

HB 4094A
Senate Committee on Judiciary
Written Testimony

Background. When a settlement is reached on behalf of an incapacitated, financially incapable, or minor person, it is necessary to open a conservatorship or probate proceeding to obtain court approval of said settlement. The petition to approve settlement must be accompanied by an affidavit of reasonableness (“affidavit”) “setting forth all relevant information concerning the settlement, including medical reports covering the nature and extent of the injuries sustained and the prognosis.” UTCR 9.040. Counties often supplement the requirements for the Affidavit to include additional information such as:

- a) *A description of the incident causing the injury or death;*
- b) *A description of the injuries;*
- c) *The amount of the prayer and settlement.*
- d) *If a structured settlement is requested, the present value of the future payments should be indicated;*
- e) *The amount of the attorney fees and costs;*
- f) *The proposed disposition of the settlement proceeds;*
- g) *A concise statement explaining the reasons for the settlement and the efforts to maximize recovery;*
- h) *A statement explaining that the attorney has independently evaluated the interests of the injured party;*
- i) *A statement explaining that the attorney has examined every medical record; and*
- j) *A statement explaining why it is necessary and proper to settle the case at the present time.*

Multnomah County SLR 9.055; Clackamas County SLR 9.041

This sensitive information is necessary for the court to determine if the settlement is sufficient for the protected person or minor. However, it is often inappropriate to have available to the general public.

Sealing, Redacting, and Filing Under Pseudonym. If the beneficiary of the settlement had capacity and was not subject to a protective proceeding, they would be able to elect to have the sensitive information of their injury and settlement remain confidential. If an individual is incapacitated, financially incapable or a minor and they wish to keep this information confidential, the documents must either be sealed, redacted, or filed under pseudonym.

Under UTCR 5.160, to seal documents, it is necessary to have specific statutory authority to do so, whether or not confidentiality is a term of settlement. Currently, this statutory authority is limited to a small handful of situations, such as when the matter has gone to

mediation and is subject to confidentiality under ORS 36.220. Even then, it is up to the courts discretion whether or not to proceed with filing under seal.

Redacting documents or filing under pseudonym in an ongoing probate proceeding is not a practical solution. For example, in a conservatorship, you file annual accountings with the court explaining all financial transactions throughout the year, including financial statements and vouchers. If redacting or filing under pseudonym, it is necessary to take the identifying or confidential information out of potentially hundreds of pages of financial records. It is often preferable to file under seal.

The Issue. There are a handful of courts in Oregon who are not willing to seal affidavits, even in the most sensitive cases. For example, our office recently represented a minor child with a disability who was a victim of sexual violence. Despite the sensitive nature of the underlying injury and the minor's vulnerability to undue influence and financial abuse, the court rejected the order to seal the affidavit. We were allowed to redact the documents, which took 15-20 hours of legal time to communicate with the court and complete redaction, costing the minor, disabled child approximately \$3,000 in attorney fees. It also delayed approval of the settlement and distribution to the child's conservator for around three months.

Our office had a similar matter come in a few months later in the same county and the parents had to decide whether it was more important to not have the details of their son's sexual assault as public record or to save the cost of the potential \$3,000 in attorney fees for his substantial future disability related expenses.

Purpose. Individuals who meet the definition of "incapacitated," "financially incapable," and "minor" under ORS 125.005 are arguably the most vulnerable population in our state. Although the information contained in the UTCR 9.040 affidavit is necessary for the court to fulfill their duty, it should not be necessary to make this information public record. HB 4094 gives the courts authority to seal these affidavits, which will better protect this vulnerable class.