional advice from another lawyer.

STEPS TO CONFLICTS OF INTEREST RESOLUTION

1. Identify the current, former, prospective client(s) – **WHO IS THE CLIENT?**
2. Determine whether a conflict of interest exists [MR 1.7(a)]
   - Current clients (MR 1.7, 1.8, 1.11, and 1.13 considerations)
   - Interests of former clients (MR 1.7 and 1.9)
   - Interests of 3rd parties [MR 1.7, 1.8(f), 5.4(c), 1.13(f)]
   - Personal lawyer interests [MR 1.7, 1.8 various, 3.7]
   - Interests of a Prospective Client (MR 1.7, 1.18)
   - Government Lawyers (MR 1.11 and 1.12)
   - Imputed Conflicts [MR 1.10, 1.8(k), 1.11(b), 1.12(c)]
3. Consentable conflict?
4. Obtain INFORMED consent, confirmed in writing from EACH affected client
5. Remedies if not properly resolved



STEP 1: WHO IS THE CLIENT?

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STEP 2:

IS THERE A CONFLICT?

SIMULTANEOUS REPRESENTATION UNRELATED MATTERS

You CANNOT represent one current client adverse to another current client, even if the matters are *wholly unrelated*!

Something is radically out of place if a lawyer sues one of his/her/their clients on behalf of another client even if the matters are ***wholly unrelated***.

CURRENT CLIENTS

Rule 1.7(a)

(1) A lawyer's representation creates a conflict of interest if: the representation of one client will be directly ***adverse*** to another current client; **or**

(2) There is a substantial risk that the lawyer's ability to counsel the client will be ***materially limited*** by responsibilities to another client.



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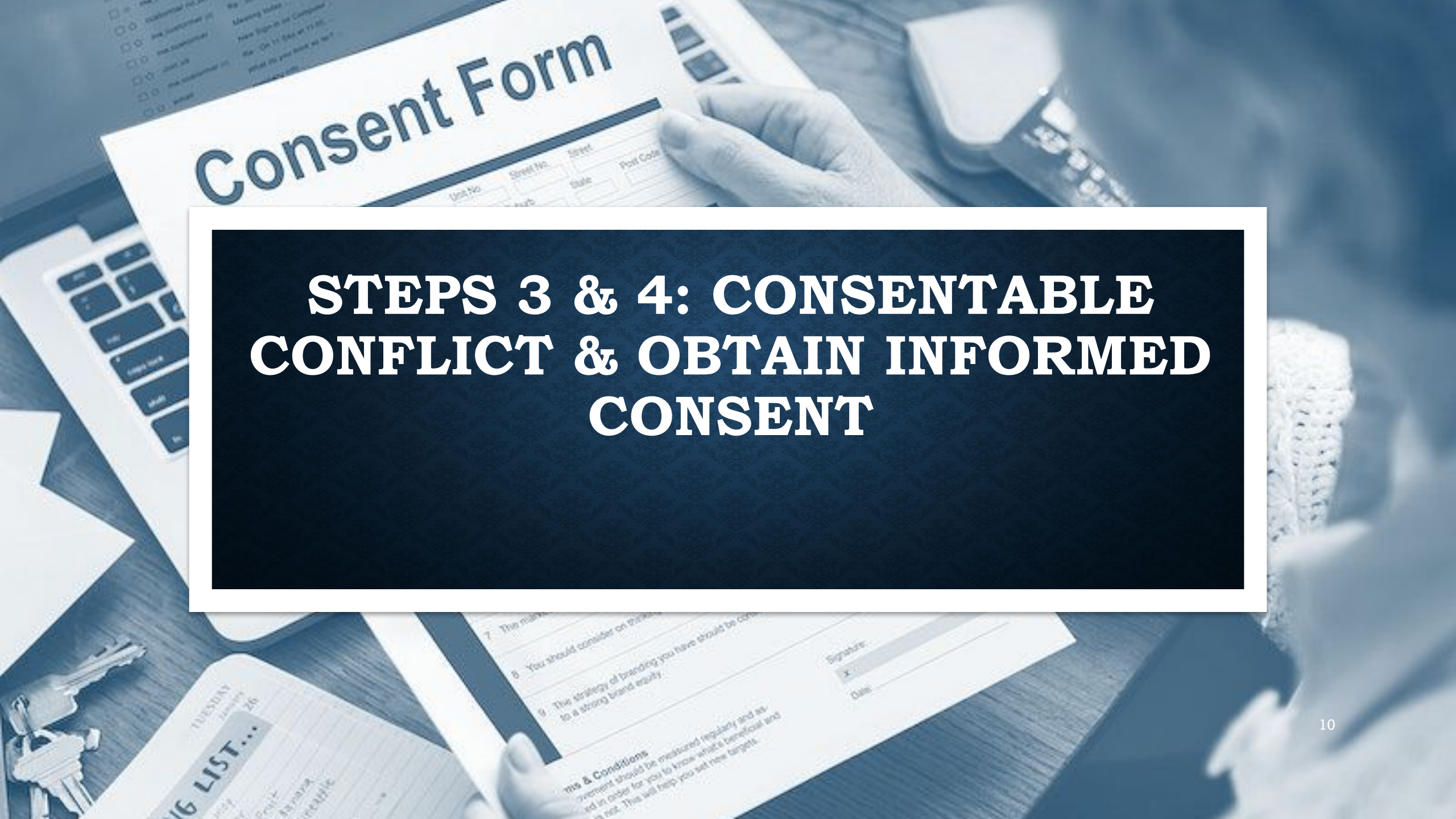
E.G., POSITIONAL CONFLICTS

RULE 1.7(A)(2)

PERSONAL AND PRIOR WORK CONFLICTS, RULE 1.7(B)

Involve a "significant risk" of a material limitation from lawyer's own interests

Threat or claim against lawyer in an ongoing matter (aka prior work conflict)



STEPS 3 & 4: CONSENTABLE CONFLICT & OBTAIN INFORMED CONSENT

HOW TO CURE A CONFLICT:
IS THE CONFLICT CONSENTABLE?

Some conflicts not "consentable," so don't ask for consent

Adversity in transactions less troublesome than litigation, yet care must be taken

KEYS TO CONSENT

01

Must be **informed and written**; both are your responsibility

02

Advise client in writing to seek independent counsel

03

Need both client's consent to disclose information to the other sufficient to obtain informed consent



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EXAMPLE LANGUAGE

STEP 5:

POTENTIAL SANCTIONS

MARITRANS GP, INC. V. PEPPER, HAMILTON & SCHEETZ, PG. 212

- **Injunctive Relief** – "urgent necessity to avoid injury", "irreparable injury or gross injustice"

- **Disqualification** – can be raised *sua sponte;* not eligible for interlocutory appeal; comes from counsel, the court or clients; can have harsh consequences to parties

- **Fee Forfeiture** – disgorgement of fees paid or forfeiture of fees owed to attorneys who have breached their fiduciary duties to their clients + professional discipline

JOINT REPRESENTATION

Common representation parties on the same side of a deal is permissible

But the situation may be rife with potential conflicts

JOINT REPRESENTATION PERMISSIBLE IF:

1. Lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each client
2. Representation is not prohibited by law
3. Representation does not involve assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding
4. Each client gives informed consent - DISCLOSURES MANDATORY (next slide)
5. Withdrawal required if adverse conflicts arise

Common Areas: immigration law, trusts & estates, multiple plaintiff scenarios in personal injury cause of action

JOINT REPRESENTATION
INFORMED DISCLOSURE REQUIRED

What is the informed consent?

1) Explain material risks of, and reasonably available alternatives to, the proposed course of conduct.
2) Explain possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved."
3) Confirm in writing.

IPCR 1.7 cmt. 18; IPCR 1.7(b)(4)

JOINT REPRESENTATION LIMIT YOUR RISK

Document	Spell out	Identify
Document informed consent in a joint engagement letter	Spell out the advantages (e.g., presenting common front, reduced expenses, etc.)	Identify risks and disadvantages (e.g., no secrets between joint clients, risk may have to withdraw if severe conflict arises)



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LET'S LOOK AT EXAMPLE DISCLOSURE

