



Judge David D. Brannon

Today's Agenda

- Probate Court Update
- Probate Court Litigation (ethics)
- Attorney Client-Privilege
- Concealment
- Powers of Attonrey
- Creditor Claims
- Conflict of Interest



Probate Court Update



Guardianship Audit 100% Complete

- More than 2,500 guardianship cases audited
- Approx. 950 (37%) of the cases were identified as delinquent
- Approx. 667 wellness checks were performed in more than 25% of the cases
- 78 of the cases were transferred to another county or state
- 624 (almost 25%) of the cases were able to be closed
- Approx. 50 of the cases were identified as cases in which the Court is acting as Superior Guardian



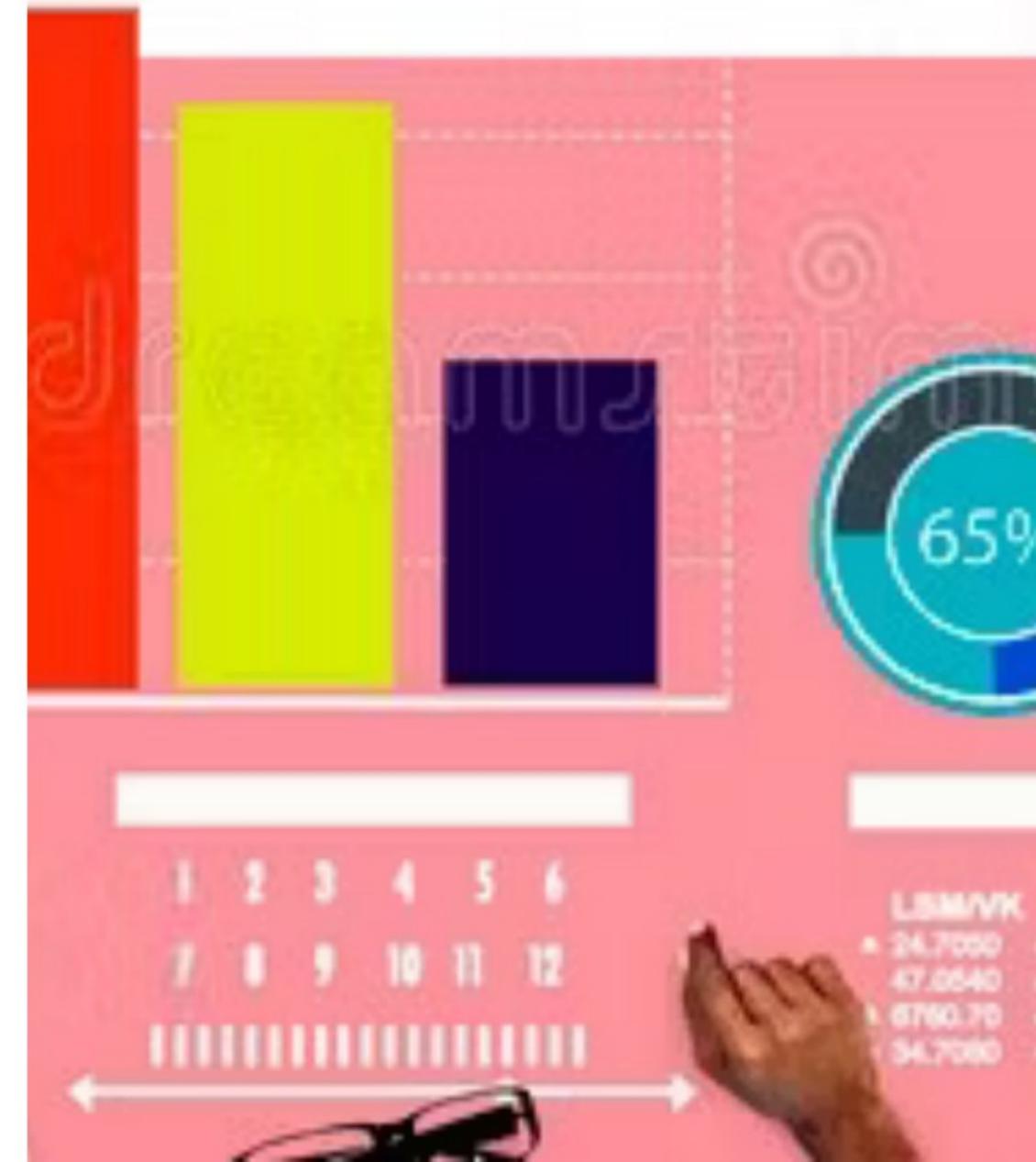
Mental Health Situation

- 112 bed step-down unit at the Jail
- JusticeWeb and open records
- 2 major initiatives (GDAHA task force, County stakeholders)
- The right people are in the room
- Local Rules, legislation, collaboration with others
- AOT coming
- Accountability

Case Stats (Marriage Licenses, 2805)

- Q4 2022, 637
- Q1 2023, 472
- Q2 2023, 797
- Q3 2023, 899

DATA >



Mental Illness Cases Q3 2022 - Q3 2023

- 513 New Cases, average 128/ quarter
- 581 Closed
- In Q3 2022 there were 86 new filings
- Q3 of 2023 there were 148 new filings
- Open MI cases, 259



323 New Adult Guardianships filed Q3 2022 to Q3 2023

- Average 128/ quarter
- 581 Cases closed (audit)
- Open guardianships, 2455

New Estates Q3 2022 - Q3 2023

- 3,248 new estates
- Average of 812/ quarter
- 3,636 closed
- Open, 2,928



OSBA Innovative Court Program (PRC)



Case Management and eFile v 2.0

- Single vendor (Journal Technologies)
- County-wide
- This will take a couple of years
- Major opportunity



Get involved



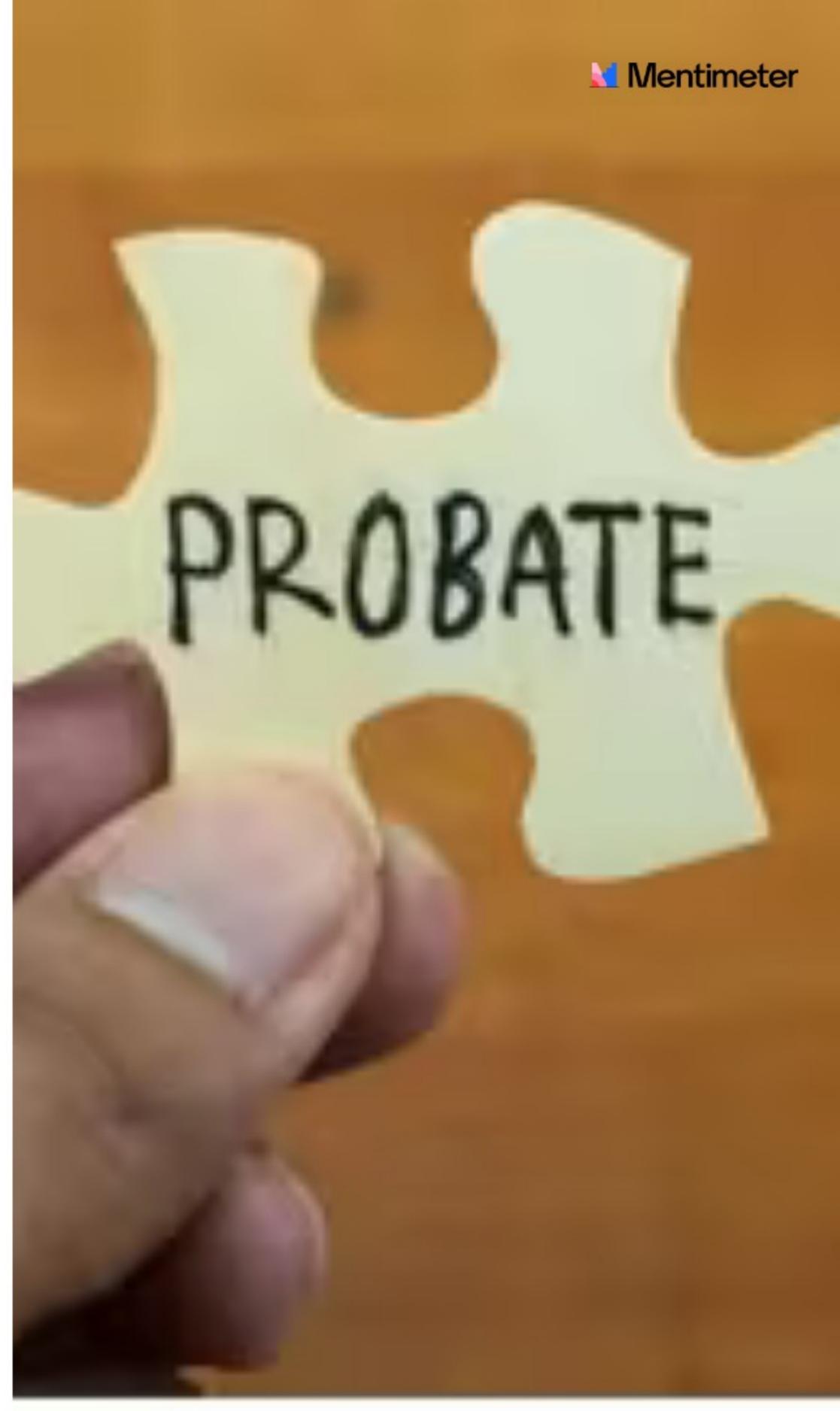


Montgomery County Probate Court
Judge David D. Brannon

STRATEGIC PLAN
2024 – 2029



Probate Litigation

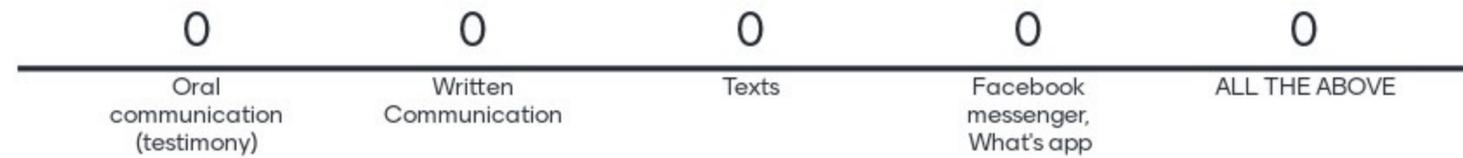


What's the Attorney-Client Privilege?

Rule of evidence that shields confidential communications made between an actual or potential client and an attorney, acting in capacity as an attorney, when communications pertain to the giving or receiving of legal services.

Upjohn Co. v. United States, 449 U.S. 383, 389-390
(1981)

What does the Attorney-Client Privilege Protect?



Key points re Attorney-Client Privilege

- Not every communication you have with your Estate Planning clients will be privileged
- Understanding the limitations and nuances in estate planning, trusts, probate, etc.

What is NOT protected?

- Facts
- Documents shared with attorney not otherwise privileged
- Communications that include other advisors, non-client family members, others
- Privileged communications disclosed to others
- Client comms. when fraud, undue influence, or duress allegations arise after client's death

Consider

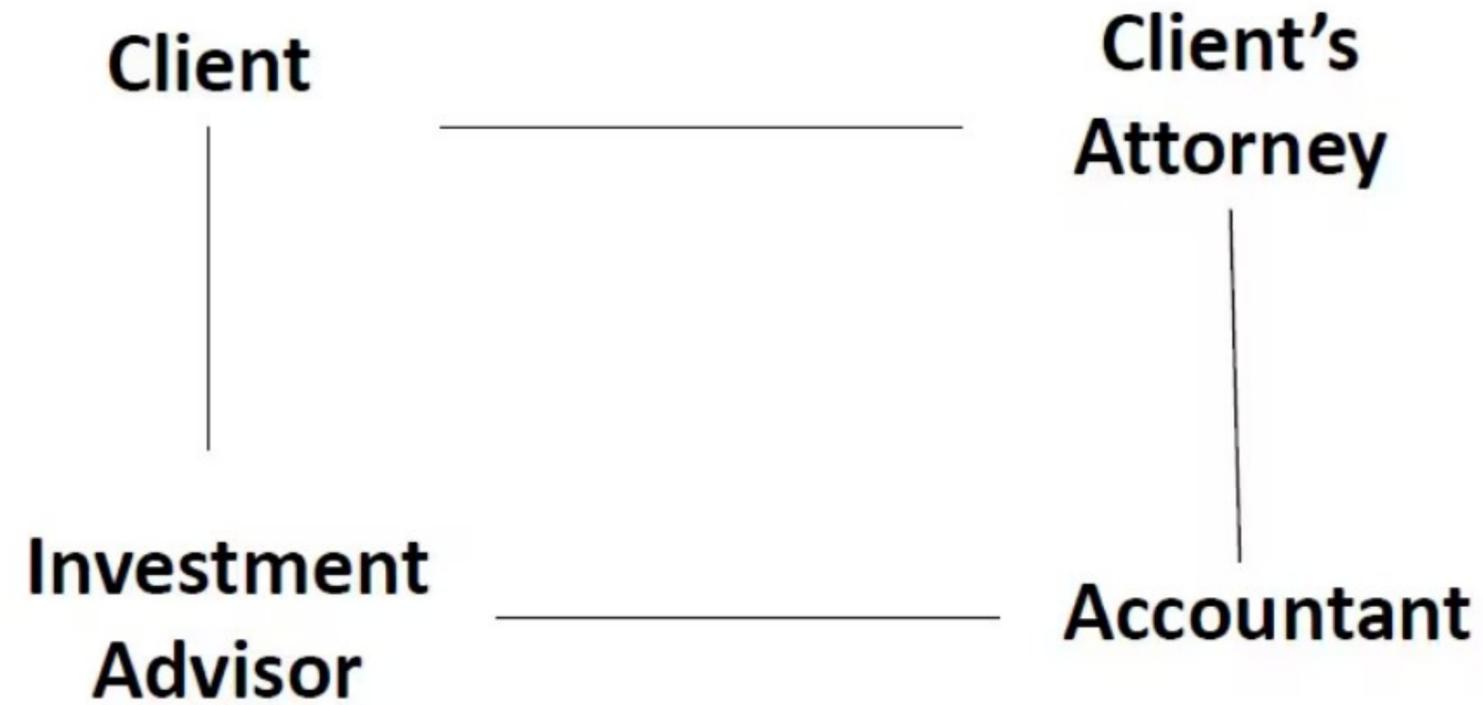
- Inform client and others (family, financial advisor, accountant)
- Include "Attorney-Client Privileged Communication. Do not forward" in messages
- Tell visitors to step out when appropriate
- Maintain a careful file

Warning on Records

- Keep good ones
- Applicable all the time



The Financial Advisory Team Meeting



Is this meeting privileged?



Exception to A-C Privilege; R.C. 2317.02(A)(1)(b)

A communication between a **client** who has since died and the **deceased client's attorney** if the communication is **relevant** to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the **dispute addresses the competency** of the deceased client **when the deceased client executed a document** that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute.

Concealment



R.C. 2109.50 et seq.

- Complaint made by person interested in estate, testamentary trust or guardianship
- Against person suspected of having concealed, embezzled, or conveyed away or having been in the possession of tangible property
- Court issues citation (sheriff usually) to appear (from any county in Ohio) and be examined
- Jury may be demanded by either party
- Burden of proof by preponderance of the evidence
- Guilty finding results in damages + mandatory 10% penalty

OAPJ Modernization Committee Proposal

- The purpose of amending the concealment statute is to simplify, clarify and make more uniform the application of the statute throughout the State
- The concealment statute is applied differently in different counties, with some courts requiring a hearing to go forward immediately, others discovery
- The committee wanted to preserve quickness and efficiently return assets wrongfully taken or withheld from an estate while also allowing two-tier lit.
- Also preserved is the "quasi criminal" aspect of the statute and the allowance of costs and penalties
- The committee recognized that the process and requirements in the current concealment statute are rarely followed (examined, reduced to writing, etc.)
- Input from attorneys
- A concealment action has its own specific requirements for service and hearing, and we think that "charge" will distinguish a concealment action
- Gives the court discretion to determine whether the case will be heard by the court or by jury

What do you think about proposals?



Got a better idea?

Waiting for responses ...

Power of Attorney

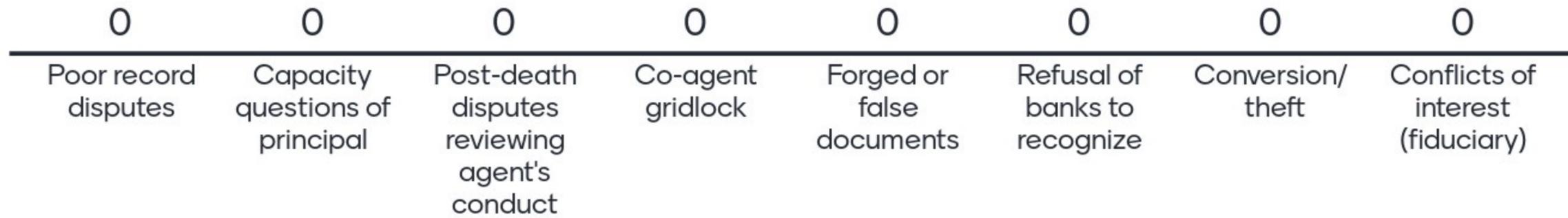
R.C. 1337 et seq.



What's in a POA?

- "Principal" may appoint "agent" to act on his or her behalf for personal, financial, business, health, etc. matters
- Springing vs. Durable
- Third parties not required to accept them
- Scope of authority defined in POA and statute (UPOAA)
- Checks on POA (co-POAs, reporting to third party, agent's duties under R.C. 1337.34)

What trends are we seeing?



Mental capacity in question?

- Typically someone with standing wants recors to review an agent's conduct under R.C. 1337.36
- R.C. 1337.36(A)... principal, agent, guardian, conservator, fiduicary (administrator or executor), spouse, parent, descendant, heir, gov. agency...
- R.C. 1337.36(B) basically says upon motion by the principal...court shall dismiss unless finding lacks capacity to revoke agent's authority...

Warning

- Attorneys
- Courts
- Parties



?

- What standard? Contractual, testamentary, or incompetent
- Civ.R. 17(A)?
- Civ.R. 35?
- R.C. 2111.01(D)?
- Ethics?



Agent's liability under R.C. 1337.37

An agent that violates sections 1337.21 to 1337.64 of the Revised Code is **liable** to the principal or the principal's successors in interest for the **amount required to restore the value** of the principal's property to what it would have been had the violation not occurred **and** the amount required to **reimburse** the principal or the principal's successors in interest for the **attorney's fees and costs paid** on the agent's behalf.

What are some preventative measures?

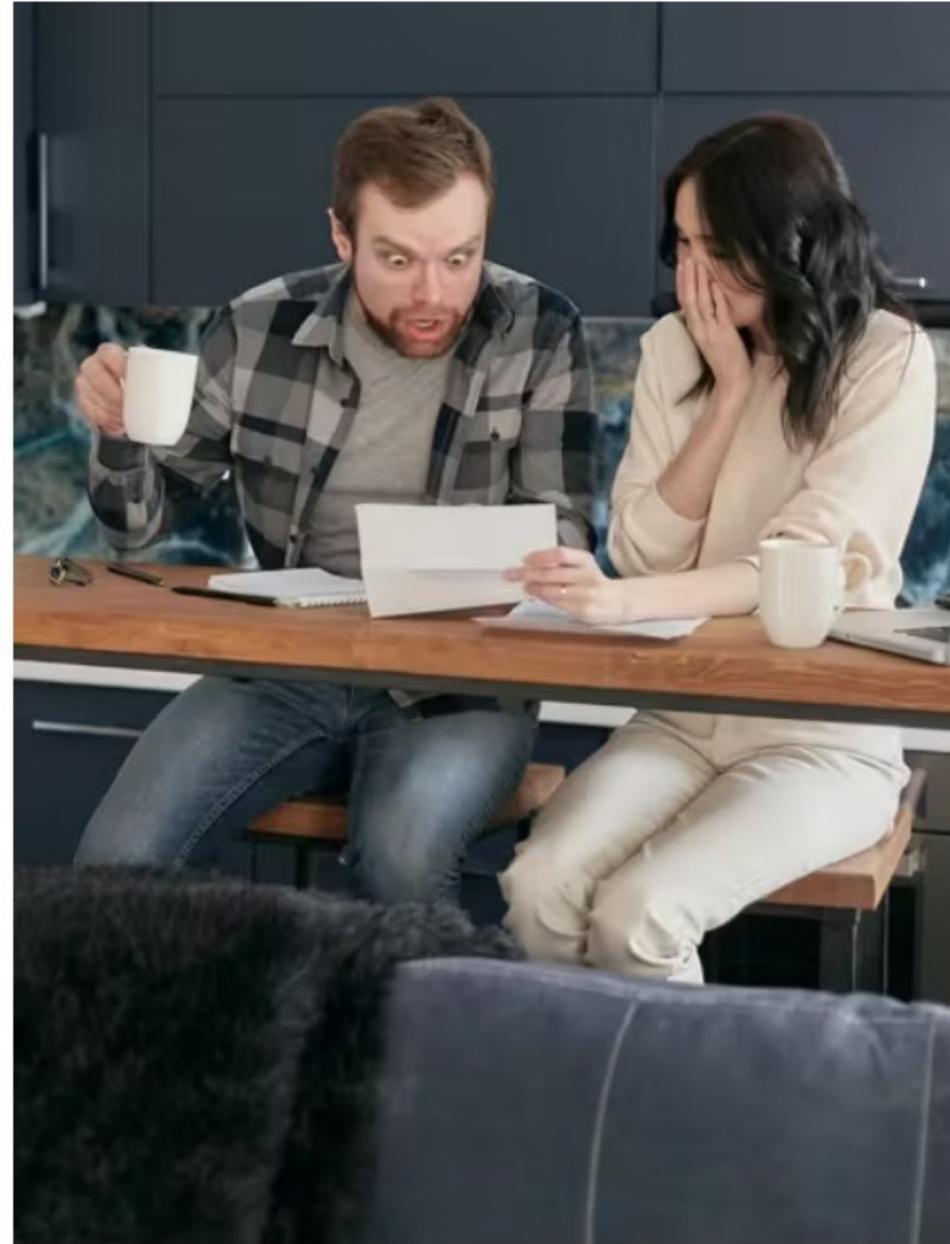
- Warn the agent or obtain consent
- Get agent counsel
- Allow audit by others, but ONE agent
- Any others?



How many of you are serving or designated agents?

None of the options are correct!





Presentation of Claims Against Decedents' Estates: Current Pitfalls and Recent Changes (R.C. 2117.06)

**Creditors get SIX(6)
months from date
of death to present
claim.**

Quick check: How long do creditors have to present claims against estates of deceased debtors?

None of the options are correct!





The screenshot couldn't be generated



Still a caution!



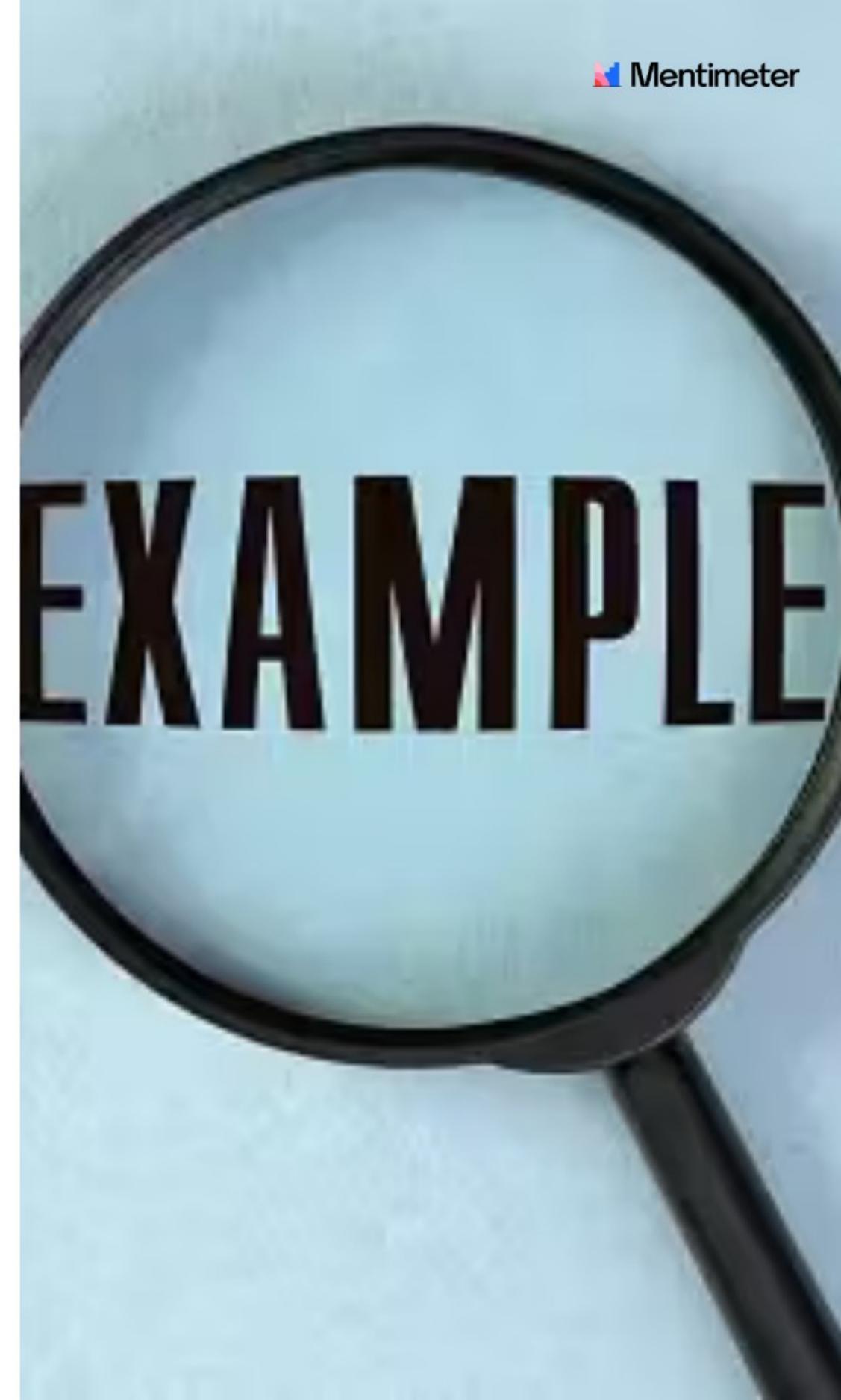


Conflict of Interests everywhere in probate



Just a few examples...

- Joint representation
- Fiduciary "hat" v. beneficiary "hat"
- Spouse and family members
- Fiduciary v. personal interests
- Go beyond scope (GRD needed for EST)
- Attorney as fiduciary (billing as lawyer or fiduciary)

A magnifying glass with a black handle and frame is positioned over the word "EXAMPLE". The word is written in large, bold, black, sans-serif capital letters on a light blue background. The magnifying glass enlarges the word, making it the central focus of the image.

EXAMPLE



Solutions

- Conflict waiver
- Just don't try it
- Complete transparency
- Guidance from judicial officer



Inconsistent positions

