APPOINTMENT OF NEW MEMBERS TO EDITORIAL BOARD

This issue marks the third issue of the first inaugural year of publishing the Newsletter.

We believe the Newsletter has achieved many of our goals. Communication of the Executive Committee activities to the Section members has significantly improved with the Newsletter. Articles in the Newsletter have highlighted recent rulings and decisions concerning Oregon law and proposed and new Oregon law of interest to Section members.

The members of the current Editorial Committee are identified on page 1 of the Newsletter. At the next meeting of the Executive Committee of this Section on February 1, 1985, new members of the Editorial Committee will be named. Your participation in the publication of the Newsletter is needed. This is an excellent way to become involved in Section activities.

Please contact any member of the Editorial Board or the Executive Committee if you are interested in serving on the Editorial Board or contributing articles.

ESTATE PLANNING FOR THE HANDICAPPED

A large number of persons in our society are handicapped to the extent that they cannot take care of their own affairs. The major question confronting those concerned with the handicapped is who will care for them, both physically and financially, when their immediate families are no longer available.

Almost every developmentally handicapped adult is receiving, or is at least eligible for, governmental assistance. There are many forms and types of such assistance. The primary programs are Social Security, Medicare, Supplemental Security Income (SSI) and Medical Assistance (Medicaid). The estate planner should become familiar with such benefits and should know for which benefits the handicapped person is eligible and which he or she is receiving.

The estate planner should also consider where the handicapped person is residing. The more severely or profoundly handicapped may be residing in a state institution. The moderately and less severely handicapped may be living in a group home or smaller residence operated by a local governmental or private agency. The handicapped individual may also be participating in sheltered workshops, training centers or other programs supported by public funds and controlled by governmental rules and regulations.

The handicapped person’s eligibility to receive such benefits and to participate in such programs will be directly affected by the person’s income and assets. All such aid, including monthly Social Security or Supplemental Security Income, contains limitations and restrictions on the amount of private funds and property of the handicapped person. See 42 USC §§ 1381-385.1396-20 CFR 416.1100-1266; 42 CFR 433.1 et seq.; 45 CFR 302.0 et seq.; and OAR Chapter 461. A person living at a state institution may be liable under Oregon law to reimburse the state in whole or in part for his or her care if possessed of sufficient income or assets. ORS 179.620.

In planning for the disposition of their estates, the families of handicapped persons must consider the effect of a bequest or devise upon the eligibility of the handicapped person for such assistance. If the family leaves funds or assets directly to the handicapped person, that person will probably be disqualified from governmental assistance.

There are several choices available to the family of the handicapped. The family can choose to simply disinherit the handicapped person outright. This choice is usually philosophically and psychologically impossible to
make. A second choice is an informal arrangement by which the parents of the handicapped child give their estate to another person, such as a non-handicapped offspring, who agrees informally to manage the estate for the handicapped brother or sister. There are obvious dangers and difficulties in such an arrangement. A third choice, the traditional conservatorship, while more formal, unfortunately does not insulate the estate from claims by public or governmental agencies.

For many the estate planning tool of choice is the trust, either inter vivos or, in most instances, testamentary. The key to the drafting of such a trust involving a handicapped person is to expressly limit the purpose of the trust to provide extra and supplemental care, maintenance, support and education in addition to and over and above the benefits the handicapped person otherwise receives from local, state or federal government, or from private agencies including, but not limited to, Social Security, Supplemental Security Income, Medicare, Medicaid, and any other such benefits.

This supplemental or restricted trust should provide absolute and unrestricted discretion in the trustee or trustees to determine when and if any benefits should be paid. The trustee should be able to make or to withhold payments at any time and in any amount deemed appropriate in the trustee’s sole discretion, which discretion should be conclusive and binding on all persons. Further, the trust should provide that no distributions may be made if such distributions would affect the handicapped person’s right to receive any governmental payments or assistance, unless in the discretion of the trustee it would be in the handicapped person’s best interests to receive distributions from the trust.

Of course, the estate planner should also include standard spendthrift language in the trust, although it must be emphasized that such limiting language is not in itself sufficient to accomplish the primary purpose of the supplemental trust.

In any event, the estate planner must caution the client that there is no guarantee such a trust will actually or absolutely protect the handicapped’s governmental assistance. The issue is still an open one, at least in Oregon. Some courts have held that the state cannot reach the child or a discretionary trust. See, e.g., In re Johnson’s Estate, 196 Cal App 2d 503, 17 Cal Rptr 909 (1961). See also Estate of Escher, 407 NYS2d 106 (1978). The Oregon courts have not ruled directly on the issue. The Oregon Supreme Court criticized basic spendthrift provisions which result in the public supporting a beneficiary’s children. Shelley v. Shelly and U.S. Nat. Bank, 223 Or 328, 337, 354 P2d 282 (1960). On the other hand, when proper protective language is used, there is recent authority to support the view that the intent of the testator or settlor should control even if it may mean defeat of a public claim against a beneficiary. See Owens v. Heisel, 67 Or App 537, 769 P2d 331 (1984).

The prudent planner may wish to consider additional terms in the trust for even greater protection. For instance, the drafter may include a provision that at least some of the income will be distributed periodically to other beneficiaries rather than being used or accumulated for the handicapped individual. This may provide an additional safeguard against anachy by a governmental agency since there would be other interested beneficiaries of the trust, not only the remaindermen, with equitable rights. Furthermore, depending on the size of the estate and other circumstances, the anomy may wish to include an “automatic termination” clause or discretion in the trustee to terminate the trust for the handicapped person if the trust is challenged or if it appears an anack will be successful. However, careful consideration of tax and other consequences must be given before any such terms are used. Certainly the powers of the trustee should be broad enough to authorize the trustee to expend trust funds to defend any attempt by the government to reach the trust.

While the financial welfare of the handicapped person is important, the personal welfare is no less so. The estate planner must be concerned with who will make the important decisions regarding the life of the handicapped when immediate family and friends are gone. Who will decide the living situation? Who will consent to medical care? Who will approve education, work and social activities? A guardianship will normally be the preferred method of providing for the handicapped person’s well-being, although in some instances an advisor or advocate will suffice.

The parents of the handicapped child are the natural guardians until the child reaches eighteen years of age. This "natural" guardianship ends when the child reaches majority even though the child is handicapped and is not self-sufficient. The parents should, therefore, be named legal guardians during their lifetimes, and should then nominate successor guardians in their wills to look after the child when they are no longer alive or able to directly concern themselves with the handicapped child’s well-being. Of course, they should be advised that their nominations in the will are not binding upon the court, but will be given preference. ORS 126.035. If no family or friends are available or qualified, the parents may wish to nominate an organization such as the Association for Retarded Children of Oregon, which is a private, non-profit corporation dedicated to assuring the legal, social and personal rights of mentally retarded Oregonians. The ARC maintains a Guardianship, Advocacy and Protective Services (GAPS) program which provides for future planning, parental assistance and intervention for handicapped persons, and which can serve as the guardian for persons who need protection, yet lack the involvement or network of family or friends.

Regardless of who is nominated or appointed as guardian, the client may also wish to name advisors or advocates to assist in caring for the handicapped person. The advisors or advocates may include friends, counselors, medical providers, and even the attorney who does the estate planning. They might also include the GAPS Board of the ARC which offers such services.

The parents can augment the future planning for the handicapped by preparing a document separate and apart from the will called a Letter of Intent. This document, usually kept with the will, sets forth the parents’ desires for the personal life of the handicapped child after the parents are gone. Although not legally binding, the Letter of Intent can be very helpful to those concerned with the future well-being of the child including the trustees, the guardians, the advocates and advisors, and the court as well. The Letter of Intent gives the parents the opportunity to set forth in non-legal terms their personal desires concerning the life of the handicapped, such as home atmosphere, companionship, privacy, personal habits, visits, vacations, daily routine, social contacts, dress, personal appearance, health care, and medical treatment. The Letter can be especially important during the transitional period after the last parent’s death. The will should direct the guardians and others to refer to and to follow to every extent possible the intentions set forth by the parents.

This article has addressed only a limited aspect of future planning for the handicapped. Many other issues should be given consideration including the role of life insurance, the use of a durable power of attorney for the elderly, and similar matters.

An estate planner for the handicapped may wish to review some of the resource materials available on the subject. E.g., C. Davis, Financial and Estate Planning for Parents of a Child with Handicaps, 5 West. N. Engl. L. Rev. 495 (1983); Frolick, Estate Planning for Parents of Mentally Disabled Children, 40 U. Pitt. L. Rev. 305 (1979). Anyone doing estate planning in this area should start by obtaining and reviewing the booklet, which is available for a modest fee, entitled “future Planning on Behalf of Developmentally Disabled Persons, A Guide for Estate Planners,” published by the GAPS Board of the ARC of Oregon. The address of ARC is 3085 River Road North, Salem, Oregon 97303.
FROM YOUR EXECUTIVE COMMITTEE

In the short time since the annual meeting, the Executive Committee has been actively planning and participating in several projects and activities. The following is a brief summary of these projects and activities, other than those which may be discussed elsewhere in this Newsletter.

The Estate Planning and Administration Section and the Oregon State Bar are co-sponsoring a new comprehensive probate systems manual (the “Orange Book”) which will coordinate with the current Administering Oregon Estates (the “Black Book”). The authors of the systems manual are Jeffrey Boly, Conrad Hloore, Mark Perrin, Dwight Purdy and Merrill Yoelin. This will be a master system designed for use by the attorney and support staff involved in the probate process. The next step after completion of the manual will be to computerize the system.

The CLE Subcommittee chaired by Laurie N. Caldwell has completed the Portland and Eugene presentation of the basic estate planning seminar, and video replays will be held around the state in December and January. The seminar was very successful in providing a practical approach to estate planning for clients with small to medium-sized estates. The large attendance and enthusiastic response confirmed our understanding that there is a continuing need for courses of this nature.

The Section intends to co-sponsor a seminar with the Oregon State Bar next fall or winter in connection with the probate systems manual. Additional seminar topics of interest to the Section include intermediate estate planning and probate administration, with an emphasis on malpractice issues. The CLE Subcommittee is currently working on obtaining video tapes from national estate planning seminars sponsored by such organizations as ALI-ABA and OLI. These tapes would be shown in various locations around the state with the assistance of local estate planning organizations or interest groups. The CLE Subcommittee for the coming year consists of Laurie Caldwell, Jim Castell and Valerie Vollmar with assistance by Steve Lane for the video taped seminars.

The Legislation Subcommittee chaired by Stan Loeb is in the process of screening proposed bills and suggesting legislation. There are numerous issues under consideration, including statutory rule against perpetuities legislation and changes or clarifications in the laws concerning survivorship, tax apportionment, elective share, intestate shares, interest charged on pickup tax and timing of split gifts under the gift tax laws. In addition, the committee will look at the changes made recently by the Washington State legislature, including automatic revocation of beneficiary designation in the event of divorce, allocations to income beneficiary under the Principal and Income Act, non-judicial dispute procedure and listing of tangible personal property separately from a will. The Legislation Subcommittee will be working with the Trust Legislation Committee in these areas.

A major bill which is being authored by Stan Loeb, Rees Johnson and Walter Pendergrass is an expedited probate administration procedure. Unlike the current Small Estates Act, the new provisions would be incorporated into Oregon's existing statutory scheme for probate administration but provide a summary procedure for distribution in appropriate circumstances.

Nancy Cowgill reports from the Oregon State Bar Leaders’ Conference held this fall that the Oregon State Bar believes that the indirect costs associated with the Sections should be reimbursed by each Section. At that meeting, the Bar proposed keeping all investment income generated by the Treasury of each Section, and, in addition, proposed a 75¢ assessment per Section member to be made March 1 of each year. After discussion by all of the Sections, the Bar proposals have been approved by the Oregon State Bar Committee on Sections.

The Executive Committee intends to hold another meeting on February 1, 1985 and continue to hold subcommittee meetings be followed by a day-long workshop in the spring.

WHAT’S NEW (OR MAY BE) IN OREGON LAW

Recent appellate decisions, one issued by the Oregon Court of Appeals and the other issued by the Nevada Supreme Court, raise questions concerning the applicability of Chapter 115 of Oregon Revised Statutes which governs claims held against an estate.

In Wilbanks v. Goodwin, 70 Or App 425 (1984), the Oregon Court of Appeals held that the time limitations set forth in ORS 115.005(3) did not apply in an action for specific performance of a contract to make a will. Section 115.005 bars claims not presented to a personal representative within 12 months after the date of first publication of notice to interested persons, or before the date the personal representative files his final account, whichever first occurs. The Court concluded that an action for specific performance of a contract to make a will was not a claim against the estate within the meaning of ORS 115.005. This apparently means that the six-year statute of limitations specified in ORS 12.080 applies to actions for specific performance of a contract to make a will.

In Continental Insurance Company v. Moseley, — Nevada — (1984), 683 P2d 20, the Nevada Supreme Court on remand from the United States Supreme Court held that, where an estate had actual knowledge of a claim against the estate, the estate's failure to make any action to notify claimant of the probable proceedings, other than publishing notice pursuant to statute, was insufficient to afford claimant due process. In Moseley, a civil action was pending against the decedent at the time of her death which had been filed by the claimant. However, the claimant failed to file a claim against the estate until two days after the last day specified in the published notice to creditors for filing claims. The Nevada statute required creditors of the estate to file their claims within 60 days after the first publication of notice to creditors and further specified that any claim not so filed would be barred forever. In its initial opinion, the Nevada Supreme Court concluded that the published notice to appellant and that the claims statute, which was designed to foster the efficient and expedient administration of estates, should be enforced in accordance with its terms.
The United States Supreme Court granted certiorari, vacated the judgment and remanded Moseley to the Nevada Supreme Court for further consideration in light of Mennonite Bd. v. Adams, 462 US 103 S Ct 2706, 75 L Ed 2d 180 (1983). The Mennonite case involved an Indiana quiet titie action and the question of whether notice to a mortgagee of a pending tax sale was adequate. The Court relied on Mullane v. Central Hanover Bank and Trust Co., 339 US 306 at 314, 70 Ct 652 at 657, 94 Ed 865 (1950), which establishes the fundamental principal that notice must be reasonably calculated under all circumstances to apprise interested parties of the pendency of the action. The Court found that publication and posting are not reasonable where an inexpensive and efficient mechanism, such as mail service, is available. Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid.

ORS 115.005 is quite similar to the Nevada statute and it seems likely that its effectiveness will be subject to the same challenge. The issue was previously raised in Oregon in the case of Chataly v. Driskell, 237 Or 245 (1964). The Court found the Mullane doctrine inapplicable because although the creditor had no actual notice of the time for filing claims, he did have actual notice that the estate was opened. In those cases in which the creditor does not have actual notice of the probate proceedings, the reasoning in Moseley may apply to require the estate to give actual notice to the creditor. Practitioners should consider whether Moseley will apply to claims which were not known to the personal representative but which could have been discovered with reasonable diligence.

Based on these two decisions, practitioners should be aware that the shorter time limitations in Chapter 115 may not apply to all claims against an estate, either because the claim (such as an action for specific performance of a contract) is not governed by Chapter 115 or because actual notice to a known creditor was not given. This may result in uncertainty of a beneficiary’s right to property received from an estate.

**PLF EXCLUSION 17**

The Professional Liability Fund has experienced a significant increase in claims attributable to lawyers performing services of a purely financial nature, such as arranging loans or mortgages or recommending the purchase of specific securities, commodities or precious metals. The Fund never intended to cover such activities.

On the other hand, the Fund does cover the preparation of documents which relate to such transactions. The problem is the functions in the middle which involve both investment advice and legal services.

In the September Newsletter, the Executive Committee reported that the Professional Liability Fund Board proposed to address this problem by changing Exclusion 17 to read

"To any claim or portion thereof caused by an act, error or omission of the Covered Party in the rendering of investment advice concerning specific investments."

That wording has now been adopted by the Fund Board.

In response to continuing concern raised by lawyers involved in the fields of taxation, securities, banking, trusts and probate law, Donald B. Bowerman, Chairman of the PLF Board, appointed and the Board approved a continuing ad hoc committee which will screen and approve all assertions of the Exclusion 17 defense. That ad hoc committee consists of the following members:

Merritt S. Yoelin
Douglas R. Grim
Donald J. DeFrancq
Jeffrey E. Boly
Donald B. Bowerman
Joyce C. Dahl

Two of the members of the ad hoc committee are also members of this Section: Merritt S. Yoelin and Jeffrey E. Boly.

The theory behind the ad hoc committee is that naked investment advice is like obscenity: the committee will know it when they see it.

In the November 1984 Professional Liability Fund publication “In Brief” the Fund Board reported as follows regarding Exclusion 17:

"It has been concluded that any investment function where a lawyer is making a specific recommendation as to the purchase of stocks, bonds or other securities, as well as specific investments in real estate or other tangible or intangible property, does not come within the definition of the private practice of law.”

Unless rescued by the ad hoc committee, a lawyer may not have coverage where he advises a client regarding the economics of a proposed tax shelter investment or advises the personal representative of an estate how the proceeds of estate sale assets should be invested. There are many other situations where lawyers traditionally have given advice that may not be covered.

The Executive Committee has decided to draft standards for the guidance of the Ad Hoc Exclusion 17 Committee. These standards will be submitted to the PLF for approval.

**SCHEDULE OF SEMINARS AND EVENTS**

The following is a selected schedule of seminars which may be of particular interest to Section members:

**January 14-17, 1985:** THE 37TH ANNUAL INSTITUTE ON FEDERAL TAXATION, sponsored by University of Southern California at Century City, Los Angeles.

**February 1, 1985 (Spokane) and February 8, 1985 (Seattle):** ESTATE AND TRUST LITIGATION PRACTICE, sponsored by CLE Committee of Washington State Bar.

**February 2, 1985:** 14TH ANNUAL ESTATE PLANNING SEMINAR, Portland, co-sponsored by Estate Planning Council of Portland, Inc. and the Northwestern School of Law at Lewis and Clark College.

**February 20-22, 1985:** NEW YORK UNIVERSITY LAW SCHOOL, Workshop on Tax Reform Act of 1984, San Francisco, California.

**March 4-8, 1985:** ALL-ABA CLE, PLANNING TECHNIQUES FOR LARGE ESTATES, Honolulu, Hawaii.


**April 29-May 3, 1985** ALL-ABA CLE, PLANNING TECHNIQUES FOR LARGE ESTATES, New York, New York.

**June 16-21, 1985:** ESTATE PLANNING IN DEPTH, co-sponsored by ALL-ABA, Continuing Legal Education for Wisconsin and The University Wisconsin Law School, Madison, Wisconsin.
A publication of notice

An estate may be probated in any county in Oregon which has venue. Venue is in the county where the decedent (1) was domiciled or had his or her place of abode at time of death, (2) had property located at the time of death or the time probate is commenced or (3) died. ORS 113.015. Once probate is initiated, a personal representative must cause notice to interested persons to be published once in each of three consecutive weeks. ORS 113.155. Those practitioners who occasionally probate estates in counties other than where they practice may find it difficult to determine where the notice should be published. They may also find that the cost of the publication varies significantly from county to county.

The following is a list of the newspapers that are typically used for publication of notice to creditors in the various counties in Oregon. The list may not be complete because ORS 113.155 permits notice to be published in any newspaper in the county in which the probate is pending. Those practitioners who publish notice in newspapers other than those indicated may want to contact the editor with information on the other newspapers so the list may be complete.

<table>
<thead>
<tr>
<th>County</th>
<th>Newspaper</th>
<th>Price per column</th>
<th>Approximate cost</th>
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<tbody>
<tr>
<td>Baker</td>
<td>Democrat Herald 1915 First Street, Baker, OR</td>
<td>$2.50</td>
<td>$45.00</td>
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<tr>
<td>Benton</td>
<td>Gazette Times Sixth and Jefferson Corvallis,</td>
<td>4.57</td>
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<tr>
<td>Clackamas</td>
<td>Enterprise Courier Eighth &amp; Main Streets</td>
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<td>Clatsop</td>
<td>Daily Astorian 949 Exchange Astoria, OR</td>
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<tr>
<td>Coos</td>
<td>The World 350 Commercial Coos Bay, OR</td>
<td></td>
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<tr>
<td>Crook</td>
<td>Central Oregonian 558 N Main Prineville, OR</td>
<td></td>
<td>48.23</td>
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<tr>
<td>Curry</td>
<td>Curry County Reporter Cold Beach, OR</td>
<td>3.30</td>
<td>49.50</td>
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<tr>
<td>Deschutes</td>
<td>Bend Bulletin 1526 NW Hill Bend, OR</td>
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<tr>
<td>Douglas</td>
<td>News Review 345 NE Winchester Roseburg, OR</td>
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<td>Gilliam</td>
<td>Condon Times Journal PO Box 740 Condon, OR</td>
<td>2.40</td>
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<tr>
<td>Grant</td>
<td>Blue Mountain Eagle 741 West Main John Day, OR</td>
<td></td>
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<tr>
<td>Hood River</td>
<td>Hood River News 409 Oak Street Hood River, OR</td>
<td></td>
<td>56.00</td>
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<tr>
<td>Jackson</td>
<td>Medford Mail Tribune 491 Sixth Street Medford, OR</td>
<td>8.75</td>
<td>91.89</td>
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<tr>
<td>Jefferson</td>
<td>Madras Pioneer 452 Sixth Street Madras, OR</td>
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<td>Josephine</td>
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<tr>
<td>Klamath</td>
<td>Herald and News* 1301 Espadana Klamath Falls, OR</td>
<td>6.65</td>
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<tr>
<td>Lake</td>
<td>Lake County Examiner 101 N F Street Lakeview, OR</td>
<td>3.28</td>
<td>51.66</td>
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</table>

* requires prepayment for customers outside circulation area.
** may be used to publish notice in Washington County and Clackamas County, as well as Malheur County.
<table>
<thead>
<tr>
<th>County</th>
<th>Newspaper</th>
<th>Price per column Inch Per Run</th>
<th>Approximate cost</th>
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<tbody>
<tr>
<td>Lane</td>
<td>Register Guard</td>
<td>$ .74/line</td>
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<tr>
<td>Lincoln</td>
<td>Newport News Times</td>
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<tr>
<td>Linn</td>
<td>Albany Democrat Herald</td>
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<tr>
<td>Malheur</td>
<td>The Argus Observer</td>
<td>87.75</td>
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<tr>
<td>Marion</td>
<td>Statesman-Journal</td>
<td>10.12</td>
<td>146.21</td>
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<tr>
<td>Morrow</td>
<td>Hesper Gazette Times</td>
<td>2.75</td>
<td>51.10</td>
</tr>
<tr>
<td>Multnomah</td>
<td>Daily Journal of Commerce**</td>
<td>49.00</td>
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<tr>
<td>Polk</td>
<td>Itemizer-Observer</td>
<td>4.52</td>
<td>60.00</td>
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<tr>
<td>Sherman</td>
<td>Sherman County journal</td>
<td>45-50.00</td>
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County and Clackamas County, as well as Multnomah County.

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** may be used to publish notice in Washington County and Clackamas County, as well as Multnomah County.